

1990

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## Recommended Citation

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# Analyzing Tort Law: The Flawed Promise of Neocontract

Peter A. Bell\*

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.<sup>1</sup>

The main plot of the torts drama has shifted remarkably as we begin the 1990s. In the 1970s, the great monster Contract was being laid to rest after decades of devastating innocent accident victims.<sup>2</sup> Contract's conqueror, Tort, the youthful, compassionate champion of the infirm, stood shining and tall, her striking visage a warning to all who would maim America's people. In the best horror-film tradition, however, there were indications in the midst of this Tort-triumphant drama that Contract had not yet drawn its last breath.<sup>3</sup>

As the century's last decade dawns, we are privy to a new torts drama. In this sequel, hero Tort has become an uninspiring Deng Xiaoping-like figure. The one-time savior has grown

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1. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

2. See, e.g., G. GILMORE, *THE DEATH OF CONTRACT* 55-85 (1974). Several commentators have extended Gilmore's insights to tort cases. Professor Peter Schuck, for example, interprets death of contract as describing judicial hostility to using the marketplace as a method to allocate the risk of personal injury. Schuck, *The New Judicial Ideology of Tort Law*, in *NEW DIRECTIONS IN LIABILITY LAW* 4, 6-8 (W. Olson ed. 1988).

3. See, e.g., *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 437, 447, 694 P.2d 267, 277 (1983) (finding limitation of liability clause in sales contract between parties with equal bargaining power enforceable); *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 332 (Fla. 1983) (holding warranty contract that limited remedy provision not unconscionable); *Mid-America Sprayers, Inc. v. United States Fire Ins. Co.*, 8 Kan. App. 2d 451, 460, 660 P.2d 1380, 1387 (1983) (holding allocation of risk in a lease not unconscionable).

gross, ever-greedy and terribly destructive. Tort waddles sloppily down Liability Lane crunching the good neighbors' homes in its ever-widening path. At last, to save the town, forward steps a new hero, a revived contract law, in its new, cleancut and even more powerful form: NEOCONTRACT. Neocontract, true friend of the consumer, ally of a prosperous America, arrives just in time to save the nation from the orgy of Tort gone mad.

So, more or less, goes the intellectual drama being played out center stage in scholarly analyses of tort law these days.<sup>4</sup> The major scholarship of the 1980s about tort, other than the congratulatory<sup>5</sup> works of Richard Posner, emphasizes the failings of the tort system and calls for a return to sanity, or for the quick implementation of alternative systems to perform the vital functions of compensation and deterrence.<sup>6</sup> In the last half of the decade, a major new kind of analysis of the proper role of tort has come to the fore, an analysis catapulted to new heights of prominence, and perhaps popularity, within the last year through the writing and peregrinations of Peter Huber.<sup>7</sup>

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4. Certainly a lot else is going on in tort scholarship these days. Particularly significant are the empirical studies of the workings of the tort system undertaken by the Rand Corporation's Institute of Civil Justice and other organizations. *See, e.g.*, S. CARROLL & N. PACE, *ASSESSING THE EFFECTS OF TORT REFORMS* (1987); A. CHIN & M. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985); T. DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS* (1988); D. HENSLER, *SUMMARY OF RESEARCH RESULTS ON THE TORT LIABILITY SYSTEM* (1986); D. HENSLER, W. FELSTNER, M. SELVIN & P. EBNER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (1985); J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986); E. KING & J. SMITH, *ECONOMIC LOSS AND COMPENSATION PAID IN AVIATION ACCIDENTS* (1988); M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* (1988); *see also* AMERICAN LAW INSTITUTE, *COMPENSATION AND LIABILITY FOR PRODUCT AND PROCESS INJURIES — SPRING 1988 PROGRESS REPORT* (Apr. 15, 1988); AMERICAN LAW INSTITUTE, *COMPENSATION AND LIABILITY FOR PRODUCT AND PROCESS INJURIES PROGRESS REPORT* (Apr. 13, 1987); T. WILLGING, *TRENDS IN ASBESTOS LITIGATION* (1987); Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89. These studies provide important information, but they play a supporting role in the debate about whether, and in what form, modern tort law should exist as a societal response to the problem of accidental injuries. That is the central drama to which this Article refers.

5. Congratulatory in the sense that they praise tort law for following the inexorable economic analysis he glorifies in his writings. *See, e.g.*, R. POSNER & W. LANDES, *THE ECONOMIC STRUCTURE OF TORT LAW* 312-16 (1987); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 147-200 (3d ed. 1986); R. POSNER, *THE ECONOMICS OF JUSTICE* 192-203 (1981).

6. *See supra* note 4; *infra* notes 30-60.

7. P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES*

That analysis, termed "neocontract" by Huber<sup>8</sup>, requires tort law to determine both its liability and damages rules on the basis of ex ante agreements: what the parties did agree or would have agreed if they had bargained about liability and damages before the accident happened.<sup>9</sup>

Neocontract is a powerful and appealing analytic tool. It resonates of Rawlsian justice.<sup>10</sup> It promises a calm, cool, and collected analysis of accidental injury problems that seems to respect the humanity and decision-making capabilities of individual adults. Neocontract seems to encourage cooperative behavior, with those most intimately affected by tort decisions framing the rules for their game. It offers an intellectually rigorous method of analysis that can be applied to most personal injury cases.

It is also dangerously flawed as a comprehensive analytic tool. It fails to give proper care and respect to the individuals whom it purports to honor. Like its predecessor as a scholarly darling — economic analysis of law — it regularly fails to recognize or to allow the law to recognize the realities of the world of accidents. Neocontractual analysis recognizes the problems that permeate tort law today, but fails to see or appreciate the socially valuable aspects of tort that provide the vitality that drives tort law into so many parts of American life.

This Article will focus principally on neocontractual analy-

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(1988). See Hager, *Civil Compensation and Its Discontents: A Response To Huber*, 42 STAN. L. REV. 539, 540 (1990)(discussing book's celebrity). Huber has travelled far and wide since publication of this book, engaging in debates and explaining his theses. Memoranda from the Manhattan Institute discuss his extensive speaking tours, provide glowing reviews of his writings and even offer for sale audio tapes of Huber's performances on radio talk shows. See, e.g., MANHATTAN INSTITUTE FOR POLICY RESEARCH, JUDICIAL STUDIES PROGRAM UPDATE (Mar.10, 1989) (on file with author). At recent scholarly meetings, law professors from Yale, Stanford and the University of Houston have spoken of the sensation created by recent Huber visits. An entire panel at the annual meeting of the American Political Science Association in Atlanta in September, 1989, was devoted to Huber's book, with the author there to confront his "critics." Huber has been featured in front-page *New York Times* discussions of risk and public policy. E.g., Passell, *The American Sense of Peril: A Stifling Cost of Modern Life*, N.Y. Times, May 8, 1989, at A1 col 1. He regularly writes a column in *Forbes* magazine. See, e.g., Huber, *Electrophobia*, FORBES, Sept. 4, 1989, at 313. In short, to a much greater degree than any other writer about tort-related issues, Huber is a visible public figure.

8. P. HUBER, *supra* note 7, at 195 ("neocontractual plan").

9. *Id.*

10. See J. RAWLS, A THEORY OF JUSTICE (1971). For a more brief description of Rawlsian theory expressly in contractarian terms, see K. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 64-70 (1988).

sis and the flaws that should disqualify it from dominance as an analytical tool in tort. Part I examines the substance, and some of the dazzle, of neocontractual thought about tort rules. It categorizes and describes the two principal schools of neocontract and the important variations therein. That discussion also highlights the most valuable insights provided by neocontractual analysis thus far.

Part II describes and examines neocontract's serious flaws. It first faults neocontract for relying nearly completely on abstract notions of autonomy and for ignoring both relational values and the life experiences of the persons most directly affected by personal injury law. A related second section emphasizes how neocontract's inattention to reality leads one school of neocontract to inaccurate imaginings about people, and leads the other school to a flawed understanding of *ex ante* agreements as an expression of what people want. Finally, Part II explains the failure of neocontractual analysis to attend adequately to the safety-enhancing and justice components of tort, with its essentially *ex post* look at accidents.

This Article does not aim to banish neocontractual analysis from tort. Rather, it aims to assist greater understanding of its weaknesses and of the real strengths of modern tort law. Many writers have pointed out that we are the prisoners of our intellectual times.<sup>11</sup> It is no surprise, therefore, that much of the good tort scholarship of the Reagan-Bush years emphasizes individual responsibility, free markets, and hostility to bureaucratic machinery. Most of those notions happen to coincide with the interests of the business, medical, and insurance groups whose hostility to the tort system stems from the painful financial bites tort takes from them. Those financially and politically powerful groups have borrowed and advanced neocontractual ideas not just in legislatures,<sup>12</sup> but also in popular

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11. See, e.g., Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURVEY AM. LAW 139, 196 (1988). Even arch-neocontractualist Richard Epstein has said that if he had been a judge in the 1930s, his attitudes toward product liability rules would have been very different than they are now, as a result of the different place at which the "advanced thinking of the times" stood. *Session One Discussion of Paper by Richard Epstein, University of Chicago*, 10 CARDOZO L. REV. 2227, 2238-39 (1989) [hereinafter *Session One Discussion*].

12. For example, the American Tort Reform Association, an umbrella organization of groups seeking to curtail tort law, reported in the spring of 1989 that 131 favorable (to it) new laws had been enacted in 40 states in the preceding four years. U.S. NEWS & WORLD REPORT, May 15, 1989, at 50. The legislative response to the medical malpractice "crisis" that surged and abated in the

media advertisements.<sup>13</sup> The latter suggest that business groups have found it in their interest to foster development of an intellectual climate of disdain for the tort system. The nation has suffered enough from acceptance of the intellectual myths of the Reagan years, such as the "trickle-down effect" and the "evil empire." The legal system may suffer as well if current intellectual trends so dominate that they are uncritically accepted by judges, juries<sup>14</sup> or the public at large.<sup>15</sup>

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mid-1980s resulted in the most extensive legislative intrusion into the common law of tort since the workers' compensation laws of the early 20th century. See, e.g., Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 943-44 (1984).

13. See, e.g., *Insurance Advertising: Need To Protect Constitutional Right to Conduct Voir Dire*, 15 ATLA ADVOCATE 4 (1989); *The Insurance Industry: Do its ads undermine jury impartiality?*, A.B.A.J., Nov. 1989, at 46; THE NEW YORKER, Mar. 26, 1990, at 54-55 (one of many large advertisements run by American International Group, a large insurance underwriter, under the heading "AIG Issues Forum"). Aetna Life & Casualty ran a series of newspaper ads in four American cities deploring "lawsuit abuse." The American Tort Reform Association was "so impressed" by the success of this ad campaign (Aetna received favorable comments from more than 7000 people) that it circulated glossy poster-reproductions of each of the ads to its membership, with an offer to supply any number of the posters that a member requests. "Dear Member" letter from the American Tort Reform Association (Nov. 1989) (copy on file with author).

14. The prevalence of advertisements excoriating the tort system, and the efforts of some politically conservative entities to promote scholarship critical of the tort system, suggest that the powerful anti-tort forces have expanded their target audience to include judges and jurors. In the early to mid-1980s, most efforts to curtail tort awards were focused on legislatures. Despite successes there, business groups found no great reduction of recoveries. See Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 415-17 (1987). Increasingly, through such organizations as the Manhattan Institute and the American Tort Reform Association and its state affiliates, wealthy interests have supported scholarship critical of tort. The former organization is a conservative think-tank funded in large measure by Lewis Lehrman, a conservative businessman and 1986 Republican candidate for governor of New York. It has financed or helped to finance several symposia at which the dominant tone has been critical of tort. It has supported and heavily promoted Peter Huber's book (cited *supra* note 7). That book does an enviable job of excoriating the tort system in a form accessible to the mass of readers interested in public policy, but who would throw up their hands at the sight of a densely footnoted law review article such as this. The latter Tort Reform Associations have sponsored and publicized studies critical of tort. For example, the Pennsylvania Task Force on Product Liability, an organization devoted to reform of that state's product liability law, financially supported the research of two scholars from the University of Pennsylvania's Wharton School, which not surprisingly revealed that product liability law was having a terrible multi-billion dollar effect on the state's business. This scholarship was not revealed in a scholarly journal, but in a well-publicized press conference held at the state capitol at a time when

In the course of this challenge to the increasingly accepted wisdom about the virtues of neocontractual analysis and the vices of the tort system, this Article takes issue with the conclusions of many distinguished tort scholars. I encourage the reader to examine the challenges put forth herein in the spirit of exploration. We who look at tort law in America do so with little knowledge about how it actually works and, more particularly, with little empirical basis for many of our premises.<sup>16</sup> Too much of the writing I read in the course of preparing this Article reeks of certitude about the rightness of one approach or another to the problems posed by accidental injuries.<sup>17</sup> Such certainty of direction seems misplaced in a land as uncharted as the world of tort.

## I. NEOCONTRACT: SUBSTANCE AND CHIC

It is not easy to understand "neocontract." As used in this Article, neocontract falls into two principal categories: one in which the rules of tort law are determined by what people would have agreed they should be; the other in which individual persons and entities pre-determine their levels of compensation and liability under present tort rules by agreements they make before accidents occur. I term the former category the

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the Pennsylvania legislature was considering several pieces of legislation aimed at curtailing the common law of products liability in the state. See *THE REFORMER*, Oct. 1989, at 2 (magazine of the American Tort Reform Association).

15. These neocontractual, anti-tort ideas may be accepted uncritically by many people. Anthropologist Robert Hayden concludes that many of the ideas advanced by neocontractualists find unexamined acceptance among many Americans because of powerful cultural hostility to formal demands for compensation involving an individual's own injuries, and because of strong beliefs in our culture in the sanctity of contract. Hayden, *The Cultural Logic of a Political Crisis: Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, Disputes Processing Research Program Working Paper 9, at 10, 33-37 (Institute for Legal Studies, Mar. 1989).

16. See, e.g., P. REUTER, *THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY* 46 (1988); Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 356-57 (1988)[hereinafter *Proposals*].

17. Alan Schwartz's 1988 article about tort theory in products liability was a refreshing exception to that aura of certainty. Schwartz, *Proposals*, *supra* note 16, at 356-57. Although I take issue with many of Professor Schwartz's ideas, I found the spirit of exploration he maintained through his article much more conducive to careful thought about the problems with which he dealt than the more bombastic approach of some of his fellow neocontractual theorists.

"implied contract" (IC) school of neocontract and the latter the "actual contract" (AC) school.

These main types of neocontractual analysis have their roots in similar philosophies of law. Both schools relentlessly articulate the virtues of *ex ante* decision-making.<sup>18</sup> That means they favor having people and entities agree on how injury-causing interactions between them shall be dealt with *before* such events occur. Within each school, there are variations in approach that affect considerably the attractiveness of their candidacy to become the primary approach used in resolving tort disputes.

The common roots of the two schools of neocontract lie in classical liberal theories of law based on the high value of individual autonomy.<sup>19</sup> Under such theories, society bases its legal rules on individual choice. When feasible, legal rules would permit individuals to order their own lives, which includes freely arranging relationships with others. Law would respect individuals by enforcing voluntary agreements and by instituting rules that reflect what individuals would agree to if they were able to do so. Legal rules based on the foregoing principles have a powerful claim to be termed "just" because the people affected by the rules have consented to them.<sup>20</sup>

Interestingly, many neocontractual theorists find themselves equally, if not more, comfortable with a utilitarian philosophical base. The utilitarian roots have two main strands, both based on the notion that the individual knows better than anyone else what is best for him. One strand provides that legal rules should exist in forms that foster and protect individual arrangements, because the sum of freely derived individual arrangements will provide the greatest amount of utility in society.<sup>21</sup> The second strand provides that society should choose

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18. See Ackerman, *Foreword: Talking and Trading*, 85 COLUM. L. REV. 899, 900 (1985) ("[T]he *ex ante* perspective of the lawyer-economist has revolutionized the study of tort law.").

19. See, e.g., J. RAWLS, *supra* note 10, at 118-50. I refer to "theories" when others might legitimately describe this philosophical basis for neocontract as essentially one classical individualist theory, see, e.g., Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613, 617 (1986), because there are many different articulations of the individualist ethic in law. See, e.g., K. Scheppele, *supra* note 10, at 57-70; Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach To Products Liability*, 74 VA. L. REV. 677, 677-87 (1988); Schwartz, *Proposals*, *supra* note 16, at 357-61.

20. See *supra* note 19.

21. See, e.g., *infra* note 40 and accompanying text.

the legal rules that create the greatest utility, not because that in itself determines what is just, but because those are the rules that people would choose if they were able to do so.<sup>22</sup>

These philosophical roots, deeply imbedded in American social philosophy, explain much of the attraction of neocontractual critiques of the tort system. Huber's immensely popular writing — for legal academic writing — reverberates with themes and phrases that appeal to these individualist notions. His book, *Liability: The Legal Revolution and its Consequences*, begins by emphasizing the idea of tort as an omnipresent tax on all our goods and activities, and heads its initial description of the tort system "From Consent to Coercion."<sup>23</sup> His final three chapters trumpet the virtues of a tort system that solves accident problems by consent or choice and that rejects the present "coercion."<sup>24</sup>

These philosophical roots also explain the relentlessly ex ante approach that distinguishes neocontractual analysis from conventional tort analysis. It makes little sense to ask a victim and claimed injurer what rules they would choose to cover their situation, after an accident has already happened. Each would be too obviously affected by that decision for agreement to be likely. Besides, if the parties could agree on the proper social arrangements for their problem ex post, tort rules would not be necessary, as the parties could simply settle their dispute between themselves on a voluntary basis. Therefore, if we are to determine legal rules by focusing on the mutual consent of actual or potential interactors, we need to ask what they agreed to, or would have agreed to, before the accident happened. According to the neocontractualists, those legal rules would be the "just" rules because they would emanate from the consent of individuals or entities facing a common problem of risk. Society would not be forcing certain solutions to that common problem on affected persons. Rather, society's rules would be a

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22. See, e.g., Schwartz, *Proposals*, *supra* note 16, at 357-58. This strand assumes that people would choose rules maximizing social utility because that would give them the best chance to enlarge personal utility. Theorists who focus more closely on the individual frequently modify this apparent symmetry between libertarian and utilitarian theory by emphasizing the lack of consent that would occur due to persons who fear they might be among those who would bear the downside burden of that increase in overall social utility. See, e.g., J. RAWLS, *supra* note 10, at 150-61.

23. P. HUBER, *supra* note 7, at 3-5.

24. *Id.* at 190-232. The final three chapters in the book are titled: "Compassion by Consent," "Choosing Safety," and "Consent and Coercion," respectively.

mere enforcement or reflection of their desires. These legal rules also would be "just" because they would maximize utility, as reflected in the aggregation of utility decisions by potential injurers and victims about what would be best for them in the event injury occurred.

In short, neocontractual analysis begins from a very appealing place: the view that persons should be able to plan their own lives, including those parts of their lives involving the risk of injury, rather than have others make those plans for them.<sup>25</sup> One school of neocontractual analysis says this should happen directly: potential injurers and victims should be able to make their own arrangements about what will happen when injury occurs. The other school recognizes that such arrangements often will not be made, but says that the same result should be reached indirectly: when injury occurs, it will be dealt with by the law in the way the parties would have agreed to if they had been able to make arrangements beforehand. What these variations mean for tort theory can be understood by a closer look at each school.

#### A. THE ACTUAL CONTRACT SCHOOL

The actual contract (AC) school of neocontractual thought advances the notion that accidental injuries would be better handled by a system that relies on private contract. When possible,<sup>26</sup> persons encountering a potentially dangerous product, service, or activity would enter into a contract with the potential injurers. That contract would set forth how much, if anything, the potential injurer would have to pay if the product, service, or activity injured the potential victim. It also would set forth the conditions precedent to the attachment of an obligation to pay. Thus, liability for injuries would depend not on rules set by society but on arrangements made by the persons or entities most directly concerned with a dangerous transaction.

According to the AC school, this situation would be far preferable to the current tort system because it would no longer coerce persons into buying more safety or insurance

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25. See, e.g., Hayden, *supra* note 15, at 36-37; Schwartz, *Proposals, supra* note 16, at 357 ("[T]he various moral theories to which Americans adhere respect truly consensual arrangements.").

