

Neo No-Fault Early Offers: A Workable Compromise between First and Third-Party Insurance

Jeffrey O'Connell* and John Linehan**

TABLE OF CONTENTS

I. INTRODUCTION.....	104
II. RAHDERT'S ANALYSIS: ESTABLISHING AN OBJECTIVE BACKGROUND FOR THE ISSUE OF PERSONAL INJURY COMPENSATION REFORM.....	106
III. CURRENT PROPOSALS FOR PERSONAL INJURY COMPENSATION REFORM....	111
A. <i>Liability Limitations: Tort Law Reform within the Current Third- Party Framework</i>	112
1. Efficiency.....	113
2. Deterrence.....	115
3. Compensation.....	117
4. Equity.....	117
5. Summary.....	118
B. <i>Expansion of First-Party Insurance Within the Current Third-Party Framework</i>	120
1. Efficiency.....	123
2. Deterrence.....	126
3. Compensation.....	128
4. Equity.....	129
5. Summary.....	130
C. <i>Bridging the Divide: Existing No-Fault Models for Reform</i>	131
1. Workers' Compensation.....	131
2. No-Fault Automobile Plans.....	135
3. Lessons for the Future of No-Fault.....	140
IV. NEO NO-FAULT: A WORKABLE COMPROMISE BETWEEN FIRST AND THIRD-PARTY REFORM.....	141
A. <i>Efficiency</i>	142
B. <i>Deterrence</i>	144
C. <i>Compensation</i>	145
D. <i>Equity</i>	147
V. CONCLUSION: THE APPEAL OF NEO NO-FAULT AND THE FUTURE OF AMERICAN PERSONAL INJURY COMPENSATION REFORM.....	148

*. The Samuel H. McCoy II Professor of Law, University of Virginia. B.A., Dartmouth College, 1951; J.D., Harvard University, 1954.

**.. B.A., Williams College, 2002; Candidate for J.D., University of Virginia, class of 2006.

I. INTRODUCTION

Recent national and state political activity, centering mostly on today's crisis in medical malpractice, has again brought to the forefront the long-simmering issue of "tort reform."¹ Although concerns over personal injury compensation have persisted for decades and the recent deficiencies have clear historical precedents,² to date there has been little success in achieving optimal reform. This is largely due to the fact that the debate is monopolized by two dueling sides—deeply embedded in their respective special interests, and stubbornly resisting attempts to compromise.³ With the persistence of this bi-polar configuration, the likelihood of sensible reform remains bleak. The accident recovery system is a complex, multi-faceted amalgam of tort law and private as well as social insurance⁴ that involves a wide array of policy objectives;⁵ any one-sided, simplistic modification of the status quo will necessarily prove to be either ineffective, imprudent, or both.

Developed nations, as a matter of course, have some organized means of personal injury compensation that measures the costs arising from accidents and attempts to distribute benefits appropriately.⁶ Under the American system,⁷ there are

1. The phrase "tort reform" has been popularized by the conservative legislative agenda and is used primarily to describe reform exclusively in tort law. However, coverage for accident costs is achieved not only through the tort system, but also through private first-party and social insurance. See generally MARK C. RAHDERT, COVERING ACCIDENT COSTS 1-4 (1995). Therefore, we instead use the broader term "personal injury compensation reform" to refer to holistic solutions for the personal injury system.

2. See *id.* at 1.

3. See *id.* at 2-5.

4. We use "social insurance" as an umbrella term commonly used to refer to a host of compensatory regimes. However, it should be noted that this phrase is imprecise and has been applied misleadingly:

Social Security and Medicare are *welfare* programs. They are not (as liberals like to say) "social insurance." Nor are they (as conservatives often say of Social Security) "pensions." These labels aim to deter scrutiny or criticism. Social Security and Medicare benefits are paid with current taxes. The same is true of (say) food stamps, farm subsidies or unemployment benefits. Workers have not been "saving" to pay their own Social Security and Medicare costs.

Robert J. Samuelson, *Same Old Evasion*, WASH. POST, Sept. 8, 2004, at A23 (emphasis added). We nonetheless use the term as commonly employed.

5. See RAHDERT, *supra* note 1, at 101.

6. See Kenneth S. Abraham & Lance Liebman, *Private Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 76-77 (1993).

7. The American model of personal injury compensation is not really a "system," in the traditional meaning of the word, in that it is not an organized, self-contained model, but instead a hodgepodge of overlapping first and third-party means of coverage. *Id.* at 75, 77. See also Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1315-16 (1994) (listing the nine primary loss-shifting systems: tort liability, workers' compensation, private loss insurance, sick leave, social insurance, public assistance, veterans'

two different means by which compensation for loss may be pursued. Direct or first-party compensation may apply to an injury victim through an available insurance plan (such as health care or disability insurance) without much need for litigation. When injury accrues from fault, the victim may also seek recourse through third-party means by bringing suit in tort against the alleged wrongdoer.⁸ Upon a finding of fault, a court orders a defendant to pay damages to fully compensate the victim.⁹ Such damages are almost always covered by liability insurance with payments from the defendant's insurer rather than directly from the culpable defendant.

Ostensibly, these two channels of compensation appear to operate independently, emphasizing the division between first-party insurance and third-party tort liability insurance. However, scholars such as Mark Rahdert have, instead, emphasized an intimate relationship between first and third-party channels, along with insurance and tort law more generally.¹⁰ Rahdert claims that the failure to appreciate this operational interdependency is itself a central reason why accident costs are so ineffectively accommodated in the United States.¹¹ He argues that our personal injury compensation system is better understood as a complex organism that would function most efficiently with the attainment of a better homeostatic balance between first and third-party regimes.¹²

Against the background of Rahdert's exposition of the typology of the American system, this article investigates both lines of reform—third-party tort reform and first-party private and social insurance expansion. We conclude that these unilateral agendas of reform fail to successfully address the myriad of related goals deserving consideration in any effective model of personal injury compensation. An examination of workers' compensation and automobile no-fault reforms show the existence of more balanced solutions premised on a sophisticated understanding of the connection between tort law and insurance. Drawing upon these precedents, we then promote a neo no-fault or "early offers" model as the most suitable for mending today's discordances. Not only does neo no-fault satisfy our four-pronged criteria of

benefits, public health, and private health).

8. The phrase "third-party insurance" is commonly used in the United States. The three parties are: (1) the insurer, (2) the tortfeasor, and (3) the claimant. In contrast, accident insurance and loss insurance involve only two parties: (1) the claimant-insured, and (2) the insurer, and is denoted "first-party" insurance. See ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 588 (1965).

9. "[T]he cardinal principle of damages in accident cases is—in fact as well as theory—that of compensation....The primary notion [of compensation] is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money." 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 493 (2d ed. 1986).

10. Rahdert notes that authorities from Oliver Wendell Holmes Jr. to George Priest and Peter Huber have studied the relationship between torts and insurance. See RAHDERT, *supra* note 1, at 9.

11. See *id.* at 186.

12. *Id.*

efficiency, deterrence, compensation, and equity, but its balanced and pragmatic structure makes it a model more capable of appealing across the political spectrum.

II. RAHDERT'S ANALYSIS: ESTABLISHING AN OBJECTIVE BACKGROUND FOR THE ISSUE OF PERSONAL INJURY COMPENSATION REFORM

Impartial actors seeking proper reform are immediately hampered at the outset by partisan trial lawyers on one side and the insurance companies and corporate and professional defendants on the other—both engaging in mutual billingsgate. For this reason, those who wish to enter the fray with a more objective grounding would gain from reading Mark Rahdert's *Covering Accident Costs*.¹³ Although written in 1994, Rahdert's book still manages to fully explicate the contours of an issue that has largely retained its form in recent decades due to a continued political stalemate.¹⁴ In a field dominated by short term observations, knee-jerk reactions, and myopic special interest goals, Rahdert gives a refreshingly broad and comprehensive view of the history of the American model of accident compensation and the interrelation between insurance, in all of its various forms, and the tort system.¹⁵

In his analysis of the development of our system of accident recovery, Rahdert focuses on what he calls the "insurance rationale"¹⁶ for tort liability, which he views as the central catalyst in this field of American law.¹⁷ This rationale dates back to the generative event in the modern tort liability system—the early 20th Century reforms in workers' compensation.¹⁸ These laws were passed in the midst of a political and social crisis even greater than today's, a crisis in which the opposing interest groups clashed over wage and compensation disputes.¹⁹ Legislators were successful in instilling change in existing tort law through a compromise solution that made employers strictly liable for compensating their workers' economic loss from injuries, but limited their payments to economic loss²⁰ and barred any victim recourse through

13. See generally RAHDERT, *supra* note 1, at 2-3.

14. See *id.* at 2-3.

15. See RAHDERT, *supra* note 1, at 2-3.

16. Rahdert explains that the term "insurance rationale" is largely similar to the more common phrase, "enterprise liability." However, he states that the insurance rationale has a broader meaning in that it refers not only to profit-oriented business activities, but to "any entity that enjoys advantages in obtaining insurance against the risks of injury associated with its activities. Thus, the rationale extends to nonprofit charitable organizations, municipalities, drivers of motor vehicles, and even homeowners, all of whom ... should be subject to liability in circumstances where they enjoy material advantages in their ability to insure against the risk of injury." See *id.* at 199 n.37.

17. *Id.* at 1.

18. See *id.* at 18.

19. See *id.* at 16-21.

20. See 1 A.L.I., REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 114 (1991) [hereinafter 1 A.L.I. REPORT] ("A long-established tenet of WC is that compensation will be provided only for the *financial* harms produced by workplace injury,

further litigation.²¹ The insurance rationale, the paternalistic contention that employers could more easily and effectively insure their workers than the workers could themselves, was utilized to justify these radical changes in the status quo.²²

The Legal Realism movement of the mid-20th Century, which emphasized practical, functional considerations in legal development, was effective in spreading the insurance rationale from the context of workers' compensation to address reform throughout the tort system.²³ Withdrawing from the previous emphasis on moral justifications, reformers began to view liability as an inherent cost of activities or products that should be internalized and represented through an insurance premium.²⁴ It was reasoned that the producer defendant could more easily spread the costs of an accident to others through the mechanism of an insurance pool, and that such compensation would be achieved without unduly burdening producers.²⁵ The insurance rationale made a distributional judgment that the social costs of accidents could be better absorbed by producers of goods and services²⁶—a contention that in turn propelled a pro-plaintiff trajectory in the remaining areas of fault-based tort law.²⁷

As the insurance rationale became more widely accepted by courts and legislatures, the traditional doctrinal gulf between insurance and tort law began to be bridged.²⁸ Justice Roger Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*²⁹ was an early judicial affirmation of insurance considerations as a basis for alterations in tort law.³⁰ He claimed that in the context of mass production, defendants should be held to a standard of strict liability rather than negligence due to the fact that manufacturers could more easily obtain insurance, spread their losses, and more efficiently curtail accident costs.³¹ Traynor observed that under the previous negligence standard, injured consumers were faced with unfair obstacles to prove fault-based liability, and that producers of goods *en masse* were insufficiently deterred.³² Traynor's opinion in *Escola* was subsequently and frequently cited by

not for pain and suffering as such.”).

21. See *id.* at 113-14.

22. Rahdert emphasizes the radical and experimental nature of the workers' compensation laws. See RAHDERT, *supra* note 1, at 20.

23. See *id.* at 23-28.

24. See *id.* at 25.

25. *Id.*

26. *Id.* at 26.

27. See RAHDERT, *supra* note 1, at 26.

28. Rahdert states that there was a “wall of separation” between insurance and tort law that was gradually eroded by the increasing acceptance of the insurance rationale. *Id.* at 61-77.

29. 150 P.2d 436, 461 (Cal. 1944) (Traynor, J., concurring).

30. RAHDERT, *supra* note 1, at 72.

31. *Id.* at 73.

32. See *id.* at 73.

courts during the 1960s and 1970s, spreading the application of strict liability in product liability cases.³³ Rahdert lists a host of contemporary facets of third-party insurance that evolved during this period based on the insurance rationale:

Beyond product liability, other tort-law developments influenced by insurance considerations include treatment of other traditional zones of strict liability, such as liability for 'ultrahazardous activities'; expansion of the scope of duty in negligence law; reduction or elimination of municipal, spousal, and other tort immunities; extensions of vicarious liability; liberalization of requirements for proof of causation (especially the development of the market share theory); adoption of comparative negligence; the development of toxic torts; extension of liability to successor corporations; interpretation and application of dram shop laws and related issues of liability for alcoholic intoxication; constitutionality of legislative measures limiting liability, such as automobile guest statutes; and application of choice-of-law principles to tort cases.³⁴

Laws enforcing mandatory liability insurance for motorists were also influential in this expansive trend.³⁵ The aggregate effect of these changes was the eventual transformation of the tort system along increasingly pro-plaintiff lines by favoring a third-party insurance system that greatly expanded the defendants' exposure to liability.³⁶

Even while the insurance rationale reached the apex of its acceptance in the mid-1970s, a flurry of opposition developed that gained particular momentum during perceived crises in spiraling insurance rates.³⁷ Critics contended that third-party liability led to an "unacceptably high level of unpredictability" in the system, encouraging insurers to "fudge" their calculations and thereby inflate premiums.³⁸ The ultimate ramification of this configuration was widespread stagnation in economic and technological developments, caused by the displacement of resources into overcompensation, and the fear of risk in new product creation.³⁹

33. *Id.* at 75.

34. *Id.* at 75-76.

35. Originally, liability insurance for motorists only protected insureds. 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* 157 (2 ed. 1986). But new laws and liability policies eventually protected victims of an accident in which an insured or insured's car is involved. *See id.* at 156.

36. *See id.* at 155.

37. The cycle of apparent "crises" in medical malpractice began in the mid-1970s, repeated in the mid-1980s, and is again making headlines today. *See, e.g.*, Larry M. Pollack, note, *Medical Maloccurrence Insurance: A First party No-Fault Insurance Proposal for Resolving the Medical Malpractice Insurance Controversy*, 20 U. MICH. J. L. REFORM 1245, 1245-55 (1987). Despite the ubiquitous use of the label "crises," some scholars maintain that the previous periods of downturn did not justify the use of the word. *See e.g. id.* at 1256-57; RAHDERT, *supra* note 1, at 109-10.

38. *See* RAHDERT, *supra* note 1, at 44-46.

39. *Id.* at 50.

