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Public Services Meet Private Law

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TABLE OF CONTENTS

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* © Michael I. Krauss 2006. Professor of Law, George Mason University; http://classweb.gmu.edu/mkrauss/. Thanks are due to Tracy Robinson, J.D., for her Tort theory seminar work, which prompted this paper. Thanks also to Robert Levy, Craig Lerner, Walter Olson, Dan Polsby, George Priest, Michael Wells, and the Hon. Danny J. Boggs for their constructive comments on earlier drafts, and to participants in workshops at Case Western, Cornell, George Mason, the University of Tennessee, and the University of Toronto law schools. Anne Loomis provided superb research help. The Law and Economics Center of George Mason University has provided frequent support for my research, and I thank them as well. I dedicate this paper to likely future attorneys Rebecca Krauss and Joshua Krauss.

PROLOGUE

Here is a too-easy torts final exam question:

An aircraft, negligently maintained by its operator, crashes on takeoff. The operator and her passenger are killed. In addition, the plane strikes and causes $250,000 of damage to a zoo that is a local tourist attraction. For which of the following is the operator's estate liable in tort?

- The amounts claimed by eligible persons for the wrongful death of the passenger;
- The damage to the zoo;
- The cost of a babysitter hired by the sister of the passenger to care for the sister's toddler while the sister attends the passenger's funeral;
- The loss (represented by the time value of money for the period between the untimely accident and the passenger's actuarial life span) to the insurance company that paid the proceeds of the passenger's life insurance policy to its designated beneficiaries;
- The cost of overtime pay by the county to the police officers it directed to control traffic around the crash scene;
- The interest costs borne by the factory worker who had to borrow money after being laid off when the factory that had employed him shut down. The factory had shut down because it could no longer afford to pay increased property taxes, which the city had imposed to compensate for the loss of other tax revenue resulting from the decline in tourism that followed the closure of the zoo.

If you answered that the negligent aircraft operator is liable for all of these damages, stop. Return to the classroom. Do not collect your law degree, for clearly you missed the duty, causation, and damages segments of your torts course.[1]

1. Only the first two types of damage are recoverable in tort. The third type of damage is excluded if the sister is not named in the state's wrongful death statute.

I. INTRODUCTION

On October 30, 1998, New Orleans became the first city in the nation to file suit against the firearm industry.[2] Chicago followed two weeks later.[3] Within eighteen months, thirty cities and counties had sued over forty gun manufacturers, dealers, and trade associations.[4] Most of these plaintiffs contend that the defendants' firearms are defective and "unreasonably dangerous" products as then manufactured and marketed.[5] The governments demanded damages for harms allegedly caused by those defective and unreasonably dangerous products. So far, so good: these claims, however persuasive, at least respect the basic principles of product liability law.[6] They allege that the defendants acted wrongfully,[7] and they demand compensation for harm proximately caused by this wrongdoing.

Alas, the prima facie validity of the firearm suits ends here, for governments are not claiming that their property was destroyed or damaged by exploding, defective guns. Rather, the gist of these suits is a demand for recovery of costs that plaintiffs incurred to treat uninsured gunshot victims in city hospitals, to pay for police and 911 employee overtime, to compensate for lost tax revenue as property values dropped in violence-infested neighborhoods, and the like.[8] As has been documented elsewhere, these suits have been almost universally

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2. *See* Morial v. Smith & Wesson Corp., 785 So. 2d 1, 2 (La. 2001).

3. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1106 (Ill. 2004).

4. Bill Miller, *District Suing the Gun Industry: Damages Sought for City's Carnage*, WASH. POST, Jan. 21, 2000, at A1 (reporting that Washington, D.C. was the thirtieth local government to file a lawsuit against the gun industry). The other governments include: Atlanta; Boston; Bridgeport, Conn.; Camden, N.J.; Camden County, N.J.; Chicago; Cincinnati; Cleveland; Detroit; Gary, Ind.; Los Angeles; Los Angeles County; Miami-Dade County; New Orleans; Newark, N.J.; San Francisco; St. Louis; Wayne County, Mich.; and Wilmington, Del. Jurist Legal News & Research, *Gun Laws, Gun Control & Gun Rights Current Cases*, http://jurist.law.pitt.edu/gunlaw.htm (providing links to the thirty complaints) (last visited Feb. 20, 2007).

5. *See, e.g.*, *Morial*, 785 So. 2d at 6; Jurist Legal News & Research, *Gun Laws, Gun Control & Gun Rights Current Cases*, *supra* note 4.

6. *See* MacPherson v. Buick, 111 N.E. 1050, 1053 (N.Y. 1916).

7. This Article accepts, without discussing or in any way relying on, the position that product liability is based on wrongful behavior, even though most courts purport to base it on strict liability. *See, e.g.*, William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 779 (1983) ("[T]he concept of fault is embedded in the structure of strict products liability law itself.").

8. *See, e.g*, Complaint at 12, Bridgeport v. Smith & Wesson, No. CV99-036-1279 (Conn. Super. Ct. Jan. 27, 1999).

unsuccessful,[9] for they spurn three necessary conditions of a valid tort suit: they fail to prove breach of a duty of care, they fail to establish proximate causation, and they invoke noncognizable damages.[10]

Some who would hold firearms manufacturers liable for expenses incurred by governments after the criminal use of guns take issue with the claim that the government services for which compensation is claimed are ineligible for tort recovery. They argue that government services should not "subsidize" tortfeasors, and that proper accounting requires tortfeasors to internalize social costs of their alleged misbehavior.[11] They would do away with what they term the "free public services doctrine" (FPSD),[12] which one author described as holding that "a government entity may not recover from a tortfeasor the costs of public services occasioned by the tortfeasor's wrongdoing."[13] Why should taxpayers pay to direct traffic after a collision caused by a drunk driver? Why should the drunk (and his insurance company) not be charged the cost of the public ambulance used to transport victims to the hospital, or the fire engine used to douse the flames created by the drunk driver's car collision with a gas pump?[14] Why should the drunk be able to externalize all this harm?

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9. One suit has thus far survived summary judgment. The court in *City of Cincinnati v. Beretta U.S.A. Corp.* held that "a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." 768 N.E.2d 1136, 1142 (Ohio 2002). The case has not yet gone back to the trial court.

10. MICHAEL I. KRAUSS, FIRE AND SMOKE: GOVERNMENT LAWSUITS AND THE RULE OF LAW 9, 11-12 (2000).

11. *See, e.g.*, Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727 (2002); *see also* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001); Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691 (2005); Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81 (1994); Laura L. Gavioli, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue*, 78 TUL. L. REV. 941 (2004); David C. McIntyre, Note, *Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents*, 55 FORDHAM L. REV. 1001 (1987).

12. Lytton, *supra* note 11, at 727.

13. *Id.*

14. *See, e.g.*, Keith Stone, *Conference Airs 'Bright Ideas' for a Better L.A.*, DAILY NEWS OF L.A., Nov. 17, 1996, at N3 (reporting that an attorney at a conference argued Los Angeles should charge drunk drivers for the time and expense of their cases, so that the city can recoup some of its costs); Kelly J. Wilding, *Miscellaneous*, PITTSBURGH POST-GAZETTE, Aug. 11, 1999, at E7 (reporting that the Pittsburgh city council voted to adopt an ordinance permitting service companies and borough officials to recoup expenses for fire, police, and emergency services from reckless people who cause accidents, including drunk drivers).

It is obvious to advocates of cost recoupment suits against gun manufacturers that the stakes in the FPSD debate are high. One critic recently edited a collection of articles on suing the gun industry, in which he asserts that FPSD has been accepted as a "well-established principle of common law" in some states but "dismissed . . . as without precedent" in others.[15] This implies that the common law is currently confused about the doctrine. On the other side of the political spectrum, proponents of federal tort reform have sought to specifically immunize gun manufacturers from recoupment suits.[16] Of course, such legislation, if enacted, would imply that the recoupment suits might have been valid in the statute's absence.[17]

This Article contends that both camps would benefit from a thorough understanding of FPSD's place within the common law of tort. According to an FPSD critic, for instance, only ten states and a few federal courts follow FPSD.[18] But as the Prologue's "exam question" suggests, FPSD is in reality an illustration of universal and fundamental common law tort concepts: duty, proximate cause, and damages. Wherever these elements remain requirements for common law liability, public service cost recoupment should be denied.[19]

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15. Timothy D. Lytton, *Introduction* to SUING THE GUN INDUSTRY 15 (Timothy D. Lytton ed. 2005).

16. Protection of Lawful Commerce in Arms Act, S. 659, 108th Cong. (2003) ("To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others"); Protection of Lawful Commerce in Arms Act, H.R. 1036, 108th Cong. (2003).

17. A statute that is comprehensive indicates a legislative intent that the statute totally supersedes and replaces the common law dealing with the subject matter. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 50:05 (6th ed. 2005); *see also* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 789 (1952) (holding that a comprehensive statute describing course of conduct, parties, things affected, limitations, and exceptions excludes all aspects of the common law not specified by Congress in the statute).

18. Lytton cites cases for the following states: Alaska, California, Florida, Louisiana, Massachusetts, New Jersey, New York, Pennsylvania, Virginia, and Wisconsin. Lytton, *supra* note 11, at 728-29 n.2. He also discusses what he deems the "mixed" acceptance of the doctrine in federal courts. *Id.* at 729 n.3.

19. This is why the list of jurisdictions that do not accept FPSD is far more extensive than the list of jurisdictions that actually mention the doctrine by name. For example, proximate cause was invoked in Georgia in *Torres v. Putnam County*, 541 S.E.2d 133, 136 & n.4 (Ga. Ct. App. 2000) (dismissing suit against defendants for the cost of sending county building inspector, sheriff, and deputy sheriff to inspect defendants' land for zoning violations). *Cf.* City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1240 (Ind. 2003) (noting that the doctrines of remoteness and proximate

Abolishing FPSD could permit the government to recover the cost of many services it currently provides, from firefighting costs due to careless smokers to the costs of special education required by children born with preventable medical problems.[20] As this Article shows, FPSD's opponents unjustifiably confine their recoupment demands to expenditures made where the target defendant is a corporation. Their proposed modification of FPSD is, in reality, a means to further their agenda of regulation by litigation.[21]

FPSD's opponents find the justifications offered in defense of the doctrine to be weak and circular.[22] They challenge FPSD as unfair and inefficient, and claim that FPSD springs from judicial activism that distorts common law and usurps legislatures' policymaking prerogatives.[23] If these critics are correct, trial attorneys and judicial and economic conservatives should unite to condemn FPSD.

But this Article argues that FPSD does not distort tort law. FPSD is in fact an *embodiment* of the common law of torts; *ridding* tort of FPSD would be legislating from the bench. Abolishing FPSD inside the common law would require defiling fundamental tort doctrines. Deploying governmental rescue services to mitigate the effects of misbehavior does not constitute damages proximately caused by that misbehavior. Moreover, no one owes a duty to governments to refrain from utilizing government

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cause may apply to the city's public nuisance claim against a firearm manufacturer). Lytton believes proximate cause analysis is often different from the free public services doctrine. Lytton, *supra* note 11, at 748-49.

20. For an example of the expense of special education, see BARRY WERTH, DAMAGES 159 (1998) (estimating cost of private school special education for a brain-damaged child as $47,748 per year for sixteen years).

21. Lytton, for example, has written extensively elsewhere in favor of the use of municipal and individual suits against gun manufacturers and dealers as a way to augment government regulation of the industry. Timothy D. Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, *in* SUING THE GUN INDUSTRY, *supra* note 15, at 250; Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000); Timothy D. Lytton, *Negligent Marketing:* Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1 (2000). Galligan approves of recoupment suits against firearms and tobacco manufacturers because they will "equalize[] the relative strength of the parties. The suit is one powerful entity—a governmental entity—against another, a large entity or group of entities. . . . [I]t is large versus large." Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1049.

22. *See, e.g.*, Lytton, *supra* note 11, at 752 ("The few opinions that give justifications provide little more than merely the outlines of an adequate defense of [FPSD], and they suffer from question-begging . . . . [S]urveying the case law reveals that in imposing the doctrine, courts have failed to offer any convincing justification for it.").

23. *Id.* at 731, 759, 765.

services, except conceivably to refrain from maliciously calling upon them.[24] Therefore, any alleged overuse of government services is not damage proximately caused by wrongdoing.

This Article defends FPSD by describing four flaws that undermine the anti-FPSD thesis. Part II details FPSD critics' most blatant failing: a defective analysis of current law. This faulty analysis leads FPSD's critics to suggest a reform that would in fact render tort law incoherent. Part III discusses FPSD critics' failure to acknowledge *why* government services are not of the "fee for service" variety, arguing that the essence of certain community services is their provision without charge. This Part also rebuts the critics' claims that FPSD underdeters corporations from committing negligent acts, and that FPSD is an instance of judicial activism. Part IV unmasks the underlying issue that permeates the anti-FPSD thesis: a pervasive distrust of corporations. The Article concludes by summarizing the claim that FPSD must be retained as an essential component of the common law of tort, unless and until tort is superseded by public ordering.[25]

II. FPSD AND TORT DOCTRINE

Tort liability for negligence requires that a plaintiff allege and produce persuasive evidence of: (a) the defendant's duty to the plaintiff; (b) the defendant's breach of this duty; (c) the proximate and legal causation of the plaintiff's loss from this breach; and (d) the cognizable damages arising from this loss.[26] But tortfeasors do not owe any legal duty to the providers of government services. Likewise, the discharge of government

24. Thus, prank false alarm phone calls to the fire department would arguably be fraudulent and tortious under common law. Courts have allowed suits by emergency workers injured in accidents on the way to answer emergency calls that are later found to be false alarms. *See, e.g.*, Duncan v. Rzonca, 478 N.E.2d 603 (Ill. App. Ct. 1985) (city police officer injured on way to answer silent robbery alarm at bank set off by negligently supervised child); Daas v. Pearson, 319 N.Y.S.2d 537 (N.Y. Sup. Ct. 1971) (city police officer injured on way to answer intentional false alarm). There is no obvious reason why municipalities could not similarly recover from plaintiffs for damage to city vehicles involved in such accidents. Further, many municipalities make it a crime to falsely summon emergency workers. Such statutes may be used to aid in determining the standard of care required of citizens. *E.g.*, *Daas*, 319 N.Y.S.2d at 540-41.

