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TORT REFORM IN THE TWENTIETH CENTURY: AN HISTORICAL PERSPECTIVE

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WHILE reform of the present system of tort law is currently a visible and controversial subject, it is by no means a novel one. Indeed, a cursory glance at the history of tort law in the twentieth century suggests that it is difficult to find any significant period of time in which the field was not being "reformed" by someone, or in which "reform" was not being advocated. "Law reform" is, of course, an habitual phenomenon, with legal scholars identifying themselves as being interested in law reform the way they might identify themselves as being interested in securities regulation or trusts and estates. But by "reform" in this article, I mean something more substantial: I mean a thoroughgoing alteration of the existing premises and governing principles of the tort system. If this definition is employed, it may be startling how regularly tort law has been reformed in the last seventy-odd years. Beginning about 1910, four reforms of the tort system have taken place, each of which represented a decisive break with the status quo and a major reorientation of principles thought to be fundamentally embedded in tort law. I refer to workers' compensation, strict liability as an extensive basis for recovery in tort, comparative negligence, and no-fault automobile accident programs.

I propose in this article to survey the first three of these reforms with an eye to ascertaining whether they have any common features or characteristics that might serve to clarify the future course of current reform proposals.[1] Such an approach makes a large assumption: that the past, if not necessarily a guide to the future, is at least a source whose investigation may clarify the meaning of present events. At one level, this assumption seems problematic, since the history of legal doctrine demonstrates that substantive positions widely held at one point in time—for example, the proposition that slavery cases represented a genuine con-

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1. I am not discussing the reform of no-fault insurance in this article, although parallels exist between that reform and the three chosen for discussion. For a discussion of one such parallel, see *infra* note 79 and accompanying text.

flict between rights to liberty and rights of property—may have disappeared from the universe of respectability at another point. We cannot expect, in this vein, the assumptions of the *Dred Scott* case to furnish any meaningful guide to current race relations, since we have abandoned those assumptions.

But at another level, history does seem to provide us with a window into our own time. If one uses the history of legal doctrine again as an example, there is an apparently cyclical repetitiveness to the discourse of doctrinal arguments. Critiques of a position advanced in an earlier era, failing to persuade in their time frame, recur later in another context. The argument from consequences, the *in terrorem* argument, the argument designed to reveal a lack of logical connection between premise and conclusion each possess an impressive resilience. One finds echoes of a present debate in the past; one senses one has heard much of this before.

With this simultaneous sense of the remoteness and the commonality of the past, one comes to appreciate the role of history as perspective. History can reveal that issues invested with great urgency and seriousness by participants in a contemporary debate have been aired before. Moreover, history can demonstrate that those issues have been *resolved* before and the world has neither split asunder, nor become Nirvana. The cacophony of contemporary debate may thus be muted, or even deflected, by the "perspective" of time. But history as perspective functions in another, perhaps more fundamental fashion. It reveals that despite the recurrence of issues and arguments, debates continue to exist; issues are never fully settled; substantive positions lack permanence; generations never fully "learn" from or adopt the structures of the past. In some instances, in fact, an observer of history feels like a paradewatcher in *The Emperor's New Clothes*: the obliviousness of debaters to a fundamental truth, or their imprisonment in a blinding set of ideological assumptions is abundantly clear, but one cannot rescue them from the predicament. It is as if the actors in a debate are fated to exclude certain points of view, fated to limit argument to a pre-ordained range of options.

This sort of perspective yields detachment of a less sanguine sort. One comes to feel that history is constantly being rewritten, not as a progressive refinement of events moving closer to truth, but rather as a pre-determined distortion of the past that serves to vindicate the axioms of the present. The detachment one experiences is that of the powerless spectator; incapable of helping

contemporaries penetrate the fog of cultural and ideological assumptions that prevents their truly coming to terms with the past. But even this darker version of perspective can yield some insight, if only that of bemused skepticism. To recognize that one has heard the arguments before does not insure that one will not hear them again, but the recognition prevents the arguments from being able to masquerade as ineffable truths, however harmonious they are with present enthusiasms.

One is tempted to apply the above comments about perspective to the latest round of tort "reforms." We are told there is an insurance "crisis," as if insurance rates have never sharply increased at any point in the past,[2] or, more fundamentally, as if a system of compensating persons for injuries could not exist without insurance. We are told that damage judgments are escalating out of proportion, as if the ratio of damage judgments to personal income and purchasing power has gotten desperately out of synch. We are told that the basis for the "crisis" lies outside the insurance industry, in massive jury awards, ultraliberal tort doctrines, careless judges, and unscrupulous plaintiffs' attorneys. On the other side, we are told that the proposed reforms, such as caps on the amount of damages, the elimination of punitive damages, and a federalization of tort doctrine so as to alter its ultraliberal character, will fundamentally upset the tort system and deprive Americans of their constitutional right to unlimited compensation and their supraconstitutional right to be made whole for their losses. Whether any of these allegations is accurate is a question I shall subsequently address. But it seems apparent that *whether the claims are accurate or not*, the debate will go on and some "reforms" will occur; tort law is entering another period of significant change. I will suggest, however, that history can teach us that this forthcoming reform, like previous reforms, may seemingly constitute a sweeping change in tort law, but the change will make very little difference. A basic philosophical problem of the tort system will remain: the problem of retaining moral answerability for injury, as exemplified by the ritual of compensation