26. With the growth of medical malpractice and products liability cases as a percentage of total tort disputes, the area in tort in which such agreements are possible continues to expand. See Epstein, *Causation — In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 675 (1987).

than they want,<sup>27</sup> because it would permit potential injurers to face stable and manageable insurance situations,<sup>28</sup> and because it would get rid of much of the horrendous expense involved in settling disputes that arise when one person is injured by another.<sup>29</sup> As this short list suggests, the philosophical basis for the school is as much utilitarian as libertarian. The school likewise reflects a strong commitment to the free market as the most desirable method for determining who gets what in society, even when the "who" is a person injured in an accident and the "what" is compensation from the injurer.

Various AC school theorists differ in their commitment to libertarian or utilitarian philosophies as well as in their perceptions of and commitment to the free market. These differences lead to a variety of specific proposals concerning the role actual contracts should play in determining the occurrence of and compensation levels for accidents. These proposals can be divided into three main groups: (a) "pure" liability contracts; (b) "modified, cushioned" liability contracts; and (c) "modified, limited-market" liability contracts.

### 1. Pure Contract

The pure liability contract proposal would give individuals and entities free rein to decide *ex ante* what will happen in the event one of them is injured by the other in a tort situation.<sup>30</sup> Richard Epstein seems most clearly to favor this approach.<sup>31</sup>

27. See, e.g., P. HUBER, *supra* note 7, at 8.

28. See, e.g., *id.* at 133-52; Epstein, *Products Liability As An Insurance Market*, 14 J. LEGAL. STUD. 645, 669 (1985) [hereinafter *Products Liability*].

29. See, e.g., P. HUBER, *supra* note 7, at 225.

30. A "tort situation" is one in which someone arguably has been injured by another. It includes, but is not limited to, situations in which current tort law might impose liability on the injurer. Additional situations should be included because it is possible that parties agreeing *ex ante* might agree to some payment to the injured person in situations in which tort law clearly would not require it. Workers' compensation laws arguably exemplify such agreements, albeit on a more collective basis.

31. See Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202-07 (1989) [hereinafter *Unintended Revolution*] (chastising products liability law for abandoning traditional privity requirements that allowed manufacturers to determine responsibilities by contract); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984) (praising freedom of contract — "an aspect of individual liberty, every bit as much as freedom of speech" — in employment situations); Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES. J. 87, 149 [hereinafter *Medical Malpractice*] (criticizing medical malpractice law for failing to permit physicians and patients to work out tort responsibilities by contract). There may be better examples. I think I get Epstein's general drift. In

Unfortunately, those who seem philosophically most comfortable with this pure — in the sense that the market should be permitted to operate however its players wish — system of contracting have not articulated in any detail how it would work. Rather, the pure system has been offered generally as a point of departure for criticism of current tort doctrine, particularly in the areas of medical malpractice and products liability.<sup>32</sup> It remains, nevertheless, the most powerful and substantial model of the AC school, because it is the one most consistent with the philosophy of self-determination that underlies the school.

## 2. Modified, Cushioned Contract

More of the “chic” of the AC school surfaces in the modified “cushioned” system suggested by Peter Huber’s writings.<sup>33</sup> As befits the leading tort politician-academic of these times,<sup>34</sup> Huber provides more dazzle and flash in his writing than those of us who wade more sluggishly through footnote-infested swamps. He “floats like a butterfly and stings like a bee” in his battle with the tort system, and, like most in battle, seems intent on doing what is necessary to win.<sup>35</sup> As a result, he is less

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the face of his voluminous writings, however, I find it difficult to keep straight exactly what he says where. Alan Schwartz seems to share Epstein’s affinity for the market as the ideal place for resolution ex ante of tort issues. He carefully challenges assertions that market failure occurs often. See Schwartz, *Proposals*, *supra* note 16, at 355-56, 371-84.

32. See, e.g., Epstein, *Unintended Revolution*, *supra* note 31, at 2199-2207; Epstein, *Medical Malpractice*, *supra* note 31, at 141-49.

33. I find it difficult to pin down exactly what broad approach Huber would take to tort situations. In his book, Huber seems to favor abandonment of tort liability when contract is possible and, in its place, the provision of some kind of injury insurance by the seller of a product or provider of a service. P. HUBER, *supra* note 7, at 194-97. In other writings, Huber seems to want not as much, or perhaps more. See, e.g., *Session Three: Discussion of Paper By George L. Priest*, *Yale University*, 10 CARDOZO L. REV. 2329, 2339 (1989) [hereinafter *Session Three Discussion*] (stating that “any set of legal presumptions the courts want to prescribe on silence is okay with me, provided one has a real law of disclaimability to bring things back to a market optimum”).

34. I accord Huber this title largely because he clearly writes and proselytizes for a public of decision-makers much broader than the academic community. See *supra* note 7. Ironically, he most resembles in this respect William Prosser, whose ideas most influenced the tort world of the 1960s and early 1970s as much because of his eloquence and dedication to getting those ideas carried through into law as because of the brilliance of the ideas themselves. Prosser was chief among the group of “Founders” so roundly condemned in Huber’s book. P. HUBER, *supra* note 7, at 6-10.

35. See, e.g., Huber, *Insurance, Not Lawsuits, for the Accident Prone*, *Wall St. J.*, Sept. 28, 1988, at 24, col. 3. In the final paragraph of that article, Huber encourages readers to keep in mind the need to use the political process to se-

consistent in his theory than neocontractual colleagues such as Epstein. He clearly believes in openly arrived at agreements as the best way to free society from the undesired coercive effects of tort.<sup>36</sup> Yet, he seems quite willing to give away a substantial piece of that freedom by allowing the law to require such contracts to provide certain minimal levels of compensation.

The Huberian notion of actual contract seems to be one in which parties would be free to agree *ex ante* about part of their responsibilities in the event of an injury-causing accident. The parties would have to agree to some minimal level of compensation for the injured person.<sup>37</sup> That minimal level would be enforced either by the requirement of a mandatory term in all contracts relating to tort liability, or by the courts' refusal to enforce, on unconscionability grounds, any tort-related contracts that did not have such minimum compensation guarantees.<sup>38</sup> This position retreats from the notion that people should be entirely free to determine their fate after accidents, and thus moves away from a more complete commitment to individual autonomy. It emphasizes, in turn, the gain for society as a whole. Huber thereby places himself in the camp of neocontractual theorists favoring contract because it maximizes social utility. In short, despite his affection for a world of consensual relations, Huber is not above coercion when he believes it will improve society's well being.

More openly embracing utilitarian objectives with modified cushioned liability contract proposals is Jeffrey O'Connell, one of the early proponents of no-fault automobile plans.<sup>39</sup> O'Connell, with his focus on no-fault compensation, seems quite at home with contractual resolution of tort situations. His affinity for such plans derives not from some particular respect for individual autonomy, but from a recognition that consensual

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cure appointment of judges who will cooperate with his views of tort. *Id.* Huber's regular use in his writing of anecdotes chosen and described to make the tort system look foolish likewise suggests his concern with winning his point. *See, e.g.,* P. HUBER, *supra* note 7, at 4. I do not mean to suggest there is anything wrong with trying to convince others of the rightness of one's ideas. I admire Mr. Huber's skills as a writer and speaker.

36. *See* P. HUBER, *supra* note 7, at 224-27.

37. Huber does not suggest what that minimal level would be. *See* P. HUBER, *supra* note 7, at 194, 203. Nevertheless, he clearly does not advocate a "reembrace" of the free contract jurisprudence of the late 19th century, which holds such allure for Richard Epstein. *Id.* at 227.

38. *Id.* at 194.

39. *See generally* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE ACCIDENT VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

resolutions will reduce dramatically the massive transaction costs he has long seen as the major flaw of the tort system.<sup>40</sup> O'Connell's plans differ from other AC school approaches by advocating agreements that pay only actual victims, after an injury has occurred.<sup>41</sup> O'Connell has recently proposed an interesting plan in which the provider of the product or service would make a one-sided pre-accident commitment, to which the victim could agree after the accident. It would require a provider to bind himself to offer to pay a person seriously injured by his good or service her net economic loss within ninety days after the injury. The victim would then have ninety days to accept that offer or to file a tort claim.<sup>42</sup> Like Huber, O'Connell wishes to encourage consensual dealings while at the same time guaranteeing minimum levels of compensation to injured persons. Unlike Huber, O'Connell allows the victim to make decisions about giving up tort rights in return for this "cushion" of compensation with full awareness of the realities of her situation.<sup>43</sup> This makes it unique among the neocontractual ap-

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40. See O'Connell, *A "Neo No-Fault" Contract In Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 899 (1985)[hereinafter *Neo No-fault*]; O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 503-12 (1976). This Article will not rehash statistics showing that the resolution of tort disputes often consumes very large amounts of time and money. See, e.g., J. KAKALIK & N. PACE, *supra* note 4, at 66-73, 98-124. The transaction costs of the tort system as it functions today are quite substantial. Such high costs are not a necessary component of tort. See, e.g., Hensler, *supra* note 4, at 100-04; Symposium, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation*, 1989 U. ILL. L. REV. 35.

41. See plans described in Cooter & Sugarman, *A Regulated Market in Unmatured Tort Claims*, in *NEW DIRECTIONS IN LIABILITY LAW* 174, 183 (W. Olson ed. 1988).

42. O'Connell, *Neo No-Fault*, *supra* note 40, at 906-07.

43. O'Connell thinks this plan will assuage some of the tort system's substantial problems despite the ex post character of its agreements, because seriously injured persons need quick compensation and thus will be reluctant to take chances in the lengthy, difficult, and risky tort system. *Id.* at 910-14. He emphasizes that his system will facilitate consensual arrangements without depriving victims of any of the rights they have in the current tort system. *Id.* Throughout this Article I refer to tort and tort victims using feminine pronouns and to neocontract and tort injurers using masculine pronouns. I do so to invite you, the reader, to consider more regularly through this Article the links between the tort-neocontract debate and the debate between feminine and masculine views of law. See, e.g., West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 59-71 (1988); see also *infra* notes 99-166 and accompanying text (emphasizing the need for more inclusive jurisprudence). I also use pronouns this way to encourage you to think about injury victims as a disadvantaged, perhaps oppressed, group in much the same way you may have learned to think about women or minorities.

proaches in its willingness to allow the victim to make decisions from the harsh reality after the accident.

### 3. Modified, Limited-Market Contract

The other modified AC school approach requires a minimum level of compensation for injured persons *and* limits the kinds of transactions in which the potential victim can give up her tort rights. This modified approach, most fully articulated by Stephen Sugarman and Robert Cooter in separate and joint writings,<sup>44</sup> creates a "market in unmatured tort claims."<sup>45</sup> In that market, potential tort victims would be able to contract away completely their compensation rights in the event of a tortiously-caused injury, before any such injury occurred. They would do this by selling their potential tort claim to their employers. Such a sale would be enforced by courts only if the seller were left with adequate insurance against injury.<sup>46</sup> Not surprisingly, Cooter and Sugarman articulate the rationale behind their proposal in utilitarian terms: it would eliminate unnecessary insurance payments consumers make; it would eliminate the capriciousness of the payments that come out of the tort "insurance" system; and it would greatly reduce the substantial transaction costs associated with the tort system.<sup>47</sup> This system's willingness to coerce persons into buying certain "high-quality" insurance and its refusal to permit persons to sell their tort rights on an open market demonstrate that these

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44. S. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 201-09 (1989); Cooter, *Toward A Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383-411 (1989); Cooter & Sugarman, *supra* note 41, at 174-85. Jeffrey O'Connell has put forth a similar idea, O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Products Liability Woes for Employers and their Employees and Suppliers*, 644 INS. L.J. 530, 537 (1976), but it has been Cooter and Sugarman who have put forth the most detailed recent proposal.

45. See Cooter, *supra* note 44.

46. Cooter and Sugarman, like Huber, are not precise as to what would constitute "adequate" insurance. They deal with that concept somewhat more fully than Huber, however, describing it as "high quality" first-party insurance, including insurance that did not compensate non-pecuniary losses, and that even omitted a small portion of pecuniary losses. Cooter & Sugarman, *supra* note 41, at 178. These theorists permit a potential victim to contract only with her employer because they believe this would result in more equal bargaining with potential injurers or their insurers, leading to fairer payments to the potential victims and greater pressure for safety. It also would reduce the costs of transacting with potential injurers — a large batch of potential claims could be sold at once — and the costs of arranging for compensation. *Id.* at 177.

47. *Id.* at 175-76.

AC school theorists have ventured far from the libertarian notion of self-determination.

#### B. THE IMAGINED CONTRACTS SCHOOL

Unlike its actual contract cousin, the imagined contracts (IC) school of neocontract does not leave potential injurers and victims to resolve tort compensation by agreement. Instead, the IC school theorists try to determine what the parties *would have agreed to* concerning compensation if they had been able to bargain adequately before the accident. From that determination, the IC theorists deduce what constitute the appropriate legal rules to govern tort situations. For example, in analyzing product liability rules, Alan Schwartz asks principally what sort of contract terms pertaining to compensation for injuries a buyer and seller of a product would agree to in advance of product-related injuries.<sup>48</sup> To the extent we can discover those hypothetical terms, the terms should become the law that governs compensation for such injuries when they occur.<sup>49</sup> In short, the IC school does not concern itself with people's actual agreements, but rather concerns itself with the imaginary world of the agreements they would have made, and governs the tort world accordingly. Contract still controls, but in a somewhat ghostly form.

Much of the power of this approach comes from its roots in the idea that people should be able to make their own choices about what happens to them in life. Law should not force people to accept what they would not otherwise choose, without good reason.<sup>50</sup> Even though the IC school does not concern itself with real consent from real people, it considers itself true to the autonomy ideal, because it develops legal rules from what real people really would have wanted.<sup>51</sup> Admittedly, one branch of the IC school, which I term the "utilitarian" wing, derives its notions of what people would consent to primarily

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48. Schwartz, *Proposals*, *supra* note 16, at 357-71. In fact, this IC approach commonly dominates analysis in fields of law such as commercial transactions and intestacy. Nevertheless, its prominence in tort analysis is new in the 1980s, probably because courts and scholars did not previously see tort's aims as effectuating people's intentions.

49. *Id.*

50. In general, a reason might be a person's inability to safeguard his interests, either because of his incapacity or because he cannot obtain information or exercise free choice. See, e.g., Schwartz, *Proposals*, *supra* note 16, at 372-76.

51. See, e.g., *id.* at 358 (linking this "hypothetical" consent to autonomy).

from looking at what would be best for them collectively. The other branch, which I call the "contractarian wing," looks more searchingly at the particular individuals involved. Despite the dangers of determining legal rules from imagined factors, the IC school, particularly in its contractarian form, is more appealing than the AC school, which supposedly relies on reality, not imagination. The IC school generally does a better job of ensuring that people get what they really want in terms of protection and compensation than does the AC school, which only purports to give them realistic choice in such matters.<sup>52</sup>

The attraction of the IC school to neocontractualists lies in its freedom from the shackles of preexisting consensual relationships. Unlike actual contract, imagined contracts can determine the outcome of and rules for any tort situation. All an analyst needs is the capacity to imagine either what the parties would have agreed about how accidental injuries should be handled, had they been able to agree *ex ante*, or what general rules people in society would have agreed on to handle these kinds of accidental injuries, had they been able to get together to agree.<sup>53</sup> This approach can be used in any area of tort law. So far, it has been used predominately in the analysis of tort damages, particularly with respect to compensation for intangible injuries.<sup>54</sup>

With respect to damages, the IC school posits that optimal compensation (what people would want) is equal to the amount of insurance an accident victim would purchase voluntarily.<sup>55</sup> When this analytic spotlight is turned on the issue of appropriate compensation for intangible injuries,<sup>56</sup> the IC school concludes that tort law should not award such damages because

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52. The reasons underlying my belief are explained more fully later in this Article. See *infra* text accompanying notes 135-54, 185-209.

53. Often the imagined getting-together-to-agree scene postulates that the people devising the legal rules will be ignorant of their particular situations in the world they invent. See, e.g., J. RAWLS, *supra* note 10, at 12; K. SCHEPPELE, *supra* note 10, at 64.

54. See, e.g., Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEG. STUD. 517, 520-21 (1984); Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 273 (1989).

55. See, e.g., Danzon, *supra* note 54.

56. Intangible injuries would include those presently awarded in the tort system for pain and suffering, emotional distress, loss of consortium, or loss of enjoyment of life. IC school theorists have not tended to focus on reputation or privacy damages, which they might treat differently. See, e.g., Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 819-53 (1985).

people do not ordinarily buy insurance against such losses.<sup>57</sup> If people do not want to pay for insurance that would pay them dollars in the event they suffer an intangible injury, the IC school argues, tort law should not force them to buy that insurance by including it in the price they pay for goods and services. If tort law awards damages for intangible injuries, providers of goods and services will have to buy insurance to pay those awards, paid for by increasing the price of the good or service.

Of course, the tenets of the IC school can be used to determine appropriate rules for all of tort, not just damages. This approach has been used recently to suggest rules for products liability, implied warranty, and a range of substantive areas dealing with legal secrets.<sup>58</sup>

This discussion suggests that the utilitarian and the contractarian wing of the IC school use different analytic techniques, and that the legal rules each advocates might differ.<sup>59</sup> The utilitarian wing seems to imagine rule agreements based on whatever will maximize social utility. For them, people sitting around, unsituated as to the places they would occupy in society, would agree to rules that would create the biggest social pie, thereby increasing the chances that each of them would be better off once situated in society. They would be better off because, on average, everyone would be better off with a larger social pie.<sup>60</sup>

The contractarian wing imagines differently in an important way. It too is concerned about what effect legal rules will have on the size of the social pie. After all, the smaller the social pie, the more likely it is that any one of us will be worse off. Nevertheless, the contractarians also recognize that people generally are limited-issue risk averse. This means that regardless of how risk averse or risk preferring they are generally, people are unwilling to take a chance that anything *too* bad will

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57. See, e.g., Danzon, *supra* note 54, at 520-21; Schwartz, *Proposals*, *supra* note 16, at 364-67.

58. See K. SCHEPPELE, *supra* note 10, at 269-98; Schwartz, *Proposals*, *supra* note 16, at 392-98.

59. For example, in outlining her contractarian view, Kim Scheppele sees its strongest impact as prohibiting certain legal arrangements, such as allowing individuals with superior information to use that information to the detriment of someone else who had no way of knowing that harm was about to befall her. K. SCHEPPELE, *supra* note 10, at 314. Yet, the utilitarian wing might require privity in products liability, even though that might encourage further abuse of information imbalances, because it would make people on average better off. See, e.g., Epstein, *Products Liability*, *supra* note 28, at 660.

60. Schwartz, *Proposals*, *supra* note 16, at 392-98.

happen to them. They will not sign on to a legal rule unless the persons who will be losers in the face of that rule will not lose too much.<sup>61</sup> Accordingly, some legal rules will be adopted providing a "floor", a certain level of well-being below which the loser could not fall. Because uncompensated serious injury may seem an unacceptable state of affairs to a potential victim, the contractarian wing might insist on some level of compensation regardless of the implications for social utility overall. Because the contractarian wing focuses on the situation of the persons who would be worst off under an agreed upon rule, it may provide a perspective inclusive of more reality about people's injuries than would the more utilitarian wing of the IC school.<sup>62</sup>

In sum, there are substantial differences in approach within the neocontractualist position. Some of these, as I will emphasize later, seem to come quite close to confirming the present workings of the tort system.<sup>63</sup> The existence of these separate schools of neocontract, and of the branches or wings within each school, must be kept in mind in examining neocontract's value in the analysis of tort law. Many of the flaws, and insights, in neocontractual analysis discussed in Part II apply only to some of the wings or branches. Before turning to the troubles engendered by overreliance on neocontract, I will salute its major insights.

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61. This is essentially the approach embodied in John Rawls' "difference" principle. Rawls focuses more on disadvantaged classes of persons, rather than on disadvantaged individuals. See J.RAWLS, *supra* note 10, at 98; see also K. SCHEPPELE, *supra* note 10, at 65 (arguing that if an individual does not know which position in a society he will hold, it is logical for him to attempt to improve the position of the person the individual least wants to be). In his work on justice in contract law, Anthony Kronman seems to go even further in a focus on what the law should permit. He advances the principle of "paretianism," that one person should be permitted to make himself better off at another's expense only if it is to the benefit of both that he be allowed to do it. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 486-88 (1980). It is not clear whether Kronman would permit an advantage-taking relationship if most, but not all, people taken advantage of increased their welfare.

62. See, e.g., K. SCHEPPELE, *supra* note 10, at 309-12 ("a contractarian point of view involves asking what social arrangements look like to individuals"). In Scheppele's view of the agreeing process, "if we ask which rules people would agree to live under *if they might be anyone* in a particular society, then this requires, in the relevant thought experiments, that people try to imagine what it is like to be in other people's shoes." *Id.* at 311 (emphasis in original).