25. *See* Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623 (1991).

26. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 30, at 164-65 (5th ed. 1984).

services does not constitute proximately caused compensable damages. FPSD, it turns out, does little more than give a name to an instantiation of basic doctrines of tort.

A. Duty

In *County of San Luis Obispo v. Abalone Alliance*,[27] the California Court of Appeal explained the common law doctrine of duty: "Whether intentional or negligent, a tort 'involves a violation of a *legal duty*, imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is "damnum absque injuria"—injury without wrong.'"[28] The court was commenting on legal duty generally, not in specific relation to FPSD.[29] But a duty analysis applies fully even when used to deny tortfeasor liability for a byproduct of a free public rescue service. This has classically been the case under the longstanding "firefighter's rule."[30] Dating back to 1892, the firefighter's rule precludes a rescue worker from recovering in tort from a negligent landowner, where the rescue worker was injured while attending to an emergency created by a landowner's negligence.[31] The original rationale for the rule against recovery was arguably based on property law,[32] but today the firefighter's rule is often seen as one of the surviving instances of the doctrine of assumption of risk.[33] Like FPSD, the firefighter's rule is said to bar recovery because the person who negligently caused the blaze *owed no duty* to the firefighter. The proximate cause of the firefighter's injury was not the negligent landowner, but the firefighter's own voluntary decision to do the job.

The similarity between the firefighter's rule and FPSD can be seen in *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, where both played a role.[34] In this case, two corporations were allegedly responsible for an explosion and ensuing fire at a fuel plant in Morgan City, Louisiana; the

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27. 223 Cal. Rptr. 846 (Ct. App. 1986).
28. *Id.* at 855 (citations omitted).
29. The court did, however, discuss the doctrine. *Id.* at 850-51. After discussing *Flagstaff* and *Air Florida*, the court held that "a government entity may not, as the County seeks to do in this case, recover the costs of law enforcement absent authorizing legislation." *Id.* at 851. Thereafter, the court determined there was no statute authorizing such recovery. *Id.* at 851-53.
30. The rule also applies to police officers. *See* David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2031 (1992).
31. *Id.*
32. *Id.* at 2034. Courts originally considered firemen's liability under the "traditional classifications of entrants upon premises—licensees, invitees, and trespassers." Firefighters were licensees, not subject to the more strenuous duties owed to invitees. *Id.*
33. *See id.* at 2035.
34. 460 So. 2d 685 (La. Ct. App. 1984).

city sued both corporations to recoup the cost of fighting the fire.[35] In affirming the lower court's denial of recovery, the Louisiana Court of Appeal stated:

> We deem it unreasonable to hold that an owner owes it to firefighters not to let his building catch fire. To the contrary: it is the *firefighters' duty to the property owners (and neighbors) to save them from their negligence*. . . .
>
> . . . .
>
> . . . By assuming the responsibility of providing for such "rescue" services, the City has placed itself in a situation analogous to that of the professional rescuer.[36]

As *Fontenot* demonstrates, the government's self-imposed duty to provide rescue services without later suing for compensation, and the negligent citizen's lack of duty to refrain from non-maliciously using government services, are two sides of the same coin. However, Professors Lytton and Galligan dispute the relevance of this duty analysis to FPSD. According to Galligan, "[t]he argument that public entities exist to provide public services is a confusing response. So what? Public services traceable to a defendant's torts ought to be recoverable in order to encourage efficient investments in safety."[37] Lytton excoriates *Fontenot* as question-begging:

> According to the court, the government cannot recover the costs of public service expenditures from tortfeasors because tortfeasors owe the government no duty of care to prevent such losses. Tortfeasors owe no duty because the government, like a professional rescuer, assumes the risk of losses incurred while providing services to tort victims. The government can be said to assume this risk because such losses are inherent in the government's duty to provide public services. That is, the government is under a duty to provide public services free of charge. Thus, the government cannot recover the costs of public services from tortfeasors because they are under a duty to provide such services free of charge. The *Fontenot* court's duty analysis ultimately amounts to a restatement, rather than a justification, of the free public services doctrine: the government cannot recover public service costs from tortfeasors because it is under a duty not to.[38]

Professor Lytton is of course correct to assert that common law courts normally repeat fundamental rules rather than offer independent philosophical groundings for them. This is known as applying established precedent.

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35. *Id.* at 686.

36. *Id*. at 687-88 (quoting Thompson v. Warehouse Corp. of Am., 337 So. 2d 572, 573 (La. Ct. App. 1976)).

37. Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1045-46.

38. Lytton, *supra* note 11, at 754 (footnotes omitted).

But applying preexisting rules is only question-begging in the sense that the rule of law itself is question-begging. The invocation of a precedent assumes the legitimacy of a legal rule instead of constantly reestablishing it.[39]

Consider the substantive question, then. The common law precludes recovery for free public service expenses, *but why*? Are governments precluded from recovering because their expenses were in fulfillment of *their own duty* to provide rescue services? Is recovery precluded because *the tortfeasor owes no duty to the government* providing the service? Is there really a difference in this distinction, or are these two ways of phrasing the same idea?

1. Government's Duty to Rescue

In 1987, FPSD opponent David McIntyre discussed the importance of duty in FPSD.[40] In McIntyre's opinion, the "primary rationale" behind the general rule against municipal cost recovery is the assertion of a self-imposed "preexisting duty" of government to act.[41] Courts have held that recovery of the costs of rescue from a negligent corporation whose tort led to an increase in such costs is precluded because government fulfilled a "governmental function" by providing rescue services.[42] In effect, governments assign themselves duties to rescue according to the services they have established. It is a government's statutory self-imposition of this responsibility, not the tortfeasor's common law duty to his direct victim, that is the legal source of costs incurred by the government. Indeed, in *City of Cincinnati v. Beretta U.S.A. Corp.*,[43] the Ohio Court of Appeals agreed with the trial court's conclusion that "the

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39. Indeed, Lytton presents his own question-begging argument: governments should recoup public services from corporations because . . . well, because Lytton thinks they should.

40. *See* McIntyre, *supra* note 11.

41. *Id.* at 1009. Courts have held that there is no positive constitutional right to government-supplied rescue services. Governments are free to decline to provide such services. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter, the State is under no constitutional duty to provide substantive services for those within its border."); Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (holding city's failure to send an emergency squad to a resident in physical distress who called for help does not violate the Fourteenth Amendment's guarantees of Equal Protection and Due Process).

42. *See* McIntyre, *supra* note 11, at 1008-09 nn.44-45.

43. Appeal Nos. C-990729, C-990814, C-990815, 2000 Ohio App. LEXIS 3601, at *1 (Ct. App. 2000), *rev'd*, 768 N.E.2d 1136 (Ohio 2002). The Ohio Supreme Court, on appeal, confirmed that as a general rule "a municipality cannot reasonably expect to recover the costs of services whenever a tortfeasor causes harm to the public, [but] it should be allowed to argue that it may recover such damages in this type of case." City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1149 (Ohio 2002) (creating an exception for "ongoing and persistent" misconduct).

city may not recover for expenditures for ordinary public services which it has the duty to provide."[44] Similarly, in 2001 the Connecticut Supreme Court upheld dismissal of the City of Bridgeport's suit against firearm manufacturers because the city, having provided public services as part of its normal civic function, lacked "any statutory authorization to initiate . . . claims" of liability against the firearms industry.[45]

2. Tortfeasor's Lack of Duty to Government

Courts have also rejected government attempts to recover the cost of public service occasioned by a tortfeasor's negligence on the grounds that the tortfeasor owed no preexisting legal duty to government. For instance, in *Fontenot,* the city spent $38,000 on fire and police services to extinguish a fire caused by a corporation's alleged mishandling of combustible chemicals.[46] In denying the city recovery for the cost of these services, the court declared that any duty Fontenot, Inc. owed in handling its flammable chemicals "does not include within the ambit of its protection the risk that public . . . funds will be expended to fight a fire . . . ."[47]

In *County of San Luis Obispo v. Abalone Alliance*,[48] defendants intentionally, though not maliciously, committed acts of trespass that they in fact *hoped* would result in the expenditure of police resources; yet *even they* were not held liable for those expenditures. The court rejected the county's attempt to recover money spent for police overtime and related costs arising from defendant protest groups' occupation of a construction site for a nuclear power plant.[49] *A fortiori*, the same result surely must ensue when a public expenditure is neither foreseen nor desired. Hiking alone on the Appalachian Trail in the wintertime may be foolhardy, and perhaps even a dereliction of one's moral obligations to one's dependents and employer, but it is assuredly not a legal breach of any common law duty to the Park Service's mountain rescue squad.

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44. *Beretta U.S.A. Corp.*, 2000 Ohio App. LEXIS 3601, at *38.

45. Ganim v. Smith & Wesson Corp., No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330, at *4 (Dec. 10, 1999), *aff'd,* 780 A.2d 98, 108 (Conn. 2001).

46. *See* Mayor of Morgan City v. Jessie J. Fontenot, Inc., 460 So. 2d 685, 686 (La. Ct. App. 1987).

47. *Id.* at 688.

48. 223 Cal. Rptr. 846 (Ct. App. 1986).

49. *Id.* at 849-51 ("[A] government entity may not, as the County seeks to do in this case, recover the costs of law enforcement absent authorizing legislation.").

In *State v. Long Island Lighting Co.*, the court dismissed a state's action to recover costs incurred to direct traffic when defendant's power lines allegedly negligently fell onto a roadway, even though defendant arguably *did* breach a duty to the state.[50] Unlike other FPSD cases, here the state's own property had been obstructed as a result of the allegedly wrongful behavior, making the government's tort case much stronger than for the firearm suits. Notwithstanding this distinction, the court dismissed the recoupment suit: "The plaintiff may not recover damages for undertaking its duty to ensure the safety of the traveling public. . . . Plaintiffs performed the very tasks intended by the Legislature. They exercised their functions, powers and duties relating to traffic regulation and control."[51] For the court, the source of the plaintiff's expenditures was its voluntarily assumed statutory duty to ensure the flow of traffic, not the damage to its own property by the defendant.

Where a tortfeasor negligently *damages* (not merely obstructs) government property, courts generally permit recovery for the harm to the property, even though recoupment is not allowed for rescue and cleanup efforts.[52] In *District of Columbia v. Air Florida, Inc.*, a government sued an airline to recover expenditures incurred to rescue the injured, recover the bodies of the dead, and raise the wreckage of a jet that had crashed into Washington's 14th Street Bridge on takeoff from National Airport.[53] Air Florida certainly owed a duty to its *passengers* and to persons on the ground not to negligently injure them or damage their property, and the airline also owed a duty to the District of Columbia not to negligently damage the 14th Street Bridge. However, the airline owed *no duty* to the District's fire department to refrain from prompting use of its emergency services. Rather, the fire department itself created and assumed a duty, which did not exist at common law, to help both Air Florida and stricken passengers and motorists. The airline agreed to pay the state for damage to the bridge,[54] but the lawsuit against the airline for recovery of the cost of rescue services was dismissed.[55]

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50. 493 N.Y.S.2d 255, 256, 259 (N.Y.Co. Ct. 1985).

51. *Id.* at 257 (brackets omitted).

52. Lytton discusses the exception for damage to public property at Lytton, *supra* note 11, at 743. McIntyre discusses the exception at McIntyre, *supra* note 11, at 1025.

53. 750 F.2d 1077, 1079 (D.C. Cir. 1984).

54. *Id*. at 1079 n.1.

55. A District of Columbia United States District Court dismissed the city's suit for failure to state a claim upon which relief could be granted, and the Court of Appeals for the D.C. Circuit affirmed. *Id.* at 1078.

3. Subrogatory Theory of Duty

In an effort to forestall the common law's inevitable duty analysis, David McIntyre posits an agency theory that bypasses the traditional notion of duty.

> [T]here is no reason why a municipality's financial interests should not be entitled to legal protection, *particularly since it is suing on behalf of its taxpayers* to whom the money ultimately belongs. . . .
>
> . . . .
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> . . . [I]n a disaster situation a duty of reasonable care is owed the public at large which, in essence, is represented by the government plaintiff in a response cost recovery action.[56]

Professor Lytton uncritically paraphrases McIntyre's arguments: "Taxpayers lose when they pay to replenish public resources depleted by the tortfeasor, and the public at large loses whenever those resources are no longer available for other purposes. In this regard, government is analogous to a corporation, whose losses ultimately harm shareholders."[57]

Under McIntyre's agency theory, provision of government services is analogous to insurers' indemnification of insureds, allowing insurers *de jure* subrogation rights against the party that injured their insureds in some cases. There are two problems with this argument, however. First, subrogation requires that the party suing stand in the shoes of the actual victim;[58] subrogation may be invoked only if the victim herself has a

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56. McIntyre, *supra* note 11, at 1011, 1020 (emphasis added). Note that Erich Rolf Luschei analyzes *City of Flagstaff* under a similar approach, arguing that the city government should have been compensated (although under a theory of unjust enrichment, rather than in tort) for assuming the railroad's duty to rescue residents put in danger by the railroad's dangerous chemicals. *See* Erich Rolf Luschei, Comment, *Government Recovery of Emergency Service Expenditures: An Analysis of User Charges*, 19 LOY. L.A. L. REV. 971, 984 (1986).