2. In fact, the insurance industry was in a severe slump in the mid-1970's. At that time, premiums rose dramatically, forcing professionals and small businesses to choose between paying exorbitant premiums or dropping their insurance coverage where they could. Testimony of J. Robert Hunter, National Insurance Consumer Organization, before the U.S. House of Representatives Committee on Public Works and Transportation Subcommittee on Investigation and Oversight 2 (Jan. 22, 1986), *reprinted in* K. Abraham, Insurance Law: Cases and Materials 81 (unpublished manuscript, available in University of Virginia School of Law Library).

from a lawsuit. I derive this message from the history of tort reform itself.

I now turn to the three reform movements under review in this essay. In each instance I will briefly discuss the cultural and ideological context of the reform, and the principal rhetorical arguments it engendered. I will be concentrating particularly on the language of contemporary opponents of the reform, language that may have a distinctly familiar ring.

I. WORKERS' COMPENSATION

In 1910, New York State passed the first American workers' compensation statute,[3] modeled on the English Workman's Compensation Act of 1897.[4] The statute, while a radical innovation in some respects, was also the culmination of growing attention in both England and America to the increasingly visible and apparently special situation of industrial workers engaged in the performance of dangerous jobs.[5] An industrial society, to those who participated in its first years of maturity, appeared to require its workers to take great risks and to create an interdependence among its members. The archetypal institution of emergent industrialism, the railroad, was an example. Railroads were propelled at a force that enabled them to outdistance any competing form of transportation in their speed and their imperviousness to weather conditions, but that very force made them exceptionally dangerous if one crossed their path or came into contact with their inner workings. When railroad wrecks occurred or injuries to critical personnel adversely affected railroad performance, nearly everyone suffered: passengers, employees, shippers, in-

3. 1910 N.Y. Laws ch. 674 et. seq.

4. 60 & 61 Vict. ch. 37 et. seq.

5. In 1909, the New York State legislature authorized the creation of a commission:

> to make inquiry, examination and investigation into the working of the law in the State of New York relative to the liability of employers to employees for industrial accidents and into the comparative efficiency, cost, justice, merits and defects of the laws of other industrial states and countries, relative to the same subject, and as to the causes of the accidents to employees.

Laws 1909, ch. 518. The Commission, commonly referred to as the Wainright Commission, was to offer "such recommendations for legislation by bill or otherwise as the commission might otherwise deem wise or appropriate." *Id.* The law, enacted in 1910, essentially implemented the Commission's recommendations. *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 284-85, 94 N.E. 431, 436 (1911) (Weiner, J., writing for a unanimous court).

dustries, consumers.[6]

Industrial accidents, then, appeared to be an inevitable, but costly by-product of the new world of the late nineteenth and early twentieth centuries, leaving the industrial workers, for the most part, with the burden of picking up the tab.[7] The interaction of industrial accidents with the common law, as interpreted

6. Concern with railroads manifested itself in legislation rendering railroads liable for injuries to employees in certain circumstances. Such legislation expanded the common-law doctrine of absolute liability for loss of goods by common carriers. *See* Forward v. Pittard, 99 Eng. Rep. 953 (1785). In addition, such laws extended absolute liability for treatment of passengers. *See* Lipman v. Atlantic Coast Line R.R., 108 S.C. 151, 93 S.E. 714 (1917). The first such successful legislation imposing liability on railroads was the Federal Employees Liability Act of 1908, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 et. seq.) This law rendered those railroads engaged in interstate or foreign trade liable for injuries to employees due to "negligence." 45 U.S.C. § 51. Several states, such as Texas, Arizona, South Dakota and Florida adopted similar statutes covering railroads engaged in intrastate trade. *See* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 164-68 (1980); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953), *reprinted in* SELECTED TOPICS OF THE LAW OF TORTS 22-23 (1954) [hereinafter Prosser, SELECTED TOPICS].

7. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526 (4th ed. 1971) [hereinafter W. PROSSER].

The explanation for the unfair treatment given to early industrial workers seems to stem from the economic theory prevalent at this time. According to Prosser, "[t]he cornerstone of the common law edifice was the economic theory that there was complete mobility of labor, that the supply of work was unlimited, and that the worker was an entirely free agent, under no compulsion to enter into the employment. He was expected, therefore, to accept and take upon himself all of the usual risks of his trade, together with any unusual risks of which he had knowledge, and to relieve his employer of any duty to protect him." *Id.* This understanding of the role between employers and employees greatly influenced the creation of rather scant duties, under the common law, owed to employees by employers. Prosser lists these five specific common law duties as follows:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools and equipment for work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Id. (footnotes omitted).