63. See, e.g., *id.* ch. 14 (regarding the development of the law of implied warranty as consistent with her contractarian philosophy).

### C. BRIGHT IDEAS

Neocontractual analysis offers several insights concerning the tort system. It reminds us of the potential, in several major areas of tort law, for persons who end up as parties in tort suits to make arrangements about the possibility of accidental injury before it occurs.<sup>64</sup> It reminds us that tort law has effects on the potential victims who do *not* get injured, as well on those who do, and that we therefore also must consider the system's effects on their welfare when we fashion legal rules.<sup>65</sup> And, it reminds us that in its eagerness to protect persons, tort law may be depriving those persons of their freedom to take certain chances and to arrange for other kinds of protection.

These reminders, while interesting and perhaps useful, seem relatively insignificant in comparison with the power of two observations hammered home by a substantial portion of the neocontractualist writing. First, neocontractual analysis makes me realize, more fully than all the statistics I have read, the extent to which the massive transaction costs involved in tort litigation are the cancer that threatens to do away with tort. Second, neocontract uncovers and emphasizes that the poor are taking a particular beating at the hands of tort law. Although the latter point has been a sidelight of much neocontractual criticism of tort law,<sup>66</sup> it quickly wakes up the reader who believes one of the strengths of the tort system is the assistance it provides the disadvantaged. Both these points deserve further explanation.

#### 1. The Importance of High Transaction Costs

Neocontractual analysis delivers such a powerful message about the deleterious effects of transaction costs on the tort system because those costs seem to be the seminal force driving

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64. See, e.g., Epstein, *Medical Malpractice*, *supra* note 31, at 141-49. This and other neocontractualist writings call attention to the potential significance of contractual agreements in the medical malpractice and products liability fields, which make up the bulk of high-cost tort litigation. In figures suggested by the Rand Institute of Civil Justice study of Cook County jury trials, only 4% of plaintiffs brought products liability claims and less than 2% were malpractice claims. A. CHIN & M. PETERSON, *supra* note 4, at 13.

65. See, e.g., Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 227, 288-89 (1985) (arguing that much of the cost of the DPT vaccine results from liability insurance, and that the high cost may deter some parents from having a child vaccinated).

66. See, e.g., P. HUBER, *supra* note 7, at 13-14, 151; S. SUGARMAN, *supra* note 44, at 41; Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1560 (1987).

the main neocontractual critiques of tort. The most often articulated critique from the IC school is that tort forces people to buy insurance they do not want, at least not at the price being offered.<sup>67</sup> You need not be a law and economics buff to recognize that consumers do not want to pay a dollar for an expected return of thirty-nine cents.<sup>68</sup> When they buy goods and services costing more because of the associated liability insurance costs, consumers are paying for the protection offered by the tort system. The payout from the system is quite small compared to the expense of determining whether a payout should occur. Therefore, the liability insurance that a consumer must buy<sup>69</sup> gives her substantially less compensation for each dollar it costs her than does the first-party insurance she could buy. First-party insurance looks so attractive largely because it is much cheaper per unit of protection offered. It is so much cheaper because its administrative costs are only ten percent of the premium.<sup>70</sup> The remainder is returned in the form of compensatory benefits to its insured. If tort's costs of deciding liability and paying out compensation were significantly lower, the gulf between what a party pays for first-party insurance and what she pays, via higher prices, for similar liability insurance "coverage" would narrow, perhaps considerably. As that gap narrowed, concerns about forcing potential victims to pay for liability insurance would dissipate somewhat. Issues would remain about the lack of freedom to refuse that insurance, although it is by no means clear that such refusals could not be honored.<sup>71</sup> The liability insurance still would cost more in relation to its expected payout than the first-party insurance.

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67. See *supra* text accompanying notes 50-52.

68. These figures are suggested by the Rand Institute of Civil Justice study of compensation in asbestos-related injury cases, in which researchers concluded that only 39 cents of every dollar paid out by the defendants actually reached the injured person. See J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, *COSTS OF ASBESTOS LITIGATION* 36 (1983). The average injured plaintiff receives 56% of all money paid in a tort suit in net compensation. J. KAKALIK & N. PACE, *supra* note 4, at 70.

69. "Must," that is, if one assumes that the consumer cannot refuse tort coverage in return for some payment that makes the risk worthwhile to her. According to Huber and other neocontractual scholars, that is exactly how the tort system works: it refuses to let consumers take their chances, even in return for receiving a substantial benefit. See P. HUBER, *supra* note 7, at 195; O'Connell, *Neo No-Fault*, *supra* note 40, at 906.

70. See, e.g., Priest, *supra* note 66, at 1560 (reporting 10% as administrative costs for private health insurance, 8% as the costs for Social Security disability insurance, and 21% as the administrative costs for the workers' compensation system).

71. See *infra* text accompanying note 241.

That difference, however, would be substantially smaller, perhaps so small that consumers would scarcely notice it. More likely, they would be satisfied to pay that difference, in the belief that they also are buying some deterrence and justice in addition to a right to compensation.<sup>72</sup>

This brief treatment suggests that neocontract's criticism of tort on compensation grounds rests substantially on tort's transaction costs. The same is true for a significant piece of the neocontractualists' criticism of tort as a provider of safety.<sup>73</sup> For the most part, neocontractual theory does not pay much attention to the deterrent effects of tort. Nevertheless, Stephen Sugarman, in his recent book advocating the death of tort, regards the system's high transaction costs as the death knell for any consideration of tort as a valuable force for safety. At the end of the best direct treatment of tort law's deterrent effects yet done, Sugarman concludes that, in the face of inconclusive evidence that tort deters, tort law must be regarded as a net social cost, because it spends so much in transaction costs to achieve little, if any, deterrence.<sup>74</sup> Others continue to criticize tort as providing consumers with "excessive insurance" if the damages assessed against defendants are computed to provide appropriate safety incentives.<sup>75</sup> The excessive insurance argument necessarily depends on high tort transaction costs for its clout, as outlined in the preceding paragraph.

Neocontractual analysis thus poses a critical challenge for those who wish to retain the strengths of the ex post tort ap-

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72. See *infra* text accompanying notes 221-22.

73. It is only a "significant" piece of the neocontractualist criticism of tort as a deterrent, because that criticism also focuses heavily on the courts' inability to do a good job of setting behavioral standards. See, e.g., Schwartz, *Proposals*, *supra* note 16, at 367-70; Huber, *supra* note 65, at 305-29. Much of this criticism focuses on decisions in the products liability area and echoes that of other commentators who believe that judges and juries sitting in individual cases should not be making decisions about how products should be designed. That kind of criticism has little to do with neocontractualist thought, except that as these critics are claiming that decisions about appropriate product design can be better made by individual consumers, in a series of individual contracts. With respect to this safety aspect, the neocontractual theorists for the most part seem to regard governmental regulation as the more appropriate source for decisions about product adequacy. See, e.g., P. HUBER, *supra* note 7, at 46-51; S. SUGARMAN, *supra* note 44, at 153-65.

74. S. SUGARMAN, *supra* note 44, at 23-24. Sugarman extrapolates from a variety of studies estimating the percentage of total litigation and related costs that actually make it into the injured person's pocket. He concludes that each injury compensated by a tort judgment would have to deter from one to 14 other such acts of negligence for tort to be deterring effectively. *Id.* at 24.

75. See, e.g., Schwartz, *Proposals*, *supra* note 16, at 370.

proach: we must substantially reduce transaction costs. If this cannot be done, the disparity in compensation between the tort system and a contractual system will continue to be so great that potential victims will find it difficult to resist the neocontractual argument. The benefits of tort simply will not be worth the price, not because those benefits are negligible, but because the transaction costs are so high that the price of the benefit is too great. It would be a shame if justice became too expensive.

## 2. The Regressive Tort Tax

It might be even more of a shame if this expensive package of tort "benefits" contained little justice. That is the second major threat posed by the neocontractual insight that the tort system takes from the poor and gives to the rich, or at least the richer.<sup>76</sup> This argument also comes from a contractual focus on what people get for their money. A contractual look at tort raises the obvious specter of regressiveness. Poor persons, who suffer relatively little in the way of lost wages from accidents, receive less money from liability judgments than do more affluent claimants. At the same time, the poor pay a higher percentage of their resources to finance the tort system than do the secure. This occurs because some of the price of each product or service on the market consists of the cost of liability insurance<sup>77</sup> for that good or service. For the most part, prices of goods or services in our society do not vary depending on the wealth of the purchaser. As a result, when a poor person buys a good or service, he pays as much for the liability insurance that comes with that product as does a wealthier individual. Nevertheless, he is in fact getting less insurance, because the payout from that liability insurance will be less, often substantially less, than that made to the more affluent consumer.<sup>78</sup> The logical corollary of such regressiveness seems to be that, were the poor able to contract out of the liability system by ob-

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76. See D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & V. BRITTAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 317 (1984) [hereinafter OXFORD COMPENSATION SURVEY] (finding that accident victims in lower socioeconomic groups were proportionately *more* likely to recover damages than victims in managerial or professional occupations).

77. The term "liability insurance" used here is intended to encompass all amounts spent by the producers/providers of a product or service to pay for liability costs or expected liability costs.

78. This point has been cogently made by both Priest and Huber, among others. P. HUBER, *supra* note 7 at 13-14; Priest, *supra* note 66, at 1558-60.

taining the product or service for a lower price in return for a binding waiver of their tort rights, they would logically do so.<sup>79</sup> They then could use that money to buy more of what they want, including more loss insurance than they would receive from compelled liability insurance.<sup>80</sup>

The regressive effects of tort, however, may not be quite as severe as neocontractual theorists suggest. Because they consume more goods and services, wealthier persons end up paying more money overall for such liability insurance. These increased payouts do not buy them more protection than the poor receive from losses due to accidental injuries, unless those increased purchases subject them to greater risks of harm. In fact, some of the scanty and apparently conflicting data on tort claims suggests that wealthier persons experience more tort problems than poor persons, yet they file tort claims at a lower rate.<sup>81</sup> In addition, although low-income plaintiffs receive less total dollars from the tort system than do the wealthy, they may receive a higher percentage of their income/total wealth from tort than do the wealthy.<sup>82</sup> Overall, this means that the

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79. Cf. P. HUBER, *supra* note 7, at 151.

80. One must be cautious in assuming that the poor would see this matter in exactly the same fashion as the theorists. For example, when given the opportunity not to buy uninsured motorist liability insurance with their automobile insurance policies, 81% of the residents of one of Los Angeles' poorer areas continued to buy such insurance. Because such insurance pays the insured on the basis of tort principles, poor persons stood to gain less return on such insurance than did wealthier persons. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L.J. 419, 424 (1987). Moreover, these persons were charged substantially more for their coverage than were residents of higher income areas. Accordingly, even if the low limits for what that insurance would pay meant that the poor often would receive as much payout as the financially secure, they were paying a substantially higher price for that coverage.

81. See Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443, 457 (1987). An American Bar Foundation study supports the conclusion that wealthier persons have more tort problems and a lower rate of claiming. B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 127-28, 152, 156-57 (1977). Some sense can be made of this information if one remembers that wealthier persons are less likely to have a need for the tort system when they are injured, thanks to a higher rate of first-party insurance and to better informal support systems. Another more recent study in Great Britain indicated that women, the young, the old, and the unemployed all were less likely than average to make tort claims for accidental injuries. OXFORD COMPENSATION SURVEY, *supra* note 76, at 52. Because the poor are likely overrepresented in these groups, that study suggests the poor may claim at a lower rate than wealthier persons. *But cf.* A. CHIN & M. PETERSON, *supra* note 4, at 10-12 (noting that "[p]laintiffs more often came from groups that are perceived as having fewer resources").

82. In figuring that the poor might receive a higher percentage of their

poor pay less total dollars for liability insurance than do the wealthy while receiving less total dollars from it. And although paying a higher percentage of their income for such insurance, the poor also receive a higher percentage of their incomes from it.

Moreover, there is some evidence that households of accident victims end up significantly poorer than accident-free households. The Oxford Centre for Socio-Legal Studies' extensive survey of accident victims and their compensation in England and Wales revealed that total household income of all the households in its survey was only three-quarters of the national average, even after taking into account all sources of income compensation.<sup>83</sup> There seems no obvious reason why the effect of accidents on United States households would be radically different.<sup>84</sup> Regardless of theory, therefore, the tort system may be working most often to help the poorer segment of society.<sup>85</sup>

Not only does tort often work to help the poor, it rarely works directly against them, and often costs the wealthy. It is

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incomes, I do not mean to take into account the obvious: that because the medical costs for care of similarly injured poor and wealthy bodies will approximate each other, the tort payment for medical expenses will be a higher percentage of the poor person's income/wealth. Leaving medical payments aside, the tort payment should be a higher percentage for the poor. Payments for the non-pecuniary injuries suffered by poor persons should come much closer to those made to wealthy persons than are their respective incomes. Many studies of tort recoveries show that victims with smaller economic losses receive a higher percentage of their loss than do persons with larger economic injuries. See, e.g., Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 100-01. Because the wealthy will have larger economic losses than the poor, this suggests, albeit not conclusively, that the poor make out better in tort relative to their total economic loss.

83. OXFORD COMPENSATION SURVEY, *supra* note 76, at 286. The study showed further that when the accident victim was the main household earner, and when the injury was serious, the household income dipped below half of the national average. *Id.* at 324-25.

84. See K. DEVOL, *INCOME REPLACEMENT FOR LONG-TERM DISABILITY* 32-33 (1986). This study concludes that workers' compensation benefits replace 86% of lost income in the first year of disability, but declining percentages in succeeding years, so that only 68% of income is being replaced by the fifth year of disability. *Id.* at 32. The study does point out that social security and private disability payments increase that percentage substantially. *Id.* at 49-51. Yet the study also admits that it did not take into account any attorneys' fees incurred by claimants in obtaining their compensation. *Id.* at ix. A more detailed study of the replacement of the net losses of claimants injured by others' actions concluded that the combination of tort, workers' compensation, social insurance, and pensions replaced only 36% of the net losses suffered by claimants. Johnson & Heller, *Compensation for Death From Asbestos*, 37 INDUS. & LAB. REL. REV. 529, 532 (1984).

85. See *supra* note 81.

important not to lose sight of the direct effects of the tort system, just because neocontractual analysis has enlightened us about its indirect effects. The poor rarely are sued and held liable in tort. Wealthier persons are much more likely to feel the direct financial and psychological costs of being a tort defendant.

I do not mean to say that tort law is not regressive, just that it probably is not as regressive as neocontractual analysis would suggest at first blush. Tort law is regressive. So, too, are almost any required safety measures. When producers and providers are required to spend money on safety, the goods and services that most likely will go up in price are the low-cost ones, those most often purchased by the poor. Low-cost goods most likely will lack the required safety features. For example, when the federal government imposed flammability standards on mattresses, the prices of the lowest quality mattresses rose relatively the most.<sup>86</sup> At least when producers/providers make expenditures on safety in response to tort law, there is a theoretical guarantee that the safety benefits to the consumer will outweigh the costs.<sup>87</sup> The same is less clearly true for safety measures imposed by regulation.<sup>88</sup>

## II. THE FLAWS IN NEOCONTRACT

"A single death is a tragedy, a million deaths is a statistic." <sup>89</sup>

— Josef Stalin

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86. Linneman, *The Effects of Consumer Safety Standards: The 1973 Mattress Flammability Standard*, 23 J.L. & ECON. 461, 471-73 (1980).

87. Theoretically, a producer will not spend on safety unless the expected benefits from such an expenditure in terms of accident cost reduction outweigh the overall expenditure costs. If the tort system concludes that it will cost an actor more to institute a particular safety measure than the measure is expected to save in reduction of accident costs, the system will not hold the defendant liable for failure to make that safety expenditure.

88. The scholarly study of the mattress flammability standards referred to above concludes that there was little impact on safety from their implementation. Linneman, *supra* note 86, at 462-71. In the environmental area, the Environmental Protection Agency has long been subject to criticism by industry because it does not base its decisions to ban (or not permit) the use of certain substances on a judgment that the expected accident costs of the product outweigh its benefits. Although there is considerable debate about the extent to which EPA protects the environment, the agency's standards for barring new substances or banning old ones do not purport to weigh carefully the safety costs and benefits. See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

89. J. BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 766 (15th ed. 1980).

Neocontractual theorists seem to believe their mode of analysis should reign supreme in the legal resolution of tort situations. They clearly propose that actual contracts play a dominant role in the resolution of medical malpractice and products liability cases, which dominate present tort litigation.<sup>90</sup> When actual contract is not feasible, they would determine the rules in those areas by imagined contracts. In fact, they argue that neocontract should govern tort even when no preexisting relationship between victim and injurer allow for actual pre-tort contracts. Contracting could be done by creating a market for unmatured tort claims,<sup>91</sup> or, more practically, by using rules fashioned through an examination of what people would agree to in general.

Neocontractual analysis is deeply flawed, although often appealing. Some of its appeal is deserved, particularly when neocontractual analysis illuminates the dark sides of tort. As an overall prescriptive device<sup>92</sup> for tort rules, however, neocontractual analysis fails. It fails most fully because it seeks to reimpose on the law of tort a philosophy and style of dispute

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90. Medical malpractice and products liability suits make up the largest group of high award cases. A. CHIN & M. PETERSON, *supra* note 4, at 52-53.

I refer to neocontractual theorists here as though they were a unified group even though the preceding section recognizes significant differences among them. The common philosophical roots of both schools of neocontract and their similarities in analytic approach make it appropriate to treat them as one theoretical group in discussing many of the flaws of neocontract. It should become clear later in this discussion that the differences among neocontractual theories outlined above *do* render them differently attractive as solutions to the problem of accidental injury.

91. See Cooter & Sugarman, *supra* note 41, at 174-85.

92. I emphasize the flaws of neocontractual analysis because I believe it is *a* way, not *the* way, of looking at tort law. The existence of these flaws should caution us against accepting conclusions about tort rules or practices that seem to flow from that analysis. For example, neocontractual analysis seemingly would lead to the conclusion that tort law should not award damages for non-pecuniary loss. See, e.g., Danzon, *supra* note 54, at 520-24 (stating that the "optimal compensatory award is the amount of insurance the victim would have purchased voluntarily," and finding the willingness to pay for even first-party non-pecuniary loss insurance very low). It is certainly valuable for architects of tort rules to be sensitive to the unwillingness of persons to purchase a right to money in the event they suffer psychic injury. Such increased sensitivity might advance the search for a method of compensation/deterrence that does not commodify human suffering by forcing it into dollar terms. See R. Abel, Torts, A22 (unpublished manuscript, prepared for Association of American Law Schools' Annual Meeting, January 4-7, 1990, on file with author). Yet, it should not lead to a decision to bar recovery for most or all non-pecuniary damages in tort, in part because of the flaws in the basic analysis. Some of those flaws related to the validity of recovery for non-economic loss are set forth in *infra* text accompanying notes 210-25.

resolution, which I term "predetermined law," that hobbles achievement of substantive justice and individual empowerment. The abstraction inherent in that philosophy underlies a second major flaw of neocontractual analysis as advanced by most present theorists: they fail to see adequately the people whose agreements supposedly determine how tort situations will be resolved, and they fail to see adequately many of the ways in which the relevant world works. Finally, neocontractual analysis fails because it does not appreciate what may be lost in the transition from the present tort system, particularly in terms of deterrence and justice. In discussing these flaws, I will pay most attention to the central features of neocontract discussed in Part I: the AC school's emphasis on arranging many and perhaps most potential tort situations through use of actual contracts, and the IC school's emphasis on severely limiting tort damages.

#### A. THE FLAWS OF PREDETERMINED LAW

The analytic utopia for neocontract has people sitting together calmly, in the "coolness of the beforehand,"<sup>93</sup> talking about the possibility that they, or others in society<sup>94</sup> might injure or be injured. From this place come the rules, established by agreement, that govern tort situations when they arise. These rules and this method of deciding the outcomes of tort situations before they arise comprise what I call "predetermined law." I will discuss some of the falseness of that "coolness" image itself in the next subsection. First, I will discuss why that attractive image should not govern tort decision-making.

Tort law currently is the very opposite of predetermined law. Modern tort law is determined by public policy choices, not by private agreements.<sup>95</sup> It is determined in the agitated

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93. P. HUBER, *supra* note 7, at 226. For some reason, the images this phrase conjures in my mind are always either a group of white men in white-linen suits, sitting around on a front porch sipping mint juleps; or, a less-clearly-male group of white English people sitting in a drawing room having afternoon tea. Fearful of my own ethnocentricity, I invite the reader to try on your own image. My image of tort lawsuits is not so confined to people of no color.