57. Lytton, *supra* note 11, at 760. Presumably Lytton is only concerned with corporate tortfeasors, for reasons made clear *infra* at notes 163-92 and accompanying text.

58. *See, e.g.*, Yellow Freight Sys., Inc. v. Courtaulds Performance Films, Inc., 580 S.E.2d 812, 815 (Va. 2003) ("Subrogation is, in its simplest terms, the substitution of one party in the place of another with reference to a lawful claim, demand, or right so that the party that is substituted succeeds to the rights of the other."); Fed. Land Bank of Baltimore v. Joynes, 18 S.E.2d 917, 920 (Va. 1942) ("Subrogation is the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt."); Aetna Cas. & Sur. Co. v. Whaley, 3 S.E.2d 395, 396 (Va. 1939) (noting that, in equity, a debt paid by a surety "is treated as still subsisting and the surety stands in the shoes of the creditor, entitled to the same rights the creditor was entitled to").

legal claim against the tortfeasor that can be assigned to the insurer, or here, the government.[59] This is a questionable proposition in the case of disaster responses.[60] Second, if citizens do have individual causes of action against a tortfeasor, their right to sue must be assigned to the government.[61] But no individual *or* statutory rights transfer occurred in the municipal cost recovery cases, nor were government plaintiffs merely seeking reimbursement for losses incurred by citizens.[62]

Professor Lytton concedes that the "insurance collective" analogy is unsustainable.[63] He states that "[i]t would be a mistake to view efforts by government entities to recover public service expenditures as subrogation actions," because no assignment of the public's rights has been made to government, and because "government entities sue in their own right for their own losses, which are distinguishable from the losses of their citizens."[64] Likewise, Galligan praises the "tactical brilliance" behind firearms and tobacco recoupment suits because they allegedly "avoid[] the difficulties inherent in subrogation claims," including issues of contributory and comparative negligence and assumption of risk, all of which may be invoked against a subrogated plaintiff.[65] But without a subrogatory basis for their causes of action, anti-FPSD supporters are left where they started: simply no duty is owed by a tortfeasor to the fire department to minimize use of its service. In a somewhat astonishing aside, Professor Lytton appears to concede all this. He grants that

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59. It is worth noting the general rule that claims for personal torts are not assignable. *See* City of Richmond v. Hanes, 122 S.E.2d 895, 898 (Va. 1961):

> The general doctrine, both at law and in equity, is that rights of action for torts causing injuries which are strictly personal and which do not survive are not capable of being assigned . . . . The rule was based on principles of public policy to discourage champerty and maintenance.

Id. (citations omitted).

60. *Cf.* Am. Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786, 790 (Ala. 2002) (noting it has been long recognized in Alabama that "a surety who pays the debt of his principal 'stands in the shoes' of the payee and may enforce the payee's rights in order to seek reimbursement"); Sundheim v. Sch. Dist., 166 A. 365, 369 (Pa. 1933) (noting that a party seeking to enforce subrogation "must point to some equitable right through the persons in whose shoes it stands").

61. Trevino v. HHL Fin. Servs., Inc., 945 P.2d 1345, 1348 (Colo. 1997) ("Subrogation is a contractual or statutory right pursuant to which a portion of an injured plaintiff's rights against the tortfeasor responsible for the injuries are assigned to the subrogee.").

62. For a similar discussion of the legal flaws in municipal lawsuits against the gun industry, see Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 MISS. L.J. 631, 640 (2001).

63. Lytton, *supra* note 11, at 751.

64. *Id.* Lytton does not explain how this can be consistent with his comparison of government as a corporation and citizens as shareholders. Shareholder losses are presumably equal to their proportionate ownership share of the company's loss.

65. Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1023-24.

"[d]uty analysis, if properly developed, might well provide support for the free public services doctrine."[66] But he concludes that "[c]ourts have failed, however, to offer *thoughtful* duty analysis when it comes to the free public services doctrine."[67] Unfortunately for Lytton, a facile charge of "thoughtlessness" does not a persuasive argument make.

B. Proximate Causation

In the typical municipal case against firearm manufacturers, a third factor precludes government tort recovery over and above the government's voluntary decision to rescue and the tortfeasor's lack of duty owed to the government. An intervening intentional tort by one or more third parties who criminally used the firearm has typically broken any chain of causation that may have existed between the gun maker's actions and the injury. In common law tort, the causal nexus between a plaintiff and a defendant, once created, does not extend across certain intervening events, including deliberate human wrongdoing.[68] These events interrupt the chain of causation that began with the defendant's alleged wrongdoing.[69] The traditional doctrine of causal intervention is that "the free, deliberate, and informed act or omission of a human being, intended to exploit the situation created by defendant, negatives causal connection."[70] Consistent with this doctrine, courts have found that an intervening crime by a third party precludes proximate causation of a plaintiff's harm as a matter of law.[71]

Courts appear to be particularly willing to find a break in the causal chain if the intentional tort committed by the third party is a violent crime. For example, in *Stahlecker v. Ford Motor Co.*, the court upheld a

66. Lytton, *supra* note 11, at 754.
67. *Id.* (emphasis added).
68. Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827, 827 (2000).
69. *Id.*
70. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 136 (2d ed. 1985) (emphasis omitted).
71. See, for example, *Watson v. Kentucky & Indiana Bridge & R.R. Co.*, 126 S.W. 146 (Ky. 1910), in which a tank car full of gasoline derailed due to defendant's negligence, resulting in a gas leak. Duerr, a third party, threw a match on the leak, starting a fire that injured the plaintiff and his house. Defendants presented evidence that Duerr, who had been discharged by the defendant that morning, intentionally started the fire. Duerr claimed, however, that he was unaware of the leak and was merely lighting a match. The court found that the defendant was entitled to a directed verdict on proximate cause grounds if the jury found that Duerr acted maliciously. *Id*. at 151.

demurrer for tire and car manufacturers in a wrongful death suit where a motorist was murdered after being stranded when one of her car's tires failed.[72] The court held that even if the tire was defective and unreasonably dangerous, it was not the proximate cause of the motorist's murder by a third party who encountered her alone in an inoperable vehicle, because the criminal act by the murderer negated any causal relationship between the motorist and the manufacturer.[73] Similarly, in most cases between a government and a firearm manufacturer, the criminal use of the firearm by a third party negates the gun maker's liability even if the manufacturer was in some way negligent.

C. Damages

FPSD opponents do not address damages as methodically as duty and causation,[74] but they do consider municipalities to be directly damaged upon deployment of emergency services in response to negligent corporate tortfeasors. In fact, according to FPSD opponents, government damages are more intensely suffered than are private damages, because when *government* is a tort victim, we are *all* victims.

> Viewing the government as a tort victim undermines the idea that somehow public services are free, as the doctrine suggests. The costs of suppressing negligently started fires or cleaning up oil spills or rescuing airline crash victims are losses to society as a whole; they drain resources away from other private or government activities. . . . Allowing government to sue for these losses in tort shows them to be real costs that someone must bear, not merely free services. If the tortfeasors whose conduct occasions these costs do not bear them, then all of us will.[75]

Under this view, government damages are a straightforward proposition; one dollar spent by a city fire department to save the property of a negligent defendant constitutes a dollar's worth of damage to the city. After all, that dollar was not free; it has been drained away from other activities.

There are two problems with this argument. First, negligently caused economic loss without accompanying physical harm or damage to the

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72. 667 N.W.2d 244, 258 (Neb. 2003).

73. *Id.*

74. Lytton does note that economic damage arguments frequently appear "alongside" FPSD dicta. *See* Lytton, *supra* note 11, at 749. This curious inversion allows Lytton to mask the fact that the economic damages rule is *part of* FPSD, not "alongside" it. Lytton commits the same mistake apropos proximate causation, opining that because of the proximate causation requirement, "[e]ven in the absence of the free public services doctrine, most types of law enforcement expenditures would remain unrecoverable." *Id.* at 770. What this misses is that FPSD exists in part *because of* proximate causation, not apart from it.

75. *Id.* at 779.

plaintiff is generally not recoverable in tort.[76] Another difficulty is that when government services exist solely for emergency and disaster relief, it is hard to say that use of these services constitutes any damage at all. This problem was suggested by an economic expert witness for the defendant oil company in the mammoth *Amoco Cadiz* case.[77] There, the Seventh Circuit had to consider whether FPSD could protect Amoco from costs incurred by the French government to clean up an oil spill Amoco had allegedly negligently caused off the coast of Brittany. The question was whether some of the claimed damages existed at all:

> One could say . . . that there is a difference between proprietary and strictly governmental operations because the proprietary arms of the government have other things to do. If the workers of the Electricity Board were not repairing the lines damaged by the plane, they could be constructing new lines; if the staff of the phone company were not tracing a freeloader's calls, they could be hooking up new phones. But if the sailors of the French Navy were not skimming oil [from the *Cadiz* spill], what would they be doing? Invading some neighbor? On this view governmental operations are different because the opportunity costs of their employees and equipment are zero. If they were not being used in the cleanup, they would have no productive use at all.[78]

Some commentators have conceded that the opportunity cost of dousing a particular fire is de minimis, and that governments are truly harmed only when they must supply emergency services above and beyond a "normal" base level. McIntyre took this position, advocating liability "only for extraordinary or excessive costs. Common every-day accidents would not trigger liability because such accidents are within the zone of risk anticipated by response services."[79] Erich Rolf Luschei also defended this view in a 1986 article advocating user charges for tortfeasors who negligently cause "excessive use of the government service."[80] Luschei explained that limiting recoupment suits to *excessive*

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76. Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 Supp. AM. J. COMP. L. 111, 112 (1998); *see also* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308 (1927); Byrd v. English, 43 S.E. 419, 420-21 (Ga. 1903); Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 204 (Ohio Ct. App. 1946).

77. *In re* Oil Spill (*Amoco Cadiz*), 954 F.2d 1279, 1313-14 (7th Cir. 1992).

78. *Id.* In the end, the Seventh Circuit did not find this argument terribly persuasive, stating in dicta that the French government most likely took the probability of such events into account when it decided how many ships to build and how many sailors were required to staff them. *Id.* at 1314.

79. McIntyre, *supra* note 11, at 1018 (footnotes omitted). Because disasters conceivably could be caused by individuals as well as corporations, McIntyre did not advocate limiting disaster response recovery lawsuits to corporate tortfeasors. For his definition of "disasters," see McIntyre, *supra* note 11, at 1001 n.10.

80. Luschei, *supra* note 56, at 993.

use "serves two purposes. First, it permits some subsidy or cost spreading. Second, it eliminates the government's costs of litigation by limiting the right of action."[81] Under this theory, citizens may be entitled to some use of public services through the payment of taxes, but *excessive* use should incur tort liability to the state.[82]

Under an excessive expenditure theory, ordinary government rescue costs such as police and firefighter salaries, or the purchase and maintenance of standard equipment, would be nonrecoverable damages. Presumably, some standard level of service for each taxpayer (perhaps one call each to police and fire departments each year?) would be permitted without government recoupment of expenses. Above the standard level of service, however, if wrongdoing underlay the expenditure, costs could be recouped by the government agency, through either a flat-rate user fee, an individualized tax bill based on the actual cost of the service, or a common law tort suit to recoup excess expenditures.[83] Alternatively, government rescue services might be financed much as water service is billed, by individually calculating fees based on the level of protection required ex ante for a particular property rather than through indirect financing methods such as property tax.[84] One proposal for funding fire protection makes fees a function of a formula that includes the property value, size of the property, number of occupants, and the ex ante probability of fire.[85] In such a system, collective loss-spreading is reduced, but deterrence is enhanced through discounts for the installation of protective systems like smoke detectors and sprinklers.[86]

These mechanics of an excessive expenditure theory have everything to do with insurance and nothing to do with tort, for under this plan, actuarially correct ex ante risk, not ex post corrective justice, determines the *premium* to be paid by each *insured*, not the *award* to be paid by

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81. *Id.*

82. *Id.* at 974 n.15.

83. Such legal action need not be tort based. Liability might result from abnormal use of a government service under public ordering, whether fault-based or not. Thus, a system of fees could be instituted, such as that used in the mid-1990s at Yosemite National Park to recover the cost of search and rescue missions for hikers and climbers. In 1996, the Park billed two rock climbers found guilty by a U.S. magistrate of "creating a hazardous condition" for the cost of their rescue, $13,325. Christopher Reynolds, *Much Talk, Little Action on Charging for Rescues*, L.A. TIMES, Dec. 20, 1998, at L2.

84. Such proposals are popular with anarcho-capitalists who believe that services such as fire protection are private rather than public goods. *See, e.g.*, ROBERT W. POOLE, JR., CUTTING BACK CITY HALL 62 (1980).