A primary opposition to emerge was inspired by the “Chicago school” theorists of the law-and-economics movement of the 1960s and 1970s.⁴⁰ This circle focused its attack upon the growth of strict liability in tort law, which it viewed as inferior to negligence as the predominant standard of liability.⁴¹ Anchored in the theoretical foundations of Learned Hand’s cost-benefit analysis in *United States v. Carroll Towing Co.*,⁴² these critics argued that the emphasis upon a fault-based standard promotes the optimally efficient outcome in expending resources to address—but not overemphasize—safety concerns.⁴³ In addition, they proposed private contractual arrangements as a superior method of distributing risk rather than the application of court-mandated legal rules.⁴⁴ Law-and-economics scholars have generally focused their reforms within the original framework of tort law, de-emphasizing the role of loss-spreading insurance considerations for tort law.⁴⁵

An opposite school of dissent is one which asserted that a first-party, no-fault alternative for compensating accident victims is superior to the current third-party model—extinguishing the current system’s reliance upon a determination of fault as a prerequisite for compensation.⁴⁶ Proponents of this view asserted that a first-party configuration would provide a more streamlined and efficient means for compensating accident costs.⁴⁷ As a corollary, such backers of no-fault insurance view pain and suffering damages as inherently repugnant to a properly functioning insurance system,⁴⁸ and criticize the third-party system’s overweening reliance on tort litigation—further exacerbating transaction costs and delays while also deflecting insurance proceeds from victim compensation.⁴⁹

Personal injury lawyers continue to uphold the efficacy of the third-party system, and, instead, blame the monopolistic pricing practices and industry-wide mismanagement by the insurance companies as the root of deficiencies in the liability system.⁵⁰ They argue that premiums would be more effectively reduced through systematic changes in the nation’s insurance markets and more rigorous regulation of rate determinations.⁵¹ Rather than abandon the current third-party structure, they maintain that reform be limited to expand first-party insurance in order to aid victim compensation without any corresponding diminution in tort law, especially in

40. *Id.* at 38.

41. *Id.* at 38-39.

42. 159 F.2d 169, 173 (2d Cir. 1947).

43. RAHDERT, *supra* note 1, at 38.

44. *Id.* at 39.

45. *Id.*

46. *See id.* at 40.

47. *See id.*

48. RAHDERT, *supra* note 1, at 43.

49. *See id.* at 43-44.

50. *See id.* at 113-15.

51. *Id.* at 114-15.

recovery of pain and suffering.⁵² The insurance companies and defense interests, on the other hand, focus their blame on the decidedly pro-plaintiff pattern of legal outcomes in the courts, buoyed by unrestrained juries awarding inflated damages to successful plaintiffs.⁵³ It is argued that this increasing trend, promoted by the insurance rationale, has instilled instability in the system, and forced insurance rate makers to elevate premiums.⁵⁴ The most widespread proposals for third-party tort reform in recent decades have focused on the establishment of liability caps for damages, supplemented by reforms such as the curtailment of joint and several liability and the collateral source rule.⁵⁵

Rahdert appraises both sides of the debate as being largely accurate in pinpointing needed reforms, but also claims that they are alike in espousing incomplete views of the overall issue.⁵⁶ Both are similarly flawed by their myopic concentration on their respective special interests, and for their inability to consider the larger historical context of recurring "crises" in insurance premiums. Rahdert argues that, in the end, "[T]he truth probably lies somewhere in between these two extremes."⁵⁷ While acknowledging the dramatic rise in insurance rates, Rahdert offers other, often overlooked, explanatory factors that influence the current trajectory of events.⁵⁸ These include: improved accessibility and quality of plaintiff legal services; developments in civil procedure and the rules of evidence; advances in medicine and science; media attention to large tort recoveries; rising costs of medical treatment; increases in national wealth; and a handful of toxic tort disaster cases.⁵⁹ All these factors have been effective in increasing the likelihood of plaintiff success and the size of the awards attained.⁶⁰

In an effort to provide a more objective basis for pursuing systematic change, Rahdert gives a critique of the current third-party system—buttressed as it is by the insurance rationale.⁶¹ In reflecting upon the escalating premium rates, he concludes that although these rates outpaced inflation, the situation was not so dire as to call for the abandonment of the insurance rationale as a viable theoretical foundation.⁶² According to Rahdert, there remains the need to simultaneously address the continued instability and unpredictability in tort doctrine, thereby curtailing the spiraling costs and inefficiencies of today's hyper-litigious third-party system, while

52. See RAHDERT, *supra* note 1, at 114.

53. See *id.* at 112-13.

54. *Id.* at 113.

55. See *id.*

56. See *id.* at 112.

57. RAHDERT, *supra* note 1, at 112.

58. See *id.* at 115-25.

59. *Id.* at 116.

60. *Id.* at 116-22.

61. See *id.* at 127-77.

62. RAHDERT, *supra* note 1, at 110.

being mindful of accident victims' needs.⁶³ Therefore, Rahdert claims that while reform is needed, there must be some sort of compromise that would reconcile aspects of first and third-party agendas without entirely usurping the insurance rationale.⁶⁴ Proper reform must account for the intimate relationship between insurance and tort, and cannot shirk from addressing the panoply of policy goals that originally motivated the insurance rationale—namely, compensation, safety, and equity.

III. CURRENT PROPOSALS FOR PERSONAL INJURY COMPENSATION REFORM

To date, only a handful of reforms involving either the expansion of tort liability or limits thereon have received much support.⁶⁵ The result has been only piecemeal revision, with limited success at the margins. As no satisfactory solutions are being advanced, and as political stalemates continue, a paradoxical environment that thirsts for reform, but denies any wholesale attempts in this direction is created.

The most popular, current "tort reforms" all make the vital mistake of failing to reconcile the functions and goals of both first and third-party systems. It is thereby instructive to disclose their particular deficiencies in order to illuminate the unique power and potential of our proposed neo no-fault alternative. We are mindful of Rahdert's view that the insurance rationale should by no means be abandoned, but that it should be reformed in a balanced manner that seeks to marry aspects of first and third-party insurance with complementary alterations in tort law.

When weighing the relative pros and cons of competing alternatives, scholars have tended to choose sporadically from a wide range of largely overlapping policy objectives to find a base criterion to structure their analysis.⁶⁶ In this piece, we follow Guido Calabresi, who succinctly targeted the goals of deterrence, efficiency, and compensation.⁶⁷ We also emphasize the added criterion of equity, in order to pay respect to the notion of tort law as a manifestation of equitable social policy, as any palatable social reform must provide due consideration to notions of fairness and justice.⁶⁸ Our evaluation of current models of reform, in light of these four criteria,

63. See *id.* at 162.

64. See *id.*

65. See *id.* at 161-63.

66. See Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137 (2000) (criticizing the tendency of many academics to focus upon certain factors in tort to the exclusion of other important goals).

67. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: LEGAL AND ECONOMIC ANALYSIS* 26-28 (1970). See also Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings By Also Abolishing the Collateral Source Rule*, 3 U. ILL. L. REV. 591, 592 (1979).

68. Rahdert also emphasized the importance of equity. See RAHDERT, *supra* note 1, at 172-73.

discloses how most proposals ultimately fail to provide a suitable basis for balanced reform.

A. Liability Limitations: Tort Law Reform within the Current Third-Party Framework

Since the 1980s, campaigns for tort reform have been vigorously promoted by Republicans at the state and federal level, with the support of insurers and their corporate and health care insureds.⁶⁹ This movement, as suggested above, perceives the flaws in the current system of personal injury compensation as solely rooted in the distinctly pro-plaintiff trend in tort law as it has developed since the 1960s with the ascendancy of the insurance rationale.⁷⁰ Therefore, its supporters do not desire to deconstruct the heart of the current model based upon extended litigation over fault, but instead seek to reverse only what they deem its distorted evolution. Current backers of tort reform, who are so vocal in the political dialogue, proclaim the urgent need for drastic reform, but in reality their proposals are somewhat modest in that they purport to retain the general framework of the current model with only peripheral modifications in tort doctrine to further limit defendant liability.⁷¹

Ostensibly, proponents of tort reform take their inspirational cue from the law-and-economics school of thought discussed above, and are inspired by the recurring insurance “crises” of recent decades.⁷² The Reagan Administration’s Justice Department, perhaps, best delineated the outlines of this agenda, and thereupon framed the general debate with reports from its Tort Policy Working Group.⁷³ With the reinforcement of special interest lobbying efforts, in the late 1980s more than forty states enacted tort reform legislation modeled after their plan.⁷⁴ The crusade resurfaced with the 1994 Republican “Contract with America”⁷⁵ and more recently with the Bush Administration’s reaction to rising medical malpractice premiums.⁷⁶

69. See *id.* at 1-3.

70. See *id.* at 2.

71. See *id.* at 77.

72. See *id.* at 39-40.

73. See U.S. ATTY’S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); U.S. ATTY’S GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987); Jeffrey O’Connell, *A Correct Diagnosis of the Ills of Liability Insurance—And A False Cure: A Comment on the Reports of the Federal Tort Policy Working Group*, 63 NOTRE DAME L. REV. 161 (1988).

74. See 1 A.L.I. REPORT, *supra* note 20, at 82.

75. See O’Connell, *supra* note 7, at 1309.

76. Responding to President George W. Bush, Congressional Republicans attempted to pass legislative reform in 2003. Nevada Senator John E. Ensign introduced S.11, the “HEALTH Act of 2003,” modeled after the bill, H.R. 5, 208th Cong. (2003), which was approved by the House of Representatives. However, Senator Ensign’s bill was successfully filibustered. See Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure*

Perhaps the reason why the tort reform movement represents one of the only asterisks signifying change in the general trajectory of tort development lies in the simplicity of its message. The main substantive reforms, which, as indicated, include limits placed on awards for pain and suffering, punitive damages, attorneys' contingency fees, joint and several liability, and the collateral source rule—combined with the periodic payment of judgments—all either make it harder for claimants to receive pay or restrict payments when made.⁷⁷

1. Efficiency

Systematic inefficiency represented by costs in time and money, is the most prominent shortcoming of personal injury compensation and has proven to be its most elusive problem. This is because the very nature of the current system produces a predictably high and inevitable measure of friction in transaction costs—a friction stemming from the uncertainty, delays, and instability that are the inevitable byproducts of allocating fault and determining the amount of pain and suffering. Proponents of tort reform have sought to improve efficiency by altering how liability is determined and limiting the quantum of liability once it is determined, while retaining the cumbersome criteria associated with allocating fault and determining pain and suffering.⁷⁸

Early law-and-economic theorists were pioneers in proposing different substantive standards of liability that are capable of attaining an optimal level of efficiency.⁷⁹ Richard Posner was the first to question the enterprise liability theorists' emphasis on the primacy of victim compensation and the loss spreading goals of the insurance rationale.⁸⁰ Protesting the spread of strict product liability, he claimed that the negligence test utilized by Learned Hand was at least as effective, if not more so, in preventing accidents, and with less cost to defendants.⁸¹ He hypothesized that while strict liability might simplify the issues of individual cases, it would nevertheless increase the overall volume of claims and encourage plaintiffs to expend more efforts to pursue their new advantage at trial.⁸² Since the early seventies, other

the Current Crisis in Health Care?, 37 AKRON L. REV. 417 (2004) (explaining recent tort reform legislation).

77. See 1 A.L.I. REPORT, *supra* note 20, at 81-82.

78. See RAHDERT, *supra* note 1, at 165-66.

79. See Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205-207 (1973).

80. *Id.* Posner and others use the term "enterprise liability" to refer to what Rahdert has dubbed the "insurance rationale." See *supra* text accompanying note 10.

81. See Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835, 848-49 (1996).

82. Posner explains:

It might appear that strict liability would reduce the costs of tort litigation, both by simplifying the issues in a trial and thereby reducing its costs and by removing an element of uncertainty and thereby facilitating settlements, which are cheaper than trials. But the

law-and-economics theorists such as George Priest⁸³ and Peter Huber⁸⁴ have similarly opposed the rise of strict product liability, while affirming defenses based upon plaintiffs' conduct.⁸⁵

The work of Posner and others, however, in its real world application, provides little change to the status quo. Posner claimed economic theory reveals that a strict liability standard provides for no *real* advantage over negligence: "Economic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability."⁸⁶ In effect, rather than seeking drastic reform, Posner held a conservative view of tort law. In this sense, early law and economic theorists' agendas were inherently reactionary because they were primarily concerned with thwarting the expansive changes spurred by the insurance rationale.

From today's vantage point, we can see that Posner was especially prescient concerning the effects of one change in the standard of fault promoted by the insurance rationale. The transition from negligence to a form of strict product liability failed to stimulate any substantial change. As Posner had predicted, the introduction of strict product liability, instead, increased both the overall volume and cost of litigation,⁸⁷ but tireless inquiry merely shifted from faulty conduct to a faulty product.⁸⁸

matter is more complex than this. By increasing the scope of liability, strict liability enlarges the universe of claims, so even if the fraction of cases that go to trial is smaller the absolute number may be larger. And, by increasing the certainty that the plaintiff will prevail, strict liability encourages him to spend more money on the litigation; conceivably, therefore, the costs of trials might actually increase.

Posner, *supra* note 79, at 209.

83. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1587 (1987).

84. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 221 (1988).

85. See RAHDERT, *supra* note 1, at 39.

86. Posner, *supra* note 79, at 221 (speaking about strict liability, Posner was referring to a general (or absolute) no-fault criterion and not strict product liability calling for defect in order to impose liability).

87. The number of product liability cases in federal court grew from around 2,400 in 1975 to 13,408 in 1989. W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 17 (1991); see also, 1 A.L.I. REPORT, *supra* note 20, at 20 ("In [products liability] there was a major doctrinal revolution—the move from fault to strict liability—which supposedly led to an explosion in tort claims and thence to an unraveling of the liability insurance pool, culminating in the widespread unavailability, let alone affordability, of insurance coverage in the mid-eighties.").

88. See 1 ALI REPORT, *supra* note 20, at 20-21. See also, JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* 57 (1975) ("[The use of] so-called strict liability in cases involving an injury from a manufactured product still entails the process of proving the product defective. The result is that the change in the law has been largely one of terminology, not substance.").

Actually, the central means by which current apologists for tort reform hope to promote stability and improve efficiency is not as much through changes in substantive standards of liability, as through a curtailment of damage awards.⁸⁹ This agenda is based upon the perception of a direct and uncomplicated connection between the increase in tort costs and third-party liability premiums. Therefore, the logical way to address this linear process is to lower costs of litigation by decreasing damage awards and incentives to sue. Again, the simplicity of this syllogistic portrayal⁹⁰ is appealing and has influenced its adoption in many states.⁹¹

It should be noted, however, that law and economics scholar George Priest, concerned with the insurance crisis of the 1980s, pinpointed unpredictability as a central causal factor of the inflation of insurance premiums.⁹² He concluded that liability limitations are only capable of obtaining lukewarm results.⁹³ Priest evaluated such tort reform solutions as “constitut[ing] only partial contributions toward solution of the problems caused by modern tort law,” and that the ultimate objectives, “cannot be achieved by tinkering with damage measures and by limited changes in liability standards for particularly sympathetic sets of defendants.”⁹⁴

2. Deterrence

The tort reform movement is keen to advance statistics reflecting the hyper-litigiousness of American society, and outlier settlements that are designed to shock even the most dispassionate observer.⁹⁵ In recent years, the movement has emphasized data, some of it highly suspect, reflecting some of the more egregious outcomes in medical malpractice suits.⁹⁶ Although these numbers fail to represent

89. See RAHDERT, *supra* note 1, at 39.

90. Something along the lines of: premiums are high/ increased damages in tort heighten premiums/ therefore, lower tort damages to lower premiums.