According to Prosser, a further disadvantage for early industrial workers, under the common law, existed as a result of the fact that "[t]he risks which did not lie within the scope of the specific obligations of the master were considered to be accepted by the servant as an incident of his employment, and the employer was under no duty to protect him against them." *Id.* at 527. This point of view can be seen reflected in relatively recent cases. *See, e.g.*, Conboy v. Crofoot, 194 Kan. 46, 397 P.2d 326 (1964) (employee who performs duties outdoors in wet, muddy, cold weather assumes the risk of catching frostbite); Cooper v. Mayes, 234 S.C. 491, 109 S.E.2d 12 (1959) (experienced electrician found contributorily negligent in failing to use safety precautions when cutting electrical wires despite assurances from employer that wires carried no live current); Walsh v. West Coast Coal Mines, Inc., 31 Wash. 2d 396, 197 P.2d 233 (1948)

at that time, presented an awkward dilemma. The very persons most likely to suffer accidents in an industrial setting—workers that engaged in hazardous tasks—were least likely to receive compensation for their injuries.[8] The common-law principle of conditioning tort liability on a showing of fault, then dominant in both England and America,[9] required that an injured employee be able to show that not only was his[10] employer or an independent contractor negligent in causing his injury, but that he was himself free from negligence, and had not assumed the risks of his job.[11] Nor could he recover from his employer if the injury

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(where inspector's knowledge of danger of mine cave-in equal to owner's, owner not liable for inspector's death).

For a further discussion of the duties perceived to be owed to an employee by his employer, in the late nineteenth and early twentieth centuries, see F. BURDICK, THE LAW OF TORTS § 27 (1926).

8. *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 286, 94 N.E. 431, 436 (1911) (quoting Wainright Commission's Report to the New York State Legislature). The Commission noted:

> [T]he evils of the [present] system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent.
> . . . .
> [A]s [a] matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and, therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want.

Id.

9. *See* Issacs, *Fault and Liability*, 31 HARV. L. REV. 954, 974 (1918) (describing start of the 20th-century as period where fault was at least an important, if not most important element of tort law theory); Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914) (articulating late 19th-century view of not imposing liability without fault in master-servant relationships).

In a recent treatise by Harper, James and Gray, the authors make the following observations about the earlier concept of fault as a basis for liability:

> At about the turn of the present century most of what was written on the subject of torts had only praise for this general scheme of liability. The tendency was to regard the area of strict liability as an exception to the general rule, and very often as an exception to be disparaged and narrowed. It was felt that the system had on the whole brought about a correspondence between law and morals since under it a person was generally held liable only where he had been guilty of some kind of fault—wrongful intent or culpable negligence. Earlier concepts of liability were often criticized as amoral because they imposed liability in many situations on a person who had caused injury without being in any way to blame.

3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 12.1, at 103-04 (2d ed. 1986) (footnotes omitted). For a more detailed discussion of the relationship between fault and liability in the early industrial setting, see *id.* §§ 12.1-12.4.

10. The masculine pronoun is being used generically, but the usage also reflects the greater participation of masculine actors in the early twentieth century workplace.

11. W. PROSSER, *supra* note 7, § 80, at 526-27.

had been caused by a fellow employee, the way most industrial injuries were caused.[12] As a result, few industrial workers were compensated for injuries they suffered on the job.[13] This in turn deprived the employees of accountability for their losses and lowered their incentives to work at dangerous jobs. Industrial employers and their employees had recognized this feature of late nineteenth-century employment, and many had entered into private contractual arrangements whereby employees in certain occupations were assured compensation for their injuries.[14]

Workers' compensation legislation, however, proposed a more significant change in the condition of injured industrial workers. First, workers' compensation statutes eliminated fault as a basis of recovery:[15] the worker received compensation for his injuries regardless of whether the worker or someone else had been negligent.[16] Second, and perhaps even more significant, the

12. *Id.* at 525-26.

13. *Id.* at 572. Prosser contends that "[u]nder the common law system, by far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the worker, who was least able to support it." *Id.* Prosser goes on in a footnote to support his statement by quoting the following various estimates on the percentage of industrial accidents which remained uncompensated, as: "70%, 1 Schneider, Workmen's Comp., 2d Ed. 1932, 1; 80%, Lumbermen's Reciprocal Ass'n v. Behnken, Tex. Civ. App. 1920, 226 S.W. 154; 83%, Downey, History of Work Accident Indemnity in Iowa, 1912, 71; 87%, First Report of New York Employers' Liability Commission, 1911, part 1 xxxv-xliv." *Id.* at 530 n.32.

14. *See, e.g.*, Griffiths v. Earl of Dudley, 9 Q.B. 357 (1882) (colliery workman permitted to recover pursuant to a private contractual arrangement).