94. The AC school would have the parties talking about what to do about their own possibilities of injuring and being injured. The IC school would have the people discussing how injury situations, which might involve them, would be handled in society.

95. Tort does not completely ignore private agreements, even when those agreements pertain to the existence of tort liability or limitations thereon.

emotional hotness of the afterward, in the context of actual controversies in which actual injury victims sue allegedly actual injurers. For the most part, tort law requires a party who has acted unreasonably, and thereby caused injury, to pay for those injuries.<sup>96</sup> Even in those appellate decisions articulating tort "law" of general applicability, the courts focus in part on the parties before them.

Neocontract, in contrast, espouses a philosophy of dispute resolution and rule setting that looks at tort situations and the people therein in an abstract manner. Its characteristic *ex ante* method for reaching decisions requires individuals and society to look at the world of accidental injury as they expect it to be. The individual is valued in neocontract — Peter Huber's book seeks to wrest from the coercive tort system the individual's ability to order his life's affairs; Alan Schwartz builds his products liability rules on the base of consumer sovereignty<sup>97</sup> — but the individual is valued in the abstract and in isolation. Neocontract's concern for the individual seems fully satisfied by giving the individual imagined or real choices about liability rules *ex ante*.

These distinctive features of neocontractual analysis must make us skeptical about its conclusions regarding tort law. Neocontract is imprisoned by an autonomous world view that unnecessarily narrows its views of what is relevant to decisions about what should be done with real-life accidents. No doubt because of that world view, its predetermined law is built on the shaky foundation of the imagined, rather than the solid foundation of real people and real situations. Finally, neocontract's attention to the individual, by placing the center of attention on the person-who-might-be-victim, takes power away from the individuals who need it most and have traditionally been the focus of tort: the people in society who actually are

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*See, e.g.,* Gross v. Sweet, 49 N.Y.2d 102, 106, 400 N.E.2d 306, 308, 424 N.Y.S.2d 365, 367 (1979); *supra* note 3.

96. This statement of a general tort principle is overbroad. There remain pockets of strict liability in tort law, particularly in the area of abnormally dangerous activities. *See* RESTATEMENT (SECOND) OF TORTS, § § 519, 520 (1976). If "unreasonably" includes intentional invasions of protected interests, the statement fairly describes most of the rest of tort law. With the exception of liability for manufacturing defects, products liability has largely settled down so that there is no liability unless a product was unreasonably dangerous when marketed. *See, e.g.,* Note, *Products Liability — Negligence Presumed: An Evolution*, 67 TEX. L. REV. 851, 859 & n.46 (1989).

97. For fuller explication of Huber's, Schwartz's and other neocontractualists' plans or philosophies, see text accompanying *supra* notes 26-63.

injured in tort situations. Each of these flaws in predetermined law merits separate attention.

### 1. The Prison of Autonomy and Abstraction

Neocontractual analysis of tort emanates from neocontract's philosophical devotion to the principle of autonomy.<sup>98</sup> That is both its strength and its limitation. Neocontract's strength lies in the notion that people should be able to determine what happens to them, in tort situations as well as elsewhere. It makes self determination happen through use of actual or imagined agreements, which supposedly allow individuals to choose how tort will treat them. Unfortunately, providing such freedom for ex ante arrangements expresses only one side of what we value in society, and requires us to think in only one narrow way about the principles governing tort situations. Neocontract emphasizes individualism and procedural justice. It ignores relationships and substantive justice.

In its focus on autonomy, neocontract misses the value of connection. Communitarian and feminist legal theory have highlighted recently the importance of looking at more relational views of law, views that emphasize reciprocity and solidarity and an "ethic of care."<sup>99</sup> Just as persons in society have concerns about being overcome or invaded by others, so too do we have concerns about being isolated or separated from others. Most of us can readily<sup>100</sup> identify both of those concerns as significant parts of our psychological makeup and can readily identify places in our lives where each of those concerns dominantly motivated our behavior. Yet, neocontractual analysis heeds only one of those two major forces in our lives: auton-

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98. See *supra* notes 19-22 and accompanying text.

99. There are too many articulations of general principles of feminist jurisprudence for the neocontractualists to have ignored them (as they largely do, save Professor Scheppele). The best articulation of feminist jurisprudence directly related to tort comes in the work of Leslie Bender. See Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988). For a general view, see *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 BUFFALO L. REV. 11 (1985); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). For a recent snapshot, somewhat critical, of communitarian jurisprudence, see Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

100. Critical legal theorists, in particular, have stressed the contradiction between people's desire for autonomy and fear of the other, and their desire for connection and fear of alienation. They see that contradiction as a central feature of our lives, which is reflected in the conflict between liberal theory and critical theory. West, *supra* note 43, at 50-54.

omy and individuation. Embracing this separation thesis,<sup>101</sup> neocontract sees a world primarily consisting of individuals, out to protect and maximize their individual positions.

This philosophical one-sidedness shows up in many places in neocontract. Most obviously, it shows up in the AC school, which wants to resolve tort situations through actual agreements between potential victims and potential injurers. That school seeks to bring persons together so that the potential victims will give up their full tort rights in return for some benefit,<sup>102</sup> presumably a price reduction for the good or service, some cash payment, or some improved insurance policy. If the potential injurer's unreasonable behavior subsequently injures the potential victim, their agreement will more or less automatically cause some compensatory payment. As a result, once the parties reach agreement and the potential injurer sets aside the premium for the health/life insurance of the group of potential victims, the injurer has no further responsibility to either the potential or actual victims. Assuming they have obtained substantial or complete waivers of tort liability,<sup>103</sup> providers of goods or services have very little incentive to take care of these potential victims.<sup>104</sup> They have no incentive to relate to the potential victims in caring and attention-giving ways that might mitigate such a person's eagerness to sue in tort in the event an

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101. The "separation thesis" describes a view of the world that sees people as essentially separate. *Id.* at 2. According to West, that is an essentially masculine world view. It contrasts sharply with the essentially feminine world view that primarily sees people as connected. *Id.* If one characterizes neocontractual analysis as male legal thought, many of the comments in this section about the incomplete nature of neocontract's world view would be most easily recognized by those steeped in feminist jurisprudence.

102. See, e.g., P. HUBER, *supra* note 7, at 195-96.

103. Priest has thoroughly studied actual warranty contracts in the area of products liability. He reported that such agreements never provided for liability for personal injury on the part of the product manufacturer or seller. *Session One Discussion, supra* note 11, at 2232. Richard Epstein concurred that when such a result was the obvious contractual optimum, such uniformity should be expected. *Id.* at 2233-34.

104. The extent of a provider's incentives relates directly to the level of compensation he must pay pursuant to the tort waiver agreement. Under the "pure" AC school approach, that level will approach zero. *Cf. id.* at 2233 (stating that consumers may be unwilling to shift contractually the risk of injury to producers because of moral costs). Under the modified approaches of Huber and O'Connell, the level of compensation will be somewhat higher. See *supra* text accompanying notes 33-43. The higher it is, the greater will be the provider's incentive to avoid injuring the potential victims. Even were such compensation levels quite high, they would provide substantially less incentive to take care than does tort law, which requires an injurer to pay pecuniary and nonpecuniary damages.

injury did occur.<sup>105</sup> Once an injury occurs, the providers have no incentive to listen to, respond to, or take care of the victim. The victim gets her prearranged compensation regardless of the provider's behavior. In short, once the actual contract is signed, the provider has every incentive to ignore the potential victim. This neocontractual blindness to connection shows up elsewhere. The dominant images in the writing of arch-neocontractualists Peter Huber and Richard Epstein are of persons or businesses about to be overcome or annihilated by others. Epstein bemoans the passing of the privity requirement in products liability law because, in the absence of contract's potential for control, the skillful and watchful people<sup>106</sup> will have their pockets picked by the incompetent and careless.<sup>107</sup> Huber's book highlights stories of innocent actors done in by the lawsuits and threatened lawsuits of others. For example, he identifies one individual entrepreneur, whom he describes as "pioneering," who stopped providing a cheap, innovative way for Americans to own small airplanes, not because he did anything wrong, but because he feared the lawsuits of others.<sup>108</sup> Such images typify the subscribers to the separation thesis, whose dominant world view is of hostile "others" threatening to invade their lives.<sup>109</sup>

The result of this view is, of course, the missed opportunity that accompanies any one-sided world view. Neocontract misses the opportunity for the development of relationships and cooperation tort law provides.<sup>110</sup> The threat of tort liability

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105. When potential victims also are potential tort plaintiffs, the provider of goods or services often will interact with them in certain ways — usually friendly ways — in the belief that such interactions will minimize the potential victim's inclination to sue if he becomes an actual victim. Medical professionals, for example, have given considerable attention to improving the way they deal routinely with their patients, as a means of protecting against malpractice claims.

106. In which category Epstein no doubt includes himself. *See, e.g., Session One Discussion, supra* note 11, at 2223.

107. *See Epstein, Products Liability, supra* note 28, at 660.

108. P. HUBER, *supra* note 7, at 4, 156. Throughout his book, Huber plays this theme of the good guys threatened with or actually attacked by hostile others wielding tort law. *See, e.g., id.* at 3-4 (opening litany of "good" activities closed down by tort), 111-12 (discussing the "guerrilla warfare" waged by classes of persistent plaintiffs who cash in on emotion while defendants "pay dearly" to escape legal uncertainty of tort), 159 (noting that providers of orphan drugs, desperately needed by small groups of victims of rare diseases, were chased away from the United States by tort liability).

109. *See supra* note 101.

110. Often tort law will engender strikingly adversarial relationships, which few would regard as socially valuable. Thus, I stress that tort law pro-

encourages providers to pay attention to the safety of recipients of those goods and services before and after accidents occur. In short, providers/injurers and recipients/injured must relate to one another, in an atmosphere of mutual responsibility.<sup>111</sup> This creates the opportunity for cooperative behavior in a multitude of ways that can better the lives of all concerned.

This shows up clearly, for example, in the relations between doctor and patient, one of the principal areas in which neocontract approaches have been advocated. Tort rules about informed consent have changed doctor-patient relationships, so their conversations about treatment are much fuller than in the era of doctor decision-making. Patients take more responsibility for the course of their own treatment. Doctors, even though they give up some control, likewise take more real responsibility for the lives of their patients, because they now must deal with the real desires and understandings of those patients, rather than with the imagined preferences that governed before informed consent.<sup>112</sup>

The result of this tort-induced relationship and cooperation is not clear.<sup>113</sup> Because its articulators have so regularly seen

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vides an *opportunity* for relationships and cooperation. Over time, if persons and institutions must continually heed each other, more satisfactory social arrangements will be worked out than if they may easily ignore one another.

111. Tort's comparative fault and avoidable consequences rules make the injured responsible for minimizing the risks and extent of injury. Claim settlement practices make the injured responsible for discovering ways the injurer can assist her recovery.

112. *See, e.g., J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT* 82-84, 130-64 (1984). The fact that the realities of the doctor-patient relationship often do not approach the informed consent ideal of real conversations should not obscure tort's general encouragement of better doctor-patient communication.

113. A very bright, acerbic colleague asked, on reading an earlier draft of this section, whether the ethic of care in tort would require toy manufacturers to "go down to the hospital and change his [the victim's] bedpans?" Something in me reacted immediately: "No, no, I didn't mean that." On reflection, I suspect that immediate reaction came from the autonomy orientation that most of us (males?) (professors?) have. I also suspect that it would be a typical reaction. Further reflection convinces me it is also the wrong reaction. It may be that changing victims' bedpans is exactly what providers of defective toys should be doing in response to child-crippling accidents. Perhaps not. Regardless, immediate rejection of the bedpan-change approach displays a mind too closed to alternative approaches to the problem of accidental injuries. Alternatives exist, both in the way providers and recipients interact around safety before an accident and in the way they, as injurers and injured, interact after an accident. People explore such alternatives when they *have* to relate to each other. Tort law requires that. Neocontract's AC school leaves little room for such ongoing relationships. Perhaps, to our surprise, changing bedpans *would*

tort as an area of law aimed at governing the chance encounters of strangers, they have paid little attention to tort's potential for inducing cooperation. Neocontractual analysis may benefit tort by highlighting the considerable extent to which pre-injury relationships exist. Nevertheless, fuller understanding of tort's relational dimensions and their implications awaits fuller recognition of those dimensions by the parties, judges, and scholars. I am confident only that beneficial solutions to the problem of accidental injury are more likely to be achieved through the kind of constant relating required by tort than by the splendid ignoring permitted by neocontract.

At least one neocontractualist seems to recognize relations are important, but he does so in a limited way. Part of the communicative genius of Peter Huber lies in his recognition of the competing tugs of autonomy and connectedness in people. He constantly plays to that tension, repeating consent and cooperation as values advanced by neocontract.<sup>114</sup> Huberian cooperation, however, will not build you a barn. It is very thin, very limited cooperation. People cooperate to make agreements not to have tort lawsuits. The cooperation needed in such deeply personal relationships as those among doctors and patients<sup>115</sup> is not: "I will give you money now so you will leave me alone when things get tough for you." Cooperation in leaving each other alone — what Huber's cooperation amounts to — rarely forges productive connections among people.

In parallel fashion, neocontractualists seem to focus on procedural justice, to the exclusion of substantive justice. The AC school seems to believe that if procedures can be created, in which potential injurers and victims can make agreements about what will happen in the event of accidents, the results of those agreements will be just. This focus on procedural justice is typical of autonomy-focused law.<sup>116</sup> Such a focus usually avoids looking at the substantive justice of what the law man-

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turn out to be the best way for injurers and victims to interact in a very difficult relationship. If so, neocontract is unlikely to get us there. Providers/injurers and recipients/victims have a thin relationship, frozen at an early time, under the AC school scheme. Tort forces them to bump up against each other more regularly and continually. Such fuller contact contains the potential for creative, richer solutions to the injury problems.

114. See, e.g., P. HUBER, *supra* note 7, at 189, 227.

115. This is one of the areas in which some theorists advance the case for actual liability-limiting contracts. See Epstein, *Medical Malpractice*, *supra* note 31, at 149.

116. See, e.g., P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 66-68 (1978).

dates or allows to happen. It means that the law asks only if the parties agreed. The law thereby fails to ask if the agreement was fair.<sup>117</sup>

a. *The Prison of Abstraction*

In addition to the limits imposed by the prison of the autonomous world view, neocontract self-imposes a prison of abstraction. This tendency to abstraction is evident in the IC school, by definition, because the theorists must imagine what people would agree on, in an unreal state of impartiality.<sup>118</sup> This abstraction is chosen deliberately. Without it, no nice, neat theory of the just and the unjust can be constructed. If consensual arrangements are at the heart of what Americans believe just,<sup>119</sup> then, according to the IC school, the way to attain justice in tort rules is to determine rules upon which people would agree.

Although useful, this analytic tool is dangerous, precisely because of its apparent neutral scientific rigor, deriving tort rules carefully from first principles discovered in consent-based analysis.<sup>120</sup> Such apparent scientific rigor masks the biased nature of the later-required imagining. That imagining amounts to little more than the particular theorist's notions about what people like he would agree to, given the need to attend to possible bad outcomes.<sup>121</sup> More insidiously, the images of the agreeing group that neocontractualists carry around with them tend to be of people like them, particularly in terms of gender and race.<sup>122</sup> Because these people are imagined, they tend to lack

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117. For a more detailed critique of contractualist tunnel-vision along these lines, see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 104-122 (1982).

118. The AC school also is considerably abstract. It initially seems more concrete because it would have tort situations settled by actual agreements among real people. At least in the pure AC school, theorists do not predetermine the agreement. The AC school theorists, however, also imagine what that world of actual agreements would look like. As will be noted *infra* text accompanying notes 185-209, that abstraction creates difficulties for the AC school, because it significantly blurs the theorists' vision as to what that actual contracting world will look like.

119. See Schwartz, *Proposals*, *supra* note 16, at 357.

120. Alan Schwartz's article is an extremely good example of legal rules carefully deduced from seemingly obvious starting points. *Id.*

121. For example, Richard Epstein's concern about protection of the watchful and skilful consumer. Epstein, *Products Liability*, *supra* note 28, at 660. Epstein clearly sees himself in that group. See, e.g., *Session One Discussion*, *supra* note 11, at 2236. Accordingly, he will imagine agreements more like those watchful and skilful people will make.

122. See, e.g., Matsuda, *supra* note 19, at 615-17; Okin, *Justice and Gender*,

the full complexity of real people.<sup>123</sup>

Not only is this imagining likely to be inaccurate, it is also likely to be incomplete. We can learn something about principles of justice by the attempts of neocontractualists to derive such principles from the imagined agreements of imaginary people. We could learn as much by trying to derive these first principles of justice from people's shared experiences. Feminist scholars increasingly look to consciousness-raising — the sharing of life experiences among members of a group — as a method of legal philosophy for discovering basic justice principles.<sup>124</sup> This same idea of a collective focus on the particularities of real-life experience as critical to justice determinations forms part of John Attanasio's philosophy of aggregate autonomy.<sup>125</sup> Neocontractual analysis seeks to abstract real-world problems. Tort currently does just the opposite: for the most part, its rules are molded in the context of actual cases and controversies, involving real injuries, real people and real events. Because the law seeks sensibly to solve the problems tort situations pose, a place as divorced from reality as the IC school is not the best place to look for a just solution to those problems.

## 2. Missing realities

Another significant problem with the predetermined law of neocontract, clearly related to its abstract character, is its characteristic blindness to certain kinds of realities, a blindness not shared by tort. I discuss in Part II. B. the particularly important pieces of reality undercutting both the AC and IC-insurance<sup>126</sup> schools of neocontract. This section explains the dissonance between the neocontractual theorists' views of reality and reality itself.

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16 PHIL. & PUB. AFF. 42, 45-47, 69-72 (1987). This is not to say that IC school theorists are racist or sexist, or that they see a homogeneous agreeing group. Rather, the nature of the process of imagining agreements leads to conclusions that will differ depending on who the imaginers are. If we need to think deeply about what people will agree to, we are likely to imagine their reactions based on our own reactions and those of persons we know best. That naturally builds a "like-us" bias into the imaginings, which in turn mutes the imaginings of those unlike us. Such persons are particularly likely to include those of a different race.

123. Okin, *supra* note 122, at 71-72.

124. See, e.g., Matsuda, *supra* note 19, at 622.

125. Attanasio, *supra* note 19, at 700.

126. The IC-insurance school of neocontract is that part of the imagined contracts school of neocontract that deduces optimal levels of compensation in tort law from the insurance decisions of individuals. See *supra* notes 48-63 and accompanying text.

This dissonance stems in part from the autonomy/abstraction characteristics of neocontract just discussed. It also stems from the related theoretical mindset of the neocontractualists. They offer a particular theory as *the* guide to the decision of all tort situations. It is no surprise that this form of analysis has grown more prominent in tort: tort scholarship in the 1980s has tended increasingly to the theoretical.<sup>127</sup> The danger, again, lies in overemphasis on theory, which is just what the neocontractualists do.<sup>128</sup> Theory itself is much to blame, as is the particular theoretical viewpoint of neocontract.

A quasi-religious "right vision" seems to persist in heavily theoretical approaches to tort. The most obvious example is the work of Richard Posner, which by its abundance and breadth of intelligence and information<sup>129</sup> has dominated the use of economic analysis in tort. Although awed and influenced by Posner's work, I am not persuaded that tort law runs almost unflinchingly on the efficiency track. Judge Posner's writing leaves me with the sense that were he to spend a day with my family, he would be able to write an article explaining all of our behavior — why we talk to the dog; why we go to the bathroom; why we eat, sleep, and drink as we do; why we play Guess Who instead of Sorry; — as fully consistent with his theories.<sup>130</sup> That simply is not consistent with my experience of how my life works.

Neocontract, of course, has its own theoretical constructs—for example, autonomy and the separation thesis discussed in the preceding subsection. Its slavish devotion to its theory, however, is no different than Posner's. This is illustrated in the detailed architecture of Alan Schwartz's consumer sovereignty

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127. See Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 764 (1985).