85. *Id.* This proposal was suggested by William Pollack to encourage spending to shift from fire suppression to fire prevention, and a form of it was adopted by Inglewood, California in 1978. *Id.* at 62-63. Private fire insurers originally both fought fires and paid for damages. *See* Harry M. Johnson, *The History of British and American Fire Marks*, 39 J. RISK & INS. 405, 406 (1972).

86. *See* POOLE, *supra* note 84, at 62.

each *defendant*, to the municipal government.[87] Such proposals bear a family resemblance to anarcho-capitalistic visions for abolishing government; private fire insurance carriers originally fought fires *and* contractually compensated their clients, with subrogation rights against fire-setters, for fire damages they did not succeed in preventing.[88] But none of this involves ex post compensation for harm caused by wrongdoing—none of this sounds in tort.

Despite the disconnect between excessive expenditure theories and tort doctrine, municipal recoupment suits are nonetheless cast as a means to replenish government treasuries depleted by extraordinary expenses. Overtime costs,[89] outlays for the acquisition of specialized equipment,[90] and supplies purchased for a specific rescue have all been claimed in tort.[91] In *City of Bridgeton v. B.P. Oil, Inc.*, the court noted that the city was claiming a common law right to sue for "*excessive* use of its fire department."[92] Likewise, the state in *Air Florida* asked for "*extraordinary* expenses" borne by the District and occasioned by the airline crash.[93] In the litigation following the incident at Pennsylvania's Three Mile Island generating plant, the Third Circuit left open the possibility for recovery of costs incurred by deployment of emergency personnel.[94] The district court had dismissed the case because "[t]he type of damages claimed is

87. Corrective justice posits that resources are transferred from one party to another in the tort system in order to compensate for damage wrongly inflicted by the first party on the second party. *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56-83 (1995); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567 (1997).

88. Johnson, *supra* note 85, at 406. Ironically, proposals like Pollack's would transform firefighters into monopoly insurers, turning on its head the anarcho-capitalist dream.

89. *See, e.g.*, City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323 (9th Cir. 1983); Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685, 687 (La. Ct. App. 1984); City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49, 50 (N.J. Super. Ct. Law Div. 1976); Koch v. Consol. Edison Corp., 468 N.E.2d 1, 7-8 (N.Y. 1984).

90. *See, e.g.*, *Fontenot*, 460 So. 2d at 686; *City of Bridgeton*, 369 A.2d at 50. According to McIntyre, *District of Columbia v. Air Florida, Inc.* involved the District of Columbia's rental of cranes to lift plane wreckage from the Potomac River. McIntyre, *supra* note 11, at 1005 & n.27; *see* District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984).

91. Part of the costs Pennsylvania sued to recover in Three Mile Island related litigation was for emergency supplies. *In re* TMI Govtl. Entities Claims, 544 F. Supp. 853, 854 (M.D. Pa. 1982), *vacated*, 710 F.2d 117, 121 (3d Cir. 1985).

92. *City of Bridgeton*, 369 A.2d at 54 (emphasis added).

93. *Air Florida*, 750 F.2d at 1079 (emphasis added).

94. Pennsylvania v. Gen. Pub. Utils. Corp., 710 F.2d 117, 121 (3d Cir. 1983).

similar to that produced by other man-made catastrophes such as fires, explosions, collapsing structures and the like,"[95] but the Third Circuit held that a jury should decide whether a "nuclear incident" is so exceptional a hazard that it is not subject to ordinary government services.[96]

Many commentators have noted the anomaly of governments seeking common law reimbursement from some tortfeasors for services long provided without charge to others. In the gun lawsuit filed by Boston, the court summarized cases applying FPSD in these words:

> Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. . . . [S]uch contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.[97]

In recent years, communities have struggled to discourage excessive use of public services, but these efforts have not usually taken the form of recoupment suits. In 1986, the Ventura County, California fire department weighed whether to fine parents up to $10,000 for wildfires caused by their children.[98] A former chief of the fire department explained the rationale: "It was felt that it was not fair to the average taxpayer to bear the brunt of suppression costs of fires that were set either deliberately or by gross negligence."[99] Apparently, extinguishing such fires, for the fire department, was "over and above our normal service."[100] Objecting with what reads as a classic defense of FPSD, the father of a suspected child arsonist told a reporter, "I feel it's the [fire] department's civic duty [and not mine] to take care of [fires]."[101] Of course, on basic tort principles a negligent or intentional fire setter is liable in tort for property she destroys, but the issue in Ventura was whether a parent should be liable for *cleanup costs*, as opposed to the value of property burned. Crucial to Ventura County's position, however,

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95. *Id.* at 121.

96. *Id.* The issue was never resolved. The parties settled the case without another trial. McIntyre, *supra* note 11, at 1032 n.175.

97. City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *34 (Super. Ct. July 13, 2000).

98. Mack Reed, *Parents of Fire Starters Smoldering Over the Bill,* L.A. TIMES, July 12, 1996, at B1.

99. *Id*.

100. *Id.*

101. *Id.*

was the fact that it was *authorized by state legislation that superseded common law*.[102]

Many communities impose regulatory fees for those who overuse rescue services. Debates over such fees probe the nature of government service and of community self-help. For example, to cut down on abuse of the 911 emergency telephone system, the Los Angeles City Council imposed fees on anyone who called the city fire department for routine medical treatment.[103] A newspaper report noted that "paramedics say some of the most demanding [911] callers are wage-earning citizens who complain that they are taxpayers who have a right to city ambulance service."[104] In 2004, prosperous Fairfax County, Virginia enacted fees of $300 to $550 for residents requiring the use of emergency ambulance service.[105] Not all citizens thought the new fees were fair; one complained, "[w]e pay the highest taxes in the [Washington, D.C.] area; we shouldn't have to pay for emergency ambulance service."[106]

In addition to user fees, quasi-criminal legislation recoups government costs associated with antisocial behavior. Faced with thousands of calls for police to check out burglar alarms, in recent years numerous municipalities have issued citations to citizens whose security systems repeatedly sound false alarms.[107] Virginia law allows localities to charge for expenses associated with emergency responses to DUI violations and

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102. *Id.* California's Health & Safety Code section 13009 authorizes actions by government agencies to recover the costs of fire suppression and emergency services connected to fighting negligently or illegally set fires. CAL. HEALTH & SAFETY CODE § 13009(a) (Deering 2000).

103. Laurie Becklund, *Paramedics Play It Safe—Crews Now Respond to Nearly All 911s*, L.A. TIMES, Aug. 4, 1991, at A1.

104. *Id.*

105. Jim McElhatton, *Fairfax to Levy Ambulance Fee*, WASH. TIMES, May 25, 2004, at B2. The fees would vary based on the level of emergency services required. Additionally, citizens would be charged $7.50 per mile. Lisa Rein, *Fairfax Jobs Program for Retarded Renewed*, WASH. POST, May 25, 2004, at B1. Clearly this was an effort to fund municipal services through employees' health insurance plans; it is highly doubtful that the county would pursue an uninsured taxpayer personally for ambulance services. Medical insurance is "invisible" (paid for nominally by employers in whole or in part), while taxes are often all-too visible come election time.

106. Claudette C. Ward, Letter to the Editor, *Ambulance Fees Will Be Harmful*, WASH. POST, June 24, 2004, at FS4 (writing in the Fairfax Extra section).

107. *See, e.g.*, Lewis Kamb, *Burglar Alarms Cry Wolf—Police Cry Foul: Seattle Considers Not Responding Unless Calls are Verified*, SEATTLE POST-INTELLIGENCER, Sept. 11, 2001, at A1.

similar traffic offenses.[108] A companion statute allows Virginia localities to recover expenses incurred in emergency responses to a terrorism hoax.[109] Of course, fines are also user fees in some cases, as with "weigh station" penalties and with many traffic violations, the fines for which may be seen as a charge for the approximate cost of rescuing those involved in private misuse of the public highways. But the key characteristic of all these measures is that they are enacted *legislatively*. They are regulations of the state's relationships with citizens—manifestations of *public ordering*.[110] None of these fines or fees is portrayed as common law tort liability.[111] The public debate over user fees shows that these questions are, at their core, concerned with the fundamental nature of the polity. Many taxpayers do not view city rescue expenditures as "damage" to a "victim," but rather as outlays incurred as a matter of public policy, to be funded in a fair manner to be determined by the political process after public debate. Of such policy debates the common law is not made.

III. FPSD AND POLICY

Despite this Article's efforts to portray tort as a noninstrumental mechanism of corrective justice without any overarching social goal, the reader may not be persuaded. Myriad "policy studies" lead some, especially on the political left, to believe that every legal rule must conceal a hidden or explicit policy judgment, and that the barrier between the public and private law components of the law is far from watertight.[112] This Article's view, controversial but widely held, is that tort's sole purpose is to be tort—to establish liability when and only when duty, breach, causation, and cognizable damages are present.[113]

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108. VA. CODE ANN. § 15.2-1716 (2003 & Supp. 2005) (originally enacted in 1997). The statute allows localities to charge a $250 flat fee, or a per-minute fee not to exceed $1000. *Id.* Note, however, that routine non-emergency services resulting in a DUI conviction are not recoverable under the statute, consistent with the statute having carved out a narrow exception to the common law FPSD. *See* Counties, Cities, and Towns: Police and Public Order, Op. Va. Att'y Gen. No. 04-054, 2004 WL 2361387, 2004 Va. AG LEXIS 41 (Sept. 23, 2004).

109. VA. CODE ANN. § 15.2-1716.1 (2003 & Supp. 2005) (originally enacted in 2002).

110. *See, e.g.*, Krauss, *supra* note 25; Krauss, *supra* note 62 (comparing private ordering and public ordering).

111. The malicious terrorist phone call comes closest to being a tort, but the plaintiff would have to be the intended victim, who could sue for intentional infliction of emotional distress.

112. *See, e.g.*, Claire Cutler, *Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations*, 24 MILLENNIUM J. INT'L STUD. 377 (1995) (arguing for private law as a basis for effecting public policy and rejecting the idea of the neutrality of private law).

113. *See, e.g.*, WEINRIB, *supra* note 87, at 145-70.

This vision of tort buttresses FPSD. But the defense of FPSD need not solely rely on this foundational argument. Even if policy arguments are relevant to tort claims, we can dismiss those that undergird the criticism of FPSD as it pertains to corporate defendants.

A. The Red Herring Called Deterrence

The case against FPSD typically holds that free public services generate an *externality*—too much of the harmful behavior that the public service serves to remedy. *Internalizing* this externality will, it is argued, result in optimal deterrence. Taxes, fees, and fines apparently will not accomplish this adequately, so tort law must take up the slack. In particular, FPSD critics claim that corporations create a need for substantial public services, but will not "pay their way" unless we abrogate FPSD. For example, Luschei maintains that "[c]harging tortfeasors for the cost of emergency services may reduce the frequency and severity of tortious behavior."[114] Galligan writes that suits by governments against tortfeasors play a "key role" in providing "efficient deterrence, as the legal economist uses that term."[115] McIntyre argues that "tortfeasor liability for the cost of disaster response services would more accurately reflect the true cost of accidents than does the present system of localized taxpayer subsidies."[116]

These "economic" arguments fail to take note that corporate tortfeasors cannot typically direct damage onto municipal services. Corporations already bear full liability as tortfeasors for harm they negligently or intentionally cause to persons and property, including government property. In addition, a corporation internalizes all the harm inflicted on its own property and business model. Corporate tortfeasors can rarely be confident that their negligence will require the deployment of, say, the municipal fire department, without also damaging nearby businesses or the company's own facilities, both of which the corporation is presumably already adequately deterred from harming.[117]

Negligent defendants typically do not dispute that they are liable for physical damage to governmental property and for costs incurred to

114. Luschei, *supra* note 56, at 972.
115. Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1020.
116. McIntyre, *supra* note 11, at 1015.
117. And of course corporate reputation would invariably be affected by wrongdoing, to the direct detriment of the corporate tortfeasor, absent any tort award.

protect public and private property from physical damage. Such was the situation in *Amoco Cadiz*.[118] The Seventh Circuit noted that "[t]he bulk of the expenses were incurred [by France] in protecting and restoring public property. Amoco concedes that France is entitled to compensation for such costs . . . ."[119] The primary dispute in *Amoco Cadiz* was whether France padded its bill by failing to adequately "separate the costs of protecting proprietary interests from other expenses . . . ."[120] Similarly, in *Air Florida*, the D.C. government's suit to recover public service expenditures was unsuccessful, but the airline conceded liability for $70,000 in damage done to D.C.'s 14th Street Bridge.[121] And in the seminal FPSD case, *City of Bridgeton v. B.P. Oil, Inc.*, the New Jersey Superior Court denied recovery for fire department costs to contain a spill on defendants' land, but noted that "if the city were the owner of adjacent land damaged by escaping oil, it like all landowners, may recover damages caused by this escape."[122]

The deterrence argument must be that tort law *under*deters corporate tortfeasors because some fraction of the social cost of their wrongful behavior is borne by the public weal. However, this claim applies to virtually every negligent action, by a corporation or an individual, that has ever been perpetrated since the common law of tort evolved. This is because negligent behavior results in liability only for *proximately* caused harm, thereby externalizing *remote* "but-for" costs. The deterrence argument would therefore expunge the notion of proximate causation from tort law, as economic analysts like Guido Calabresi in fact once seemed to advocate.[123] Tort law's economic loss doctrine may also be a culprit. The driver who negligently causes an accident on the George Washington Bridge during New York City's rush hour does not owe compensation to the thousands of commuters who lose pay because their arrival at work is delayed, or to the employers who lose profit because their workers are delayed, or to the police departments that incur overtime expenditures redirecting traffic. Without a revolution in tort, there are

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118. *In re* Oil Spill (*Amoco Cadiz*), 954 F.2d 1279, 1311 (7th Cir. 1992).
119. *Id.* at 1310-11.
120. *Id.* at 1310.
121. District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984); Al Kamen, *District Agrees to Settlement by Air Florida*, WASH. POST, Dec. 14, 1983, at B8. Less than two years after the crash occurred, the airline and the plane's manufacturer also settled out of court with nearly all of the survivors and victims' relatives for around $50 million, in one of the quickest air crash settlements ever. Kenneth Bredermeier, *$50 Million Paid in Air Florida Crash Claims*, WASH. POST, Nov. 25, 1983, at A1.
122. 369 A.2d 49, 55 (N.J. Super. Ct. Law Div. 1976).
123. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

arguably "too many" breakdowns on the George Washington Bridge during rush hour.