15. The English Workmen's Compensation Act of 1897, 60 & 61 Vict. ch. 37, et. seq., allowed an employee to recover for "present injury by accident arising out of and in the course of employment." *Id.*

The N.Y. statute imposed liability:

> [i]f in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment . . . is caused to any workman employed therein, in whole or in part, or the damage or injury caused thereby is in whole or in part contributed to by
>
> a. A necessary risk or danger of the employment or one inherent in the nature thereof; or
>
> b. Failure of the employer of such workmen or any of his or its officers, agents or employees to exercise due care, or to comply with any law affecting such employment . . . provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.

1910 N.Y. Laws ch. 674, § 217.

16. *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 288, 94 N.E. 431, 437 (1911) (contrary to common-law system of fault-based employer liability, new system under Workmen's Compensation Act imposes liability upon employers irrespective of fault); W. PROSSER, *supra* note 7, § 80, at 531 (workmen's compensation is a form of strict liability whereby employers are liable for employee injuries caused by "pure unavoidable accident"); Smith, *supra* note 9, at 236-37

statutes eliminated causation as a prerequisite for liability.[17] A worker could recover if he had been injured "within the scope of employment," regardless of whether the injury could be traced to any representative of the employer.[18] In a common scenario, where a worker had come into contact with a hydraulic press, a boiler or a blast furnace, it did not matter whether the worker had injured himself or had been injured by someone else. The liability in workmen's compensation schemes was thus not only liability without fault, but liability without any defenses whatsoever.[19]

(new Act provides for compensation to employees when injured in course of business by "pure accident without any fault" on the part of employers).

17. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 207-08 (1957). Larson notes that "in the early years of compensation development [lawyers and judges attempted] to read 'arising out of employment' as if it were 'proximately caused by the employment,' with [imposition of the] accompanying rules of foreseeability and intervening cause." *Id.* at 207 (footnote omitted). With the eventual recognition, by lawyers and judges, that compensation arises from "the relationship of an event to an employment," and not from "the relation of an individual's personal quality [fault] to an event," traditional tort concepts of causation were no longer applicable to compensation cases. *Id.* at 208.

18. W. PROSSER, *supra* note 7, § 80, at 531 ("The only questions remaining to be litigated are, first, were the workmen and his injury within the act, and second, what shall be the compensation paid.") (footnote omitted).

19. A major criticism of the common law theory of negligence was that an employer could escape liability by employing the "unholy tenets of common law defenses," i.e., contributory negligence, assumption of the risk, and the fellow servant rule. By application of such defenses, common-law courts could relieve the employer of any responsibility even though he, or his other servants had failed "to exercise due care." *Id.* at 526-27; *see, e.g.*, Schlemmer v. Buffalo, Rochester & Pitts. R.R., 220 U.S. 590, 598-99 (1910) (railroad employee's estate denied recovery for intestate's death because employee was contributorily negligent for attempting to couple the railroad cars in a dangerous way, when a safer way was at the time called to his attention); Ehrenberger v. Chicago R.I. & P. R.R., 182 Iowa 1339, 1342, 166 N.W. 735, 736 (1918) (plaintiff assumed risk of injury for his actions, even though taken under protest, in transporting a log plaintiff knew or should have known to be too heavy to carry); Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49, 53 (1842) (railroad not liable under fellow servant rule for injury to one of its employees caused by careless actions of another one of its employees engaged in same occupation).

Workers' compensation effectively imposed strict liability and abolished such defenses. W. PROSSER, *supra* note 7, § 80 at 531; *see, e.g.*, Imperial Brass Mfg. v. Industrial Comm'n, 306 Ill. 11, 137 N.E. 411 (1922) (under workmen's compensation act, right to compensation exists without reference to fault of employer or care of the employee); American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A. 999 (1916) (if deceased workman died in accident while in employ of another, and death was not due to self-inflicted injury or willful misconduct or intoxication, compensation must be awarded, for in absence of contrary proof, it is presumed that death did not occur from these causes); Borgnis v. Falk Co., 197 Wis. 327, 133 N.W. 209 (1911) (upholding statutory abolition of defense of assumption of risk and fellow servant rule under workmen's compensation statute).

Abolition of these common law defenses was a major criticism of workmen's compensation acts. *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 288, 94 N.E.