128. It is just what tort law does not do, given its context of individual cases and the presence of juries.

129. Posner's early works explicating the economic basis for legal decision fell to a large extent into the tort area. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Posner writes more than almost anyone. He displays the breadth of his knowledge in a work that analyzes the relevance of Aristotelian ethics to his wealth maximization theory about law. See Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981). His fullest thinking is embodied in R. POSNER AND W. LANDES, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

130. This may sound unfair to Posner, a serious and often brilliant scholar. It is not meant to slight his work. Nevertheless, these feelings comprise an important and dominant part of my reaction to his work as a whole. My conversations with other law teachers convince me my reactions are not idiosyncratic.

theory,<sup>131</sup> in the discovered and embraced contractarian theory of Kim Scheppele,<sup>132</sup> in the common insurance as optimal compensation theory,<sup>133</sup> and in other neocontractual approaches.

These theories work for some people, some times, in some circumstances. How well they work will depend on time, place, culture, and conditions. If you have people who value only autonomy, then neocontract is for you. If you have people who are all rational wealth maximizers, then step right up to the wealth maximization system. What seems right for Americans may not seem right for the Chinese. The tort law of the Depression and of the sixties may not seem right for the nineties. The problem is, of course, that most of us have a fair number of the characteristics that we ascribe to different times, places, or cultures mixed in with more dominant characteristics. Theory, including neocontractual theory, does not allow for those other characteristics — non-rationality, community, unstructuredness — to come in when decisions about law are being made. As a result, theory-driven decisions about law are incomplete. They do not fit very well with people's lived experience. Recognition of this has led some respected recent scholarship to emphasize that examiners of tort rules must pay close attention to important differences in fact patterns that arise in different types of accident settings.<sup>134</sup>

Neocontractual theory seems particularly ill-equipped to pay that sort of close attention. Neocontract, it must be remembered, espouses decisions made *ex ante*, in the "coolness of the beforehand."<sup>135</sup> It views tort disdainfully as "emotional, reactive, and coercive."<sup>136</sup> Unfortunately, the world of accidental injuries is full of emotion and pain. It is a messy world, in which the unexpected happens, throwing people's lives into an unpredictable uproar. Tort law already imposes substantial order on this world by requiring any injured person who wishes to obtain compensation to fit her unique situation into certain preformed pigeonholes, such as, "negligence" and "causation." It may be, as the neocontractualists would argue, that it is desirable to impose even more order on that messy world, and to

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131. See Schwartz, *Proposals*, *supra* note 16, at 357-67.

132. See K. SCHEPPELE, *supra* note 10, at 301.

133. See, e.g., Danzon, *supra* note 54, at 520-33.

134. Calabresi and Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 626 (1985); Komesar, *Injuries and Institutions: Tort Reform, Tort Theory and Beyond*, 65 N.Y.U. L. REV. 23, 33-50 (1990).

135. P. HUBER, *supra* note 7, at 226.

136. *Id.* at 191.

impose it from a place that is quite far away from the heat and messiness. To the extent that is done, much of the reality of the world of accidents will be drained from the decisions about its rules.<sup>137</sup> For example, Peter Huber is able from his detached viewpoint to see litigation over the allegedly harmful effects of the drug Bendectin as symptomatic of the irrationality of the tort system.<sup>138</sup> Most courts and juries found that the allegedly teratogenic drug did not cause birth defects. Some found that it did. Huber paints a horrific picture of the effects of such inconsistent judgments.<sup>139</sup> What he fails to acknowledge is that such inconsistency may more accurately reflect reality than would a uniform response to the same legal issue of causation. That so many of the Bendectin cases went to trial strongly suggests that plaintiffs' lawyers found enough evidence connecting Bendectin to their clients' birth defects to give them a good chance of convincing a jury and reviewing judges that causation existed. Because losing plaintiffs' lawyers come away emptyhanded, and because they will not be in business long if they come away empty too often, their judgments have the ring of sincerity and some authority. In light of whatever evidence was so convincing to plaintiffs' lawyers, a situation in which Bendectin is absolved from responsibility in most cases may show simply that it *probably* did not cause the plaintiffs' birth defects, although it *may* have.<sup>140</sup> That is inconsistent. It sends

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137. I am reminded of a film I saw the night before organizing this section of this Article: *The Dream Team*, starring, among others, Michael Keaton. The film is about the adventures of four seriously mentally ill patients, accidentally released onto the streets of New York City for a few days. One of the four constantly tries to impose order on his disorderly world. In one scene, he takes forever to traverse a city block, because he is constantly picking up the litter left by other people. He then follows one litterer into a bar and sits between two men who eat and drink sloppily. When the lunatic chastises each of his neighbors and tries to nag them into cleaning up their spaces, they turn on him angrily and toss him back into the street. Perhaps these segments of the film are a useful reminder that attempting to impose too much order on a messy world can be viewed in some contexts as madness.

138. P. HUBER, *supra* note 7, at 102.

139. *Id.* at 209.

140. I use the example of Bendectin because Huber pays considerable attention to it. He asserts that the scientific evidence overwhelmingly shows Bendectin does not cause birth defects. *Id.* at 102. I am not in a position to evaluate Huber's knowledge about Bendectin. Others who have checked carefully into some of his book's factual conclusions have found them occasionally inaccurate. See, e.g., Hager, *supra* note 7, at 571; Henderson and Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479, 481 n.7 (1990). Regardless, if a case can make it past a trial judge's review of motions for a directed verdict and for judgment notwithstanding the verdict, past a jury's group consideration of carefully

unclear messages. And, it reflects realities. There may be more orderliness and clarity when decisions are made *ex ante*. Such orderliness and clarity may be undesirable when the rules attempt to reflect a disorderly and unclear world. An accurate portrait of a blurry scene is a blurry portrait.<sup>141</sup>

### 3. Disempowering victims

One of the themes recurring in even contractarian discussions about just societies is the need to attend to those persons who lose as a result of law-created social arrangements.<sup>142</sup> Such persons, accident victims, traditionally have been the focus of tort law. Because tort rules often receive their impetus and direction from the goal of deterring unsafe behavior, tort also is concerned with potential victims. Nevertheless, its main concern always has been actual victims. Neocontract, on the other hand, is concerned primarily with non-victims. It does much less for injured people than does tort, under either school of neocontractual thought.<sup>143</sup> Predetermined law proves problematic to the extent that concern for victims is a valid societal goal.

Neocontractual theorists would rightly respond by pointing out that by having actual *ex ante* agreements, or by reducing tort recoveries to take account of what people would have agreed to *ex ante*, people generally would be better off, and ac-

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presented evidence, and past an appellate court's scrutiny of the sufficiency of the evidence, it would seem that at least some impartial people, more directly informed than Mr. Huber, do not share his view that the scientific evidence is so overwhelming against causation.

141. See Scales, *supra* note 99, at 1388; see also L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 71, at 34 (G. Anscombe trans., 3d ed. 1953): "Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?").

142. John Rawls, the leading modern exponent of contractarian analysis (i.e., looking at what people in the "original position" would agree to, to determine first principles of a just society) articulated the "difference principle" as a central feature of his theory of justice. That principle requires that decisions about the distributions of benefits in society should not worsen the condition of the least disadvantaged members of society. J. RAWLS, *supra* note 10, at 78-83; see also K. SCHEPPELE, *supra* note 10, at 311-12 (stating that in a contractarian society, "members are routinely concerned with making social and political institutions acceptable to those who might be adversely affected by them").

143. Neocontract of the kind articulated by Jeffrey O'Connell would not attend less well to injury victims than would tort, because the victims would retain real choice: the ability to sue in tort if they so desired. See *supra* text accompanying notes 42-43.

tual victims would be unsubstantially worse off.<sup>144</sup> It is not clear that this is so, as Part II. C. discusses. Nevertheless, it seems probable that, due to the high transaction costs of the tort system, almost any neocontractual plan would put more money in consumers' hands than they have with the tort system. Of course, consumers will have given up a substantial amount of "goods" to get that additional money.<sup>145</sup>

One of the principal losses for consumers will be power; power in the sense of that same self-determination that concerns neocontractualists. Predetermined law glories in the idea that choice is returned to individuals, and, thus, empowers them.<sup>146</sup> Despite these claims, neocontract offers consumers limited choices. It is potential injurers, the real focus of the AC school,<sup>147</sup> who gain substantial choice under its theories. At the same time, consumers have substantially less choice and substantially less individual power under neocontract, particularly if those consumers are injured.

On this point, it is important to recognize that when the AC school of neocontractualists talks of giving people more choice, it is focusing on the choices available to potential injurers, not potential victims.<sup>148</sup> I will discuss later how tort gives recipients/victims more real choice and neocontract less choice than the neocontractualists contend.<sup>149</sup> Neocontract gives consumers access to some goods and services that a court might find unreasonably dangerous. It also makes many goods and services more affordable by lowering providers' liability costs. That greater affordability must be discounted by the amount

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144. See, e.g., Schwartz, *Proposals*, *supra* note 16, at 357-61.

145. Consumers will have more money either because they will be given money in exchange for giving up some of their future tort rights, or because goods and services will become cheaper, as a result of reductions in providers' liability costs. What consumers will give up, in terms of safety and compensation, to get that additional money will be discussed *infra* text accompanying notes 226-57.

146. See, e.g., P. HUBER, *supra* note 7, at 207-13.

147. The writings of Huber and Epstein, who are at the forefront of the AC school, focus overwhelmingly on the problems posed for providers of goods and services, and their insurers, by current tort law. See, e.g., P. HUBER, *supra* note 7, at 227; Epstein, *Unintended Revolution*, *supra* note 31, at 2196; Epstein, *Products Liability*, *supra* note 28, at 646; Huber, *supra* note 65, at 279.

148. Of course there is no neat test that divides us into potential injurer and victim categories. We are more obviously in one category or the other. Some persons and entities are more clearly potential injurers much of the time; for example, surgeons and pesticide manufacturers. The neocontractualists focus more on the choices of those in the potential injurer role.

149. See *infra* text accompanying notes 227-40.

the consumer would pay to replace the health, wage, and suffering insurance the tort system previously provided.

In contrast to this rather modest gain in choice for consumers, providers of goods and services will find their choices expanded tremendously under the AC school. They will be able to choose whether to expose themselves to liability to their consumers. Even if a cushion of some minimal compensation is required, the providers still will have choice of designs, behaviors, and processes available that they previously considered unavailable. That perceived unavailability occurs because the providers thought there was a serious chance courts would find that choice unreasonable. In fact, behavior choices that would have been ruled unreasonable will be available because providers no longer will face the prospect of paying full injury costs.<sup>150</sup>

More important in this analysis of choice is to recognize the substantial loss of choice and loss of autonomy for the potential victim and the actual victim that will result from neocontract. All of us potential victims will lose choice because providers will have a weaker or nonexistent incentive to pay attention to us, an incentive now provided by our threat to use the tort system if injured.<sup>151</sup> All of us, potential and actual victims alike, will lose choice because neocontract would remove the pressure to develop new legal theories of accountability.<sup>152</sup> That pressure will dissipate because people will not get goods or services in the absence of an agreement not to sue in tort, and thus, tort suits in many fields will disappear. To get a sense of the significance of such a development, think about what the legal rules determining responsibility for injury-causing behavior would look like now if they had been frozen in place by a similar neocontractual system thirty or forty years ago.<sup>153</sup> Think, too,

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150. *See id.* By full injury costs, I mean the dollar amount a jury would award an injured person if focusing solely on the traditional judicial instruction that they award damages sufficient to make the plaintiff whole, to return him to the position he would have been in had the defendant not behaved unreasonably.

151. For a fuller treatment of this idea, see the discussion *supra* text accompanying notes 103-04.

152. *See, e.g.,* Galanter, Bhopal in America, America in Bhopal: Legal Responses to Industrial Disaster 5-6 (Jan. 8, 1988) (unpublished paper on file with author) (comparing role of lawyer in tort in the United States and India).

153. Think, for example, whether there would be any woman in 1949 who would not have signed willingly a waiver of any rights to recover damages for loss of consortium she might suffer from a defendant's product. Tort law then gave her no right to such damages. If such waivers had been validated by courts, would the law have moved, beginning with *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), to recognize a wife's

about hazards such as asbestos, the Dalkon Shield, and the Pinto gas tank, which would never have been addressed by government regulators had societal views of responsibility not been pushed forward by tort suits. In addition, all of us will lose choices under neocontract as large enterprises move even further from social controls. Tort law now makes a large corporation accountable by calling it before a court to accept responsibility for injuries it causes. This ethic of accountability will decline as injuries become just another statistically certain cost, paid off by the accounting department.

It will be the victim herself who will face the major loss of autonomy. Accidents that maim or kill impose severe constraints on choice, perhaps the most severe people ever face.<sup>154</sup> In the actual contract regime, injured persons faced with such severe constraints will suddenly find they have given up one of the very few slices of power provided the injured in our society: the power provided to victims by tort.

This empowerment comes in several forms. First, tort gives the victim the opportunity to tell her story about the awfulness of what happened to her.<sup>155</sup> She will be assisted in presenting that story by a trained articulator. She will be heard by a judge and jury, symbols of justice and of his community. This opportunity to speak and be heard about personal tragedy may be the most important feature of tort for accident victims, more important in some ways than obtaining monetary compensation.<sup>156</sup> There also is a strong community interest in hearing the voices of those who have been seriously wronged, an interest reflected in the extraordinary openness of American courts to citizen complaints.

Second, tort provides seriously injured persons<sup>157</sup> with an

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cause of action for loss of consortium? Such recognition has become the law throughout the United States. These decisions have furthered the legal rights and status of women.

154. See, e.g., Attanasio, *supra* note 19, at 724.

155. This seemed an important object to many of the veterans and their families who brought suit against the chemical companies who supplied Agent Orange. At the hearings concerning the fairness of the class action settlement in that case, the class members frequently spoke of the importance of their "day in court," when they would have the opportunity to tell their stories to people who would listen carefully and respond morally. P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 174-77 (1986).

156. A New Jersey study found that the objective individual litigants' most common reason for participating in adjudicatory proceedings was "to tell my side of the story." Hensler, *supra* note 82, at 99.

157. I purposely focus on seriously injured persons in talking about the disempowering effects of neocontract. Such a focus seems most consistent with

important measure of control over their own lives. Most such persons suffer considerably, both physically and emotionally from their injuries.<sup>158</sup> Tort gives such persons the power to call to account those who have injured them. Victims find powerful allies in the form of plaintiffs' personal injury lawyers. With that strong assistance, the victim can require a response from those she believes injured her. Unlike injurers in the neocontractual scheme, injurers sued in tort cannot ignore the victim, no matter how much bigger, stronger, and more important they are. The victim is able to get information about what happened.<sup>159</sup> The claimed injurers must answer her questions and charges, in a setting in which she will have the opportunity to challenge their versions of what happened. Should she win, or obtain a settlement, the victim will have received some independent validation of her suffering.<sup>160</sup> She very likely will feel some satisfaction at having punished her injurer and at having sent a message to those like her injurer that they cannot act in that injury-producing manner with impunity.<sup>161</sup> One psychological study of litigation concluded that successful resolution of a lawsuit was an important factor in the improved mental health of victims traumatized by a disaster.<sup>162</sup> In sum, tort permits the victim to reassert control over her own life, both by the manner in which it proceeds and by the financial boost that results from a favorable outcome.

Finally, when an injured person has sued, or may sue, an

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contractarian notions that any system of law must be justified, at least in part, by reference to its treatment of the least-advantaged. *See, e.g.*, K. SCHEPPELE, *supra* note 10, at 311. In addition, the law related to compensation for and prevention of injuries should be most concerned with those victims who most need the help offered by legal remedies. Mildly injured persons, for the most part, will be able to resume their normal lives without government intervention.

158. *See, e.g.*, Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 763 (1985) ("The victim's agony is not merely the physical pain, but the frightening realization that she has been destroyed as a person."); *see also* G. GLESER, B. GREEN & C. WINGET, *PROLONGED PSYCHOSOCIAL EFFECTS OF DISASTER: A STUDY OF BUFFALO CREEK* 64-66 (1981) [hereinafter *BUFFALO CREEK*] (reporting cases of psychopathology among disaster victims).

159. This seemed to be an important object of the Agent Orange litigation. *See* P. SCHUCK, *supra* note 155, at 256.

160. *See* *BUFFALO CREEK*, *supra* note 158, at 129.

161. This was a commonly expressed feeling after the citizens of Buffalo Creek, West Virginia settled their litigation against the coal company that had permitted a dam to break, flooding the valley where they lived. K. ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD* 248-49 (1976).

162. *BUFFALO CREEK*, *supra* note 158, at 129.

injurer, the latter must deal with that victim, and must deal with the realities of that victim's injuries. That dealing may happen in many forms: the alleged tortfeasor may play "hard-ball" litigation, may settle claims cheerfully or grudgingly, may assist the victim to put his life back together in nonmonetary ways, or may seek help in resolving a dispute with the victim from non-tort sources. Whatever the means, the injurer and injured will have to relate to one another, probably even more closely and intensely than they did before the accident.

This required relationship means that the solutions to the individual or group's accident problems in some way will be a joint solution: the parties will have worked on it together.<sup>163</sup> They will have done that work in the context of what really happened. Were the accident situation governed by a contractual clause drawn up by the parties long before the accident, the parties would have crafted a solution to the problems posed by the accident in a faraway world of imagining about what the accident problems might be. That faraway world would be at an even greater distance because the imagining at the time of contract formation would have focused on classes of potential victims and accidents, rather than on the particular injured individual or the particular situation.

Unlike neocontract, tort has no predetermined law created in a faraway place. The injurer must deal with the victim and the situation as it really is. This reality-based "dealing" creates the potential for transforming accident situations, and the relations between victims and injurers or society, in satisfying ways. As a result of the present threat of litigation and judgment, tort creates a constant pressure on the parties to create a mutually satisfying relationship, even if only a relationship of payor and payee.<sup>164</sup> Tort, by not allowing injurers to walk away from victims, creates many possibilities: new kinds of settlements, such as structured settlements that more fully meet each party's needs;<sup>165</sup> new forms of dispute resolution, such as

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163. Even if the solution takes the form of a judgment for or against one of the parties by a third party, such as a court, the result will be one in which the parties have worked in relation to one another throughout the process. To a large extent, the nature of that relationship will dictate the final result chosen by a judge or jury, although the final result will more obviously come from the parties if they are able to construct some solution.

164. Or, (to put it in neocontractualist terms) which maximizes joint utility.

165. See generally D. HINDERT, J. DEHNER & P. HINDERT, *STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS* (1986).

the Wellington Agreement that guided some of the asbestos litigation;<sup>166</sup> and even new non-monetary ways of dealing with accidental injury, such as reportedly occurred in Japan after an airplane crash, when the president of the airline personally went to the homes of the victims' families to apologize.<sup>167</sup>

As the above subsections show, the *ex ante* style of dispute resolution and the philosophy underlying neocontractual analysis unnecessarily limit the search for substantive justice and individual fulfillment in the context of accidental injuries. The next subsection examines the blindness of neocontract to particular realities of the accident world. The following subsection discusses the substantial benefits, in addition to self-determination, people now gain from tort law.

## B. THE FLAWED VISION OF REALITY

As we have seen, a prime characteristic of an *ex ante* approach to problem solving is its abstraction, its distance from the reality of the problems it seeks to solve. That characteristic, therefore, places a premium on clear vision: if you are going to decide matters before they happen, you better be a good prognosticator. The neocontractual theorists who have brought their pre-vision to bear on tort situations are not.

The neocontractualists' flawed vision of reality shows up principally in three areas. First, they are inadequate imaginers of reality. Second, the AC school in particular posits a decision-making system of actual agreements that misperceives people's relative abilities to make agreements about future risks, and that cannot work logistically. Finally, the AC school's imaginings designed to ascertain optimal compensation levels for tort have both a misguided analytical look and an incomplete understanding of what tort provides.

### 1. Inadequate Imaginings

Because neocontract insists on deciding what will happen in tort situations *ex ante*, it must imagine the decisional rules to which people would agree. Except for the "pure" approach to actual contract, the same is true for the theorists of the AC school. They must decide on the nature of the "cushion" or the limited kinds of transactions that will frame the actual con-

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166. See Wellington, *Asbestos: The Private Management of A Public Problem*, 33 CLEV. ST. L. REV. 375, 378-90 (1984-85).

167. See Wagatsuma & Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 488 (1986).

tracts.<sup>168</sup> The fact that this imagining is done from a distance makes it very likely that decisions will distort reality. This likelihood of distortion is confirmed by some of the imaginings of the principal theorists.