Deterrence-based arguments like these are simply not persuasive to those who ground tort law on notions of corrective justice, and for whom proximate causation properly encapsulates the corrective demand.[124] But even for economic theories of tort based on "Kaldor-Hicks" wealth maximization and deterrence,[125] the argument against FPSD is vulnerable.[126] In any case, FPSD critics do not advance the deterrence argument, for they do not advocate the *general* abolition of proximate causation and the economic loss doctrine. They appear to care only, and peculiarly, about *corporate* negligence provoking *one kind* of remote economic harm—rescue services. For that narrow subset of remote results of wrongdoing, the deterrence argument is quite simply unavailable because it is incoherent.

Looming in the background of this very partial deterrence argument is a seeming bias against corporations. For example, Lytton argues that "there is no relation between the tax rates of individuals and corporations and the costs of the public services that their activities occasion," resulting in corporate underinvestment in safety.[127] That corporate tax rates have no intrinsic relation to public service consumption is incontrovertible. But there is an equally weak link between tax rates of *individuals* and the cost of the public services these individuals' activities occasion. Do we know whether individuals *subsidize* corporations on this account or vice versa, or whether, as seems to me more likely, some individuals and corporations subsidize other individuals and corporations? Why, for example, do those opposed to FPSD not channel their concern with deterrence by addressing the possibility that large numbers of *individuals*, for instance, those who decline to evacuate their homes in the face of an approaching hurricane, systematically underinvest in safety because they expect government to bail them out? If deterrence is

124. *See* Krauss, *supra* note 25, at 625-27; WEINRIB, *supra* note 87. Galligan replies, with candor given his revolutionary goals, that "corrective justice . . . is not reflective of our post-millennium reality." Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1030.

125. *See, e.g.*, Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). *Contra* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

126. *See, e.g.*, W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982) (defending tort law's refusal to grant damages for "economic loss" on deterrence grounds).

127. Lytton, *supra* note 11, at 766.

a primary rationale for abolishing FPSD, should not individuals also be required to pay for "excessive" emergency services that they use?

Compared to individuals, corporations arguably have a *greater* desire to take extra care to guard against public service expenditures due to their negligence. This is because corporations are more solvent than individuals, and because corporations, unlike most individuals, have goodwill that cannot be adequately protected by insurance.[128] Indeed, corporations are more likely to self-insure even for physical damages proximately caused by their negligence.[129] Liability insurance surely dulls the insured's incentives,[130] but even insured-against harms damage corporate goodwill. Corporations feel pressure to avoid the negative publicity that no doubt results from disasters such as the Air Florida crash, the *Cadiz* oil spill, or the Three Mile Island incident.[131] Individuals' incentives to behave non-negligently are arguably much more dulled by insurance, or by free rescue services, than are corporations' incentives. Even if damage from a corporate disaster has been somehow largely confined to expenditures made by government for rescue, containment, and cleanup, citizens will harbor negative feelings toward the corporation for using up these scarce community resources.[132] These malevolent feelings are often translated into hefty punitive damage awards for physical damages caused, which surely deter and quite possibly *over*deter, and to which corporations are almost uniquely vulnerable.[133] Indeed, protection of

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128. *See, e.g.*, Joseph R. Dancy, *Electronic Media, Due Diligence, and the New Industrial Revolution*, 53 CONSUMER FIN. L. Q. REP. 72, 80 (1999) (stating that if a company has "a traditional insurance program like many other companies, chances are the company has little or no coverage for the serious damage caused to its goodwill . . . .").

129. Sidney G. Saltz, *Allocation of Insurable Risks in Commercial Leases*, 37 REAL PROP. PROB. & TR. J. 479, 490 (2002) ("[M]any large companies self-insure risks of loss to others caused by their negligence . . . ."); *see also* Douglas R. Richmond, *Self-Insurance and the Decision to Settle*, 30 TORT & INS. L.J. 987, 996 (1994) ("Self-insurance has become increasingly popular among commercial entities . . . .").

130. *See, e.g.*, KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 142 (1974). Health insurance in particular creates numerous moral hazard problems. Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 535 (1968).

131. For example, after the Exxon *Valdez* disaster off the cost of Alaska in 1989, consumer advocate Ralph Nader and several environmental groups called for a boycott of the company. Philip Shabecoff, *Six Groups Urge Boycott of Exxon*, N.Y. TIMES, May 3, 1989, at A17.

132. In an era of global communication, anger about large industrial accidents need not only be confined to communities located near the site of the disaster. For example, after a pesticide plant leaked deadly chemicals in Bhopal, India in 1994, killing more than 2000, Americans' name recognition of Union Carbide, the majority shareholder of the plant, increased greatly, as did negative feelings toward the company. Stuart Jackson, *Union Carbide's Good Name Takes a Beating*, BUS. WK., Dec. 31, 1984, at 40.

133. For example, Exxon was ordered to pay $4.5 billion in punitive damages for the 1989 spill resulting from the grounding of the *Valdez* off the coast of Alaska. Susan Beck, *$1.3 Bil. in Fees Awarded in Exxon Valdez Litigation*, LEGAL INTELLIGENCER,

goodwill is one reason why corporations, though rarely individuals, frequently voluntarily reimburse victims for damages they are not obliged to pay in tort, as well as for damages suffered by third parties through no fault of the corporation at all.[134]

It is reckless to assume, *sans* data, that corporations alone among tortfeasors have insufficient incentive to prevent or limit the scope of disasters. Unless a corporation is fly-by-night or insolvent, in which case the abolition of FPSD would not affect anything, it will be sensitive to reputational loss as well as to court ordered payments. Complex empirical studies could determine whether the current net incentive, after fines, punitive, and reputational "hits," is in some sense "optimal" and, if it is somehow "suboptimal," whether this "suboptimality" is the result of bankruptcy law, damages rules, insurance rules, agency problems resulting from limited liability, or some other feature of American law. Without such studies, the selective use of the deterrence rationale to justify abrogating tort law's FPSD, and for corporations only, is entirely unpersuasive.

B. Policy Reasons Why Public Services Are Supplied by Governments

There is one policy question at which critics of FPSD sometimes hint, but which they fail to substantially address: *should* governments supply public services at zero marginal cost, whether the user is an individual or a corporation? The answer to this question is a function of one's view of the proper role of government. For an extreme communitarian, all losses are *our losses*, so they should perhaps all be borne by *us*. The "New

Mar. 9, 2004, at 5. This amount was reduced to $2.5 billion in *In re* Exxon Valdez, 472 F.3d 600, 625 (9th Cir. 2006). Overdeterrence in such a case might entail decisions declining to ship oil.

134. Although the law was unclear as to whether manufacturers were liable for injuries caused by criminal product tampering, in 1991 Johnson & Johnson settled with the families of the seven Chicago-area residents who died nine years earlier after taking Tylenol that had been laced with cyanide. Although few of the terms of settlement were made public, they included college education funds for the eight children whose parents had died in the tragedy. P. Davis Szymczak, *Settlement Reached in Tylenol Suit*, CHI. TRIB., May 14, 1991, at 1. In the well-known case of *Bolton v. Stone*, a woman sued a neighboring cricket club after being hit and injured while standing outside her home by a ball that had strayed from the playing field. Bolton v. Stone, [1951] A.C. 1078 (H.L.) (appeal taken from K.B.). One of the judges appeared surprised that, although legal liability did not lie in tort because the accident was held to be unforeseeable, the defendant club "offer[ed] no more consolation to his victim than the reflection that a social being is not immune from social risks." *See id.* at 1087.

Zealand plan," abolishing much of tort law to pay for accidents out of the public treasury, reflects such a view.[135] Alternatively, perhaps government could be a subrogated insurer, a clearinghouse for corrective justice transfers but an ultimate bearer of no losses itself whenever tortfeasors are solvent. But should government be doing something that, say, State Farm Insurance Co. can likely do more efficiently? These are important questions for political philosophy and institutional economics, and tangentially for tort theory as well. Surely such questions should be the fulcrum of any critique of FPSD. Alas, critics of FPSD have not felt the need to address them.

Government-provided protection in times of adversity surely spreads costs, and corporations are not the only beneficiaries of this protection. Corporations are, after all, economically a nexus of contracts among individuals.[136] Corporate employees, officers, and shareholders may all be comforted knowing that government will be there to provide public services when needed by the corporation, for which they will not be billed afterward.[137] If free public protection was extended only to individuals, this modification of tort law would be equivalent to a tax on the corporate form. FPSD critics fail to show why such a tax is needed—they provide no evidence that total current corporate taxes are too low. Maybe they are just right, or even, perhaps, too high.[138]

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135. In the mid-1960s, the government of New Zealand commissioned a study of the country's workers' compensation system. The Royal Commission was simply to make suggestions with respect to workers' compensation but instead ended up recommending abolition of the tort system across the board. ROYAL COMM'N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 11, 12, 24, 26 (1967); Geoffrey W.R. Palmer & Edward J. Lemons, *Toward the Disappearance of Tort Law—New Zealand's New Compensation Plan*, 1972 U. ILL. L.F. 693, 739. Following the Royal Commission study, in 1974, New Zealand enacted a no-fault accident compensation system to replace tort remedies for accidents resulting in personal injuries. *See* Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 4 (1989) (describing the compensation scheme in New Zealand).

136. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12, 15-17 (1991).

137. Lytton seems to want to make a public example of corporations experiencing disasters. He admits that "[e]liminating the doctrine would encourage litigation—well publicized in the case of industrial accidents—that portrays these losses as costs for which someone must take responsibility." Lytton, *supra* note 11, at 780.

138. In addition to those already mentioned, note that Galligan's "public torts" are directed at manufacturers. Galligan, *Deterrence: The Legitimate Function of the Public Tort*, *supra* note 11, at 1023. McIntyre focuses on large-scale disasters not typically caused by individuals. McIntyre, *supra* note 11, at 1003.

Emergency services, often originally provided by private enterprise,[139] have evolved to become proprietary government functions for reasons that can be understood economically and philosophically. Economically, government services sometimes have characteristics of public goods that cannot be adequately provided privately.[140] The production of emergency services arguably generates pervasive benefits for which private providers may be unable to charge. Like national security, the availability of emergency services may benefit everyone in the community, whether each individual pays for them or not. Providing such goods for some necessarily means providing them for all.[141] Economists refer to this kind of externality as a "neighborhood effect."[142] Unless producers of public goods can extract payments from every user of a service, each member of the community has an incentive to free-ride on the willingness of others to pay for them. No private producer will step in to satisfy a general demand for such services because no producer can extract profits from free-riding consumers. Spread across a community, neighborhood effects and free riding can result in market failure, an unsatisfied demand for a beneficial service. Government provision of this service, with tax financing, is a response to this market failure.[143]

Philosophically, through the political process, we have resolved that public funding of some services is just. Modern notions of the state suggest that it is inappropriate to allow the market to determine who receives vital services such as police and fire protection. Market distribution of such services would arguably favor the wealthy and well organized at the expense of the poor and helpless. The moral sensibilities of most recoil at the suggestion that the poor should only receive substandard or

139. DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890-1967 (2000). In the seventeenth century, firefighting was connected to fire insurance and was therefore privately provided. *See* Johnson, *supra* note 85, at 406. The earliest public firefighting company in England was not formed until 1866. *Id.* at 407. In colonial America, collective, mutual-assistance firefighting companies predated private insurance. Private companies insuring against, as well as fighting fires and reimbursing volunteer companies who fought fires on the property of their insurance customers, arose in the mid-1700s. *Id.* at 414-17.

140. *See generally* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

141. *See* 3 F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY 43-44 (1979).

142. *See, e.g.*, David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 48 (2006).

143. *See* BRUCE L. BENSON, THE ENTERPRISE OF LAW 271-77 (1990); JAMES M. BUCHANAN, THE LIMITS OF LIBERTY 46-50 (1975).

unresponsive police or fire protection because they are "not willing" to pay for more.