The only limitation was that the worker be engaged in "employment."[20]

Despite this latter feature of workers' compensation legislation, commentators who opposed its passage did not ground their objections on the new attitude toward issues of causation that the statutes presented. The chief preoccupation of critics of the legislation was that it represented a radical departure from traditional principles of tort liability and that it amounted to an unconstitutional taking of property without just compensation.[21] Jeremiah Smith, in a two-part article in the Harvard Law Review in 1914,[22] articulated the first of these criticisms. Workers' compensation legislation, Smith argued,

> is founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts . . . . These very inconsistent results are due to the fact that the rule of liability adopted by the statute (liability for damage irrespective of fault) is in direct conflict with the fundamental rule of the modern common law as to the ordinary requisites of a tort. . . . In these modern days, the fundamental common-law rule as to the requisites of a tort is, that there must be fault on the part of the defendant . . . .[23]

Smith's argument had been made a year earlier by two judges on the New York Court of Appeals in the case of *Ives v. South Buffalo Ry.*[24] Judge William Werner, writing for the majority, called the workers' compensation statute in question "plainly revolutionary" in positing a "rule of liability . . . that the employer is responsible to the employee for every accident in the course of

431, 437; Cowles, *Workmen's Compensation in the United States*, 6 ME. L. REV. 283, 285-86 (1913); Smith, *supra* note 9, at 244.

20. *See* W. PROSSER, *supra* note 7, § 80, at 531. For an example of an extremely broad construction of "arising out of employment," see O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). In *O'Leary*, an employee had been using a company recreation area which was next to a shore area, when he attempted to rescue two drowning swimmers and died. *Id.* at 505. The Supreme Court granted recovery and held that the arising out of and in the course of employment requirement is satisfied if the " 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *Id.* at 507.

21. *See generally* Boston, *Some Conservative Views Upon the Judiciary and Judicial Recall*, 23 YALE L.J. 521 (1914); Mechem, *Employer's Liability*, 44 AM. U.L. REV. 221 (1910); Smith, *supra* note 9.

22. *See* Smith, *supra* note 9.

23. *Id.* at 235-39.

24. 201 N.Y. 271, 94 N.E. 431 (1911).

the employment, whether the employer is at fault or not, and whether the employee is at fault or not."[25] Chief Judge Edgar Cullen, concurring, declared that "I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."[26]

The *Ives* court was more interested, however, in the fact that workers' compensation, by requiring employers to indemnify their employees for injuries on the job, ostensibly took the employers' property from them without just compensation.[27] The argument that the risk to an employee should be borne by the employer because it is inherent in the employment might be "economically sound," the court conceded. But it was

> at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B, and that cannot be done under our Constitutions [state or federal].[28]

Charles Boston, writing in the Yale Law Journal[29] three years after the *Ives* decision, expressed similar sentiments. Boston stated:

> [I]t is a fundamental principle in our justice that a man's property shall not be taken for public use without just compensation, and that it cannot be taken for private use

25. *Id.* at 285, 94 N.E. at 436.

26. *Id.* at 318, 94 N.E. at 449.

27. In this light, the court concluded that "this statute does not preserve to the employer the 'due process' of law guaranteed by the Constitutions [federal and state], for it authorizes the taking of the employer's property without his consent and without his fault." *Id.* at 298, 94 N.E. at 441. For the court's complete discussion of the due process argument, see *id.* at 292-300, 94 N.E. at 439-42.

28. *Id.* at 296, 94 N.E. at 440.

29. *See* Boston, *supra* note 21.

> without his wrongful act. If we let down this bar and suffer it to be taken at the will of the Legislature, then we will put all men in the community at the mercy of the Legislature and abolish the established principles of the Constitution.[30]

Despite arguments such as these, the system of workers' compensation gained rapid acceptance. Five years after *Ives*, in *New York Central R.R. v. White*,[31] the United States Supreme Court, in a case testing the constitutionality of a New York program passed via a state constitutional amendment, dismissed both the common-law[32] and constitutional arguments.[33] Justice Mahlon Pitney held for the Court that the system was not arbitrary or unreasonable,[34] because the workers' compensation system could be justified as a reasonable exercise of the state's powers.[35] Nor was its adaptation of liability without fault a novelty in tort law;[36] common carrier and innkeeper liability had not been based on fault at common law.[37] Finally, Justice Pitney's decision tracked many of the earlier arguments advanced on behalf of the legislation, but ultimately rejected in the *Ives* decision.[38] In *Ives*, Judge Werner

30. *Id.* at 521.

31. 243 U.S. 188 (1916).

32. The common-law arguments were essentially based upon the new Act's radical departure from the common-law notion of liability based upon fault. *Id.* at 198. In this light, it was argued that employers had a type of vested interest in being able to assert the common-law defenses of contributory negligence, assumption of the risk, and the fellow servant rule, all of which were effectively eradicated under the new Act. *Id.* at 198-200.

33. The main constitutional argument put forth was that workmen's compensation acts violated the due process clause of the fourteenth amendment of the federal constitution (as well as art. 1 § 6 of the New York State Constitution) because it deprived an employer of property without due process. *Id.* at 196.

Two other minor constitutional arguments advanced against the Act were that the fixed compensation system deprived the employee of his right to full compensation commensurate to the damages sustained, and that the new act denied both the employer and employee of their freedom of contract to acquire property in any manner which they so chose. *Id.*

34. *Id.* at 204.