In the section on the abstract nature of the neocontractualist approach,<sup>169</sup> I pointed out some of the reality-perceiving flaws inherent in imagining. Such imaginings cannot help but reflect the particular ideas and values of the theorist. For example, should Richard Posner start looking for a consumer sovereignty norm to govern products liability law, he probably would imagine wealth maximization as the most important value of the people.<sup>170</sup> More significantly, the imaginers of tort theory have been, and are likely to remain, dominantly white male legal academics. Critics of Rawls-like approaches, such as those offered by the neocontractualists, argue that these authors are inevitably ethnocentric in imagining about agreeing people.<sup>171</sup> The people are like them. Not surprisingly, the one woman in the fore of current neocontractual thought, Kim Scheppele, has articulated a contractarian theory of law focusing more on equality and community.<sup>172</sup>

These flaws inherent in the technique of *ex ante* imagining show up in the actual imaginings of the major tort-focused theorists. Huber, for example, has written that Americans generally are "[a] nation of hypochondriacs, . . . developing a phobia toward technology worthy of a primitive tribe."<sup>173</sup> Epstein, talking about consumer information, emphasizes the availabil-

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168. See *supra* text accompanying notes 37-47.

169. See *supra* text accompanying notes 98-125.

170. See, e.g., Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811, 814 (1980); Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 85, 85 (1985). Interestingly, the particular era in which one does one's imagining is likely to influence how even the impartial persons in the original position are perceived. See, e.g., Linzer, *supra* note 11, at 158 (arguing that the message of Ian Macneil's writings, that parties in relational contracts frequently temper wealth maximization goals with other objectives, has had much less impact on scholars than his other messages, "probably because it is politically unpopular and academically unfashionable in this era of Me Generation wealth maximization").

171. See, e.g., Matsuda, *supra* note 19, at 619, 624-28; Okin, *supra* note 122, at 69-72.

172. K. SCHEPELE, *supra* note 10, at 85. Scheppele creates a sense throughout her book that she looks much harder than do the other neocontractualists to try to see people as they really are and would be. See, e.g., *id.* at 75.

173. Huber, *Electrophobia*, FORBES, Sept. 4, 1989, at 313.

ity of information in *Consumer Reports*.<sup>174</sup> People like Epstein and I read *Consumer Reports*. Most do not. Many cannot even read. They are not included in his imaginings about people who make agreements. Given Huber's apparent disdain for his fellow citizens, it is unclear who *would be* included in his imaginings. Substantively more serious, albeit less procedurally alarming, is the imagining engaged in by Alan Schwartz in his carefully constructed consumer sovereignty model for products liability rule-determination.<sup>175</sup> In asking what should be the "meta rule" to determine products liability law, Schwartz identifies two candidates: a maximin rule, which would direct persons to secure the best possible outcome in the worst state that could occur; and a utility maximization rule. In less than a paragraph, Schwartz dismisses the candidacy of the maximin rule, largely because his imagined agree-ers "would know that the worst outcome — incurring serious, completely uncompensated injury — is substantially mitigated by existing social safety nets."<sup>176</sup> Certainly the imagined people who "know" this fact do not include the homeless people Professor Schwartz must encounter frequently on the streets of New Haven. These imaginers apparently do not include ten per cent of the nation's children, who not only live in poverty, but do not even receive Medicaid health care.<sup>177</sup> And, missing from that group of imaginers seems to be anyone who suffered a serious injury and was among the eighty per cent of the workforce not protected by private, long-term disability insurance.<sup>178</sup> Working with theories in which small differences in the imagined bargainers can lead to large differences in the rule results,<sup>179</sup> one can hardly feel sanguine about the nature of the rules about accidents derived by neocontractual analysts.

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174. *Session One Discussion*, *supra* note 11, at 2235.

175. Schwartz, *Proposals*, *supra* note 16, at 357-60.

176. *Id.* at 359.

177. See Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L. J. 577, 581 (1989) (reporting that one out of every five children is living in poverty); *Study Says Medicaid Lags for Poor Children*, N.Y. Times, Oct. 23, 1989, at A17, col. 1 (reporting a study by the National Association of Children's Hospitals and Related Institutions stating that only half of all poor children are covered by Medicaid).

178. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 900 n.121 (1987). Such persons might find protection from wage loss under Social Security Disability Insurance, but such insurance replaces only from 45 to 80% of income subject to social security tax, and only after a five-month wait. See S. SUGARMAN, *supra* note 44, at 130.

179. Ackerman, *supra* note 18, at 902.

In light of the concerns raised here about whether the neocontractual imaginers *can* satisfactorily get in touch with reality, one might well ask whether such imaginings are necessary. Such questioning leads back to the variation on AC school analysis advanced by Jeffrey O'Connell.<sup>180</sup> O'Connell long has been concerned with what people really want, particularly if they are injured or an injurer.<sup>181</sup> He believes people want relatively quick payment of their economic losses.<sup>182</sup> Accordingly, he presented a products liability proposal that would have required claimants to accept a defendant's offer to pay their net economic loss.<sup>183</sup> Subsequently, O'Connell seems to have realized that if this is what people really want, then they need not be coerced into taking it. As a result, he now proposes that consumers and providers agree *ex ante* that the provider will offer payment of net economic loss if the consumer is injured by its good or service, and that the consumer then may choose to accept or reject the offer.<sup>184</sup> This proposal suggests an acceptable way for testing hypotheses about what people really want in their tort rules and compensation. Such testing could mean that tort law need not end up blind to what real people really want.

## 2. The Misperceiving, Mismanaging AC System

The AC school is a more serious offender in misperceiving reality. This school essentially seeks to replace the tort system with a system of private contract.<sup>185</sup> It is full of optimism about the potential of this change for correcting the ills of the tort

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180. See O'Connell, *Neo No-Fault*, *supra* note 40, at 906-10. For a fuller presentation of his variation, see *supra* text accompanying notes 40-43.

181. See O'Connell, *Neo No-Fault*, *supra* note 40, at 905-06. With his particular focus on what an injury victim might want, O'Connell, unlike some of the neocontractualists, operates consistently with the traditional contractarian focus on the effects of rules on the least advantaged.

182. *Id.* at 901, 911.

183. See Moore & O'Connell, *Foreclosing Medical Claims By Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267, 1279-84 (1984).

184. O'Connell, *Neo No-Fault*, *supra* note 40, at 906-07.

185. Neither Huber nor Epstein ever spell out a full-blown theory of how their actual contract systems will work. At times, Huber seems downright modest about his ambitions, declaiming that all he seeks is that providers have the power to disclaim tort liability for personal injury. *Session Three Discussion*, *supra* note 33, at 2339. What they want is for providers' and consumers' actual agreements to govern. They are willing to let law set default rules, those that would govern tort liability in the absence of an agreement by the parties. Huber recognizes that institutional providers would move quickly to make use of such disclaimers. See, e.g., P. HUBER, *supra* note 7, at 60-61.

system, as is typical of free market advocates. True to their abstract nature, however, the neocontractual theorists do not heed obvious social realities. Those realities include: a serious imbalance between providers and consumers in information about risk; the likelihood that people have a flawed understanding of the risks they take; and the presence of overwhelming obstacles to the execution of such agreements, even if providers deal with well-informed consumers.

Some aspects of the workings of the AC private contract system are clear, and some aspects are fuzzy. Clearly there are imbalances in information and understanding about the risk of injury from certain goods and services. The provider usually has significantly greater understanding of the risk factors than does the consumer. It is clear that consumers generally have some difficulty processing information about risk. The extent of those difficulties is unclear, as is whether those difficulties will cause consumers to underestimate or overestimate risk. It is clear that actual agreements on any basis other than "take it or leave it" are very unlikely. Under such circumstances, a system that invites providers to bypass long-standing social prohibitions against unreasonable injury-causing behavior is insupportable.

a. *Information Imbalances*

Providers generally have much greater access to information about risk and a greater stake in acquiring that information than consumers. Providers have much more access to information because they usually provide one sort of service or one kind of product repeatedly. A consumer, even a repeat consumer, consumes that good or service *much* less frequently than the provider provides it. Providers learn about injuries because injured consumers complain. Consumers usually do not learn about those injuries unless they receive substantial publicity or unless they or their friends are injured. Likewise, the provider has a greater incentive to obtain information about risk. If the product has risks of personal injury associated with it, the provider has a significant incentive to discover those risks, because there is a substantial chance that some injured person(s) will sue him in tort. The consumer may or may not have a significant incentive to discover the risks, depending on whether the good or service poses a high risk. Most goods and services will pose a low risk of harm to any individual but pose a fairly high risk of some harm, in the form of a tort suit, to

any provider. Therefore, the provider generally has a much greater ability and incentive than the consumer to determine the risks associated with the product.<sup>186</sup>

The implications of this information imbalance are unclear, ominously so for consumers. Consumers were shellacked in the political process in the 1980s tort rights battles, as collections of providers more determinedly pursued these goals than did consumers.<sup>187</sup> In fact, the only entity with a continuing pro-plaintiff stake in the tort system, the plaintiffs' personal injury bar, was the only significant player on the side of the potential victim during the battles over tort "reform." No such "champion" will be involved on behalf of the less-informed consumer in the actual agreements contemplated by the AC school. Lack of representation creates the opportunity for providers to take advantage of consumers, in the sense of using their superior understanding of risk factors to gain an advantage they would not have if consumers shared that understanding. Economic theorizing indicates both that firms do<sup>188</sup> and do not<sup>189</sup> take advantage of consumers with respect to warranty terms in the face of information imbalance. Common sense suggests that providers of goods and services will face considerable incentives to take advantage of consumers in the AC system. Providers will wish to pay as little as possible for the waivers of tort liability. They will pay less if consumers believe the thing provided is not very dangerous. Therefore, the providers will have an economic incentive to downplay the dangers of their products. The market

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186. For a more detailed exposition of this idea, see Komesar, *supra* note 134, at 38-41. It is possible that tort will exacerbate the information imbalance, as people fear that providing information about risk will facilitate and encourage tort lawsuits against them. See, e.g., Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795, 1817-18 (1989). On the other hand, much of our knowledge about the dangers of highly dangerous substances, such as asbestos, certain IUDs, and all-terrain vehicles, has come from tort suits.

187. Neil Komesar notes that such imbalance in political participation between potential injurers and potential victims is a natural outgrowth of the common tort situations. For example, in most products liability cases, the perceived risk of harm to the potential injurer is high, while the perceived risk to the potential victim is low. Komesar, *supra* note 134, at 34-35.

188. The firms exploit shopping difficulties by charging inefficiently high prices. Schwartz, *Proposals*, *supra* note 16, at 371, 374; see also Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 673-74 (1979) (noting that when comparative price and term information is available to consumers, markets behave competitively).

189. See Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. AND ECON. 67, at 79-80 (1973).

seems unlikely to correct such behavior, because providers who start paying more money than their competitors for tort waivers risk being perceived as providers of more dangerous goods and services. Besides, there has been no indication of competition with respect to warranties of safety in the past.<sup>190</sup> Huber suggests the law could require full disclosure of information about risk to the consumer.<sup>191</sup> The courts, however, will provide little check on less-than-full information disclosure. Most injured persons do not make claims now, even with the full panoply of tort rights available to them.<sup>192</sup> Far fewer persons are likely to bring an action to court when faced with a written agreement expressly giving up the tort claim. Should an action reach court, the judge or jury will face the murky issue of how much information about risk is enough to validate a tort waiver. Similar issues in the law of informed consent and defective warnings have generated considerable confusion.<sup>193</sup>

b. *Consumer Misunderstanding*

Beyond the problem of information imbalance lies the difficulty consumers have in gaining an accurate understanding of risk of personal injury. If the AC system is to work, a minimal prerequisite must be that persons giving up their rights to sue in tort at least have a pretty good idea about the risks they face. There is serious doubt about whether consumers will have adequate information, doubt which is not seriously enough heeded by the AC school theorists.<sup>194</sup>

Underlying this doubt are two principal problems: consumers may not get adequate information about risk and they may not understand the information adequately when they get it. Either problem may lead to systematic consumer underestima-

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190. See *Session One Discussion*, *supra* note 11, at 2232-33 (stating that in all the product warranties Priest examined for an article on that subject, no bargaining was going on between consumers and sellers with regard to personal injury).

191. P. HUBER, *supra* note 7, at 211-13.

192. See Abel, *supra* note 81, at 448-52.

193. See, e.g., Green, *When Toxic Worlds Collide: Regulatory and Common Law Prescriptions for Risk Communication*, 13 HARV. ENV. L. REV. 209, 219-20 (1989); Twerski & Cohen, *Informed Decisionmaking and the Law of Torts: The Myth of Justifiable Causation*, 1988 U. ILL. L. REV. 607, 613-15, 647.

194. The doubt is seriously heeded by Alan Schwartz. He posits that liability for defective products should be handled by the market. He then carefully identifies the nature of the imperfect information that might make resort to the market inappropriate, and carefully examines both the theoretical and experimental evidence relevant to that issue. Schwartz, *Proposals*, *supra* note 16, at 368-72.

tion of risk. This, in turn, will lead consumers to get too little compensation for the tort rights they gave up and will lead to underproduction of safety.<sup>195</sup>

The evidence about these problems seems inconclusive.<sup>196</sup> Working from similar databases, the most extensive legal investigations of these issues reach somewhat different conclusions. Howard Latin marshals substantial evidence from psychological literature on perception and cognition, which indicates that people do not accurately process the information provided them about risk.<sup>197</sup> Alan Schwartz asserts equally impressive evidence for the more cautious conclusion that there is no good proof that consumers misperceive risk, and that there is conflicting proof that they perceive risk accurately.<sup>198</sup>

Nevertheless, there are indications of potential problems serious enough to make us demand some assurances from the AC school that their system of actual agreements will operate with good consumer understanding of the rights they are giving up. Most of the risks for which providers will seek to disclaim liability will involve very small chances of injury for the consumer. People have difficulty perceiving a very small chance of injury as any chance at all. When the chance of injury is small, the cost to the consumer of obtaining and absorbing the information may exceed any likely benefit he will get from acquiring such understanding.<sup>199</sup> When the risk is small, and the desire for the product is substantial, the consumer most likely will just ignore the risk, preferring not to focus on the bad that can come along with a desirable commodity. This seems particularly likely with AC system agreements, which most probably will offer consumers either the good or service with the maxi-

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195. *Id.* at 371-77.

196. The evidence seems inconclusive to me. I have read much more than I now wish I had in an effort to find a satisfactory basis for a conclusion one way or the other on these matters. For the reader wishing to jump into the literature, I recommend beginning with Schwartz, *Proposals*, *supra* note 16, at 371-84, and Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677, 682-96 (1985).

197. Latin, *supra* note 196, at 682-96. Others share his view. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* 55-58 (1970); Fink, *Book Review: Consumer Safety Regulation: Putting a Price on Life and Limb* (Book Review), 22 COLUM. & SOC. PROBLEMS 551, 572-73 (1989).

198. Schwartz, *Proposals*, *supra* note 16, at 378-83. On this issue, one book well worth consulting is *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (D. Kahneman, P. Slovic & A. Tversky eds. 1982).

199. This is the prime reason Posner opposes contractual solutions to products liability situations. See Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 544-45 (1985).

mum disclaimer permissible, or no good or service at all.<sup>200</sup>

There are other indications that people have difficulty understanding the meaning of risk. The widespread use of cigarettes is a reminder that for many persons risks of harm some distance in the future effectively disappear from present view.<sup>201</sup> The existence of social security underscores that idea. The Social Security Administration exists because the government concluded that people cannot sufficiently perceive even the risk that they will get old and need money to support themselves. If people must be coerced to plan for the certainty of old age, we should look skeptically on their competence to ascertain the much less certain risks of accidental injury.

### c. *Impractical Implementation*

Whatever its theoretical attractions, the AC system quickly loses its attractiveness as one looks closely at how it will work. As with Guido Calabresi's "*Evil Deity*"<sup>202</sup> and Mark Twain's *War Prayer*,<sup>203</sup> when American society signs on with the AC school, it buys something more than just an increased pre-accident voice in its levels of accident compensation and expense. It also buys a new expensive process for reaching this desired outcome of supposedly greater choice. The process will add large financial costs. Providers in a position to contract with

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200. Priest reported that, in his studies of consumer warranties going back well before 1960, he had never seen one that provided for any liability for personal injuries. After he made that statement directly challenging Epstein's views of actual individualized contracts disclaiming liability, neither Epstein nor Huber challenged this evidence. Epstein even acknowledged this uniformity and proceeded to explain it as a rational market reaction. Session One Discussion, *supra* note 11, at 2232-34.

201. See G. CALABRESI, *supra* note 197, at 55-58.

202. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

203. In Mark Twain's short story *The War Prayer*, the local preacher leads the townspeople in an elaborate and sonorous prayer to God for victory on the occasion of the young men's departure to fight in the war. While the preacher, with his eyes closed and his breast swelling, invokes the aid of the Deity for the war effort, an old man, a messenger from God, walks up the church aisle and takes over the pulpit. The Messenger announces who he is, and expresses God's willingness to answer the prayer, as long as the populace is fully aware of just what it is they are asking for. The Messenger goes on to tell the "down" side of the prayer the congregation had just heard: that the young men of the enemy be destroyed, that their mothers and loved ones be crushed, that famine sweep their lands and that untold misery be heaped upon them. The Messenger reminds the Congregation that God is willing to grant their prayer, as long as they are fully aware of what it is they ask. M. TWAIN, *The War Prayer* in EUROPE AND ELSEWHERE 394-98 (1923).

significant numbers of consumers certainly will spend a considerable amount of money to ascertain which risks of injury, at what costs, they are willing to continue to bear, and which they wish to give up. Providers also face difficult decisions about how much choice of tort claim waiver to give to consumers. For example, should the consumer be given one price *with* producer/provider tort liability as it now stands and another supposedly lower price with that liability fully waived? Or should some gradations of the extent of the waiver be built in?<sup>204</sup>

After these difficult decisions are made, substantial work will be necessary to implement these decisions. Contracts will have to be written, with several alternative clauses provided to reflect different consumer "choices." Extensive training will be necessary, on a constant basis, for all who will deal with the public, so they can understand how to explain the choices available, and how to comprehend and record the choices consumers make. Massive records will be needed, to reflect who has chosen what protection. Once all those steps have been taken by potential injurers, the potential victims will be asked to spend a laughably excessive amount of time and effort in contracting.<sup>205</sup> In short, the AC system either will end up giving less protection per dollar spent on products because of the system's mas-

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204. Huber, apparently, would require building in some unspecified level of gradation. Despite his supposed adherence to a philosophy of "consent, not coercion," Huber would require that the actual liability-waiving contracts guarantee a minimum level of compensation to most injured persons. See P. HUBER, *supra* note 7, at 203.

205. Consumers would need to negotiate with respect to each good or service consumed. Imagining what the checkout line at my local grocery "super store" would look like in the AC School world is what leads me to term the situation laughable. Were individual people in fact to be given choice, even so minimal a choice as "with compensation for product/service caused injury" or "without compensation," ordinary weekly shopping trips would expand enormously in time. If the angry reactions of motorists who waited in gasoline lines during the oil crises of the 1970s is any indication, one might expect that lynch mobs would converge on the master-thinkers responsible for the "choice" with which they were provided. Cf. Landes and Posner, *supra* note 199, at 544 (presenting one example: "It hardly pays, when buying a case of beer, to enter into a contract specifying rights and duties in the event that one of the bottles of beer explodes in your face."). Landes and Posner astutely point out why the "laughable" situation described above would not develop: consumers will not spend any significant amount of time making decisions about whether or not to pay for tort protection against remote risks.

Even I pay no attention — none — to the chance that a mouse fetus might be in my Coca-Cola. As a torts teacher, I certainly have read enough about such situations. I even know a man who claims he drank part of a Coke containing a mouse. If I react thus, it seems unlikely that less-conscious consumers will focus at all on the tiny dangers inherent in most products and services.

sive transaction costs, or, as is more likely the case, the system will gravitate back to the total disclaimers of liability that characterized the pre-*Henningsen* world.<sup>206</sup>

In addition to the costs above described, consumers will bear significant non-financial costs under the AC system. Consumers will face repeated and significant decision-making costs associated with thinking about a probable outcome.<sup>207</sup> Likewise, they will face increased anxiety associated with uncertainty about the choices they have made.<sup>208</sup> They will face these costs even if they opt for the same level of protection afforded them by present tort law.

This latter critique of the AC system should make clear that this system will not work, at least not in the form imagined by Huber and Epstein, in which individuals or even groups of individuals could buy just the amount of "tort insurance" they wanted. Not only have the theorists, certainly the "pure" AC theorists, neglected the realities of imperfect information,<sup>209</sup> they also have neglected the realities of the agreeing process.