This understanding of a democratic resolution of the appropriateness of free government provision of services appears to underlie the New Jersey Superior Court's eloquent opinion in *City of Bridgeton v. B.P. Oil, Inc*.[144] Granting defendants' motion to dismiss a lawsuit by which a city sought reimbursement for salaries it paid to contain an oil spill, the court declared: "It has been stated that 'It cannot be a tort for government to govern.' Neither is government a saleable commodity."[145] Calling attention to the fact that fire protection had once been a private function, the court affirmed that it was assuredly a government duty now.[146] The reason behind the transformation was explained the following way:

> Governments, to paraphrase the Declaration of Independence, have been instituted among men to do for the public good those things which the people agree are best left to the public sector. Since our country was founded there has developed a widening horizon of public activity. True, certain activities have developed in areas from which revenue has been derived, such as turnpikes, water or power supply, or postal services. Nevertheless, there remains an area where the people as a whole absorb the cost of such services—for example the prevention and detection of crime. No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief. The services of fire fighters are within this ambit and may not be billed as a public utility.
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> . . . .
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> . . . [A] municipal corporation may not recover as damages the costs of its governmental operations which it was created to perform . . . .
>
> Thus, if the city were the owner of adjacent land damaged by escaping oil, it like all landowners, may recover damages caused by this escape. It cannot, however, recover costs incurred in fire protection or extinguishment. That is the very purpose of government for which it was created.[147]

Bridgeton has proven influential, and for good cause.[148] The idea that the nature and functions of government are to be decided in the public political arena, not through private law adjudication, is foundational to FPSD. The Ninth Circuit conceded as much in *City of Flagstaff v. Atchison, Topeka & Santa Fe Railway* when it held that "the cost of

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144. 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976).
145. *Id.* at 54 (quoting Amelchenko v. Freehold, 201 A.2d 726, 731 (N.J. 1964)).
146. *Id.*
147. *Id.* at 54-55.
148. For example, the Declaration of Independence rationale in *Bridgeton* was quoted in *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685, 688 (La. Ct. App. 1984), and in *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Commw. Ct. 1986). A few of the cases citing *Bridgeton* as a basis for their decisions include: *Township of Cherry Hill v. Conti Construction Co.*, 527 A.2d 921, 922 (N.J. Super. Ct. App. Div. 1987); *Koch v. Consolidated Edison Co.*, 468 N.E.2d 1, 8 (N.Y. 1984); and *City of Cincinnati v. Beretta U.S.A. Corp.*, Appeal Nos. C-990729, C-990814, C-990815, 2000 WL 1133078 at *9 (Oh. Ct. App. 2000), *rev'd*, 768 N.E.2d 1136 (Ohio 2002).

public services for protection from fire or safety hazards is to be borne by the public as a whole."[149] The court concluded:

> Even if we were satisfied [which we are not] that we had the information to choose the more efficient cost avoider in this case, . . . an added factor counsels deference to the legislature. Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.[150]

Cases like *Bridgeton* and *Flagstaff* reflect courts' critical insight into the differences between private and public law. Services that the collectivity has chosen to provide are publicly funded goods until otherwise decided in the political arena. Government can fund activities in various ways: by instituting user fees, establishing lotteries, or imposing taxes, including taxes on corporations if it is thought that they are not paying their "fair share." Criminals can be charged for the police work leading to their arrest,[151] or convicts can be charged a "hotel bill."[152] This all happens through public ordering, the political process. Courts must not shift these public costs *as a common law function*. To follow FPSD opponents' prescription would be to make an end run around the political process and to engage in exactly the judicial regulation and usurpation of tort law that Lytton, for one, purports to condemn.[153]

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149. 719 F.2d 322, 323 (9th Cir. 1983).

150. *Id.* at 323-24.

151. *See, e.g.*, Window on State Government, Texas Comptroller of Public Accounts, *Court Costs, Fees and Fines for Justice, County and District Courts*, http://www.window.state.tx.us/lga/courtcosts06/3.html (last visited Feb. 20, 2007) (describing fees for services of peace officers, including arrest fees and warrant fees).

152. *See, e.g.*, *Mafia Boss Ordered to Pay Prison Costs*, MIAMI HERALD, Sept. 11, 2005, at A3 ("A federal judge Friday ordered the former head of the New England Mafia to reimburse the government almost $120,000 for the cost of his eight years in prison."); Marla A. Goldberg, *Suspect Denies Slaying Bruno*, THE REPUBLICAN (Springfield, Mass.), Dec. 28, 2005, at A1 (stating that two men convicted in federal court of interstate travel in aid of a racketeering venture were ordered to pay about $31,000 to cover prison costs).

153. *See* Lytton, *supra* note 11, at 780. The goal of the common law is corrective justice, or righting wrongs between the parties at bar, not distributive justice, or ensuring that the community's resources are distributed in a just manner given political considerations. *See* WEINRIB, *supra* note 87, at 204-31.

C. Judicial Policymaking

It is in labeling the free public services doctrine judicial policymaking that FPSD opponents make their definitive egregious error. Lytton calls FPSD a "judicial invention,"[154] but in fact courts that invoke the doctrine see it as emblematic of judicial *restraint*.[155] To cure the defects he sees in FPSD, Lytton concludes that "[s]imply overturning [FPSD] . . . would be justified, easy, and well within the legitimate powers of the courts."[156] Lytton thus promotes abandoning a common law rule intimately linked to the distinction between private and public law.[157] How can this be done by a restrained court?[158] Similarly, Wendy Wagner has argued that gun litigation is a way of overcoming "stubborn" information problems and reaping regulatory benefits not obtainable through the legislative process.[159] It is difficult to see what this has to do with judicial restraint, the rule of law, or tort.

This wolf-in-sheep's clothing approach, judicial legislation under the guise of judicial restraint, may in fact characterize much of Professor Lytton's scholarship. Lytton has made radical, tort-transforming arguments in support of suits against the firearms industry:

> The military strategist Karl von Clausewitz asserted that war is a continuation of politics by other means. The same might be said of gun litigation.
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> . . . .
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> . . . I . . . recognize the appropriateness of more focused legislative responses to litigation, where legislatures disagree with the policy implications of particular judicial decisions.
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> . . . .
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> . . . [But the] legislature should [disagree] in a restrained way, one that respects the preeminence of courts in shaping tort doctrine and preserves the regulatory benefits of tort litigation. . . . [M]ore focused responses promote the integrity of tort doctrine, respect the separation of powers, and preserve a regulatory role for the courts.[160]

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154. Lytton, *supra* note 11, at 780.

155. *See, e.g.*, City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49, 54 (N.J. Super. Ct. Law Div. 1976) ("It has been stated that 'It cannot be a tort for government to govern.'") (quoting Amelchenko v. Freehold, 201 A.2d 726, 731 (1964)).

156. Lytton, *supra* note 11, at 780.

157. *See* Krauss, *supra* note 25, at 653-54.

158. In fact, Lytton dislikes FPSD so much that he is apparently indifferent as to just which party—the courts or the legislature—should take the lead in ending it. He argues at one point that judges should abolish the doctrine, leaving the legislature free to reestablish it by statute if desired, and at another that the doctrine "should be replaced with a statutory scheme that generally allows government to sue in tort for public service expenditures subject to specific exceptions." Lytton, *supra* note 11, at 780.

159. *See* Wendy Wagner, *Stubborn Information Problems and the Regulatory Benefits of Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 15, at 271-72.

160. LYTTON, *The NRA, the Brady Campaign, and the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 15, at 152-53, 170.

Furthermore, Lytton argues that "courts should play a secondary role in policy-making that complements the regulatory efforts of legislatures and administrative agencies."[161]

IV. GENERAL CRITICISMS OF THE FREE PUBLIC SERVICES DOCTRINE: FLAWED ASSUMPTIONS AND COMPARISONS

This Article has heretofore taken on the arguments employed by the critics of FPSD. It is now time to pass from the defense to the offense. FPSD criticism, it turns out, is biased, inefficient, and unprincipled.

A. What's Incorporation Got to Do with It?

Dean Prosser described FPSD thus: "The state never can sue in tort in its political or governmental capacity, although as the owner of property it may resort to the same tort actions as any individual proprietor to recover for injuries to the property, or to recover the property itself."[162] So FPSD is not, on its face, confined to damages caused by *corporate* tortfeasors.

Yet in the introduction to his argument against FPSD, Lytton affirms that "[t]he doctrine shields *industrial* tortfeasors from liability for cleanup costs, passing those costs on to the public. It constitutes a tort subsidy *to industry* and functions as an insurance scheme for *industrial* accidents . . . ."[163] He elsewhere pronounces that, "[i]n many instances, the doctrine lets *industrial* tortfeasors off the hook for forest fires, oil spills, and airline crashes and makes taxpayers pay the cleanup costs,"[164] and that FPSD is an "undesirable tort subsidy to careless *industries* . . . ."[165] Lytton flatly charges courts that have applied the

161. LYTTON, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, *in* SUING THE GUN INDUSTRY, *supra* note 15, at 250.

162. KEETON ET AL., *supra* note 26, § 2, at 7. Prosser describes an underlying rule of tort, although he does not explicitly label it as the free public services doctrine. Prosser notes that the rule governs municipal corporations as well as states. *Id.* at n.3. Lytton's refusal to recognize this underlying rule is what leads him to conclude that only ten states recognize the doctrine; other states simply decline to use the label. *See, e.g.*, County of Champaign v. Anthony, 337 N.E.2d 87, 87-88 (Ill. App. Ct. 1975) (quoting Prosser in affirming dismissal of county's lawsuit against criminal defendant for cost of protecting witness who testified against him at trial).

163. Lytton, *supra* note 11, at 730 (emphasis added).

164. *Id.* at 759 (emphasis added).

165. *Id.* at 781 (emphasis added).

doctrine with "pro-*industry* bias."[166] Relying on these arguments, a recent New Jersey decision refused to apply FPSD to reject a city's suit against a gun manufacturer because of the "unfairness" of allowing corporate tortfeasors to use public services the same way that private citizens do.[167]

Anti-FPSD articles refer overwhelmingly to corporate defendants such as chemical companies,[168] railroads,[169] and firearm manufacturers.[170] But

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166. *Id.* at 759 (emphasis added).

167. James v. Arms Tech., Inc., 820 A.2d 27, 48-49 (N.J. Super. Ct. App. Div. 2003).

168. For example, in Lytton, *supra* note 11, at 729 n.2, Lytton cites to: *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757 (Alaska 1999) (reversing summary judgment for defendant oil company in suit by cities to recover costs for cleanup of Exxon *Valdez* oil spill); *Mayor of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685 (La. Ct. App. 1984) (upholding judgment for city for property damage resulting from chemical fire, but denying recovery for costs to city of fighting the fire); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976) (affirming denial of recovery for costs incurred by municipal fire department in containing oil spill); and *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83 (Pa. Commonw. Ct. 1986) (affirming dismissal of city suit to recover costs of deploying police to the scene of gas pipeline explosion). In Lytton, *supra* note 11, at 729 n.3, Lytton cites to *In re Oil Spill* (*Amoco Cadiz*), 954 F.2d 1279 (7th Cir. 1992) (upholding liability of oil and shipbuilding companies for oil spill at sea).

169. In Lytton, *supra* note 11, at 729 n.2, Lytton cites *Town of Howard v. Soo Line R.R. Co.*, 217 N.W.2d 329 (Wis. 1974) (reversing summary judgment to plaintiff town for recovery of firefighting costs resulting from railroad negligence). In Lytton, *supra* note 11, at 729 n.3, he cites: *City of Flagstaff v. Atchison, Topeka & Santa Fe Railway Co.*, 719 F.2d 322 (9th Cir. 1983) (affirming summary judgment for railroad in suit by city for recovery of emergency costs expended following derailment); *Allenton Volunteer Fire Department v. Soo Line Railroad Co.*, 372 F. Supp. 422 (E.D. Wis. 1974) (dismissing fire department's suit to recover costs of fighting fires caused by defendant railroad); *United States v. Denver and Rio Grande Western Railroad Co.*, 547 F.2d 1101 (10th Cir. 1977) (allowing recovery for firefighting costs and damage to federal land negligently caused by defendant railroad, but disallowing recovery for overhead of firefighting program); *United States v. Chesapeake & O. Ry. Co.*, 130 F.2d 308 (4th Cir. 1942) (reversing dismissal of suit against negligent railroad to recover costs for fire suppression in national forest); and *United States v. Illinois Terminal Railroad Co.*, 501 F. Supp. 18 (E.D. Mo. 1980) (denying railroad's motion to dismiss suit by government to recover costs for removal of abandoned bridge piers).

170. In Lytton, *supra* note 11, at 729 n.5, Lytton cites *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (dismissing city's and civic organizations' negligence and public nuisance claims against gun manufacturer for expenses incurred as a result of gun violence), *aff'd*, 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 (Dec. 10, 1999), *aff'd,* 780 A.2d 98, 108 (Conn. 2001) (affirming dismissal of public nuisance suit by mayor and city against gun manufacturers and distributors for costs incurred related to gun violence); *Penelas v. Arms Technology, Inc.*, No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999) (dismissing with prejudice suit of Miami-Dade County against gun manufacturers to recover costs of emergency services provided in response to gun violence); and *City of Cincinnati v. Beretta U.S.A. Corp*., Appeal Nos. C-990729, C-990814, C-990815, 2000 Ohio App. LEXIS 3601, at *1 (Ct. App. 2000) (affirming dismissal of city's lawsuit to recover from gun distributor and manufacturers the costs of emergency services arising from gun violence), *rev'd*, 768 N.E.2d 1136 (Ohio 2002) (affirming municipalities may not generally expect to recover

what's incorporation got to do with this problem? Much government assistance targets *individual* victims who have either negligently caused their own peril or who have been injured by other culpable individuals. From Coast Guard rescue of careless boaters to welfare benefits for single mothers to helicopter hoistings of those who choose not to evacuate, government rescue is at least as much a response to individual misfortune as to corporate tort.