91. See 2 A.L.I. REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 166-67 (1991) [hereinafter 2 A.L.I. REPORT].

92. Priest, *supra* note 83, at 1584.

93. *Id.* at 1589.

94. *Id.* at 1588-90.

95. In the year 2000, the average jury award was \$3.5 million, “and a few claims since then have run to more than \$40 million.” See Joseph B. Treaster, *Rise in Insurance Forces Hospitals to Shutter Wards*, N.Y. TIMES, Aug. 25, 2002, § 1 at 1.

96. Much of the data on both sides comes from biased sources and therefore mutually conflicts. For instance, as to statistics reflecting the rise in average malpractice judgments, the New York Times reported:

Some advocates of new limits have argued that the rate of increase has been sharper. For example, a Health and Human Services Department report last summer that is often cited by Congressional supporters and other advocates of malpractice overhaul asserted that “the number of megaverdicts is increasing rapidly,” adding, “The average award rose 76 percent from 1996-1999.”

accurately the overall range of personal injury compensation institutions,⁹⁷ they are effective in revealing the potential of the current fault-based system to produce freakish outcomes. This arbitrariness has provoked significant fear of lawsuits⁹⁸ and has perversely skewed the attainment of the proper level of deterrence in society, resulting in significant moral hazard.⁹⁹

Despite the fact that over-deterrence serves as the primary concern of today's tort reform critics, ironically, it is on this precise issue that these critics are most detached from the theoretical origins of the law-and-economics school. This is apparent in the fact that the current proposals pay almost no attention to the problem of underdeterrence.¹⁰⁰ Instead, by arbitrarily limiting damages across the board with no compensatory offsets, critics seek to crudely ratchet down the deterrent effect solely on the defendant side of the bar. Thus, mainstream tort reform policy-makers expend no effort in the task of discovering a principled stopping point at which damages would most effectively achieve optimal deterrence.¹⁰¹ Moreover, it is far from conclusive that caps on damages for pain and suffering are effective by themselves.¹⁰²

But according to the National Practitioner Data Bank the average malpractice judgment against doctors and other health care professionals rose 8.5 percent from 1996 to 1999, or 2.1 percent if adjusted for inflation

Officials at the Department of Health and Human Services based their number on data from the insurance industry, according to the report's footnotes. An agency spokesman, Bill Pierce, said the statement about a '76 percent' increase reflected only doctors who had seen the largest premium increases—something the report did not mention.

Richard A. Oppel Jr., *Bush Enters the Fray Over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A24.

97. See e.g., O'Connell, *supra* note 7, at 1307 ("Medical malpractice is only a small part of the total personal injury tort system."); INSURANCE INFORMATION INSTITUTE, THE FACT BOOK: PROPERTY/CASUALTY INSURANCE FACTS 16 (1993) (indicating, for example, that in 1991 net automobile liability premiums for automobile liability coverage totaled \$63 billion versus approximately \$4 billion for medical malpractice premiums); see also *infra* note 228.

98. Observers have emphasized the culture of fear that has shrouded today's medical community. See HARVARD MEDICAL MALPRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS; MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK 9 (1990) [hereinafter HARVARD STUDY] (concluding that physicians' perceived risk of being sued is three times greater than the actual risk).

99. See RAHDERT, *supra* note 1, at 48 (stating that moral hazard, inherent in all insurance, is the tendency of insurance itself to increase risky behavior).

100. See *id.* at 136.

101. Law and economics scholars have generally viewed the optimal deterrence to be the point at which marginal social costs equal marginal social benefits. See *id.* at 38.

102. There still is no consensus on the effectiveness of liability caps. For skepticism of their effectiveness, see Adam Liptak, *Go Ahead. Test a Lawyer's Ingenuity. Try to Limit Damages*, N.Y. TIMES, Mar. 6, 2005, at WK 5 (noting a forthcoming study by Columbia law professor Catherine Sharkey which concluded that states with caps on pain and suffering awards have damage awards similar to states without caps); Joseph T. Hallinan & Rachel Zimmerman, *Malpractice Insurer Sees Little Savings in Award Caps*, WALL ST. J., Oct. 28, 2004, at A6 (observing that recently enacted liability caps in Texas failed to provide for any substantial gains in savings); WEISS RATINGS, INC.,

A most unfortunate result of anesthetizing the overall incentive structure to the point of underdeterrence could severely compromise accident prevention and safety.

3. Compensation

What is most alarming about the tort reform plans under discussion is their myopic focus on defendant relief through third-party liability modifications—disregarding glaring deficiencies in victim compensation.¹⁰³ The American Law Institute's 1991 Study, which relied heavily on law and economic theory,¹⁰⁴ concluded its expansive evaluation of the personal injury compensation system with the "relatively skeptical view of tort litigation as an injury prevention mechanism, and an even bleaker evaluation of the tort system as a compensatory mechanism."¹⁰⁵ Indeed, while statistics reflecting the derelict nature of the personal injury system as a means to compensate the injured are at least as alarming as the relatively small number of exorbitant plaintiff awards, tort reformers simply circumvent this problem by refusing to recognize it. This overlooks the tragic and extraordinary fact that today's society is dependent upon a system that paradoxically promotes both over and under compensation for loss due to injury.

4. Equity

Law and economic theorists have long admitted that they consider the goal of "fairness" as either irrelevant or outside the ambit of their expertise.¹⁰⁶ But reform cannot be indifferent to normative concerns in creating a system that serves justice by punishing and compensating for wrongful behavior, and equitably distributing the burdens of accidents.¹⁰⁷

THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE (2003) (concluding that caps on non-economic damages have resulted in lower claim payouts for insurers, but may not have produced any reduction in medical malpractice premiums for physicians). For numbers that support the effectiveness of damage caps, see NICHOLAS M. PALE ET AL., RAND INST. FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA xxvii (2004) (concluding that damage caps passed in California achieved the result of limiting defendants' expenditures arising out of medical malpractice trials); U.S. Department of Health and Human Services, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care: Hearing before the Subcommittee on Labor, Health and Human Services, and Education, and Related Agencies* 108th Cong. 4 (2003) (concluding that states without caps have substantially higher premiums than states with "reasonable" caps).

103. See RAHDERT, *supra* note 1, at 133-34.

104. *Id.* at 39-40.

105. I A.L.I. REPORT, *supra* note 20, at 448 (emphasis added).

106. See Jeffrey O'Connell, *Why Economists and Philosophers Flunk Torts: With A Guide To A Good Grade*, 53 EMORY L.J. 1349, 1353 (2004).

107. See generally O'Connell & Robinette, *supra* note 66 (criticizing Professor Atiyah's sole

Corrective justice, on the other hand, refers to the goal of punishing wrongdoers by requiring them to directly compensate those they have injured.¹⁰⁸ Although the structure of the tort system may appear conducive to the goal of corrective justice, the flawed reality of its real-world functioning thwarts the attainment of its aim.¹⁰⁹ Some scholars have criticized an insurance-inspired, pro-plaintiff stance of tort law for undermining corrective justice¹¹⁰ by inducing defendants of questionable culpability to assume responsibility through settlement prompted by the costs and uncertainty of litigation and the consequent fear of serendipitous jury awards.¹¹¹ But while they pinpoint one of many glaring shortcomings in the current system,¹¹² these same observers overlook the fact that corrective justice not only seeks to determine and punish the culpable, but also to provide adequate recovery to the injured. Obviously, liability caps may reduce fear and uncertainty (although arguably only marginally), but they also prevent sufficient recovery for injuries resulting from misconduct. Liability caps therefore purport to exchange nominal advancements in legal error for further deficiencies in injury compensation—hardly a satisfactory advancement in terms of corrective justice.

5. Summary

Liability limitations and restrictions on substantive tort doctrine such as changes in damage levels, the collateral source rule, and joint and several liability, could contribute to a program of reform; but standing alone, these modifications undermine the pursuit of the combined goals of efficiency, deterrence, compensation, and equity even more than they can aid them. Recent studies comparing states with damage

concern for compensation, over and above the goals of justice and efficiency, in personal injury compensation reform).

108. There are various formulations of the general principle of corrective justice:

[A]t a fundamental level, corrective justice is not a complete, substantive notion of justice but instead refers to a category of principles of a particular logical type. Specifically, most corrective justice claims have the form: "If A wrongfully injures B, A must pay B for the loss B suffers as a consequence of A's act."

LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 93 (2002).

109. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 55 (1989) ("Those who defend tort law on corrective justice grounds emphasize the highly individualized justice of a traditional courtroom. But this is thoroughly unrealistic today.").

110. See e.g., Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985); George P. Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537 (1972).

111. The costs, delays, and uncertainties also provide a strong incentive for plaintiffs to compromise their opportunities for full compensation. See RAHDERT, *supra* note 1, at 152. For a discussion of the arbitrariness of the settlement process, see JEFFREY O'CONNELL & C. BRIAN KELLY, *THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE* 13-21 (1987).

112. For a thorough and yet concise account of the various shortcomings of today's tort system in attempting to provide corrective justice, see SUGARMAN, *supra* note 109, at 55-57.

restrictions to states maintaining unrestricted damages have provided conflicting views on the effectiveness of such measures to reduce insurance premiums.¹¹³ California—the original pioneer in passing extensive tort reform legislation—is a telling example.¹¹⁴ Although a 1975 bill strictly limited non-economic damages to \$250,000 and abolished the collateral source rule, state premiums nearly tripled before stabilizing more than a decade later in the late 1980s.¹¹⁵ But some observers, instead, point out that the stabilization occurred only after California passed strict insurance regulations in 1988.¹¹⁶ Presently, it cannot be conclusively determined whether it was the tort restrictions or the insurance regulations that were more effective in stabilizing premiums. However, it is likely that their combined effect would reduce premiums over time, as many observers, including Rahdert, have proposed.¹¹⁷

Furthermore, tort reform proponents are too myopically focused upon the goal of reducing liability costs to insurers and providers of goods and services. This asymmetrical approach overlooks the related goal of proper victim compensation, and results from a fundamental misconception of how badly the entire American insurance system—public and private—functions. Even though far more coverage is achieved through first-party means—studies have determined that the tort system only compensates about one-tenth of the total costs for injury and illness¹¹⁸—the enormity of the system's deficiencies emerge when considering that nearly 45 million Americans are without any health insurance,¹¹⁹ and that only twenty-five percent of workers have long-term disability insurance,¹²⁰ or with the exiguous amounts of such

113. See *supra* note 102 and accompanying text.

114. California's Medical Injury Compensation Reform Act (MICRA) was passed in 1975 in response to a crisis in medical malpractice insurance. The bill set a cap on non-economic damages at \$250,000 and abolished the collateral source rule that allowed for plaintiffs to receive "double recovery." See generally Lauren Rallo, Comment, *The Medical Malpractice Crisis—Who Will Deliver the Babies of Today, the Leaders of Tomorrow?*, 20 J. CONTEMP. HEALTH L. & POL'Y 509 (2004) (giving a detailed analysis of the California bill).

115. Oppel, *supra* note 96, at A24.

116. *Id.* In 1988, California passed Proposition 103, which prohibited annual increases greater than 15 percent by insurers without a public hearing and required insurers to rebate earlier premiums. See Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, March 5, 2003, at A20.

117. See RAHDERT, *supra* note 1, at 112-15.

118. See O'Connell, *supra* note 7, at 1305, Table B (1994) (showing the relative percentages of benefits paid for injury and illness by principal loss-shifting systems).

119. The number of uninsured has reached 15.6 percent of the American population, up from 15.2 percent in 2002. Peter G. Gosselin, *Census: More Americans in Poverty, Uninsured*, SEATTLE TIMES, Aug. 27, 2004 at A1.

120. Alan B. Krueger, *Economic Scene*, N.Y. TIMES, Mar. 3, 2005, at C2. For a discussion of deficiencies in disability insurance, see 2 A.L.I. REPORT, *supra* note 91, at 555-56. See also, John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1479 (1966) ("[I]t is true that the American Social Security system has lagged considerably behind that of

coverages when they exist. Therefore, it is clear that first-party insurance, as well as third-party insurance, is greatly troubled. But the tort reform movement still dichotomizes first and third-party schemes as though they were two mutually exclusive, self-contained phenomena. Due to the complementary nature of first and third-party insurance, one-sided reforms that may lessen defendant deterrence and premiums¹²¹ will simultaneously exacerbate even greater deficiencies in already tragic victim undercompensation.

In sum, the fact that the energized movement for one-sided tort reform only surfaced with the liability insurance problems of recent decades indicates the influence of its special interest supporters. The legislative agenda of the Right, with its goal of arbitrarily limiting liability, forces an even greater burden upon the victims, whose continued state of undercompensation is a crisis in its own right. Today's tort reform proposals fail to provide a balanced solution to tort-related problems that adversely affect producers of goods and services as well as injury victims.

B. Expansion of First-Party Insurance Within the Current Third-Party Framework

In the United States, coverage for various forms of accident loss remains tragically insufficient across the board—a shortcoming that is especially apparent when compared with other highly industrialized nations that provide much more comprehensive support.¹²² This means that, in many situations, an injured party must resort to the tort system to account for losses that remain uncompensated by first-party insurance.¹²³ In recent decades, this reliance has grown as tort damages have accounted for an increasing (if still relatively small) proportion of compensation for injury and illness, compared with first party insurance.¹²⁴

Although still far from adequate, first party coverage has expanded greatly over the course of modern American history.¹²⁵ Well into the 20th Century, most victims of adversity depended exclusively on their own savings or charity,¹²⁶ except in rare situations when a tortfeasor was to blame for the injury and a fortuitous tort action was viable.¹²⁷ The institution of first-party insurance was only in its infancy as an accident-prone, modern, industrial world emerged. Insurance eventually grew to provide some coverage across the varied typology of health and wage losses, but this

most other countries in the limited range of provision it makes for disability for other than the aging or aged.”).

121. See *supra* note 102 and accompanying text.

122. See 2 A.L.I. REPORT, *supra* note 91, at 555.

123. See RAHDERT, *supra* note 1, at 134.

124. See, e.g., 2 A.L.I. REPORT, *supra* note 91, at 556; O'Connell, *supra* note 7, at 1305-06.

125. See RAHDERT, *supra* note 1, at 134.

126. See 2 A.L.I. REPORT, *supra* note 91, at 555.

127. Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be On American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1343-44 (1994).

growth was slow to incorporate significant proportions of the population. By 1940, only ten percent of Americans enjoyed health care coverage.¹²⁸ The New Deal reforms served as a seminal event in promoting first-party insurance coverage with the rise of the welfare state and the proliferation of public and private sector insurance plans—especially with the rise of employer provided fringe benefits during World War II and the eventual implementation of Medicare and Medicaid.¹²⁹ But despite these advances, coverage, to this day, remains piecemeal and scarcely of uniform availability, leaving, as we have seen, huge gaps in health care and disability insurance.¹³⁰ Inspired by the example of other highly industrialized nations with more comprehensive plans, some reformers have long sought to expand first-party social and private insurance to cover remaining deficiencies.¹³¹

Such hopes, however, have been repeatedly dampened.¹³² Excitement briefly peaked again during the early 1990s with the Clinton Administration's Health Care Reform Bill that sought a universal health care plan.¹³³ Since this proposal's defeat,

128. *See id.* at 1358.