### 3. The Flawed "what-they're-willing-to-pay" Analysis

The final area worth mention, which demonstrates neocontract's lack of clear vision of reality, involves the wing of the IC school that has analyzed tort damages. Their analysis suggests tort damages should equal the amount and type of insurance an injured person would purchase voluntarily.<sup>210</sup> The types and amounts of insurance people buy are used as a surrogate to

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206. This is what is most likely to happen. See *supra* note 200, and accompanying text.

207. See Viscusi, Magat, and J. Huber, *An investigation of the rationality of consumer valuations of multiple health risks*, 18 RAND J. ECON. 465, 468-69 (1987). These are not insignificant costs. The empirical data collected by Viscusi and his co-authors indicate "striking evidence of the existence of a certainty premium," *id.* at 476, a willingness of consumers to pay more for a complete removal of risk than for a corresponding decrease in the amount of risk, *id.* at 468. The existence of the certainty premium is explained in part by the reduced anxiety that accompanies certainty, and by the removal of decision-making costs. *Id.* at 468-69. The certainty premium was substantial. See *id.* at 476-77.

208. *Id.* at 468-69.

209. Cooter and Sugarman, whose plan for a market in unmatured tort claims fits into the "modified" AC approach, specifically limited the nature of their proposed market because consumers would not have adequate information to evaluate liability limits or waivers presented to them. Cooter & Sugarman, *supra* note 41, at 181.

210. See *supra* text accompanying notes 54-57.

help the theorists determine what compensation people really want, given the costs thereof. As with several other neocontractual perspectives, this "pre-insurance" view can be a valuable analytical tool. It is misguided as *the* analytic tool for determining the appropriate level of tort damages because it blatantly ignores certain realities about people's lives. Using an insurance measure for damages reflects an inadequate understanding of what people get from the tort system. Equally significant, other equally valid measures of appropriate compensation are available as surrogates for what people want.

Neocontractual analysis of the pre-insurance type reasons in a way I understand, but find strange. The neocontractual analyst looks at my life, particularly what I insure against directly, and deduces what I value and what compensation I should receive when I lose that thing I value. It notices that I pay for homeowners' insurance for my house, so that if it burns down, it will be replaced, but that I do not buy any life insurance on my seven-year-old daughter's life.<sup>211</sup> From those limited facts, this school of neocontract concludes that I value my house more than my daughter, and that if someone were to negligently destroy my house, I should be paid the full amount for which it is insured. Should my daughter be killed by someone's negligence, however, I should be paid nothing.<sup>212</sup>

In all fairness, this sort of neocontract does not say directly that I value my house or my wages more than I value my daughter. It is interested in determining what I am willing to pay now to secure a monetary payment later. It asks that question because it recognizes this is what tort law does. It charges me a fee now, in the form of additional costs that are added to goods and services by the provider's costs of liability insurance.

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211. I do buy health insurance for my daughter, but simply insurance that reimburses her medical care costs. Neocontractual analysis would not count it as money I am paying to insure against my daughter's death. The reason I buy health insurance is to guarantee that my daughter will be able to get whatever health care she needs to prolong and facilitate the quality of her life. In short, the real purpose of health insurance is the maintenance of the quality of my daughter's life. I am not buying a certain dollar value of life, but I am paying now to protect against a later loss.

212. Interestingly, this bizarre inference drawn by neocontractual analysis is quite similar to the way the law actually treats these disparate situations. From the standpoint of liability, the school bus company will be much happier if its driver drives negligently and kills my child than if he drives negligently and somehow destroys my house. In New York and most other jurisdictions, I will not be able to recover damages for my emotional devastation because of my daughter's death. See Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 338-40 (1984).

In return for that fee, I am entitled to payment, in the form of tort damages when something I value is harmed. Neocontract, as I understand it, provides that if I am not willing to pay money now in return for a guaranteed payoff in the event of later harm, then I (and society as a whole) do not want to create a system that costs money and provides compensation without giving me a choice.

This is good analysis. It raises a serious challenge to the longstanding tort practice of awarding damages for pain and suffering, because, after all, people do not generally buy insurance against pain and suffering.<sup>213</sup> It says that if I am not willing to pay now in return for an insurer's promise to pay me in the event of my daughter's death, I should not be forced to do that by the tort system.

This, however, is incomplete analysis. It looks on the tort system *only* as an insurance system, because the tort system looks like the insurance system in important ways. The tort system charges people money, albeit in an indirect, unusual way. It charges actors who will not ultimately receive the monetary benefits of the system,<sup>214</sup> and those actors charge higher prices for their goods and services. In return, the tort system pays out dollars on the occurrence of some injurious event. So does health, disability and life insurance of the sort many of us have. The IC school notices this and notices also that the first-party insurance we buy pays out to us a higher percentage of what we pay in than does the tort system. In addition, the tort system pays out more money to us than do these health, disability and life insurance policies we buy. Obviously, according to these neocontractualists, the tort system forces us to buy a very inefficient kind of insurance, namely more, and more expensive insurance than we would buy if we had the choice.<sup>215</sup>

Neocontractual analysis provides a valuable insight here. Law certainly should look skeptically on any set of rules purporting to help people by making them buy things they would not buy if given the choice. This kind of analysis reinforces skepticism about the wisdom of court decisions that require

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213. They do buy some insurance against pain and suffering, in the form of insurance against accidental death or dismemberment and in the form of uninsured motorist coverage. See Schwartz, *Proposals, supra* note 16, at 364-65.

214. The "ultimate" benefits of the tort system are paid to the injured persons who sue successfully in tort for compensation for their injuries.

215. See, e.g., Danzon, *supra* note 54, at 520-26; Leebron, *supra* note 54, at 273.

persons to purchase certain medical procedures,<sup>216</sup> or certain safety devices in their products,<sup>217</sup> deemed unnecessary by most experts in the field.<sup>218</sup>

Neocontractual analysis of this sort asks the right kinds of questions. It just does not ask enough of such questions, nor does it ask questions when the answers are hard to come by. Most often, critics argue that tort forces people to buy more insurance than they want, at a higher unit cost.<sup>219</sup> Such criticism notices only a part of what tort law does, its compensation function. The optimal level of compensation may indeed be that for which people insure themselves in the existing state of affairs.<sup>220</sup> The tort system, however, does more than just compensate injured persons. It deters, or at least purports to deter,<sup>221</sup> unreasonably unsafe behavior. It provides justice. It gives injured persons a hearing, or revenge, or access to answers to pressing questions. Accordingly, to properly analyze the tort system, the IC school of neocontract cannot just compare the insurance an individual would buy to the amount of insurance the tort system requires him to buy in the form of increased charges and increased payouts. Rather, it also must ask how much money a person would be willing to pay to decrease her chances of being injured at all. It must ask how much money a person would be willing to pay to increase her

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216. See, e.g., *Helling v. Carey*, 83 Wash. 2d 514, 518-19, 519 P.2d 981, 983 (1974) (holding physicians liable for failure to give patient inexpensive pressure test for glaucoma, even though the patient was not in a group that manifested any special risk of contracting the disease).

217. See *Ford: Faulty Capri Wipers Safer Than Recall Hazards*, Charlotte Observer, June 3, 1978, at 2A, col. 4, reprinted in W. KEETON, D. OWEN, J. MONTGOMERY & M. GREEN, *PRODUCTS LIABILITY AND SAFETY* 847, 847-48 (2d ed. 1989)

218. Cf. S. SUGARMAN, *supra* note 44, at 18-19 and accompanying notes.

219. See Danzon, *Medical Malpractice*, *supra* note 54; Leebron, *supra* note 54, at 273.

220. More likely, it is not. See *infra* note 225 and accompanying text (discussing willingness to pay as only one method for determining an appropriate level of compensation).

221. Scholars have lengthy debates about whether and to what extent tort law deters unsafe behavior. Sugarman has mounted an impressive case denigrating tort's deterrent effects. S. SUGARMAN, *supra* note 44, at 3-34. Most of the influential law and economics writing about tort law, on the other hand, is built on the idea that imposition of tort liability, or the threat of its imposition, will influence actors' behavior. See, e.g., R. POSNER & W. LANDES, *supra* note 5, at 10-14. One aspect of the current public attack on the tort system comes in the form of allegations that it too strongly influences behavior, deterring beneficial as well as dangerous activities. See, e.g., Huber, *supra* note 35, at 24, col. 3.

chances of attaining revenge against, or punishing, an actor who wrongfully injured her. It must ask how much money a person would be willing to pay to make it likely that she would be treated justly if she were injured by another. It must ask how much money a person would be willing to pay to ensure that she would be heard in the event tragedy befell her and to make it likely that she would be able to find answers to the questions important to her life that arose from such tragedy. Then, neo-contractual analysis should add up all *those* amounts people would be willing to pay for what tort law does, along with the amount people would pay for direct monetary compensation, and compare *that* total to the charges tort law forces people to pay.

After all, each of us does pay, in time, effort or direct expenditures for such things. We certainly would pay more for health insurance if the policy included a promise of less sickness or injury. We buy products, such as food, vitamins and safety helmets, because they reduce the chances we will become sick or injured. We spend vast amounts of time watching out for children, acquiring information or protesting the placement of nuclear waste dumps or incinerators near us, all because they decrease the chances that we will suffer injury or sickness. We willingly pay more for products or services if we are treated well, be it good service at a department store or an auto repair shop. Such good treatment would include listening to our important stories and answering our important questions.

Tort law does not necessarily do all these things, or do them particularly well.<sup>222</sup> Nevertheless, tort tries to do all these things, and does some of them, to some extent, some of the time. Therefore, when using neocontract's insights and estimating whether people are paying more for their tort rights than they really want to pay, include those services the tort system provides beyond mere compensation.

It is no surprise that neocontractual analysts overlook or minimize these other services in putting tort law under the "willingness-to-pay" microscope. Neocontractualists generally<sup>223</sup> tend to be happiest when they can rely on the market to

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222. For a more detailed discussion of what tort can and does deter, see *infra* text accompanying notes 242-57. For mention of what tort can do to empower potential and actual accident victims, see *supra* text accompanying notes 155-67.

223. This comment probably does not fit some neocontractualists, such as Kim Scheppele.

determine the world's workings.<sup>224</sup> For the most part, there is no easily defined market in deterrence, justice, communication and empathy. There is a market in insurance. So it is quite natural that the "willingness-to-pay" prong of neocontractual analysis focuses almost solely on the compensation or insurance function of tort. This narrow focus reveals that neocontractual analysis is limited by its intellectual roots in the market.

This school of neocontract analysis is further limited by its overreliance on consumers' insurance behavior as the surrogate measure of what level of compensation people really want, and thus of what tort should pay them in damages if injured. In imagining what forms of compensation consumers might want, some authors have suggested measures in addition to the amount of insurance purchased. Rather than looking at what insurance consumers have bought, they look at what consumers would be willing to pay to avoid a particular loss or what price consumers would accept to suffer that loss.<sup>225</sup> These modes of ex ante analysis provide a more satisfactory method of deter-

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224. See, e.g., Danzon, *supra* note 54, at 542; Epstein, *Unintended Revolution*, *supra* note 31, at 2193-2222.

225. See, e.g., Cook & Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 Q.J. ECON. 143, 146 (1977); Rea, *Contingent Damages, Negligence, and Absolute Liability: A Comment on Graham and Pierce*, 13 J. LEG. STUD. 469, 469-70 (1984); Schwartz, *Proposals*, *supra* note 16, at 362-66. Rea points out three concepts that might be used to calculate the monetary equivalent of someone's nonpecuniary loss, in addition to the amount of insurance that person would purchase: 1) the dollar amount that would compensate him for the loss (compensation); 2) the dollar amount he would give up to avoid the loss (ransom); and 3) the amount that is implicit in his expenditures for risk reduction (risk value). *Id.* A slightly different perspective would transpose the latter two concepts as: 2) the dollar amount he would demand to willingly accept that loss; and 3) the amount implicit in what dollars he demands for increased exposure to risk.

This latter perspective moves away from measurements of compensation that depend on a person's wealth. That move is desirable if one worries that the tort system may require poorer persons to spend more of their precious dollars on compensation than is appropriate to their utility-of-money state. See *supra* text accompanying notes 76-87. Although some of these perspectives sound as if they should lead to the same results in terms of valuation of risk and injury, forcing an individual to look at the possibility of injury from one of these perspectives is likely to significantly change that person's values on the risks. See, e.g., Viscusi, Magat, & J. Huber, *supra* note 207, at 477. In that article, the authors report that consumers responded differently, in ways that were "particularly striking," in the amount they were willing to pay for a reduction in risk of injury to them or their children in contrast to how much money they would accept to have an equal *increase* in that risk. Their data showed that the valuation of risk would be much lower, by a factor of six to eight, if one looked at how much consumers are willing to pay for risk reduction rather than the same risk increase. *Id.*

mining appropriate levels of compensation. They open up the law to a fuller sense of what people value.

This fuller sense of what we value is an important part of the law. For the law to tell the father of a child killed by another's negligence that his compensation will not include anything for the drastic loss of a relationship, but will include money spent for medical care, denies the reality of the father's experiences and values. It also socially devalues a child's life. That the father did not buy insurance to pay him money in the event of the child's death does not mean that the child was worthless to him. It does not even mean that the father did not spend money on insurance against the loss of the child. Money spent on health care for the child, money spent on sure-grip sneakers and a safer car, time spent watching the child, and even repeated warnings to be careful — all those are expenditures on insurance. The IC school confuses insurance with a slot machine. Insurance is not purchased with the hopes of getting a big payoff, but rather to guard against loss. Unfortunately, the tort system has not yet developed a good method to help victims with their losses, except with money. That present failing does not justify treating victims as though the only compensation they really wanted was the insurance dollars they paid for. Tort compensation, unlike insurance payouts, represents society's valuation of the plaintiff's loss. The alternative measures come closer to that true value.

### C. LOST IN TRANSITION: A FLAWED PERCEPTION OF TORT

A third major category of flaws in neocontractual analysis can best be described as its failure to describe and appreciate the strengths of tort law. Neocontractualists wish to abandon tort, either through institution of actual contracts or whittling away damages through rules created by the imagined contracts method. Their rationale is to promote autonomy and social utility. However, they fail to acknowledge either the significant autonomy supplied by the tort system or its significant social utility function: the provision of safety.<sup>226</sup> This section focuses

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226. Tort's accident reduction function is by no means its only contribution to social utility. Its contribution to individual empowerment and some of its justice-supplying features have already been discussed. See *supra* text accompanying notes 142-67. Tort's compensation functions receive less attention. Those functions are significant: tort awards provide injury victims much more full compensation than any other source. See, e.g., Johnson & Heller, *Compensation for Death From Asbestos*, 37 IND. & LABOR REL. REV. 529, 532-36 (1984)(arguing that only tort provided full compensation of net economic loss).

on neocontract's false consciousness in those two regards.

### 1. Autonomy: Tort and Choice

Neocontract not only has refused to recognize the value of choices provided individuals by the tort system, it excoriates tort as a fundamentally coercive force.<sup>227</sup> The IC school argues that tort forces people to buy insurance they do not want.<sup>228</sup> As has been pointed out above, however, the IC school model is based on extrapolations from consumer behavior in first-party insurance markets.<sup>229</sup> Those models say nothing conclusively about a person's willingness to pay for the deterrent and justice effects accompanying tort decisions.

The free market forces of the AC school assert that tort forces people to buy safety features they do not want, and that it deprives persons of choices they do want.<sup>230</sup> These charges are correct, but may not be as serious as they seem at first blush. They amount to saying that persons have been deprived of bad choices.<sup>231</sup> Despite the many examples trotted out by Huber, most providers are reacting rationally to tort. They do not withdraw their products or make them too safe. Nevertheless, tort does coerce some people in this fashion, particularly careful persons or those who prefer risk.<sup>232</sup>

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Tort also directs compensation more at actual victims, while neocontract, of the AC school variety, provides benefits to all potential victims. If a just society has a particular concern with the conditions of its least-advantaged citizens, tort seems to be a step ahead of neocontract, because it does better for actual victims. Given the serious underclaiming engaged in by accident victims, however, in theory it is plausible that even an AC system would provide equally satisfactory compensation. An AC system ostensibly would provide compensation to more persons, because it would benefit potential victims at the time of transaction, a benefit that could assume the form of injury insurance. In other words, tort probably would compensate more deeply than neocontract, but the latter might compensate more broadly. Thus, it is not clear that neocontract should focus so attentively on tort's compensation function.

227. See, e.g., P. HUBER, *supra* note 7, at 191.

228. See, e.g., Danzon, *supra* note 54, at 520-21.

229. See *supra* text accompanying notes 54-57.

230. See, e.g., P. HUBER, *supra* note 7, at 160-61.

231. Society has concluded that the good or service she wanted was "bad" for her, in that liability rules will force the adoption of safety measures, or the withdrawal of a good or service, only when it was unreasonable to provide the good or service without the safety feature, or when it was unreasonable to continue to market the good or service without changes. Other psychological factors may inappropriately frighten providers into the unreasonable withdrawal of a good or the adoption of a safety feature. Those factors are not endemic to tort: they can be cured.

232. Risk preferrers and the particularly careful seem the segment of society we need to worry about least, in terms of their likely financial well-being

The coercion threatened by tort law pales beside the coercion threatened by neocontract. Neocontract will present consumers with take-it-or-leave-it "flypaper" contracts.<sup>233</sup> They will be forced to do without the product they desire or the tort protection they may and should desire. With respect to compensation and other rules established by the inadequate imaginings of the IC school, consumers will be forced to accept *less* deterrence and compensation than some of them want, particularly with respect to relationships at the core of their existence.<sup>234</sup> Each consumer will be forced to bear a greater chance of injury, regardless of whether she agreed to give up her tort rights, because the waivers agreed to by her fellows will have decreased the pressure on providers to behave safely.

Similarly, the choice provided by tort seems more appealing to consumers than the choice presented by neocontract. Neocontract permits consumers to obtain some dangerous goods they otherwise might not get.<sup>235</sup> It allows them to obtain some goods or services more cheaply.<sup>236</sup> Overall, an observer might be more impressed by the negative choices available through neocontract. First, the consumer, by accepting the provider's disclaimer of liability, places herself in a position in which she is at the mercy of forces out of her control. The consumer no longer has any power to threaten the provider with a sanction if the provider acts unreasonably. This is just the sort of posi-

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and ability to take care of themselves. In comparison, the persons most deprived of choice under neocontract are the victims themselves. *See supra* text accompanying notes 152-55. Those are the people most likely to need societal help. Coercing the former seems more desirable than coercing the latter.

233. Huber uses the term "flypaper" contracts to ridicule the notion of contracts of adhesion. *See, e.g.,* Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 *CARDOZO L. REV.* 2263, 2263-2285 (1989). For the explanation why consumers in the Huberian system will face such contracts, *see supra* note 200 and accompanying text.

234. IC school damages will be awarded only for pecuniary loss. *See, e.g.,* Danzon, *supra* note 54, at 524-26. Therefore, any disincentive previously imposed on providers by tort with respect to the risks of destroying relationships they create will disappear. Children's lives will become much more affordable in the eyes of potential injurers.

235. There probably will not be many such goods. *See Attanasio, supra* note 19, at 735-37.

236. This likewise does not seem to be a large benefit. For most providers, liability costs are a very modest component of their overall costs. *See, e.g.,* G. EADS & P. REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 30 (1983) (reporting that premiums for corporations' products liability insurance totalled only 0.115% of sales). For most products, therefore, price will be little affected by liability insurance savings.

tion the imaginers in Kim Scheppele's more fully textured original position would regard as an unacceptable constraint on their choice.<sup>237</sup> Second, the party obtaining the most significant choice is the provider, who suddenly has been freed from worry about negligence lawsuits.<sup>238</sup>

Look, in contrast, at the choice provided by tort, the neocontractual bogeyman of coercion. Tort gives the consumer an informed choice whether she wants to encounter a dangerous good or service. Tort forces providers to internalize many of the injury costs associated with their products. That internalization means that the product's dangerousness is reflected in its price. Thus, the consumer receives substantial, meaningful, easily digestible information about the relative riskiness of the goods or services offered.<sup>239</sup> Tort reduces the risk of accidents, and thereby reduces the chances of crippling injuries, one of the most severe constraints on an individual's choice.<sup>240</sup> It gives the consumer a choice of what to do about pressing a claim for tort compensation after the accident, a time when she understands the situation more fully. The consumer need not decide ahead of time what she might want if she found herself in this unknowable situation, as neocontract would require. She still can abandon her tort claim after the accident, if she so desires. If she wants to settle, she can. If she wants to press ahead with a claim, for whatever such action will do for her *then*, when the injury world is a very real one, she can.