Perhaps FPSD opponents believe that courts only invoke FPSD in suits filed by governments against large, financially solvent corporations for recoupment of rescue costs, but this is not the case. Governmental entities rarely attempt to recoup the cost of services from individual tortfeasors, likely both because of limits on solvency and because of reluctance to sue one's own voters in tort; but this political reality does not affect the content of the underlying tort doctrine. A solvent (insured) *individual's* negligence can certainly result in the expenditure of thousands or even millions of dollars of public rescue services. In 1987, a small Texas town spared no expense to save a child who had fallen down an abandoned well because of negligent parental supervision, and though there was no evidence that the parents were unable to pay for her rescue, no reimbursement was ever sought.[171] Nor is it clear that those who stand behind individual tortfeasors are incapable of indemnifying fire departments when careless smoking sets homes ablaze. In 2002, a federal forest service employee carelessly burned a letter at a campground in a National Forest, resulting in $52 million in losses; her wealthy government employer could have reimbursed local firefighters under *respondeat superior*.[172] The apocryphal insured motorist who negligently caused an accident on the George Washington Bridge during rush hour

costs of services from tortfeasors' harm to public but creating an exception for "ongoing and persistent" misconduct).

171. The mother and aunt of Jessica McClure, who fell down a well in her aunt's backyard in Midland, Texas in 1987, were determined by the state human services agency to have been negligently supervising the girl at the time of the accident. Associated Press, *Report Criticizes 2 Relatives in Child's Fall in Texas Well*, N.Y. TIMES, Jan. 13, 1988, at A18. If the McClure family did not at the time have sufficient resources to pay for the rescue services received, it certainly did after the event was over. A $1 million trust fund was formed for Jessica's benefit from donations received from people around the world who learned of her ordeal in the media. Chip Brown, *'Baby Jessica' Adapts to Living Normal Life as a First-Grader*, L.A. TIMES, Oct. 11, 1992, at A1.

172. Howard Pankratz, *Government May Be Liable: Federal Worker's Role in Fire Opens Legal Avenues, Experts Say*, DENVER POST, June 18, 2002, at A6.

may in fact have enough coverage to pay for the huge outlay of state police overtime services to re-route traffic. But of course, motorists are never sued by governments to recoup these expenses, and this failure to sue is appropriate because recoupment suits have no basis in tort law. FPSD opponents never explain why tort law should treat corporations differently.

One possible distinction between corporate and individual demands on services is that it would be inefficient to encourage small recoupment claims against individuals, and that for this reason only significant corporate wrongdoing should set off an exception to FPSD. But Lytton himself points out that governments have occasionally launched (unsuccessful) tort suits to recoup *small* sums from corporations.[173] For instance, in 1986 Pittsburgh sued Equitable Gas Company for $1185.70 in public expenditures following a natural gas explosion.[174] In 1987 the affluent Township of Cherry Hill, New Jersey, sued Conti Construction in a vain effort to recover $4220.80, the estimated cost of police overtime pay to evacuate a neighborhood after a Conti employee negligently ruptured a gas line.[175] In 1984, the State of New York unsuccessfully sued the Long Island Lighting Company for $5263.18 in expenses incurred to divert traffic from a stretch of road onto which power lines had negligently been allowed to fall.[176] Governments arguably choose to sue corporations for small sums, as opposed to individual citizens, for political reasons, not for efficiency reasons.

Are these small-scale lawsuits rational? Why would New York State, Pittsburgh, or Cherry Hill take a company to court to recover a small amount of money, surely less money than it costs to file and prosecute the claims? In addition to the obvious public choice explanation for this phenomenon,[177] two other possible justifications for these suits come to mind. Perhaps local and state governments have an "all shoplifters will be prosecuted" policy; that is, perhaps they try to take *all* public-service-incurring tortfeasors to court, no matter the value of the claim, as a deterrent to negligent action causing governmental loss. Alternatively, government entities may be attempting to make an example out of a

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173. All three cases discussed here, *infra* text accompanying notes 174-76, are cited by Lytton, *supra* note 11, at 729 n.2.

174. City of Pittsburgh v. Equitable Gas Co., 512 A.2d 83, 84 (Pa. Commw. Ct. 1986).

175. Twp. of Cherry Hill v. Conti Constr. Co., 527 A.2d 921, 922 (N.J. Super. Ct. App. Div. 1987).

176. New York v. Long Island Lighting Co., 493 N.Y.S.2d 255, 256 (N.Y.Co. Ct. 1985).

177. Companies cannot vote; company money is "new money" brought into government coffers, and replaces individual tax dollars, thereby allowing for a lessened tax load on those who *do* vote.

particular defendant, perhaps because prior unsatisfactory behavior has demonstrated that this company is a "bad apple." But neither of these possible justifications can be easily reconciled with the fact that governments' tort lawyers seemingly ignore claims on their resources by *individual* tortfeasors, many of whom are *surely* known to be generally bad citizens.

Another argument possibly distinguishing individual from corporate beneficiaries of public services is that the former create problems the state is *meant* to resolve, while the latter cause "excessive" harm beyond the legitimate scope of free public services. McIntyre writes that "as a practical matter it would not be cost effective for a government entity to entangle itself in an expensive lawsuit for the relatively small costs incurred in responding to minor emergencies such as car crashes and small home fires that are not properly characterized as disasters."[178] Under this rationale, corporations are different from physical persons, and deserve distinctive tort treatment, essentially because they are not citizens. Judgments from New Jersey and Massachusetts have alluded to an alleged public policy rationale behind spreading the risk of emergency services away from individual persons, stating that "it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences."[179] In essence, this argument is that efficiency requires collective sharing of losses caused by individuals, but not corporations. This conclusion reinforces the impression that those who defend municipal cost recovery suits are more concerned with transferring resources from corporations to governments than with the theory of FPSD itself.

The preoccupation with corporate liability leads Lytton to argue that FPSD "unjustifiably favors tortfeasors who harm government as compared to those who harm private parties."[180] If a corporation negligently damages a private party's property through, for example, an oil spill, the corporation will be liable in tort for the damage caused to that party.[181] But if the same negligent corporate actor "harms" the government by "requiring" it to expend money to deploy emergency

178. McIntyre, *supra* note 11, at 1018 n.102.
179. *Twp. of Cherry Hill*, 527 A.2d at 922 (quoting Krauth v. Geller, 157 A.2d 129, 131 (N.J. 1960)). This quotation was also cited in *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *33 (Super. Ct. July 13, 2000).
180. Lytton, *supra* note 11, at 759.
181. *Id*. at 760.

equipment and cleanup crews to the private party's home, the corporation is not liable to the government, a result Lytton believes is unfair and irrational.[182] The mistake here should be obvious from the first part of this Article. The harm the individual suffers in Lytton's first example is *direct*, not mediated as is the public service expense in helping clean up the individual's property. Lytton concedes that directly harmed *public* property will also be indemnified in tort: if the negligent oil spill pollutes City Hall, the city will recover damages from the spiller under current tort law.[183] *No* discrimination in favor of corporations is involved here. The "problem" here is not FPSD, it is tort law's proximate causation requirement, and as discussed above, this is a non-problem.

Instead of comparing the potential liability of a corporate tortfeasor that has *directly* harmed a private plaintiff with a corporate tortfeasor that has *indirectly* harmed government, a logical study would compare the fate of a *corporate* tortfeasor that has indirectly harmed government with an *individual* tortfeasor who has similarly indirectly harmed government. Under the anti-FPSD rationale employed by the New Jersey Superior Court in *James v. Arms Tech. Inc.*,[184] a chemical company whose plant explodes due to its negligence should be liable for the costs of deployment of the municipal fire department to extinguish the blaze.[185] Bubt a negligent homeowner who requires the services of the same fire department after falling asleep while smoking is not liable for firefighting costs.[186] Yet, to paraphrase the court, given the existence of a "repeated course of conduct on [the part of smokers], requiring [a municipality] to expend substantial governmental funds on a continuous basis," why the disparity?[187]

The cost incurred by a municipality in extinguishing a given fire is not a function of the corporate status of the fire setter. As noted above, it might not be cost effective for the government to attempt to recover from every homeowner. But governments regularly devote considerable

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182. See *id.* At least the corporation would not be liable for the emergency costs. Lytton acknowledges that negligent tortfeasors may be required to repay governments for damage to real or chattel property. *Id.* at 743.

183. *Id.*

184. 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003).

185. *See id.* at 41-43. Lytton states: "Getting rid of the doctrine would allow government entities to recover from tortfeasors the costs of services such as fire suppression, environmental cleanup, and rescue operations." Lytton, *supra* note 11, at 768.

186. As Lytton believes that eliminating the free public services doctrine with regard to corporations "would not open the door to unlimited liability or unleash a flood of claims," *id*. at 750, he presumably envisions allowing government suits to recover only the costs of the relatively large emergency expenditures typically caused by corporations, rather than the more numerous, lesser costs of services provided to negligent individuals.

187. *James*, 820 A.2d at 48-49.

resources to the profitable collection of very small sums of money, such as traffic fines, from individuals. In the aggregate, small, routine rescues of individuals, such as sending out fire trucks for negligently caused automobile accidents, may well absorb the lion's share of a fire company's budget and time.[188] Imagine that a homeowner negligently damages his natural gas line, resulting in an explosion that causes neighboring houses to catch fire. This homeowner would be liable to his neighbors under current tort doctrine,[189] yet would not be pursued by the municipality for the costs of extinguishing the blaze.[190] Is this "unfair"? Opponents of FPSD do not seem to think so. Why are free public services unfair only when the tortfeasor is a corporation?

Stripped of anti-corporate bias, the real question is whether it is unjust that a tortfeasor be held liable for direct but not for mediated damages. Should there be a point at which corporations *and individuals* should be liable for expenditures by a fire department, perhaps if an unusually large number of firefighters, as compared to the number required to douse an "average" fire, must respond to a call? Should it matter that a *government* provides these services as a *service*, *not* a subsidy, to *all* legitimate (corporate and individual) stakeholders in society?[191] An

188. Consider the experience of park rangers in Yosemite National Park. While rescuing mountain climbers is quite costly due to the equipment and training required, the number of such rescues is only about fifteen percent of the total number of rescues each year. The vast majority of search and rescue missions are for lost hikers, a comparatively cheap task per rescue. According to a ranger, "[c]limber rescues are more expensive because of helicopters, but we do spend more money rescuing hikers." Clare Noonan, *Rescuing Climbers Raises Questions of Who Should Pay*, SAN DIEGO UNION-TRIB., July 21, 2002, at C7.

189. *But see* Ryan v. N.Y. Cent. R.R. Co., 35 N.Y. 210, 211-12 (1866) (stating that the party negligently causing a fire is liable for damage only to the closest building to which the fire spreads, not all buildings that may be damaged); Pa. R.R. Co. v. Kerr, 62 Pa. 353 (1870) (holding a railroad may be liable for fire damage directly caused by sparks from a passing train, but that additional damage resulting from the fire spreading from building to building was not recoverable). The Supreme Court noted in *Milwaukee & Saint Paul Railway Co. v. Kellogg*, 94 U.S. 469, 474 (1876), that *Ryan* and *Kerr* "have been the subject of much criticism since they were decided" and that the rule they stood for had not been widely accepted.

190. Negligently caused forest fires may be an exception to this trend in that individuals, as well as companies, are apparently sometimes billed or sued for reimbursement for fire suppression expenses. Ted Cilwick, *Cost of Fighting Fires in Wild Sparks Bills for Reimbursement*, L.A. TIMES, Nov. 27, 1990, at A5.

191. Though most agree that the government should provide services to citizens, many feel that these services should not be extended to illegal immigrants. An example of this sentiment is California Proposition 187, passed in 1994. The proposition demanded that the state withhold many social services, including public education and emergency

anarcho-capitalistic argument could be made for eliminating government services,[192] but FPSD opponents do not seem motivated by anarcho-capitalist theories.

B. Flawed Distributional Claims

FPSD critics seem to feel that the doctrine unfairly acts as liability insurance for corporations, insurance for which "industry tends to get far more risk reduction and pay proportionally less for it than average citizens."[193] Lytton calls this system "distributively unfair"[194] and claims, without marshalling any data to support his position, that "citizens are cross-subsidizing industry."[195] The alleged subsidization occurs because corporate taxes are not experience rated—there is no direct relationship between the taxes paid by corporations and risks created by these corporations.[196]

Lytton does concede, in passing, that corporations are required to finance, through corporate and property taxes, public services from which they are unable to benefit, such as public education and welfare benefits.[197] But he dismisses these instances of industry-to-individual "subsidization" as unworthy of his attention, because they are "products of legislative decisions, not tort subsidies created by common law judges."[198] Though this type of subsidy "may be just as distributively unfair as the free public services doctrine's cross-subsidization of industry by citizens," Lytton opines that the legislature's blessing bestows upon these "subsidies" "a level of democratic legitimacy."[199]

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room care, from illegal immigrants. Though the proposition passed by almost a 2-1 margin, federal courts restrained implementation. Gregorio T. *ex rel* Jose T. v. Wilson, 59 F.3d 1002 (9th Cir. 1995). A recently-passed Georgia law has been compared to California Proposition 187. *See* Rick Lyman, *Georgia Immigration Law Broad*, HOUSTON CHRONICLE, May 14, 2006, at A3 (describing the recently passed law that will take effect on July 1, 2007, and that will deny state benefits, including welfare and Medicaid, to those who cannot prove they are in the country legally).