129. Most health insurance coverage in the United States is provided through employment-based plans:

Almost seven out of every ten Americans under age 65 years (66 percent) are covered by employment-based health insurance, from either their job or that of their parent or spouse.... Individually purchased policies and public insurance (primarily Medicaid) both fill some of the coverage gaps created by the employment-based system. Together they account for 21 percent of coverage. Self-employed people (about 10 percent of workers) and their families must often rely on individually purchased health insurance.

INSTITUTE OF MEDICINE, COVERAGE MATTERS: INSURANCE AND HEALTH CARE 8 (2001).

130. *See RAHDERT, supra* note 1, at 133-35.

131. Personal injury compensation in the United States is especially reliant upon tort litigation:

As a leading comparative study of accident law puts it, "resort to the litigation process" in developed nations outside the United States is "both less necessary and less lucrative than it is in the United States"; American accident law in the twentieth and twenty-first centuries is thus characterized by a relatively high dependence on tort litigation as compared to other developed western nations.

JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 95 (2004) (quoting WERNER PFENNIGSTORF WITH DONALD G. GIFFORD, *A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES* 158 (1991)).

132. Marc Franklin, Sir Geoffrey Palmer, and Stephen Sugarman are three well known advocates for the construction of a comprehensive first-party insurance system as a replacement for today's tort system, which they propose to abolish. *See, e.g.,* Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778 (1967); Sir Geoffrey Palmer, *The Ninth Monsanto Lecture: The Design of Compensation Systems: Tort Principles Rule, O.K.?*, 29 VAL. U.L. REV. 1115 (1995); STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

133. *See* Robin Elizabeth Margolis, *Health Care Debate in Washington: Hard Realities Lurk Behind Clinton Reform Hoopla*, 10 No. 2 HEALTHSPAN 21, at 22 (1993).

hope for similar reform measures have waned due to a changed political climate, seeking lower taxes combined with both growing governmental deficits and an increased financial and psychological focus on combating terrorism and managing foreign policy concerns.¹³⁴ For this reason, proposals of bold change in first-party coverage, whether mandated by private or social insurance in the health care arena, face imposing political barriers. But despite this recent stagnation, it makes sense to appraise first-party insurance along with its supplementation by a tort regime in order to determine an optimal configuration given political reality.

Before advancing to a four-pronged evaluation, it is instructive to first delineate the historical relationship between first-party expansion and enterprise liability. In this manner we can carefully trace the theoretical roots of both phenomena in order to illuminate alternatives to reform. Proponents of first-party expansion have been motivated by the same bedrock compensatory concerns espoused by the enterprise liability school—that most accident victims are under-compensated, denied swift recovery, with too many people having little or no first party insurance.¹³⁵ Indeed, the ultimate goal of early enterprise liability theorists, including Fleming James and Albert Ehrenzweig, was to implement a system of governmentally administered social insurance.¹³⁶ The modification of the tort system in light of the insurance rationale was seen as a preliminary step towards the achievement of this desired goal.¹³⁷ Professors James and Ehrenzweig viewed the emphasis on fault to be a vestigial element of a premature, morality-based stage of tort law; but they still hoped to utilize its compensatory aspects to the extent that it constituted progress.¹³⁸

Considering the shared historical roots of first-party expansion and enterprise liability, it would seem that advocates of victim compensation, spurred by the example of workers' compensation, would continue to seek increases in private and social insurance coverages, along with a reciprocal decrease in the influence of the fault-based tort system. The impetus for such hopes of the original enterprise theorists would seem all the more urgent due to the obvious inefficiencies of the fault-based system.

Surprisingly, today's social insurance reformers on the Left disproportionately focus on expanding first-party insurance along with large-scale maintenance, or even expansion, of the tort system.¹³⁹ Even Rahdert, a close observer of both first-party

134. See Pamela A. Paul-Shaheen, *The States and Health Care Reform*, 23 J. HEALTH POL. POL'Y & L. 319 at 358-59.

135. See RAHDERT, *supra* note 1, at 131.

136. See e.g., Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, at 1044-46 (2003); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461, 472 (1985).

137. See Sebok, *supra* note 136, at 1044.

138. See *id.* at 1045.

139. See SUGARMAN, *supra* note 109, at i, xviii.

health and disability insurance on one hand and tort liability insurance on the other, is unwilling to promote dramatic changes in the current third-party tort system.¹⁴⁰ Instead, he suggests that despite tort law's gross inefficiencies, improvements are most likely to be achieved by simply allowing the tort system to assimilate more fully the enterprise liability reforms.¹⁴¹ As a result, despite the grandiose visions for reform, these proposals from the Left are similar to the Right's proposals for tort reform; fundamentally, they are versions of today's status quo.

1. Efficiency

Some proponents of first-party expansion claim that broadening first-party insurance would promote improvements in overall efficiency by reducing litigation expenses and transaction costs.¹⁴² Their goal is to fortify first-party means in order to increase its compensatory role, while preserving a presumably reduced role for unchanged third-party liability rules as a final conduit for full compensation.¹⁴³ Thus, much like their tort reform opponents, they seek only modifications in the current system, but more from the vantage point of victims, rather than defendants.¹⁴⁴

As to the allegedly propitious effects on tort law to be achieved through the unilateral expansion of first-party insurance, Gary Schwartz predicted that universal health care would greatly reduce the inefficiencies and costs of the tort system.¹⁴⁵ For example, he claimed that such reform would incite the eventual abrogation of the duplicative effects of the collateral source rule, which he characterizes as one of the residual "oddities of American accident law."¹⁴⁶ Schwartz notes that when it rose in the late 19th Century, the rule was justified in terms of fairness, since only a small proportion of the population chose to buy private first-party insurance.¹⁴⁷ However, the rule's legitimacy has since waned with the expansion of first-party insurance coverage and the surging costs of excessive deterrence and overcompensation.¹⁴⁸ Schwartz predicts that this process should inevitably lead to the rule's dissolution, as

140. See RAHDERT, *supra* note 1, at 137-38.

141. Rahdert argues that one of the central causes of the current system's instability and inefficiency is that there has not yet been needed consistency in new liability rules. Therefore, he argues that more appealing levels of stability and efficiency will likely be obtained "once the process of adopting the insurance rationale and fitting it into our scale of tort compensation policies is complete." *Id.* at 140. Although Rahdert provides one of the most balanced explanations of the current personal injury compensation system, he nevertheless fails to provide any promising ideas for future reform mostly because he seems too committed to the current fault-based tort system.

142. *Id.* at 44.

143. See *id.* at 42.

144. See *id.* at 113.

145. See generally Schwartz, *supra* note 127.

146. Fleming, *supra* note 120, at 1478.

147. See Schwartz, *supra* note 127, at 1343-44.

148. See RAHDERT, *supra* note 1, at 138.

has occurred in some states and in many foreign nations with universal health coverage.¹⁴⁹

Although the collateral source rule is a cause of inefficiency in the present system, promoting the duplicative recovery¹⁵⁰ (or inefficient subrogation), Schwartz's argument fails to provide much guidance for its repeal. He suggests that a necessary prerequisite of its repeal is the institution of universal coverage.¹⁵¹ But when will *that* come about? Merely repealing the collateral source rule is inimical to balanced reform. Unilateral expansion of first-party coverage as a means to ensure less reliance on tort litigation is based on the apparently reasonable assumption that due to the general insufficiency of first-party coverage, Americans are now forced, against their preference, to depend on the tort system in order to receive the most adequate compensation for their losses. The most logical remedy, then, would be to remove the necessity behind these suits. An editorial from the *Economist* suggests:

[Changes in pain-and-suffering awards] and limits on punitive damages would make the system more predictable, but it would not reduce liability litigation in America to European levels. This is not because all Americans are sue-happy (though some are) but because, for millions of Americans, the legal system is also their primary health insurer. So the best way to slash the number of lawsuits would be to fix America's dreadful health-care system—another example where more reason, and less passion, is sorely needed.¹⁵²

Accordingly, the tort system is seen as presently overburdened in its use by millions of Americans for whom it remains the only viable conduit for full recovery. Gary Schwartz similarly predicted that for medical malpractice suits, universal health insurance would lead juries and judges to be less swayed by sympathy for the plaintiffs or by the loss spreading abilities of defendants.¹⁵³ Seeing their chances for victory in court greatly reduced, presumably fewer accident victims would invest the added effort and expense of filing lawsuits.

The widespread view that an extension of first-party insurance would likely contract third-party suits may seem rational on its face, but unfortunately, data undercuts this prediction. In recent decades, as first-party coverage has expanded, the percentage of benefits paid from tort liability relative to the benefits paid from private and social insurance systems has expanded even more.¹⁵⁴ The cause of this

149. See Schwartz, *supra* note 127, at 1344-49.

150. See PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 169-70 (1985) (estimating that about 35% of all medical malpractice payments represent expenses already covered by first-party insurance).

151. See Schwartz, *supra* note 127, at 1380.

152. *Sue the Rascals*, *ECONOMIST*, Feb. 13, 1993, at 18-19 (speaking of product liability but making an argument applicable to all types of tort claims for personal injury).

153. See Schwartz, *supra* note 127, at 1354.

154. See O'Connell, *supra* note 7, at 1305.

counterintuitive phenomenon is the subsidization of tort claims by increasing first-party insurance proceeds.¹⁵⁵ Accident victims who enjoy insulation from financial need through first-party proceeds are better able to invest in prolonged lawsuits.¹⁵⁶ With little or no risk, aided by their contingent fees, trial lawyers have been successful in harvesting clients through increasingly aggressive advertising campaigns. Therefore, victims are able to buy more time and enjoy greater leverage in their attempts to attain not only whatever shortfall results from first-party coverage, but also, even more importantly, pain and suffering damages. In addition, since pain and suffering awards can typically be scaled, at least roughly, as a multiple of medical bills, claimants have an increased incentive to pad their medical expenses paid by first-party health insurance.¹⁵⁷

The subsidization effect has been evidenced with the enactment of workers' compensation and no-fault auto insurance plans. In both cases, while victims were ensured of greater and timelier compensation, an increased number of tort claims nevertheless resulted.¹⁵⁸ The strength and resiliency of this subsidy is underscored by the fact that both reform programs included substantial barriers to tort claims "in the form of 'sole remedy' provisions under workers' compensation and 'threshold' provisions under no fault auto insurance."¹⁵⁹ At least forty percent of all product liability dollars have long been absorbed by workplace claimants already covered by workers' compensation—incomparably the most extensive insurance program broadly available in the United States.¹⁶⁰ These alarming statistics should serve as ample warning to current proponents of expanding first-party coverage without measures to constrain tort claims. Consequently, the expansion of first-party insurance programs alone will only exacerbate the number and scope of lawsuits, thereby increasing system-wide costs and deficiencies. Finally, the goal of universal health care in the United States is not only highly chimerical, but even if achieved, will surely not simultaneously cover universal wage losses, a remaining deficiency tort claims will need to address. Wage loss is covered much less than health care by either private or social insurance,¹⁶¹ and in cases of serious injuries, dwarfs the costs of health care.¹⁶²

155. *See id.* at 1306.

156. *Id.*

157. *Id.*

158. *Id.* at 1308.

159. O'Connell, *supra* note 7, at 1308.

160. *See* 2 A.L.I. REPORT, *supra* note 120, at 183.

161. *See* 1 A.L.I. REPORT, *supra* note 20, at 59.

162. O'CONNELL, *supra* note 88, at 75.

2. Deterrence

One of the reasons why first-party reformers are so hesitant to change the current tort system is that they still find too much validity in the status quo to propose bold legal transformation. Such reluctance is evidenced in Schwartz's surprisingly mixed appraisal of the anachronistic collateral source rule, which, as noted above, he concedes is one of the most derided doctrines in the legal system. "Even so," Schwartz argues, "the [collateral source] rule can be defended on grounds of deterrence. To fully deter parties who might engage in tortious behavior, those parties should be required to confront liability for all the costly consequences of their tortious conduct."¹⁶³ Thus, proponents of first-party reform are worried that constricting the coiled threat of the tort system would further imperil safety.

The Left's concern for deterrence is justified by their deep skepticism of the Right's plans for liability limitations; forcing arbitrary and indiscriminate tort restrictions across the board is seen as not only unfair to claimants, but also as a naive means to reduce deterrence without any counter-balancing benefit.¹⁶⁴ Ironically, first-party reformers mirror their opponents by failing to consider what an appropriate level of deterrence should be. Both sides are convinced that the present safety threat is exhibited exclusively by opposite ends of the spectrum (for the Right too many claims, for the Left too many defenses) and seek deterrent effects unilaterally.¹⁶⁵ It does not register with many reformers on the Left that the current configuration arguably exhibits signs of overdeterrence, raising the specter of related problems such as economic stagnancy, marketplace abandonment, and moral hazard. In recent years, many (not only the Right) have seen the growing threat of liability as especially costly to health care providers who have left practice, resorted to defensive medicine,¹⁶⁶ or made cutbacks in essential care.¹⁶⁷ Ignoring such considerations,

163. Schwartz, *supra* note 127, at 1346-47.

164. See O'CONNELL, *supra* note 7, at 1309.

165. See *id.* at 1308.

166. "Defensive medicine" is a term used to describe the conduct of physicians who allegedly order costly and excessive tests for patients in order to lessen their fear of malpractice suits. Those who cite this supposed phenomenon have compiled impressive statistics:

A 1993 study revealed that defensive medicine accounted for five to fifteen billion dollars of unnecessary medical costs per year, primarily through ordering of diagnostic tests for legal, rather than medical, purposes. Current estimates of healthcare savings—if physicians could practice without provider liability—are as high as \$69 billion to \$124 billion.