35. The *Ives* court had determined that the state police power did not extend to enacting the workers' compensation acts. 201 N.Y. at 300-07. However, in *New York Central*, the Supreme Court concluded the exact opposite. 243 U.S. at 202. The Court stated that "[t]he act evidently is intended as a just settlement of a difficult problem, affecting one of the most important social relations . . . . [I]n such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the fourteenth amendment beyond the reach of the law making power of the state. *Id.*

36. *New York Central*, 243 U.S. at 202.

37. *Id.*

38. *Id.* at 202-04.

had earlier highlighted such arguments by stating that the

> theory of this law [was] . . . based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interests of the state to remove.[39]

In retrospect, the workers' compensation system was exactly what its opponents claimed it was: a radical reorientation of the existing tort system, and, given the assumptions of that system, an unjust taking of property. Although the use of a fault standard as a prerequisite for liability had not been an exclusive feature of tort law, by the time of the *Ives* decision it was sufficiently pervasive to have consigned those pockets of act-at-peril liability to what commentators called "peculiar"[40] status. Thus, employers could fairly claim that to allow employees to recover against them when they had not been at fault (and perhaps the employees had) was radically to upset their expectations. Since a successful claim grounded on the mere fact of injury took money out of the pockets of employers when they had done nothing that gave rise to legal accountability, they could also fairly claim that the result was unjust. Their assets had been taken from them; they had done nothing under the existing tort regime to deserve the loss of their assets; an unjust, uncompensated taking of property had occurred. But these arguments did not prevail. In balancing the prospect of making radical changes in tort law as a result of the proposed workers' compensation statutes against the radical inadequacies of the existing tort system in providing for those injured in industrial accidents, the legislatures and courts assigned

39. *Ives*, 201 N.Y. at 294, 94 N.E. at 439.

40. *See, e.g.*, F. BURDICK, THE LAW OF TORTS 536 (1926).

more weight to the perceived inadequacies. The determinative factor accounting for the change thus appears to have been the existing system's provision of virtually no means of accountability for victims of industrial accidents. Under the circumstances, even the fault principle had to yield.

II. STRICT LIABILITY THEORY

The debate over workers' compensation had revealed that the fault standard had not uniformly existed as a prerequisite for liability in tort.[41] But from the 1880's, when Oliver Wendell Holmes in America and Frederick Pollock in England first began their efforts to systematize tort law around comprehensive principles of liability,[42] act-at-peril liability had been placed on the defensive, as represented by its being labeled as "peculiar." Beginning in the 1930's, however, commentators became interested in developing a version of act-at-peril liability in the area of defective products. Jeremiah Smith had identified the possibility of a tort category of "absolute liability" as early as 1917,[43] and by the early 1930's, several articles had appeared advocating some form of strict liability.[44] These articles paved the way for Justice

41. Even the critics of workmen's compensation statutes admitted that "liability without fault" was a part of the history of common law. *See* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 108 (1980). There I noted that, "[d]espite the primacy of the negligence principle and despite scholarly efforts to make tort law virtually synonymous with negligence, bastions of 'strict' liability had persisted in the late nineteenth and early twentieth centuries." *Id.* (footnote omitted); *see also* Smith, *supra* note 9, at 239.

42. For a discussion of Holmes' early efforts, see O. HOLMES, THE COMMON LAW (1881); Holmes, *The Theory of Torts*, 7 AM. U.L. REV. 652 (1873). For an example of Pollock's early efforts, see F. POLLOCK, THE LAW OF TORTS (1887).

43. Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 241, 255-56 (1917). In identifying the possibility of a new category of liability, Professor Smith stated:

> Those who adopt the modern rule that fault is, generally, requisite to a tort, admit that in some exceptional cases the law, acting upon considerations of public policy, imposes liability where there is no fault. But it does not follow that such exceptional cases should be classed under the general head of tort. Jurists, who adopt the theory that fault is requisite to a tort and carry it out to its logical result, would no longer divide all causes of personal action into contract and tort, including under tort everything that is not contract. On the contrary they would divide causes of personal action into three main classes: (1) Breach of genuine contracts. (2) Tort in the sense of fault. (3) A third class comprising cases of so-called "absolute liability," *i.e.*, cases where there is neither breach of genuine contract or fault, and yet liability.

Id. (footnotes omitted).

44. *See, e.g.*, Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001, 1013-15 (1932) (rejecting any type of duty concept being attached to

Roger Traynor's pioneering opinion in *Escola v. Coca Cola Bottling Co.*,[45] in which strict liability for dangerous products was first announced as a general tort principle.[46]

Strict liability doctrine took several years to become established in the courts.[47] It was not officially endorsed by the full California court until about twenty years after Justice Traynor's opinion in *Escola*.[48] Part of the explanation for the delayed impact of strict liability theory doubtless lies in the mixed reactions it spawned among commentators. In the 1955 edition of his treatise, William Prosser, himself an advocate of strict liability, announced that the theory had received "the approval of every legal

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strict liability in favor of more realistic notion of recognizing that some types of ultrahazardous conduct can form basis for liability even without fault, i.e., without the need for any breach of duty); Harris, *Liability Without Fault*, 6 TUL. L. REV. 337, 367 (1932) (strict liability "is not without its place in our modern social scheme . . . when perceived as an antidote for the new hazards of life in twentieth century America."). For a more extensive list of earlier commentators advocating some form of strict liability, see W. PROSSER, *supra* note 7, § 75, at 494 n.27.