192. *See generally* DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: A GUIDE TO RADICAL CAPITALISM (2d ed. Open Court 1989) (1973); MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO (rev. ed. Collier Books 1978) (1973).

193. Lytton, *supra* note 11, at 764-65.

194. *Id.*

195. *Id.*

196. Obviously, if a municipality's expenses rose greatly because of an accident, a hike in taxes might be required, and if a corporation pays a significant percentage of the municipality's taxes, that corporation will bear the costs of this tax increase. But the municipality will not be allowed to increase the taxes of the corporation alone. Allowing a discriminatory tax hike is, in essence, the gist of Lytton's proposal.

197. Lytton, *supra* note 11, at 764-65.

198. *Id.* at 765.

199. *Id.*

Like other taxpayers, corporations pay income taxes used in part for transfer payments. Corporations pay property taxes that fund many municipal services to individuals.[200] Corporations pay other taxes for which they directly recoup little, such as Social Security and unemployment levies. Indeed, corporations are believed to generate, directly and indirectly, so many positive tax externalities that local governments compete to entice them to relocate to their communities. State and municipal "tax holidays" may be strong circumstantial corroboration that corporations provide net positive tax externalities ex ante.[201]

Tellingly, in a footnote Lytton makes an important concession that undermines his argument that FPSD is illegitimate corporate welfare. He writes: "Empirical data comparing public expenditures occasioned by industry to public expenditures occasioned by individuals is unavailable. Thus, claims of cross-subsidization are admittedly speculative. *Such claims are, however, not unlikely given the relatively higher risk posed by industrial accidents when compared to accidents caused by individuals*."[202] It turns out that his "subsidization" claim is based on social costs (the cost of industrial accidents), *but not on social benefits* (the positive neighborhood effects attributable to the corporation) that result from the operation of a company. Speculating that FPSD results in a net subsidy to corporations, without looking at the benefits of the corporate form, is academic "junk social science."[203]

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200. Corporations pay property taxes even though these are considered to be mostly "benefits based," that is, the benefits received by the taxpayer in exchange for taxes paid are allegedly relatively closely related. *See* HERBERT KIESLING, TAXATION AND PUBLIC GOODS 182 (1992). Property taxes are often the single largest source of revenue for cities. This is so, for example, for New York City, which received 40% of its budget from property taxes in fiscal year 2002. CITY OF N.Y. DEP'T OF FINANCE OFFICE OF TAX POLICY, ANNUAL REPORT ON TAX EXPENDITURES FISCAL YEAR 2002, at 5, http://home2.nyc.gov/html/dof/htm1/pdf/01pdf/taxexpend_02.pdf.

201. *See, e.g.*, Peter Behr, *To Lure Jobs, States Surrender Key Tax Returns*, WASH. POST, Aug. 20, 1995, at A1; Peralte C. Paul, *Big Push Won DaimlerChrysler Political Cooperation, Site Deal Seen as Keys to Securing Plant*, ATLANTA J. & CONST., Oct. 20, 2002, at F1; Elizabeth Levitan Spaid, *States in No-Holds-Barred Battle to Attract New Jobs*, CHRISTIAN SCI. MONITOR, May 31, 1995, at 3.

202. Lytton, *supra* note 11, at 764 n.177 (emphasis added).

203. Under the standard of evidence laid out in *Daubert v. Merrell Dow Pharmaceuticals*, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." 509 U.S. 579, 590 (1993). The factors used by a court to determine if evidence is admissible as scientific or technical knowledge include whether the knowledge has been or can be tested, whether the methodology at issue has been subject to peer review and publication, and whether the technique used to

C. Flawed Allocative Claim

It turns out that the distributive argument for revocation of FPSD is gratuitous speculation. Not to worry, for FPSD critics are capable of changing tack completely to promote corporate tort liability for public services as allocatively efficient loss spreading, unlike municipal taxation which constitutes inefficient, compulsory insurance.[204] Lytton writes:

> [W]hen government passes public service costs on to taxpayers, they are not free to opt out of the insurance scheme. As long as government finances public services, the free public services doctrine will compel taxpayers to participate in a loss-spreading scheme that insures against liability for the cost of public services.[205]

There are two problems with this poor imitation of Judge Posner. First, it impliedly excludes corporations from the category of taxpayers. As noted, this exclusion is groundless since no data supports the contention that corporate taxpayers are not similarly or even more acutely impoverished by coercive "group insurance" of publicly financed services. Secondly, without full fee-for-service privatization of all social services, which FPSD critics neither advocate nor support, some will always pay more, others less, than their fair share for public services.[206] It is the essence of a tax that its payment be coercive. It can be argued that a corporate citizen that has never suffered an accidental fire, explosion, chemical spill, or other large scale disaster is "inefficiently" subsidizing paramedic, fire, and police insurance for the small minority of individuals who consume the majority of EMTs', fire departments', and police forces' time. But such an argument would be specious, because it is unclear what "inefficiently" means in this context. Why is payment of "forced insurance" *by corporations* not "inefficient" to FPSD opponents? They do not provide any theory of efficiency or of politics that would explain why a net payment in one direction, but not in the other, is "inefficient." Nor do they ever discuss the communitarian premises which arguably underlie the notion of public services. Communitarian ideals might in fact *compel* general payment of "natural monopoly" public goods,

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acquire the knowledge is generally accepted. *Id.* at 593-94. Lytton's discussion on subsidization would not pass such a test.

204. Lytton, *supra* note 11, at 763.

205. *Id.* at 764.

206. Even privatized and fully competitive insurance markets will result in unequal distribution of costs and benefits ex post, though of course not ex ante if premiums are actuarially set.

trumping any efficiency claim.[207] Is it "inefficient" for the majority to pay for police protection of an embattled minority that frequently needs police protection yet does not pay its fair share? Without discussion of such issues as equal protection, due process and republican form of government issues, arguments against FPSD on grounds of efficient insurance are anarcho-libertarian whistles in the dark.

D. Voluntary Products Liability "Insurance" vs. Involuntary Public Services "Insurance"

Noting that "[l]oss spreading elsewhere in the law of torts involves voluntary participation of those in the risk pool,"[208] FPSD opponents contrast the "voluntary" insurance scheme resulting from corporate liability for defective products with the "involuntary" loss spreading required by payment of public services through taxes. For example, Lytton asserts that under products liability, "the cost of purchasing the insurance is included in the price of the product," which makes the insurance voluntary.[209] "By contrast," Lytton claims, "when government passes public service costs on to taxpayers, they are not free to opt out of the insurance scheme."[210]

This astounding comparison misunderstands both the nature of public services and the insurance element of products liability law, which is "voluntary" in a most unusual way. Consumers may *not* currently give up their rights to sue manufacturers in products liability in exchange for lower prices; they may "opt out" of products liability "insurance" only by refusing to buy the products themselves, a virtual impossibility for some goods and a very inefficient bundling for most others.[211] Similarly, producers may opt out of product liability law only by ceasing to produce, not by offering less insurance in return for a lower price. In addition, when products are purchased, *all* purchasers pay the same "insurance premium" as a component of the product price, regardless of the individual risk created by each consumer's particular use of the

207. *See, e.g.*, NOZICK, *supra* note 140, at 320-23 (noting that allowing individuals in a community to opt out of "equal sharing" of the restrictions and burdens of the community might change the character of the community).
208. Lytton, *supra* note 11, at 763.
209. *Id.* at 764.
210. *Id.*
211. *See* Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759, 802-15.

product.[212] This is exactly the same "involuntary" "cross-subsidizing" that Lytton believes is unjustly generated by FPSD.[213] Bundling is bundling, for private or for public services. Taxpayers can decide to fund more or less services through tax dollars, or they can refuse to fund services at all, leaving them to the private market. Taxpayers can move to another jurisdiction with different tax preferences, or they can decline to earn income (avoiding income tax) or purchase goods (avoiding sales tax). In neither product liability law nor public finance is there a "clean" insurance market with individually determined and agreed-upon premiums for specific risks. In the end, the involuntary nature of FPSD matters if and only if public provision of rescue services is itself fundamentally unjust.[214]

FPSD opponents declare that the doctrine is an inefficient way to provide insurance, and that "[e]liminating the doctrine would encourage most high-risk entities to purchase private insurance."[215] This implies that companies do not currently purchase enough insurance because they expect FPSD to protect them from liability in the event of a negligently-caused disaster. As a matter of fact, insurance coverage is specifically mentioned in several of the cases cited by FPSD opponents. For example, after the oil tanker *Cadiz* ran aground in 1978, Amoco's insurance company told the French government that it could not on its own handle the cleanup of such a large oil spill, but that the company would reimburse France for "reasonable costs" incurred by France in the cleanup on Amoco's behalf.[216] Following the terms of an international convention on pollution damage to which France was a party, Amoco paid the maximum recovery amount for such incidents—77 million Francs (about $16 million)—into a fund for the French government to apply toward cleanup costs.[217] The French government, however, thought this sum insufficient and sued (in American courts, *bien sûr*) to obtain additional funds.[218] It is hard to see why it should be assumed that Amoco was underinsured when the company made arrangements to pay

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212. Some consumers use their ladders daily, others only once a year. Additionally, some users are risk averse while others are reckless. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 88-92 (1972) (discussing relation of liability rules to level of care exercised by consumers).

213. Lytton, *supra* note 11, at 764.

214. Lytton's argument about corporations not paying their fair share for rescue services becomes even less intelligible when one considers that *corporations* do not actually pay taxes. In fact, the cost of corporate taxes is passed on to employees in the form of lower wages, or corporate shareholders in the form of lower dividends. *See, e.g.*, MARIAN KRZYZANIAK & RICHARD A. MUSGRAVE, THE SHIFTING OF THE CORPORATION INCOME TAX (1963).

215. Lytton, *supra* note 11, at 765.

216. *In re* Oil Spill (*Amoco Cadiz*), 954 F.2d 1279, 1310 (7th Cir. 1992).

217. *Id*.

218. *Id*.

the statutory maximum allowed for such a disaster. If the statutory maximum was insufficient, that cap, not tort law's free public services doctrine, needs to be changed.

Insurance coverage was also an issue in *Fontenot*.[219] The two corporations involved in the explosion and fire "stipulated liability, not to exceed the limits of liability in the applicable insurance policies."[220] Although defendants had policies at various coverage levels with five different insurance companies, the city chose to sue only the two firms from which the insureds had purchased "excess coverage."[221] The court explained the move this way: "Apparently, the limits of liability of the other insurers had been expended in satisfaction of other claims."[222] If that was the case, it can hardly be argued that the defendants had inadequate insurance; after all, they had not themselves exhausted the limits of liability on all of their policies. Rather, the city seemed to want to convert the insured's "excess coverage" into social insurance, so long as the money came from an outside insurer and not a local firm.

V. CONCLUSION

FPSD opponents maintain that the free public services doctrine "does not have particularly deep roots in the common law, dating back only to the 1970s."[223] As this Article has demonstrated, FPSD is in fact an ancient doctrine. What opponents see as antecedents to FPSD—cases involving unsuccessful tort claims against criminals for the cost of their capture and imprisonment,[224] or failed suits by the federal government to recover economic losses resulting from injury by a tortfeasor to soldiers,[225]—are in fact, like FPSD, nothing but particular applications of duty, proximate cause, and economic harm theories.

This Article has situated FPSD as a sound and timeless application of common law doctrines. Those who oppose FPSD resort to policy analysis motivated by an inchoate and uninformed bias against corporations. Their claim that FPSD "inefficiently externalizes the costs of tortfeasors'

219. Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685 (La. Ct. App. 1984).
220. *Id.* at 686.
221. *Id.* at 686-87 & n.1.
222. *Id.* at 687 n.2.
223. Lytton, *supra* note 11, at 731.
224. *Id.* at 733.
225. *Id.* at 735-36.

wrongdoing"[226] fails, as does their assertion that the doctrine is "distributively unfair."[227] Their conclusion that "[a]bandoning the doctrine would end an undesirable tort subsidy to careless industries and place an appropriate limit on judicial loss spreading . . ."[228] is untenable.[229]

This Article has defended FPSD from the unjust accusation that it represents judicial activism. Critics fail to explain why judges' application of traditional common law doctrines of duty and proximate causation is activism, while judicial overthrow of these doctrines on speculative policy grounds and in the name of an inchoate efficiency would not be activism. In fact, such a dramatic upheaval would be aberrant for the common law. Common law judges should examine issues before them without preconceived ideas about launching policy "reform" efforts when the right case comes along.[230]

The free public services doctrine is a brick mortared to the walls of the proximate causation, duty, and economic loss rules. Its critics fail to see the doctrine's intrinsic link to the common law of tort. The failings of their arguments give us reason to applaud, not to condemn, the free public services doctrine.

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226. *Id.* at 731.
227. *Id.* at 764.
228. *Id.* at 780-81.
229. *See* Krauss, *supra* note 25, at 625-30; *see also* WEINRIB, *supra* note 87, at 3-6. He recognizes that, although economic and other functional approaches to tort law have "an understandable appeal," nonetheless

> What the functionalist offers is not so much a theory of private law as a theory of social goals into which private law may or may not fit.
>
> . . . The functionalist is concerned with whether the results of cases promote the postulated goals. Private law, however, is more than the sum of its results.

Id.

230. *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) (arguing that the common law role consists largely of finding community norms, applying structural tests to these norms, and enforcing the norms that pass the test).