Dr. William P. Gunnar, *Is There an Acceptable Answer to Rising Medical Malpractice Premiums?*, 13 ANNALS. HEALTH L. 465, 476-77 (2004). Nevertheless, many scholars question the existence of "defensive medicine" and argue that it is more of a myth. See, e.g., Dr. Harvey F. Wachsman, *Individual Responsibility and Accountability: American Watchwords for Excellence in Health Care*, 10 ST. JOHN'S J. LEGAL COMMENT. 303, 311 (1995) ("Defensive medicine" . . . is a difficult concept to accept. In an industry known for producing scientific data, no one has ever produced a study to

many observers protest that the abrogation of legal doctrines such as the collateral source rule moves away from an optimal level of deterrence.¹⁶⁸

For example, under the assumption that the collateral source rule plays an essential deterrent role, Schwartz and others seek an expansion of subrogation rights.¹⁶⁹ Schwartz claims:

This arrangement looks like it could achieve the best of all possible worlds. The victim receives full (but not double) compensation; for the sake of deterrence the tortfeasor bears full liability, and in a competitive market the revenue derived from subrogation requires the health insurer to reduce the price of the insurance policies it offers.¹⁷⁰

In theory, an ideally functioning subrogation system is one in which an insured receives more extensive and cheaper first-party insurance coverage in return for granting an insurer the right to reimbursement through a tort action.¹⁷¹ However, rarely does such a system perform efficiently due to large administrative and transaction costs created by fractious interactions among a host of related parties that include liability insureds, collateral insurers, lawyers, and tortfeasors.¹⁷² These costs accumulate under subrogation schemes that mandate the trading of money back and forth over smaller claims, while using up insurance limits made unavailable as a result to cover larger losses which are the crux of our inadequate insurance system. With efficient first-party collateral sources taking part in insureds inefficient third-party suits, the American Law Institute ("A.L.I.") concluded, in its *Reporters' Study on Enterprise Responsibility for Personal Injury*, that an effective subrogation/reimbursement scheme ushers in such a host of new difficulties that "the daunting task" of developing procedures for effectively allocating the costs of injury is not worth the trouble.¹⁷³ Because any advantage in deterrence and compensation is

support the claim that defensive medicine exists, let alone that it costs the taxpayers many billions of dollars a year."); Michelle M. Mellow & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1606 (2002) ("the overdeterrence rhetoric has not been firmly grounded in fact. Most defensive-medicine studies have failed to demonstrate any real impacts on medical practice arising from higher malpractice premiums.").

167. See Treaster, *supra* note 95, at 1 ("[A]ccording to a survey by the American Hospital Association . . . 20 percent of the association's 5,000 member hospitals . . . had cut back on services and 6 percent had eliminated some units. Many of those units are obstetric wards, where medical mistakes have historically led to expensive jury awards and settlements.").

168. See Schwartz, *supra* note 127, at 1346-47.

169. *Id.* at 1340.

170. *Id.* at 1347.

171. See 2 A.L.I. REPORT, *supra* note 91, at 169.

172. See Fleming, *supra* note 120, at 1536 n.236 (1966) (noting the huge inefficiencies of shifting costs by subrogation).

173. 2 A.L.I. REPORT, *supra* note 91, at 179.

achieved at the cost of greater inefficiency, the ALI concluded that the best option is to reject the collateral source rule and prohibit subrogation claims.¹⁷⁴

3. Compensation

As mentioned above, Fleming James viewed the expansion of tort liability as merely a temporary means to further encourage plaintiff recovery; in that he perceived the tort system to be inherently inimical to compensation.¹⁷⁵ James viewed evolutionary changes in tort law through enterprise liability as a form of scaffolding that would eventually be discarded once a fortified system of social insurance was established.¹⁷⁶ Not only did James hope that this evolution would occur, he sincerely believed that it would come about as a logical progression.¹⁷⁷ James failed to anticipate the growth of tort liability to the point that the lobbying power of those dependent on it—especially the modern plaintiffs' bar with its millions of dollars in campaign funds—would be able to promote the current tort system as an end in itself, rather than as a diminishing part of something much larger.¹⁷⁸

Unfortunately, the existing tort system fails to complement effectively existing, exiguous first-party coverage. It is often extremely difficult to pin fault on a particular defendant (or contributory fault on a given plaintiff), considering the

174. *Id.* at 182.

175. *See* Sebok, *supra* note 136, at 1044.

176. *See id.* at 1045.

177. Priest notes how this belief influenced James' personal career decisions:

James, in fact, viewed the adoption of a comprehensive compensation plan for automobile accidents to be inevitable, a view of significant personal importance to his career. In a speech in 1939, James revealed, "The feeling that automobile compensation would inevitably come in our generation so pervaded the rank and file of lawyers of my own city that it became a material factor in my decision to quit the active full-time practice of tort law."

Priest, *supra* note 136, at 472.

178. The financial contributions of the ATLA have been extraordinary, especially in relation to other special interest groups:

Historically, "between January 1989 and December 1994 contributions from individual plaintiffs' lawyers to all congressional candidates totaled \$18,066,433." Combining this figure with the amount of PAC monies donated by the ATLA over the same period, "a total of more than \$30 million came from plaintiffs' lawyers for federal elections." To put this amount into perspective, "the five largest labor union contributors since 1989 contributed a total of \$29,727,165" to federal congressional campaigns; "the 'big three' automakers (GM, Ford, and Chrysler) contributed \$2,195,233" over the same period, "with ten of the largest oil and gas companies in the U.S. giving a total of \$6,975,764."

Jeffrey O'Connell & Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" as a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Law*, 15 J.L. & HEALTH 23, 43 (2001).

complexity of many technically demanding cases.¹⁷⁹ Not only do many deserving claims fail, but many undeserving claims succeed.¹⁸⁰ The results of an exhaustive Harvard study of malpractice litigation in the State of New York concluded that about three percent of the state's injured patients received compensation through legal claims, and of those, fewer than 50 percent actually sustained injury due to negligence.¹⁸¹ Moreover, even when victims win the litigation lottery, they must disgorge as much as a third or even one-half of their final award to cover their lawyers' contingency fees and litigation expenses.¹⁸² Since experienced trial lawyers know to diversify their portfolio of cases—a luxury unavailable to the lone claimants—ultimately it is lawyers, not accident victims, who are most assured of compensation through tort litigation.

4. Equity

Like their tort reform opponents, advocates of first-party expansion who would maintain the current tort system have a skewed notion of corrective justice. The dual aims of corrective justice, as we have seen, are sanctioning the culpable and compensating those they injure. Some observers have discerned a recent trend promoting the “remoralization” of fault, which emphasizes defendant culpability and the need to achieve retribution through litigation.¹⁸³ This serves as a flawed trend that reverts to an outdated view of the philosophical foundations of tort law.

The philosophical underpinning of modern tort law is rooted in Oliver Wendell Holmes's *The Common Law*, where he contended that tort should increasingly distinguish itself from criminal law and the inquiry into immoral conduct.¹⁸⁴ Since the 19th Century, the increasing sophistication of tort law and the rise of the insurance rationale helped to improve victim compensation, while reducing the harsh or

179. See Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 502-03 (1976).

180. See HARVARD STUDY, *supra* note 98, at 8-3.

181. See Carole Roangresenz et al., *A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries* (1999), <http://www.rand.org/publications/IP/IP184/index.html>.

182. See Jeffrey O'Connell, *Statutory Authorization of Nonpayment of Noneconomic Damages As Leverage For Prompt Payment of Economic Damages In Personal Injury Cases*, 71 TENN. L. REV. 191, 192 (2003).

183. Anthony Sebok has been especially perceptive in highlighting “the present attraction of punishment to progressive torts scholars and activists.” Sebok, *supra* note 136, at 1053. See generally, Jeffrey O'Connell & Joseph R. Baldwin, *(In)Juries, (In)Justice, and (Il)legal Blame: Tort Law As Melodrama—Or Is It Farce?* 50 UCLA L. REV. 425, 425-26 (2002) (criticizing the moralizing emphasis of contemporary personal injury law).

184. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW & OTHER WRITINGS* (1982).

retributive aspects on defendants who could utilize insurance to spread their losses.¹⁸⁵ With the rise of industrialization and technology, accidents were far less likely to be caused by immoral conduct.¹⁸⁶ In addition, with the modern technological world making determinations of fault more difficult and uncertain, tort law began to develop conceptually along more amoral lines.¹⁸⁷ Indeed, as pointed out, James and others hoped that the moralistic connotations of tort law would play a diminishing role—as the notions of loss spreading and compensation would increasingly prevail through morally neutral insurance notions.¹⁸⁸ The timing of today's "remoralization" of fault is paradoxical in that third-party insurance largely deflects the direct blow inherent in any retributive sanction. Accordingly, the fallout of tort litigation often rains on the relatively innocent through the form of increased insurance premiums for all those in the insurance pool. But a more extended viewpoint reveals that these costs are largely borne by the greater public through increased prices for goods and services, and even on occasion, it is argued, through economic stagnation and marketplace abandonment.¹⁸⁹ The tragic result of this retributive stance is that it undermines a compensatory emphasis of corrective justice. As Rahdert notes, "[i]f the purpose of tort law is to punish, deter, or show reprobation for socially unacceptable conduct, compensation of the victim is more or less an incidental by-product of the system."¹⁹⁰

5. Summary

Reforming the personal injury compensation system along lines that are most favorable to the promotion of appropriate victim compensation requires complementary alterations in tort law. Politically, this may seem to be an unlikely step in the short-run, since it faces the powerful opposition of the American Trial Lawyers Association. But first-party advocates, such as adherents of Gary Schwartz, should take heed of the original long-term agenda of the enterprise liability theorists. Victim compensation has certainly been advanced since the early 1960s through the insurance rationale and the expansion in first party insurance. Nevertheless, we have reached a critical point in which further progress requires a solution that decreases our reliance on the unwieldy tort system in order to attain wider and better loss allocation.

We have emphasized that progressive reformers on the Left who seek change exclusively through first-party expansion are similar to their conservative opponents because they offer a one-sided solution to what is really a multifaceted problem. Such an approach inevitably fails to accommodate the interrelated nature of insurance

185. See G. EDWARD WHITE, *TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY* 62 (2003).

186. See *id.* at 146.

187. See *id.* at 149-50.

188. See *id.*

189. See RAHDERT, *supra* note 1, at 155, 159.

190. *Id.* at 12.

and tort law—by placing exclusive weight on only one aspect of the overall system, the result is an inversely reciprocal see-saw effect that diminishes other elements of equal importance. As emphasized in this paper, the expansion of first-party insurance without any corresponding constraint in tort doctrine will have the adverse effect of increasing inefficiency and overdeterrence, while entrenching unacceptable fortuity and inequality in victim compensation. Effective reform must look to correlative changes in both first and third-party sides of the framework and incorporate structural change in insurance and tort law. Towards this end, earlier experiments in workers' compensation and no-fault auto insurance can serve as helpful—but imperfect—blueprints for more comprehensive reform.

C. Bridging the Divide: Existing No-Fault Models for Reform

The central, intractable, four-word question at the heart of tort liability is “Who (or what) is at fault?” The problem may be viewed as a Gordian knot: the solution is most easily attained not by attempting to carefully untie its bundled weave, but by circumventing the premise of fault upon which so much of the system is based. Astonishingly, many today do not even recognize this solution, although it was first developed and successfully implemented almost a century ago. And many who at least recognize it, certainly do not deal realistically or in detail with implementing it.

1. Workers' Compensation

The first and most successful movement for reform in the American personal injury system was workers' compensation in the early 20th Century. In the decades that lead up to its legislative enactment in all fifty states, there was intense debate over the crisis of workplace accidents.¹⁹¹ As the nation grew more industrialized at the turn of the century, a greater proportion of the general population faced the hazardous environment of the modern factory. As the accident rate inevitably grew, the established “unholy trio” of defenses—assumption of risk, contributory negligence, and the fellow servant doctrine—largely immunized industry from the costs of workplace accidents.¹⁹² But despite the deep rift between the labor unions and industrial leaders, and the enormous stakes, political compromise was achieved in the early decades of the 20th Century—as American legislatures followed the model of workers' compensation laws previously adopted in Germany and later in Britain and its Dominions.¹⁹³

191. See RAHDERT, *supra* note 1, at 8.

192. *Id.* at 16.

193. “Workers' compensation is not an outgrowth of the common law or of employers' liability legislation; it is the expression of an entirely new social principle having its origins in nineteenth-century Germany.” 2 ARTHUR LARSON, *WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT* § 5 (1992).

The achievement of workers' compensation laws was considerable in presenting a solution to a difficult and seemingly entrenched problem. As Rahdert describes it, the underlying functional premise of workers' compensation was that it was a forced method of compensation that "represented a major assault on the fault principle, which was the darling of . . . tort theory."¹⁹⁴ The laws held employers absolutely liable for medical and wage loss accrued from accidents "arising out of or in the course of employment."¹⁹⁵ Such payments were funded through insurance, which was uniformly required, and therefore constituted a "business cost" to be incorporated into the price of goods and services.¹⁹⁶ In this manner, the English statesman David Lloyd George extolled the spreading of the cost of workplace injuries throughout society, since, as he stated, "the cost of the product should bear the blood of the workman."¹⁹⁷ Employers under workers' compensation laws, on one hand, were barred from suing their employers based on fault, and were likewise prevented from receiving non-economic awards, including pain and suffering.¹⁹⁸ On the other hand, workers obtained an assured level of compensation for economic loss, disbursed on a periodic basis without regard to fault.¹⁹⁹ Usually, the only question presented under workers' compensation is whether or not the injury "arose out of and in the course of employment"—a question which employers contest in less than two percent of total cases.²⁰⁰ Therefore, this simplified inquiry into injury is the source of enormous system-wide savings in administrative and transaction-costs, dramatically reducing (but by no means eliminating) the volume of litigation, while greatly expanding the incidents of compensation.²⁰¹

Most intriguing about workers' compensation is its political viability. In order to understand more clearly the exceptional acceptance of the American system and its ability to bridge the partisan divide, it is instructive to contrast it to its British predecessor, which is more socialistic in nature.²⁰² The American model is extraordinary because it strikes a balance between social insurance and the tort system. Although it mostly eliminates the focus on fault,²⁰³ the model is nevertheless

194. RAHDERT, *supra* note 1, at 19.

195. This language appears in a typical workers' compensation statute. See LARSON, *supra* note 193, at § 6; O'Connell, *supra* note 179, at 521.

196. RAHDERT, *supra* note 1, at 19.

197. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 80, at 573 (5th ed. 1984) (quoting a campaign slogan attributed to Lloyd George).

198. See LARSON, *supra* note 193, at 1.

199. See *id.* at 6-7.

200. 1 A.L.I. REPORT, *supra* note 20, at 110.

201. Admittedly an avowed "trouble spot" for workers' compensation is the category of occupational disease claims with its huge problems of causation. See *id.* at 105, 110.

202. See LARSON, *supra* note 193, at 2 (discussing the unique character of the American system).

203. See *id.* at 3.

highly individualistic, as the government plays a minimal role with interaction generally limited to that which occurs between employers, insurance carriers, and employees. Rather than forcing employers to insure through a state fund, and to disburse a flat rate to injured employees, the American system most often provides employers a choice to self-insure or procure insurance,²⁰⁴ being only required to provide health benefits and lost wages in proportion to each individual employee's prior earnings.²⁰⁵ Thus, unlike a pure social insurance system, under the American system it is not the general public that pays for the benefit costs, but instead the consumers who choose to purchase the particular class of products.