45. 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring).

46. See *Escola*, 24 Cal. 2d 453, 461, 159 P.2d 436, 440 (1944) (Traynor, J., concurring). Justice Traynor stated, "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* (Traynor, J., concurring) (citation omitted).

47. The California Supreme Court, in its landmark 1963 decision in *Greenman v. Yuba Power Products, Inc.*, was one of the first courts to adopt strict liability in tort in products liability cases. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The line of "exploding bottle" decisions leading up to *Greenman* is as follows: *Escola*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (affirming verdict for plaintiff by accepting plaintiff's very liberal use of res ipsa loquitur, with Traynor, alone, advocating strict liability); Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 203 P.2d 522 (1949) (same); Trust v. Arden Farms Co., 50 Cal. 2d 217, 324 P.2d 583 (1958) (denying plaintiff's claim, asserting plaintiff failed to make sufficient showing that defect occurred prior to purchase, but Traynor felt manufacturer should be held liable under strict liability theory).

One reason courts were reluctant to adopt strict liability was that the doctrine of res ipsa loquitur could be stretched to cover those egregious situations where the plaintiff's injury was clearly traceable to the manufacturing process. Consequently, the courts did not feel compelled to utilize a strict liability theory. As evidenced by the above discussion, the decisions of the California Supreme Court bear this out. For an explanation of the doctrine of res ipsa loquitur, see *infra* note 85 and accompanying text.

48. *See* Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *Greenman* is generally regarded as marking the acceptance of strict liability theory in the defective products area. *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 803 (1966). For a discussion of the impact Prosser had on the development of the law in this area, see G. WHITE, *supra* note 6, at 168-73.

writer who has discussed it,"[49] but Prosser's claim was not entirely accurate. Two commentators in the 1940's, for example, reaffirmed, as one put it, that "[t]he basic principle and policy of our tort law is to impose liability only for fault, and this policy must not be departed from in order to lessen the plaintiff's difficulties of proof."[50] As in the case of workers' compensation, critics sensed that the imposition of strict liability outside its "peculiar" pockets would represent a substantial modification of the basis of tort liability. A 1957 symposium in the Tennessee Law Review reflected the ambiguous status of strict liability theory a decade after *Escola*.[51] The topic of the symposium was whether manufacturers of "general products" should be liable without negligence. The above topic reflected the tendency of strict liability to be confined to certain products, such as defective food, where its "ultrahazardous" character was apparent, and thus where an analogy to abnormally dangerous activities, such as blasting, was relatively easy to make.[52] Outside those areas, commentators, even those such as Fleming James who approved of strict liability as a general basis for recovery, were cautious in their extensions of the strict liability principle.[53] James believed

49. W. PROSSER, LAW OF TORTS § 59 (2d ed. 1955).

50. *See* Note, *Negligence: Res Ipsa Loquitur: Necessity of Control of Instrumentality by Defendant*, 31 CALIF. L. REV. 608, 611 (1942); *see also* Leidy, *Another New Tort?*, 38 MICH. L. REV. 964 (1940).

51. *See Symposium: Strict Liability of Manufacturers*, 24 TENN. L. REV. 923-1018 (1957).

52. *See* Green, *Should the Manufacturer of General Products be Liable without Negligence?*, 24 TENN. L. REV. 928 (1957) (Green found symposium topic of manufacturers of general products too ambiguous and limited his discussion to "food chemical products" and "some mechanical products"); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 940-41 (1957) (strict liability should be limited to the common law exceptions and food because, from a historical perspective, food cases have been treated as a special class).

53. *See* James, *General Products—Should Manufacturers be Liable without Negligence?*, 24 TENN. L. REV. 923, 926-27 (1957). James' cautious attitudes concerning extensions of strict liability came in the form of his advocating the following limits:

> While liability under warranty would be strict, in the sense that negligence would no longer be required, yet this does not mean that the maker would be held for all injuries caused by his products. . . . In warranty as well as negligence a plaintiff must trace his injury to a quality or condition of the product which was unreasonably dangerous either for a use to which the product would ordinarily be put, or for some special use which was brought to the attention of the defendant. . . . Further, in warranty as well as negligence plaintiff must show that this unreasonably dangerous condition existed when the goods left the maker's hands. . . . This enterprise liability should not be unlimited, but it should extend to all casualties and hazards that are injected

that the warranty theory was a more fruitful line of recovery in the case of ordinary products.[54]