Finally, tort offers the consumer another choice. The consumer can take chances with dangerous goods and services. Contrary to the doomsaying of some of the neocontractualists, consumers can agree to accept risks. The doctrines of express and implied assumption of risk stand available for consumers who want to sit in unprotected seats at sporting events, race dangerous cars, test drive motorcycles or buy dangerous goods, as long as basic conditions of free and informed choice are satisfied.<sup>241</sup> Autonomy exists in tort law.

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237. See K. SCHEPPELE, *supra* note 10, at 75.

238. For a fuller description of the nature of the choices that will come to the provider under the AC regime, see *supra* text accompanying note 151.

239. See, e.g., Attanasio, *supra* note 19, at 738; Landes & Posner, *supra* note 199, at 549-50.

240. Attanasio, *supra* note 19, at 724.

241. See, e.g., *Cash v. Street & Trail, Inc.*, 136 Ga. App. 462, 466, 221 S.E.2d 640, 642 (1975); *Winterstein v. Wilcom*, 16 Md. App. 130, 136, 293 A.2d 821, 824 (1972); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* 482-86 (5th ed. 1984); Schwartz, *Proposals*, *supra* note 16, at 370.

## 2. Social Utility: Tort and Safety

Although it is somewhat surprising that neocontractual theorists attend so little to the autonomy-providing aspects of tort, it is no surprise that they speak little about the important contribution tort makes to social utility by creating incentives for safety. A person unfamiliar with the area who read only Huber's book would think there was nothing to deter. He barely mentions providers' unreasonable behavior. Huber and Epstein, and to a milder extent their neocontractual colleagues, see the problem in tort as the excessive costs imposed by a coercive, eccentric tort law. I see the problem differently;<sup>242</sup> it is primarily a problem of injury. A very low percentage of tort victims file claims for compensation.<sup>243</sup> Yet the neocontractualists and business and professional groups identify tremendous liability costs as a serious social problem. If such a small percentage of injured people can generate such vast costs, then the extent of the problem of injury in this country is shocking. A solution to the problem is to change risky behavior to safe behavior. In the face of this problem, and its obvious first-step solution, the neocontractualists' advocacy of changes in the tort system that would *reduce* incentives likewise is shocking.

Shocking, unless . . . a theorist believes tort law does not deter unsafe behavior. Peter Huber believes that tort deters.<sup>244</sup> Stephen Sugarman does not.<sup>245</sup> In his recently published book recommending the demise of the tort system, Sugarman provides one of the most careful examinations in tort literature of whether potential tort liability deters unsafe behavior.<sup>246</sup> Sugarman's work marks an excellent start to what even he rec-

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242. The excessive transaction costs of the tort system right now are a substantial problem. Those costs must be reduced. Abandoning the basic tort system may be one way to reduce those costs, but it is certainly not the only way. It can be done within the tort system. One place to begin is with changes in the litigation behavior of the providers, who complain most loudly about the tort system's costs. Their litigation behavior certainly contributes to the high costs of litigation. In fact, costly litigation is in the injurers' interests: 1) small claims will not even be brought against an injurer if lawyers for plaintiffs believe they need a large verdict to profitably bring a medical malpractice or products liability case; 2) protracted, unpleasant litigation makes plaintiffs want to give up or not claim at all; and 3) delay keeps the dollars sought by victims in the injurers' pockets longer.

243. Abel, *supra* note 81, at 448-52.

244. In fact, Huber seems almost certain that tort law far *overdeters* providers' behavior. See, e.g., P. HUBER, *supra* note 7, at 164, 170.

245. Nor do others. See, e.g., Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1884 (1987).

246. S. SUGARMAN, *supra* note 44, at 3-34.

ognizes is a need to examine the issue thoroughly, particularly with empirical work. This is not the place for me to jump into the debate about tort deterrence. My small contribution to the further examination has been done.<sup>247</sup> Here, I want only to contribute some observations that may suggest the unique role tort can play in enhancing safety, a role completely ignored by neocontractual analysis.

Before I point directly to aspects of that unique role, let me tell about some reactions to the "real" world that occurred while I was working on these issues. Relatives came to town during the summer. We took them with us to Niagara Falls, the first time I had visited since childhood. With us was my then six-year-old daughter. Our first afternoon there, we walked along Goat Island and at one point stopped at the top of Bridal Veil Falls on an island that allowed us to look right down at the water crashing on the rocks below. There below us, amidst some land and rocks, was a cluster of wooden steps, platforms, and bridges, populated by yellow-slickered tourists.

Now, you must realize that no one can go to Niagara Falls and experience the power of the river and sense the noise and fall of the Falls without thinking about death. As we looked at the tourists below, struggling up the wooden stairs against the wind and spray for an up-close encounter with the Falls, my daughter asked me: "Daddy, is it safe down there?" I stared down at the not-very-thick poles that stretched from the platforms to brace against the rocks underneath. I had two near-immediate reactions. The first was, "No, of course not! Just look at how fragile those boards and supports are, and how powerful are the water and wind banging against them." The second was, "Of course it's safe. It has to be." I stayed with the second reaction.

I have reflected on that reaction, then, and now, to understand why I felt that apparently dangerous edifice was safe. I did not think it safe because I was confident in the essential goodness and consideration of the persons who constructed and managed that facility. My life experience and the media provide me with plenty of evidence that there are people, many people, who act inconsistently with the well-being of strangers. I did not think the edifice was safe because I had faith in the government agency, whatever it might be, that regulated its construction or use. I had no confidence that a regulatory agency would have either the will or the ability to check the

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247. Bell, *supra* note 12, at 443-49.

structure carefully enough to satisfy me.<sup>248</sup> Neither did I re-  
pose my faith in the market, serenely confident that an unsafe  
operator would have been run out of business by a safer com-  
petitor. In the face of consumer ignorance, just the opposite  
might have happened.<sup>249</sup>

What made me think the structure safe was my knowledge  
that the operators of the tour were aware that if they did not  
make damn sure the thing was safe, they would get their pants  
sued off. I recognize that even this is no guarantee. Neverthe-  
less, I assumed the operators had sufficient characteristics of  
stability that the threat of tort liability would operate on them  
as it would on me if I had put my life into some business.

Tort liability: a constant reminder to be careful. The peo-  
ple who built and now run the under-the-falls tour had to make  
a vast array of decisions in the creation and operation of this  
tour. They had to decide whether it was worth it at all to build  
the touring structure. They had to decide how to build it,  
where, with what materials, with what supports, how long-lived  
the material and its connectors should be, and what kind of  
protective devices to incorporate into the structure. Since the  
structure was built, the tour operators have had to decide how  
often to inspect, the manner of inspection, what kind of people  
need to do the inspection, what routine maintenance is neces-  
sary, how often to replace parts susceptible to wear and tear,  
what sorts of non-slip treatments to give the walking and  
climbing surfaces, what kinds of equipment to give to the tour-  
ists, what directions to give the tourists and what kind of super-  
visory and/or rescue personnel to have on hand. From having  
represented clients subject to federal and state regulations in a  
large Washington, D.C. practice, from having represented poor  
people subject to the regulations of the welfare and social se-  
curity systems, and from having read a great deal about safety  
over the last decade, I believe I have an informed sense of how  
regulation works, in general. I have virtually no confidence  
that regulators have any effective input into even a small per-  
centage of those safety decisions.<sup>250</sup>

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248. At Niagara Falls, I knew that this structure was subject to sufficiently strong anti-safe forces that it bore close watching. I doubted that any regula-  
tory body would provide the sort of regular inspection necessary to make the  
structure "safe" for me — or even for me as a watcher.

249. See, e.g., Akerlof, *The Market for "Lemons": Quality Uncertainty and  
the Market Mechanism*, 84 Q.J. ECON. 488, 489-92 (1970).

250. Several theorists who favor turning away from the tort system pro-  
pose that regulation will perform the safety function tort is supposed to per-

Perhaps the tour creators and operators are very careful people, who create and maintain the structure as I would want to if I were conducting a business.<sup>251</sup> More likely, in my mind, they are ordinary people, trying to make a comfortable living, not eager to spend money to prevent accidents that probably are not going to happen anyway and that, after all, have not ever happened in their experience. Possibly they are venal people, lured into entrepreneurial work by a drive for dollars that makes them very reluctant to spend money "unnecessarily" on safety unless a very strong case is made that such an expenditure is critical.

Without stepping one foot into the theoretical world inhabited by this and most other law review writings about tort, and being relatively sophisticated about the tort system, I place my trust in the safety of the under-the-Falls structure squarely with the tort system. It threatens the venal person that the so-desired wealth will turn to dust if some accident happens that he should have been prevented. It nudges the normal person to think more about safety. And it invites the careful person to follow better (well, at least more considerate) instincts without having to worry about a competitor gaining advantage.<sup>252</sup> From my perspective about to walk under the Falls, tort has the even

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form, and do it considerably more efficiently. *See, e.g.*, S. SUGARMAN, *supra* note 44, at 153-65. There is certainly considerable debate about whether regulation or tort more efficiently determines behavior. *See, e.g.*, Latin, *supra* note 196, at 739; Komesar, *supra* note 134, at 33-35, 53-57. Full elaboration of this debate must await another day.

251. I say "would want to" because I am not confident I would end up running a business as safely as I imagine I would, here in the academic world of freedom and choice. In a small business, I would constantly face the choice of spending money to avoid "small" risks or having that money available to me and my family to satisfy immediate needs or strong desires. In a larger business, I would feel pressure from shareholders or directors to deliver profits and would see from those working for me "bottom line" accounting of how their departments/divisions did in overall expenditures and receipts. Moreover, I might face competition from others not as concerned about safety as am I, those able to underprice my business for what is apparently the same good. In other words, a "good guy" will face considerable pressures *not* to spend on safety in running a business. *Cf.* Abel, *supra* note 92, at A31 (stating that if only 12% of injured persons make tort claims, and there is perfect competition, anyone who spends more than 12% of the optimum amount on safety will be driven out of business).

252. Even the "better" person still must be concerned about making accurate assessments whether a particular safety expenditure is worth it in terms of the risks reduced, if she wishes to remain competitive. That is the sort of decision-making, however, we hope is occurring. It is a different type of decision than deciding not to make an expenditure on safety because a competitor is not making it and is not being penalized.

more wonderful characteristic of omnipresence. Unlike regulation or regulators, tort is there for every one of the vast number of safety decisions the tour operators must make. It is not some disinterested, overburdened or in-industry's-pocket regulator who is looking over the operator's shoulder: it is me, the tourist. If something happens to me or my family, *I* go right after the operator under the tort system. And he knows it.

This story illustrates some of the unique aspects of tort as a deterrent or potential deterrent.<sup>253</sup> It contains within it the seeds of deterrence common to most tort stories: if one of the Falls tours had a higher accident rate, and therefore, higher liability costs than the others, that tour would have to charge higher prices than its competitors, thus driving tourists away from the more dangerous service. A serious problem of injuries would give private individuals an incentive to sue in tort and thus to start the accusatory and investigatory ball rolling, in much the same way private individuals operating in tort uncovered the severe nationwide hazards associated with asbestos, discoveries eventually acted on by government agencies.

The story also could have illustrated the role of tort as provider of an otherwise non-existent market for safety. If there are many slip-and-fall injuries on that tour, then there is a market for someone willing to work on non-slip stair treads for waterlogged situations. That may not be so vital. The same factors, however, undoubtedly were at work to encourage the research that recently led to the discovery of a new vaccine for whooping cough that does not have the side effects of the current Pertussis vaccine,<sup>254</sup> which has been the subject of several much-maligned lawsuits.<sup>255</sup> Without the pressure of such lawsuits and the knowledge that once this safer alternative was developed, vaccine manufacturers who did not use it would face tort liability, it might never have been clear to the researchers

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253. Sugarman emphasizes some of the factors that militate against tort law having the deterrent effect economic models tend to ascribe it. Among the factors he mentions are ignorance of law and facts. S. SUGARMAN, *supra* note 44, at 7-8. Reform can remove such factors as obstacles to deterrence. Hence, I use the term "potential" deterrence to remind us not to conceive of the tort system as forever frozen the way it is now.

254. *Vaccine for Whooping Cough Shows Promise*, N.Y. Times, Oct. 31, 1989, at C13, col. 1.

255. See Huber, *supra* note 65, at 289 ("foolishness . . . driven by the myopia of the judicial system").

that development of this slightly safer vaccine would bring any market demand.

Related to this, and of equally broad significance for the question of tort's safety role, is a fine point raised in a thoughtful recent article by Mary Lyndon.<sup>256</sup> Lyndon emphasizes that the lack of a market for information about the toxicity of many products has limited the availability of such information.<sup>257</sup> The only market is cost savings, primarily liability cost savings of the sort that result from the pressure of the tort system to do reasonable research.

One last glance at Niagara Falls brings to mind one final unique aspect of tort. As is suggested by this story, originally drafted a few days after I returned from that trip, I felt a certain strength in my relationship with a potential injurer, the tour operator. Tort has the ability to empower individual people, all over, wherever they encounter persons or institutions whose heedlessness threatens them. The individual need not rely on anyone else in that situation: the group of which she is a member — the endangered-in-the-event-of-negligence consumers — have to be attended to. Looking back at the experience and the story, I notice, too, that I felt some ownership of the law. It was mine to use, to protect me and my loved ones. Abstract neocontract is missing something substantial that tort offers people.

### CONCLUSION

What should the reader make of this Article? Neocontract has some good insights. Neocontract has some bad insights. Tort has some good sides. Tort has some bad sides. Not exactly the stuff on which to build a skyscraping new legal edifice, is it?

That is the main point of this Article. We have no business now building any great new legal edifices, particularly not one constructed entirely out of neocontract. Theorists of both the actual contract and imagined contract schools believe that ne-

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256. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795 (1989).

257. *Id.* at 1813-15. This situation suggests how the AC schools' liability waiver system might hinder development of injury-related information. Lack of information about a certain chemical, say EDB, that is hazardous, means people will buy it and willingly waive any tort rights related to injuries from EDB for very little in return. Tort law at least would keep pressure on the producers of EDB to conduct reasonable research regarding possible harmful effects.

ocontractual analysis is *the* way to analyze and resolve tort issues. They have been too insensitive to the serious and potentially serious<sup>258</sup> flaws in neocontract in their rush to replace coercion with consent. Such analytical myopia ordinarily would not pose a particular social problem. Tort law, however, has stepped hard on some very big shoes in the last decade, those worn by business and professional leaders. As a result, to the extent neocontract displays hostility toward the tort process and promises legal rules with the probable effect of reducing that threat of liability, its schools are likely to gain political ascendancy in the legislatures and courts of the United States.<sup>259</sup> What I encourage in place of this rush to a grand new theory is continued tinkering with the existing tort system.<sup>260</sup> Tort law has displayed tremendous capacity for change and adjustment over the years.<sup>261</sup> Even with respect to the intractable problem

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258. I use the term "potentially" serious to describe the flaws in neocontract because I recognize that many people doubt that certain of these problems exist. For instance, there is debate in legal academic circles about the extent to which persons fully understand the consequences of contractual waivers, and about the significance of that understanding. Compare, Priest, *A Theory of the Consumer Warranty*, 90 YALE L.J. 1297, 1307-13 (1981) with Latin, *supra* note 196, at 682-96. We need considerably more good research into matters such as consumer understandings, deterrent effects, individuals' experiences in the tort system, the real market price of injury and the like before fair-minded people will stop debating the existence of problems such as those raised in this Article. Even those readers who do not share my sense of what I have described herein as flaws should at least recognize that these flaws may exist and, accordingly, that broad neocontractual plans should be scrutinized very closely before being subscribed to as a tort panacea.

259. See, e.g., American Tort Reform Association, *The Reformer*, Dec. 1989 ("Dear Member" memorandum reporting successes of the tort reform movement in 1989) (on file with author).

260. I use the term "tinkering" advisedly, recognizing that such a conclusion would align me, at least in the eyes of Sugarman, with the "timid" American Bar Association. In his recent book, Sugarman disparages the ABA for its incremental approach to tort reform in the face of academic criticism attacking the major foundations of tort. S. SUGARMAN, *supra* note 44, at 88-89. He suggests that the ABA's meek approach was an understandable expression of professional solidarity with its members who make their living doing tort work. *Id.* Sugarman notes unsympathetically that the ABA committee reporting on the matter justified its refusal to take a comprehensive look at his favorite, more sweeping, reforms because it could reach any consensus on substantial dismantling of the tort system. *Id.* at 89. As do the neocontractualists generally, Sugarman seems to underestimate the value of group consensus formation as a method of arriving at decisions. That finds expression elsewhere in neocontractualist disdain for jury decision-making. See, e.g., P. HUBER, *supra* note 7, at 11-12, 186-87. It is a typical product of the individualist mindset neocontractualists bring with them to legal analysis. See *supra* text accompanying notes 26-64.

261. See, e.g., Bell, *supra* note 212, at 341-46 (discussing evolution of law of

of massive transaction costs, particularly with respect to novel or complicated situations, tort has been able to make some headway by encouraging and permitting use of novel procedures.<sup>262</sup> With the passing of the great insurance crisis of the mid-1980s, there seems no pressing need for immediate massive tort reform. Thus, the fifty states and other jurisdictions can carry out their roles as experimental laboratories so new approaches, some of them no doubt inspired by neocontractualist philosophies, can work their way through the courts or legislatures into law. Other jurisdictions can in turn consider what has been learned about the merits of this approach, and can incrementally implement or modify or reject it. Ideally, much of this change would continue to come through judicial decisions, which are unfailingly rooted in at least some real situation and are regularly subject to reexamination and different-context testing, both by other sets of litigants and other courts in other jurisdictions.

When I think now of what it means to "tinker" with the tort system, I first think of the work of a theorist, arguably one of the neocontractualists' own, Professor Jeffrey O'Connell.<sup>263</sup> In doing the extensive research that is buried underneath this Article, I found myself growing more and more impressed with O'Connell's work. Before working on this Article, probably because of my admiration for great theory, I had thought of O'Connell's work as intelligent, modestly creative, and lucid, but not on a par with that of the great tort theorists of the seventies and eighties. In doing this work, I think I see more clearly the virtue of his work. From the time of his pioneering efforts in the no-fault automobile accident field,<sup>264</sup> O'Connell has been engaged in listening and watching the actual workings of the tort system, offering suggestions for improvement, listen-

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recovery for psychic injury); Calabresi & Klevorick, *supra* note 134, at 626 (discussing ability of tort rules to respond differently to different situations).

262. Some of the most innovative changes came about as tort reacted to the massive asbestos case filings of the early 1980s. Those cases were identified as particularly high in transaction costs. *See, e.g.*, D. HENSLER, M. VALANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 26-28 (1987). Litigants developed numerous methods of cost reduction, including the use of computer technology. *See, e.g.*, D. HENSLER, W. FELSTINER, M. SELVIN & P. EBENER, *supra* note 4, at xi-xxiv; McGovern, *Toward A Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 487 (1986).

263. *See supra* text accompanying notes 43-44.

264. *See, e.g.*, R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 273-98 (1965).

ing to reactions, and offering new suggestions that reflect what he hears.<sup>265</sup> O'Connell seems no less sensitive than other scholars to the faults of tort: after all, he has been trying to make major changes in it for a quarter century.<sup>266</sup> He seems to take it as his task to fix that system. To that end, he makes proposal after proposal, helps draft and lobby for legislation, develops programs to alleviate the disruptive effects of tort on high school athletics, and then makes some new proposals. None of the O'Connell articles I recall devote time to building the philosophical grand designs characteristic of Schwartz, Scheppele, Epstein or even Huber.<sup>267</sup> I submit that the lesson from the work of O'Connell is that we all will profit from giving up some of the philosophical high ground and coming down to the realities of the world of tort. It is in the muck of real people's lives and injuries, that the potential for fixing what may be broken exists, along with the means to do it.

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265. See, e.g., O'Connell, *Neo No-Fault*, *supra* note 40, at 904-07 (describing how O'Connell modified a prior proposal in response to what he learned from lawyers working in the tort area and in response to the realities of the legislative process).

266. See, e.g., O'Connell works cited *supra* notes 40, 44. For evidence of O'Connell's continuation of these trends, see, e.g., O'Connell & Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and the Contraction of Loss Insurance*, 49 OHIO ST. L.J. 757, 764-65 (1988).

267. Huber seems to me more a philosophical critic than a grand designer. Nevertheless, he criticizes from such a high philosophical mountain ("consent, not coercion") that it seems appropriate to place him with these more obviously "grand design" scholars.