In Great Britain, on the other hand, the government and the Ministry of National Insurance play a central role in funding the system and administering its benefits.²⁰⁶ While the American system was ostensibly inspired by the philosophy and goals of its European counterparts, it was structured by a characteristic American pragmatism in balancing diverging concerns and agendas across the political spectrum²⁰⁷—an approach that serves as a workable precedent for today's political tort quagmire.

Workers' compensation was a solution that incorporated the premise of the insurance rationale with drastic alterations in tort doctrine, resulting in a system that more successfully satisfies our analytical desiderata of efficiency, deterrence, compensation, and equity than tort law. An enormous boon to efficiency, workers' compensation plans largely eliminate the administrative and transaction costs derived from expensive litigation over fault and payment for pain and suffering, while their privatized nature bars the need for any substantial government involvement.²⁰⁸ This configuration also achieves deterrence as producers retain an incentive to provide a safe workplace environment, while the moral hazard on the worker's side is addressed by the inaccessibility of overcompensation through tort.²⁰⁹ Unlike the British plan, which places a flat rate on businesses across the board, the American system has industry-specific premiums that are experience-rated for individual employers, thereby maintaining an incentive to act within acceptable levels of safety.²¹⁰

Indeed, the implementation of workers' compensation in the United States coincided with an enormous reduction in industrial accident rates.²¹¹ Victim

204. *See id.* at 9.

205. *See id.*

206. *Id.*

207. *See* LARSON, *supra* note 193, at 19.

208. *See id.* at 9.

209. *See id.* at 9-10.

210. *Id.* at 9.

211. Although the extent that these statutes effected this change is still debated:

Industrial accident rates in the United States began to decline soon after the enactment of workmen's compensation statutes. Economic historians disagree as to whether employers' costs under the new statutes caused the declines. Nonetheless, whether

compensation, the plan's original impetus, was achieved by exchanging the indeterminate opportunity for tort's riches for the guarantee of prompt, but limited, pay-outs.²¹² As a result, workers' compensation plans spread the benefits and burdens throughout society in a manner that is seen as satisfying the goal of distributive justice.²¹³ Finally, the system is seen as addressing the goals of corrective justice, by holding employers individually responsible for injury costs that are then promptly paid to victims, and reflected in the employer's experienced-rated premiums.²¹⁴

While often overshadowed by the world of tort litigation, no-fault models actually account for the same overall level of compensation provided through tort litigation.²¹⁵ As with many insurance programs, premiums for workers' compensation have risen dramatically in recent decades;²¹⁶ but it is argued that this growth has been comparatively steady and predictable for employers who are able to adjust their wages and prices accordingly.²¹⁷ This serves as a huge advantage over the tort liability system, a system that is so problematic for businesses and insurers because of, among other things, its inherent indeterminacy. Given the advantages of workers' compensation, the reasonable next step was seen as applying its no-fault model for accident loss outside the employment context.²¹⁸ This agenda was initially encouraged by many observers in the early and mid-20th Century, for example, Fleming James²¹⁹ and Roger Henderson.²²⁰ Rahdert too suggests experimentation with the workers' compensation model in contexts where injuries typically recur.²²¹

because of changed employer accident costs or because of the widespread public attention that work-accident law reform brought to the crisis of industrial accidents, workmen's compensation brought in its wake the first widespread safety movement in the American workplace.

WITT, *supra* note 131, at 187.

212. See RAHDERT, *supra* note 1, at 18.

213. See *id.* at 18-19.

214. See LARSON, *supra* note 193, at 7.

215. See the figures in Table E of Jeffrey O'Connell & Jay Barker, *Compensation for Injury and Illness: An Update of the Conrad-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 924 (1986). See generally, O'Connell, *supra* note 7, (providing data on the benefits paid by respective loss-shifting systems through the years).

216. "The cost of treating workplace injuries had risen to \$28.39 billion in 1993. Medical spending in workers' compensation cases rose more than tenfold from 1970 to 1990, almost twice the rate of general medical inflation." Milt Freudenheim, *Curbing the Costs of Job Injuries*, N.Y. TIMES, Jan. 16, 1995, at D1.

217. See 1 A.L.I. REPORT, *supra* note 20, at 107.

218. *Id.* at 108.

219. See Priest, *supra* note 136, at 472; WITT, *supra* note 131, at 195.

220. See Roger C. Henderson, *Should Workmen's Compensation be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117 (1969) (arguing that workers' compensation should be extended to cover nonoccupational injuries as part of a uniform system of social insurance).

221. See RAHDERT, *supra* note 1, at 186-87.

Apart from auto accidents,²²² enormous barriers exist for attempts to apply the no-fault model in other litigation-prevalent fields, particularly in products liability and medical malpractice.²²³ The heart of the problem is the difficulty of defining the insured event, which determines when payment is due and, correspondingly, serves as a barrier to the elimination of fault as the criterion for payment.²²⁴ For example, in products liability, despite the expansion of producer strict liability during the 1960s, the focus of litigation has largely transferred from defendants' faulty conduct to the similar question of defendants' faulty (i.e., defective) product.²²⁵ As to medical treatment, when an ill patient goes to a doctor for treatment and subsequently suffers grievous adverse effects, there are many difficulties in determining whether the doctor caused the injury or whether it was caused by the patient's own prior condition.²²⁶ Workers' compensation is able to limit the inquiry to the relatively simple question of whether the injury occurred on the job, but no such convenient test exists in cases dealing with malpractice and products liability, which would as a result continue to require detailed and cumbersome fact-finding inquiries, even under no-fault regimes. Nor is there any way to predict the costs of such open-ended criteria.

2. No-Fault Automobile Plans

Since the late 1920s, automobiles replaced the workplace as the leading cause of accidental death in the United States²²⁷ with total annual premiums for auto liability insurance approaching ten times that of annual medical malpractice liability premiums.²²⁸ But unlike medical malpractice, automobile coverage has long been receptive to no-fault reform and its improvements in providing for injury compensation. Just as in the employment context, the insured event may be readily defined for automobile accidents, with compensation guaranteed to any victim injured in an accident "arising out of the ownership, maintenance or use of a motor vehicle," regardless of fault.²²⁹ Such reform was signaled in the late 1930s when

222. See *supra* note 201 and accompanying text.

223. See RAHDERT, *supra* note 1, at 142-43, 168.

224. See O'Connell, *supra* note 179, at 521.

225. "[B]y retaining the requirement that the product be defective the law has kept about as severe a limitation on liability as was traditionally provided by the common law requirement of proof of negligence on the part of the defendant." O'CONNELL, *supra* note 88, at 65.

226. O'Connell, *supra* note 179, at 521.

227. WITT, *supra* note 131, at 194. ("By the late 1920s, motor vehicles had emerged as, by some measures, the new leading cause of accidental deaths in the nation, involved in close to one-third of all accidental deaths.").

228. Auto liability insurance premiums now approach \$100 billion, while annual medical malpractice liability insurance premiums remain less than \$10 billion. See Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law From the Progressive Era to 9/11* (forthcoming 2005) (manuscript at 27, on file with author).

229. KEETON & O'CONNELL, *supra* note 8, at 303.

Columbia University sponsored the Committee to Study Compensation for Automobile Accidents, which proposed an auto plan based on workers' compensation.²³⁰ This study was ahead of its time in pinpointing the deficiencies of fault-based tort law because it often left victims, particularly the poor, severely undercompensated.²³¹ Although critically acclaimed among scholarly circles, the plan never prompted serious legislative attention. Also, the rise of organized interest groups—especially the personal injury bar—in the mid-20th Century served as a powerful barrier for the sort of comprehensive reforms constructed around a no-fault theory.²³²

Unfortunately, the overall failure to implement ambitious no-fault automobile reform has foretold the frustrations of other attempts to build on the example of workers' compensation. Nevertheless, plans of reform continued to be developed, and in a few instances were successfully able to survive the Scylla²³³ and Charybdis²³⁴ of opposing lobbying interests—the insurance industry and the trial lawyer bar. But, typically, these surviving measures were narrowly drawn and accident specific, as in the case of plans for victims of nuclear accidents, black lung disease, childhood vaccines, birth-related injuries, and post 9-11 losses.²³⁵ Most of the truly ambitious schemes aimed at addressing auto accidents—obviously a much larger category of accidents—were either struck down or diluted.²³⁶

230. Columbia University Council for Research in the Social Sciences, *Report of the Committee to Study Compensation for Automobile Accidents* 132 (New York: Columbia University, 1932) [hereinafter *Columbia Report*]. See RAHDERT, *supra* note 1, at 69.

231. "The Committee believes that the principle of negligence is a principle of social expediency and that it is not founded on any immutable basis of right . . . The value of [a] principle is to be tested by its results, rather than by a priori moral considerations." Priest, *supra* note 136, at 469 (quoting the *Columbia Report*, *supra* note 230, at 160).

232. The personal injury bar consolidated its power in the middle of the 20th Century:

In 1946, plaintiffs' workmen's compensation lawyers from around the nation would form the National Association of Claimants' Compensation Attorneys. A quarter century later, the NACCA reconstituted itself as the American Trial Lawyers' Association, or ATLA. And over the next three decades, ATLA would become one of the most influential lobbies in American politics.

WITT, *supra* note 131, at 196.

233. In Greek mythology, Scylla was a sea monster that lived in the Strait of Messina, "where she seized sailors from passing ships and devoured them." Bartleby, <http://bartleby.com/65/sc/Scylla.html> (last visited Sept. 9, 2005).

234. In Greek mythology, Charybdis was a monster that lived across from Scylla and created whirlpools. Bartleby, <http://bartleby.com/65/sc/charybdis.html> (last visited Sept. 9, 2005).

235. WITT, *supra* note 131, at 196, 209.

236. For a brief but very objective and helpful description of the history, as well as the strengths and weaknesses of no-fault auto laws with an indication of how the weaknesses can be corrected, see Cassandra R. Cole et al., *A Review of the Current and Historical No-Fault Environment*, JOURNAL OF INSURANCE REGULATION 3 (2004).

Since the 1970s, twenty-six U.S. jurisdictions have passed some form of no-fault automobile legislation,²³⁷ but only a couple plans, Michigan and New York, are anything near a “pure” form of no-fault in largely eliminating fault claims. Most measures were overly qualified in their thresholds allowing for tort claims above a low level of injury, or add-on plans that allow any no-fault beneficiaries to bring tort suits while only requiring the deduction of no-fault benefits from any tort awards.²³⁸ Potential advantages fall further under the thresholds which provide victims with incentives to pad, or accumulate unnecessary health care costs in order to exceed the threshold and thereby obtain the right to sue.²³⁹ In addition, one finds the subsidy effect from first-party insurance that leads to negative consequences in the personal injury compensation system.²⁴⁰

Many argue that no-fault automobile plans fail to provide advantages over the traditional tort system.²⁴¹ Indeed, in recent years, despite continual complaints about the third-party liability structure, no-fault schemes have been met with much resistance and rebuke.²⁴² A few states have even repealed their (inadequate) no-fault auto laws.²⁴³ In addition, existing proposals for choice no-fault automobile measures, which allow motorists the option to forego tort claims, were severely set back when a federal bill presented in 1999, under initial bi-partisan support, failed to pass either the House or Senate.²⁴⁴ Detractors claim, first, that empirical observation reveals that the promised drop in premium rates has not been realized—noting that no-fault states tend to have higher premiums.²⁴⁵ Opponents also claim that by paying faulty drivers and dulling the retributive threat of tort claims, drivers will be insufficiently deterred

237. WITT, *supra* note 131, at 292, n.44.

238. See PETER A. BELL & JEFFREY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* 211 (1997).

239. See Jeffrey O'Connell & Robert H. Joost, *Giving Motorists A Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 70 (1986); For a discussion of this phenomenon, termed “post accident inflation” of claims, see Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorney's Fees*, U. ILL. L. REV. 333 (1981).

240. See *supra* text accompanying notes 155-57.

241. See Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 613 (2000).

242. *Id.* at 612.

243. *Id.*

244. See S. 837, 106th Cong. (1999). This Bill failed despite initial bi-partisan support and a study by the Congressional Joint Economic Committee that predicted savings of as much as thirty-two percent of auto insurance premiums nationally, or \$ 246 billion a year. See Mitch McConnell, Daniel Patrick Moynihan & Joseph Lieberman, *Auto Insurance: A Better Way*, WALL ST. J., Sept 22, 1997, at A22.

245. See generally David S. Loughran, *The Effect of No-Fault Automobile Insurance on Driver Behavior and Automobile Accidents in the United States* 1 RAND INST. FOR CIV. JUST. (2001) (providing a synopsis of the platform opposing no-fault auto insurance).

from unsafe driving practices, with corrective justice being denied to auto accident victims.²⁴⁶

Those who oppose no-fault automobile plans, however, *per se* fail to interpret the current plans in the proper context or fail to make important distinctions between the various types of plans. First, the flat observation that no-fault states tend to have higher premiums than tort states does not account for the caveat that, currently, no-fault states tend to be more urban and naturally experience a higher accident rate.²⁴⁷ In addition, of the twenty-four states considered “no-fault,” eleven merely have “add-on” plans that simply provide for some no-fault compensation without cutting off suits.²⁴⁸ Such plans are so diluted, and so dramatically detract from the original design and goals of no-fault, that they hardly deserve the no-fault rubric. Of the remaining “threshold” states,²⁴⁹ six have monetary thresholds of \$3000 or less, and thereby provide ample room and incentive for victims to pursue tort claims along with no-fault benefits.²⁵⁰ As a result of interest-group inspired legislative compromise, most contemporary “no-fault” auto plans have failed to displace tort law sufficiently, and in many cases serve to further fuel tort litigation.²⁵¹

A more accurate and appropriate means to judge no-fault automobile laws is to focus on plans that most closely approximates the pure model and theory of no-fault. Today, Michigan²⁵² illustrates the potentially widespread benefits that no-fault plans can achieve. The Michigan law has a descriptive (or verbal) threshold instead of a monetary threshold that allows for a tort claimant to recover non-economic damages only in the case of death, impairment of a bodily function, or permanent disfigurement.²⁵³ Accordingly, the state has been able to provide victims with very generous levels of compensation—unlimited medical and rehabilitation expenses plus wage loss benefits that can exceed \$120,000.²⁵⁴ Furthermore, “the percentage of premium dollars paid to lawyers dropp[ed] from 32 percent to 4 percent,” while the “percentage paid to claimants [rose] from 48 percent to 73 percent.”²⁵⁵ Thus, the

246. *Id.* at 2.

247. See JERRY J. PHILLIPS & STEPHEN CHIPPENDALE, WHO PAYS FOR CAR ACCIDENTS: THE FAULT VERSUS NO-FAULT INSURANCE DEBATE 99, n.3 (2002) (“A simple state-to-state comparison of premium rates is like comparing apples and oranges. Most no-fault states are urban states that inevitably have more accidents than the rural ones typically held up as exemplars of tort.”).

248. Arkansas, Delaware, Maryland, New Hampshire, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, and Wisconsin. *Id.* at 59.

249. Including Florida, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. *Id.* at 59-60 (table 1).

250. *Id.* at 60 (table 1).

251. See *id.* at 58.

252. See Schwartz, *supra* note 241, at 619.

253. MICH. COMP. LAWS ANN. § 500.3135 (2005).

254. Schwartz, *supra* note 241, at 619.

255. PHILLIPS & CHIPPENDALE, *supra* note 247, at 61.

Michigan system provides for high levels of compensation while reducing litigation and car insurance premiums, which rise slower than inflation.²⁵⁶

An empirical analysis of the Michigan no-fault auto plan, the nation's most ambitious plan, clearly indicates the benefits that may be achieved by a purer form of auto no-fault.²⁵⁷ Furthermore, it is by no means clear that no-fault plans are causally related to any substantial increase in automobile accidents, as some observers have argued.²⁵⁸ It seems more likely that personal safety and the threats of criminal sanction, increased premiums, and personal property damage are the key incentives to deter unsafe driving. Amidst admittedly conflicting studies, a study by the U.S. Department of Transportation concluded that "[n]o fault auto insurance laws do not lead to more accidents . . . [T]he highway fatality and injury rate in no fault States exhibits no significant difference from those in traditional States."²⁵⁹ As for corrective justice, there already remain strict penalties in criminal law (e.g., vehicular manslaughter), and every no-fault state still allows for non-economic recovery in tort based on fault for accidents in which the driver was behaving recklessly, or the

256. *Id.*; see also O'Connell & Joost, *supra* note 239.

This limitation [on tort damages] has reduced tort recoveries by an amount approximately equal to the total payments of no-fault benefits. Accordingly, insurance premiums have remained steady. Michigan's average auto insurance premium rose from \$93.60 in 1976 to \$153.72 in 1983, a rate of growth roughly equivalent to the increase from \$110.16 to \$165.43 in the average traditional fault-based insurance state.

Id. at 66.

257. See PHILLIPS & CHIPPENDALE, *supra* note 247, at 61.

258. There is much controversy over the relative importance of the goal of deterrence to the traditional tort system, and whether or not no-fault automobile schemes encourage accidents. For arguments in favor of traditional tort over no-fault, see Elisabeth M. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982); Richard W. Grayston, *Deterrence In Automobile Liability Insurance—The Empirical Evidence*, 40 INS. COUNS. J. 117 (1973); Cole et al., *supra* note 236, at 14. For scholarly skepticism about the beneficial deterrent effect of tort rules, see Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982); Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 560 (1985); Jeffrey O'Connell & Saul Levmore, *A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?*, 48 MO. L. REV. 649 (1983).

259. PHILLIPS & CHIPPENDALE, *supra* note 247, at 92 (quoting U.S. DEPT. OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES (1985)). Loughran concluded that:

[A]nalyzes found little evidence that the overall accident rate for the rate of driver negligence in fatal accidents in no-fault states exceeds that in tort states. If anything, no-fault states appear to have lower overall accident rates and a lower rate of driver negligence generally than found in tort states... In the United States, there exists little reason to believe that no-fault insurance affects incentives to drive safely for the vast majority of drivers.

Loughran, *supra* note 245, at 37.

accident resulted in serious injury. For the remaining majority of automobile accidents, the occasion producing injury can normally be seen as merely fortuitous. Sacrificing prompt and proper victim recompense for the purposes of supposedly extracting monetary penalties from hapless actors in motor vehicle accidents—but actually paid by their insurers—after prolonged and expensive haggling still seems short-sighted and self-defeating.

3. Lessons for the Future of No-Fault

The history of no-fault plans reveals that the Gordian knot, constituting today's personal injury compensation system, especially resists expansion beyond the employment context. The early revolutionary success of the wholesale workers' compensation experiment is not likely to be easily transported nor smoothly reapplied. But while the current state of political stalemate remains discouraging, constructive guidance may be gleaned from this historical exposition in order to outline the general framework for future reform.

First, any promising no-fault model must account for the difficulty of defining an insured event—which can vary greatly depending on the context of the accident. Existing plans, as indicated above, have been forced to be context-specific (such as for fatal injuries), meaning that reform across the personal injury spectrum has been marginal and piecemeal.²⁶⁰ The most effective means to achieve more uniform reform is to utilize a form of no-fault as a centerpiece under a system that can, nevertheless, adapt to a varied typology of accidents.

Secondly, and perhaps more critically, a successful no-fault model should hold some promise of political feasibility. While the size of this challenge cannot be underestimated, daunting political obstacles should not render constructive and progressive ideas stillborn. After all, the environment during the implementation of workers' compensation was contentious and hostile.²⁶¹ Ultimately, the key to the political triumph of workers' compensation was the fact that it struck a suitable compromise with facets of appeal for both the Right and the Left.²⁶² No-fault plans for automobile accidents were similar because they only gained political traction when the plans were compromised to form a hybrid of third-party tort and first-party no-fault coverage—although the problem in that context is that the political compromise went too far in preserving tort claims.²⁶³ At the very least, successful reform must reconcile first and third-party insurance in a workable combination.

260. See *supra* text accompanying note 236.

261. See RAHDERT, *supra* note 1, at 16-21.

262. *Id.* at 19-20.

263. "The main benefit of first-party insurance comes from its theoretical ability to eliminate the costs of litigation. But if the no-fault auto insurance experience shows anything, it is that savings of transfer costs will not accrue unless options for litigation are sharply curtailed, if not eliminated completely." RAHDERT, *supra* note 1, at 136.

IV. NEO NO-FAULT: A WORKABLE COMPROMISE BETWEEN FIRST AND THIRD-PARTY REFORM

Nearly a century after the introduction of workers' compensation, motivated by the practical and political shortcomings of traditional no-fault models, the senior author of this article developed the "early offers," or neo no-fault, regime of tort liability as a pragmatic substitution for much of today's defective system.²⁶⁴ It is a model that seeks to combine the more effective aspects of first and third-party reforms in flexible balance, and thereby purports to: 1) satisfy the four-part criterion of efficiency, compensation, deterrence, and equity; and 2) reconcile opposing societal concerns, making it a model with the potential for widespread appeal.

Neo no-fault resembles its no-fault progenitor because it aims to compensate accident victims promptly on a periodic basis for economic losses without the hassle, unpredictability, and inefficiency of the full-fledged tort system. But this proposal differs from typical no-fault law, as it eschews the need to pre-determine the insured event—a nearly impossible task, as we have seen, in the arenas of medical malpractice and products liability. Moreover, it retains a limited version of the tort system as a means to provide defendants and plaintiffs with choices, and to incorporate a deterrent device aimed at promoting incentives for safety. These two modifications give the neo no-fault model a hybrid character as an alloy of first and third-party models—underlining their respective strengths and ameliorating their respective deficiencies.

The mechanics of neo no-fault are comparatively streamlined. Upon the filing of a personal injury claim, a defendant has 180 days to decide whether to offer plaintiffs periodic payment of net economic losses as they accrue.²⁶⁵ Economic losses are defined as all unpaid medical expenses—including rehabilitation, unpaid lost wages, and reasonable but reduced attorneys' fees.²⁶⁶ Upon receiving an early offer, the claimant is then barred from pursuing a normal tort claim for both economic and noneconomic losses under normal common-law principles. It is true that the claimant may reject the offer and still pursue full tort recovery, but only on the conditions that: (1) the standard of misconduct is raised, allowing payment only where 'wanton misconduct' is proven; and (2) the standard of proof is also raised, requiring proof of

264. The "early offers" idea was originally set forth in Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimant's Net Economic Losses*, 77 NW. U. L. REV. 589, 601 (1982). For the application of this idea to medical malpractice cases, see Henson Moore & Jeffrey O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984). For the terms of a federal bill, which also can serve as a model for state legislation, applying the early offers plan to medical malpractice claims, see 131 CONG. REC. 36, 870-76 (1985) (presenting and discussing the proposed Medical Offer and Recovery Act).

265. See O'Connell, *supra* note 182, at 193.

266. *Id.*

such misconduct beyond a reasonable doubt or at least by clear and convincing evidence.²⁶⁷

Under this system, defendants are not required to make early offers; but there is a clear incentive for them to do so. These early payments are reduced compared to typical tort payouts because they deduct all collateral payments while reducing plaintiffs and defense attorneys' fees²⁶⁸ by ensuring a quick resolution to the case. Even more significantly, upon tendering payment for net economic losses, the defendants are immunized from the threat of having to pay noneconomic payments, except in the more exceptional cases in which they were grossly negligent, and thereby deserving of a criminal-like sanction.²⁶⁹ Indeed, one experienced malpractice defense attorney predicted that under neo no-fault he would advise making the offer in as many as eighty percent of the cases in his firm's medical malpractice claims portfolio.²⁷⁰ In cases where defendants determine that such early offers lack economic advantages, they can simply rely on normal tort procedures. Therefore, the neo no-fault scheme is, at best, a huge benefit for defendants, and, in the very least, no worse than the current system.

Plaintiffs as a class would also find advantages under neo no-fault. Faced with unreimbursed medical expenses and lost wages, a prompt and assured level of compensation for such essential losses, undiminished by high contingency fees, should appeal to the typical injury victim. Nevertheless, in exceptional cases involving grave defendant misconduct, a victim would still have recourse in tort to recover pain and suffering, and even to impose the possible retributive and deterrent effect of punitive damages. Thus, while victims would have to surrender their unmodified, common-law tort rights upon an early offer, in the vast majority of cases they should welcome the prompt recovery of net economic damages as an attractive *quid pro quo*.

A. Efficiency

From a macroscopic perspective, the most salient benefit accrued by the implementation a neo no-fault scheme would be impressive gains in systemic efficiency. The very essence of its structure makes it predisposed to this result. Extensive disputes over the fault-based core of tort liability could be cleanly circumvented in a large percentage of cases. The court system would be immediately

267. *Id.* at 193-94.

268. Rather than the typical plaintiff attorney contingency fees usually calculated at thirty or forty percent, the early offers model would instead pay only for a reasonable fee for the claimant's lawyer, e.g., ten percent. See O'Connell, *supra* note 178, at 45.

269. See O'Connell, *supra* note 182, at 193-97.

270. Jeffrey O'Connell, *Statutory Authorization of Nonpayment of Noneconomic Damages as Leverage for Prompt Payment of Economic Damages in Personal Injury Cases*, 71 TENN. L. REV. 191, 194 (2003) (citing an interview with William Ginsburg, Esq., Durham, N.C. (Apr. 1986)).

benefited by a sharp reduction in congestion, barring lawsuits for less serious injuries, and, in turn, diminishing administrative costs—allowing for more timely attention to remaining significant cases. Administrative efficiency would also be promoted as the distribution of losses would be less burdened by legal expenses on both sides. Estimates are that insurers' legal defense costs account for 14 percent of total costs in the current malpractice system.²⁷¹

Crucial to the success of the neo no-fault plan is that lessened reliance on litigation as a conduit for compensation will necessarily result in less indeterminacy in the present system and less delay and expense. In the courtroom, optimal results are, supposedly, attained when judges and juries are able to decide on the appropriate level of care and whether it was taken. Many economists assume that courts can make such determinations relatively flawlessly. But as one economist remarked, "[w]hen we drop those assumptions, . . . efficiency . . . goes with them."²⁷² Indeed, the misaligned outcomes produced by today's system are too often the rule rather than the exception, as defendants are seen culpable for injury when innocent (false positives) and released from liability when culpable (false negatives).²⁷³

In addition, beyond the incidence of determining liability, the calculation of non-economic damages presents its own parade of horrors for actuaries who must attempt to predict juries' subjective evaluations of damages. Not only is this process arbitrary and speculative, but the category of these damages has progressively expanded to include not only pain and suffering, grief, and loss of consortium, but also "hedonic damages"²⁷⁴—all of which are psychological losses for which there are no suitable market referents.²⁷⁵

More certainty allows not only less angst for claimants and defendants in personal injury cases, but for more confident, actuarial prediction. This, in turn, allows providers of goods and services to better internalize their costs, and more accurately represent them in their prices and insurance premiums. This is especially important for providers of goods and services who engage in complex and imperfect, albeit necessary, activities. Without some ability to anticipate and thereby absorb liability costs, many producers in high-risk fields may be tempted to abandon the

271. O'Connell, *supra* note 178, at 47.

272. David Friedman, *Book Review*, 97 J. POL. ECON. 497, 500 (1989) (reviewing STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987) (Friedman is the son of Milton Friedman, the Nobel laureate in economics)).

273. See Jeffrey O'Connell, *Two-Tier Tort Law: Neo-No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871 (1992).

274. Hedonic damages are a relatively new category of non-economic damages, awarded to a tort victim for the loss of enjoyment of life or for the value of life itself as measured separately from other tort damages. See generally Erin A. O'Hara, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 78 GEO. L.J. 1687 (1990) (explaining and discussing hedonic damages); Victor E. Schwartz & Cary Silverman, *Hedonic Damages: the Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037 (2004) (criticizing the growing use of hedonic damage awards).

275. See O'Connell, *supra* note 273, at 872.

marketplace of some goods and services, as is often alleged for pharmaceutical companies.²⁷⁶

B. Deterrence

The most potent criticism of the no-fault model is that, while the reduction of the full-scale tort system may provide for improvements in aggregate efficiency and compensation, these are, supposedly, outweighed by the dangers of insufficient deterrence and the resultant threat to societal safety.²⁷⁷

A sophisticated legal system must utilize a structured means to achieve deterrent effects. Lawyer-economist Jason Johnston described the problem for tort law as arising out of the difficulty in determining, *a priori*, the optimal standard of care for any particular good or service, combined with the difficulty for triers of fact to determine whether those standards have been met in their given cases.²⁷⁸ However, Johnston states that significant advances may be achieved by manipulating both the requisite standard of care and the burden of proof in tort.²⁷⁹ The neo no-fault model follows this path by holding a civil defendant liable only for genuinely "gross misconduct," provable by "clear and convincing evidence," or even "beyond a reasonable doubt."²⁸⁰ Under these quasi-criminal law standards for conduct and proof, the unjust cases in which innocent defendants are held liable (false positives) would mostly disappear, and the economically detrimental effects of overdeterrence assuaged. Nevertheless, false negatives are avoided by the necessity to pay for economic losses in order to avoid full scale liability; and threats to safety are addressed by the maintenance of unrestricted liability, in the form of pain and suffering and punitive damages, for egregious behavior.²⁸¹ Therefore, sellers of goods and services would be deterred from indulging in anything close to such misconduct that would expose them to liability for a full-scale of damages. Furthermore, any immunity from tort liability for less than egregious conduct must be

276. For a discussion of compelled market reduction, see O'CONNELL & KELLY, *supra* note 112, at 105. *But see* David Hyman & Charles Silver, *Believing Six Improbable Things: Medical Malpractice and "Legal Fear,"* 28 HARV. J. L. & PUB. POL'Y 108, 114-15 (2005).

277. See RAHDERT, *supra* note 1, at 136. Rahdert provides the sort of reasoning that inspires the neo no-fault structure when he states, "[o]f course, we could deal with these [safety] problems by erecting some kind of a hybrid system, one that depends on first-party insurance as the primary source of compensation but allows some litigation for recovery against third parties to achieve deterrence." *Id.* at 137.

278. Jason S. Johnson, *Punitive Liability: A New Paradigm of Efficiency In Tort Law*, 87 COLUM. L. REV. 1385, 1392 (1987).

279. *Id.* at 1396.

280. *Id.*; see HUBER, *supra* note 84, at 196.

281. Concerning punitive damages as they interact with pain and suffering damages under the neo no-fault proposal, see O'Connell, *supra* note 273, at 885-86.

earned by defendants through a commitment to pay for uncompensated economic loss—thereby avoiding those “false negatives.”²⁸²

The neo no-fault configuration is a two-tiered model of tort liability that retains noneconomic damages at the upper, or punitive, level of personal injury law, while most often eliminating them at the lower, or compensatory, level. Accordingly, it is therefore a hybrid system that compensates in a manner consistent with first-party no-fault lines, but nevertheless maintains the third-party tort system in modified, but effective, form. By retaining a crucial quantum of tort’s most potent weapon of non-economic damages, the neo no-fault system can generate an enormous torque capable of promoting deterrence. While overall uncertainty is greatly reduced, the threat of an uncertain measure of damages for gross misconduct continues to serve as that coiled threat which encourages cost-effective behavior in terms of both safety and levels of production. Providers of goods and services seeking to avoid tort law’s most extreme penalties must accommodate their behavior in a cost effective manner. Patients and consumers, meanwhile, will be protected in the event of egregious conduct, and will not have to sacrifice prompt and suitable compensation in the case of injury caused by ordinary mishap.

C. Compensation

Both sides in today’s debate over tort reform neglect to acknowledge the tort system’s failure as a compensatory device.²⁸³ As seen, caps on damage awards arbitrarily shift more of the societal burden for accident costs from defendants to victims without any reciprocal measures promoting compensation.²⁸⁴ Trial lawyers and champions of the status quo, on the other hand, propose not only retention, but also further expansion of the current tort system.²⁸⁵ While quick to emphasize poignant stories of claimant victimization, they overlook statistics that reflect glaring insufficiencies, such as the fact that only one in sixteen negligently injured patients eventually receives compensation.²⁸⁶ Forcing victims to depend on the current

282. “False negatives” are the situations in which defendants are held not responsible for plaintiffs’ losses when they should be. See *id.* at 871.

283. See 1 A.L.I. REPORT, *supra* note 20, at 448.

284. See O’Connell, *supra* note 182, at 197.

285. In recent decades trial lawyers have been effective in further expanding defendant liability through the weakening of traditional common law tort barriers to recovery. See Thomas E. Peisch & Johanna L. Matloff, *The Uninjured Plaintiff: New Frontiers of Liability*, 71 DEF. COUNS. J. 262 (2004) (discussing new theories that loosen the common law’s requirement of an actual injury as a basis for recovery).

286. See HARVARD STUDY, *supra* note 98, at “Harvard Rept. Highlights.” In addition, many of the most successful trial lawyers are extremely selective in finding suits they deem worthy of pursuit. The Washington Post noted that later Senator and Vice Presidential candidate John Edwards’s former law office “turned down 50 cases for every one they accepted—using teams of doctors and nurses to select cases of clear negligence and serious injuries, involving defendants

"litigation lottery," in which recompense is much too often uncertain, delayed, expensive, and emotionally draining, is scarcely a practice to which our society should remain committed.

The early-offers, neo no-fault system is similar to workers' compensation because it is primarily motivated by the pressing need to improve victim compensation. Its direct and streamlined configuration is designed to benefit both sides. Today's model of third-party liability forces both parties to exploit the litigation process for strategic advantage. Nevertheless, defendants would often prefer to relinquish prolonged litigation by proffering a more reasonable level of damages; they are often reluctant to assume this course because of the fear that an early and reasonable offer of settlement will be perceived as a sign of weakness—encouraging plaintiffs to reject the offer and seek a larger sum at trial.²⁸⁷ Accordingly, the current tort system has an enormous built-in momentum towards drawn-out, contentious, and unpredictable processes.²⁸⁸ The aggregate result is a stalemated war of attrition over the societal distribution of the inevitable burdens of personal injury in an advanced technological society. In the end, neither side benefits, as costs are instead magnified and arbitrarily disseminated.

Under the neo no-fault system, defendants are strongly encouraged to make a choice calibrated to circumvent the litigation quagmire. The early-offers plan would enable defendants to make a prompt and reasonable offer without fear of signaling weakness. As part of a *quid pro quo*, they would be shielded from bitter litigation and potentially crippling payouts of noneconomic damages. Victims, in turn, would thereby be assured of payment of net economic losses, which often can be not only substantial, but essential.²⁸⁹ Nonetheless, overcompensation would be largely eliminated as well; by barring pain and suffering, plaintiffs would no longer be induced to inflate their damage assessments.²⁹⁰ The Russian roulette nature of today's third-party liability system would thereby be addressed.

One could argue that under neo no-fault more victims will seek quick settlements—raising insurance premiums and, ultimately, the costs of goods and

whose pockets were deep enough to cover huge medical expenses." Lois Romano & Dale Russakoff, *To Many, Edwards is Defined by Work Ethic, Family; A Record-Setting Trial Lawyer, He Rebounded from Personal Tragedy to Enter Politics*, WASH. POST, July 28, 2004, at A21.

287. See Jeffrey O'Connell & Ralph M. Muoio, *The Beam In Thine Eye: Judicial Attitudes Toward "Early Offer" Tort Reform*, U. ILL. L. REV. 491, 495 (1997).

288. *Id.*

289. The early offer proposal could include minimum offers of a substantial lump sum for serious injuries where actual net economic losses are relatively small. This provides for fuller internalization of the costs of such accidents and to ensure that defendants are not unduly advantaged. See *id.* at 500.

290. See *id.* at 495; see also H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIM ADJUSTMENT* 151-63 (1970) (discussing plaintiff's incentives to "build" their claims, a practice that has corrupted the legal bar).

services.²⁹¹ But having the initial choice, defendants would only make an early offer when cost-justified. By foreclosing suits for pain and suffering awards and by avoiding the collateral source rule as well as subrogation claims,²⁹² early offers would not be used (like present first-party proceeds) to subsidize further litigation. Moreover, the two-tiered liability bulwark would weed out cases where losses have already been compensated because such claims, dominated by non-economic damages, can be negated. All things considered, precious insurance dollars would be far better used to compensate victims with the greatest need of such dollars without raising—and likely reducing—insurance premiums, and with defendant costs more predictably grounded.

D. Equity

With its unique structure that combines first-party-like prompt and periodic compensation with a modified third-party tort check on egregious conduct, neo no-fault seeks an equitable solution to personal injury compensation. The early offers schema seeks to approximate more effectively the related goals of corrective and distributive justice as a more attractive form of public policy than traditional tort law.

Recalling the dual aspects of corrective justice—victim recompense, and the penalization of culpable defendants—neo no-fault would seem to be far ahead of its one-dimensional alternatives. As a hybrid model, neo no-fault embraces the compensatory advantage of first-party models while retaining the retributive aspects of third-party tort, now more fairly restricted to manifestly anti-social behavior.

The neo no-fault model promises to distribute the benefits and burdens of personal injury compensation in a manner more equitable than the current fault-based system that so largely operates on chance. Moreover, the peculiar design of the present tort system wreaks a discriminatory effect upon those injured who are either retired, poor, or both.²⁹³ Because recovery for non-economic damages can be based on lost earnings, plaintiffs in lower income brackets are often unable to collect as much for pain and suffering as would similarly injured claimants with higher salaries.²⁹⁴ More importantly, economically disadvantaged and older plaintiffs feel

291. See O'Connell & Bryan, *supra* note 178, at 50.

292. The abolition of the collateral source rule and subrogation would produce truly beneficial results:

"Early offers" will fill real needs in that liability dollars will be used to cover actual economic losses when by definition they outstrip any other sources of compensation, whether from health or disability insurance. By also outlawing subrogation when early offers are made, the early offers plan vastly reduces payments to and between insurers, further reducing administrative difficulty and expense.

Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 871 (1999).

293. See BELL & O'CONNELL, *supra* note 238, at 66.

294. *Id.* at 66-67.

the sting of delayed compensation more than other claimants.²⁹⁵ Neo no-fault, on the other hand, would have an enormous leveling effect by diminishing wild disparities in outcomes across the overall class of injury victims.

V. CONCLUSION: THE APPEAL OF NEO NO-FAULT AND THE FUTURE OF AMERICAN PERSONAL INJURY COMPENSATION REFORM

The neo no-fault system provides a means for achieving the compensatory goals of no-fault across the varied categories of accidents. The model was specifically engineered to circumvent the difficulty of pre-determining the insured event, and thereby promises to sharply curtail full-scale litigation in hyper-litigious realms such as products liability and medical malpractice. In addition, the model retains, in distilled form, the most powerful aspects of the third-party framework in order to implement deterrence device and an avenue for retributive justice in cases of morally culpable wrongdoing. Neo no-fault's hybrid nature closely harmonizes with our current personal injury system with its blended integration of insurance and tort. However, as a carefully structured system,²⁹⁶ neo no-fault seeks to more effectively fulfill our four-part criteria of efficiency, deterrence, compensation, and equity. Beyond these values, the model's philosophical underpinnings and its pragmatic and independent character further its potential appeal.

Neo no-fault's unique qualities can be analogized to its predecessor—workers' compensation. Like the American model of workers' compensation (and unlike the British model),²⁹⁷ neo no-fault combines the public policy motivations behind social insurance, with a private and fiscally streamlined structure essential to an effective business models. Neo no-fault provides this without expanding governmental or bureaucratic agencies, or unfairly burdening providers of goods and services. Instead, it would unfetter a notoriously sclerotic system by curtailing its more vestigial or arbitrary elements (i.e., pain and suffering, collateral source rule), and by reducing administrative and contingency costs (i.e., delays, attorneys' fees, duplicative payments, unmanageable insurance premiums). The result is a system that seeks to work more efficiently and predictably—ensuring not only more widespread and adequate coverage for loss, but also a more favorable and fertile environment for economic development and growth.²⁹⁸

The appeal of neo no-fault is further intensified when considered in light of the issues audible on the political campaign trail. Politicians bemoan the reality of rising health care costs, the diminishing accessibility of quality health care, and the

295. See *supra* text accompanying note 182.

296. See *supra* note 4 and accompanying text.

297. See *supra* text accompanying notes 202-07.

298. For an economic model showing the improvements and savings under the early offers proposal, see Jeffrey O'Connell, Jeremy Kidd, and Evan Stephenson, *An Economic Model Costing "Early Offers" Medical Malpractice Reform*, 35 N. M. L. REV. 260 (2005).

continued surge of governmental and private costs.²⁹⁹ But while both parties have pinpointed these glaring concerns, their solutions are either one-dimensional or their numbers simply fail to add up.³⁰⁰ Neither the isolated expansion of first-party social insurance, nor the capping of damages within the current third-party liability framework—and certainly not expansion of tort liability—will be able to increase compensation and reduce costs simultaneously.

As long as the fault-based system remains in large measure intact, and “solutions” remain short-sighted and one-sided, acute problems will remain. A balanced solution that incorporates first and third-party reform, achieved by the neo no-fault model, seeks to bring these laudable (and seemingly contradictory) goals to fruition, without added expense. The Left, with its increasing concern over appearing fiscally responsible, should find this to be an effective means of attracting independents, and even conservatives, to their traditional social policy agenda. The Right, on the other hand, would add teeth to their “compassionate conservative”³⁰¹ platform by incorporating social policy objectives without threatening business interests, or expanding the role of government. In the past, only a handful of politicians exhibited the foresight and courage to back early no-fault automobile plans—most notably Democrats Daniel Patrick Moynihan³⁰² and Michael Dukakis.³⁰³ More recently, there has been some momentum behind the neo no-fault model, led by Republicans, Mitch McConnell³⁰⁴ and Michael Enzi.³⁰⁵

While these considerations may seem logical and compelling on paper, the reality of today’s political system, and the complexity of the American system of personal injury compensation serve as extraordinary barriers for the future of neo no-fault and the future of sensible reform. As ventriloquists behind the political curtain, the trial lawyers and the insurance industry have shaped the binary character of the

299. See O’Connell, *supra* note 7, at 1304.

300. *Id.*

301. See Stephen Goldsmith, *What Compassionate Conservatism Is—and Is Not*, at <http://www.hooverdigest.org/004/goldsmith.html> (last visited Sept. 13, 2005).

302. For a typically articulate and incisive exposition by the late New York Senator expressing his support for no-fault solutions to the problems of personal injury compensation see Daniel P. Moynihan, *Foreword* to JEFFREY O’CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975).

303. Michael Dukakis led the first successful drive for state legislation involving no-fault for automobile insurance in 1971 in Massachusetts. See Schwartz, *supra* note 241, at 611-12.

304. Kentucky Senator Mitch McConnell sponsored a federal no-fault auto choice bill (Auto Choice Reform Act of 1996, S. 1860, 104th Cong. (1996)) and a federal neo no-fault bill for other injuries (Legal Reform and Consumer Compensation Act of 1996, S. 1861, 104th Cong. (1996)). A disclaimer: The senior author of this piece helped draft both bills, which are based on his legal scholarship.

305. Wyoming Senator Michael Enzi has recently sponsored a federal bill for medical malpractice reform based upon the neo no-fault model. See Reliable Medical Justice Act, S. 1518, 108th Cong. (2003).

debate over reform.³⁰⁶ The neo no-fault plan has, and will continue to receive, its most strident opposition from the trial bar, since they profit the most from the bloated excesses of the current system, and stand to lose the most if tort law is severely curtailed. Their influence in recent years to protect the flawed status quo has been particularly stifling for the Democratic Party³⁰⁷—ironic for a group that has long seen itself as more supportive of progressive change.

The first step toward reform is the elucidation of the realities of our flawed personal injury compensation system, and the relative benefits and deficiencies of proposed solutions. The complexity of the situation is evidenced by the fact that so many have failed to grasp the interrelationship between insurance and tort that is at the heart of the personal injury compensation system. Currently, special interest groups have been able to divert the public debate from the complex reality, to the simplicity of their strident messages—fortified by the emotive power of their outlier statistics.³⁰⁸ Not until a general awareness of the contours of today's problems is achieved can the promise and efficacy of a reform such as neo no-fault attract political following. Towards this end, we have sought to further decipher the conundrum of the personal injury compensation system, and help clear a path for balanced reform.

306. See O'Connell, *supra* note 7, at 1304.

307. See, e.g., Michelle Love, *MN lawyers closely watch proposed med-mal reform legislation*, MINNESOTA LAWYER, March 28, 2005.

308. See O'Connell, *supra* note 7, at 1304.