The eventual triumph of strict liability as a general basis of recovery in the defective products area can be attributed to a blunting of the moral arguments made by those resisting reform. The strength of the fault principle, its adherents recognized, was that it integrated legal and moral considerations in an ambiguous, but nonetheless powerful fashion. In discussing the "duty" concept, an important linchpin of negligence analysis, Fowler Harper recognized that "the duty concept is of value only where defendant is morally culpable, because duty is primarily a moral concept. It is so shot through with moral connotations that it actually misdescribes the character of the defendant's conduct in cases where there is not moral fault."[55] Similarly, Rufus Harris recognized that strict liability amounted to liability "independent of blamefulness," and that "[n]o one, however, can fail to be aware of the vitality of the notion that liability should be placed upon fault," [because] "it is bound up intimately with the traditional aspects of the cultures of the western world . . . taking account of traditional religion with its concept of personal salvation and traditional ethics."[56]

Advocates of strict liability were ultimately able to blunt these

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into society by the activity of the enterprise, at least to the extent that they are reasonably foreseeable.

Id. (footnotes omitted).

54. *Id.* at 924-25. James articulated the basis for his acceptance of the warranty theory, in the field of products liability, as follows:

> [T]he commercial law has developed the implied warranties of quality which are frequently imposed by law for reasons of social policy and not because of any express or implied-in-fact understanding of the parties. It must, of course, be admitted that the policies that gave birth to these implied warranties were not those involving protection of consumers against personal injuries and its consequences. But the warranty has come to serve this policy in appropriate cases—a fact which courts have recognized. In this field [products liability], then, future developments of the rule should be those which this policy calls for. This would include strict liability on the part of the manufacturer, upon an implied warranty, for unreasonable dangers lurking in any kind of product. All limitations imposed by the doctrine of privity should go. Liability should extend to anyone who is hurt by a foreseeable use of the product. The foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create.

Id. (footnotes omitted). For further elaboration on James' warranty theory, see generally James, *Products Liability*, 34 TEX. L. REV. 192 (1955).

55. Harper, *supra* note 44, at 1013-14.

56. Harris, *supra* note 44, at 366.

moral arguments by maintaining that strict liability had a morality of its own. The morality of strict liability was that of protection for the powerless in a complex industrial society in which persons were often unable even to identify the agents of their injuries. The negligence system, by imposing burdens on plaintiffs to demonstrate that those who had injured them were legally at fault, penalized those without the kind of resources necessary to ascertain how they had been injured, by whom, and through what mechanisms.[57] The *Escola* setting provided a classic example: a waitress was carrying a tray of soft-drink bottles when one exploded, cutting and frightening her. Who had hurt her and how? To resolve those questions, the waitress had to establish: 1) the process by which the bottles were manufactured, filled with soda, shipped to retailers, consumed, returned, washed, and used again; 2) the testing procedures employed to determine how much pressure bottles could withstand; 3) the relative capacities of older and newer bottles; 4) the techniques used to manufacture, distribute and market the soft-drink; and 5) the number of persons involved in the process.[58] Even if she could show that

57. For a discussion of the extreme burdens placed upon plaintiffs in establishing a negligence cause of action, see *infra* notes 58-59 and accompanying text. However, the harshness of the negligence theory was mitigated somewhat by the liberal use of res ipsa loquitur. For examples of the California Supreme Court's liberal use of res ipsa loquitur to allow recovery for plaintiffs injured by defective products under a negligence theory, see *supra* note 47 and accompanying text.

58. *Escola*, 24 Cal. 2d at 458-61, 150 P.2d at 439-40.

Before the development of strict liability theory in the area of defective products, injured plaintiffs had to bring suit under either a negligence or implied warranty theory. The similarities between these two theories are noted by James as follows:

> In warranty as well as negligence a plaintiff must trace his injury to a quality or condition of the product which was unreasonably dangerous either for a use to which the product would ordinarily be put, or for some special use which was brought to the attention of the defendant [manufacturer]. . . Further, . . . plaintiff must show that this unreasonably dangerous condition existed when the goods left the maker's hands.

James, *supra* note 53, at 927 (footnotes omitted); *see also* James, *supra* note 54, at 206.

The differences between these two theories is well-illustrated by Woods. According to Woods, in order for the injured plaintiff to recover under a negligence theory, he would have to demonstrate that the manufacturer breached his duty to use reasonable care in the manufacturing process by "a negligent failure to inspect, test, assemble, or design the product," and that failure (i.e., that breach of duty) was the proximate cause of plaintiff's injuries. H. WOODS, COMPARATIVE FAULT § 14.5, at 263 (1978). The enormous burden placed upon plaintiffs here, in having to establish various factors, like those listed in the text, often proved too much. According to Woods, "[n]egligence on the manufacturer's or seller's part is often difficult to prove. To investigate and prove a negligent failure to inspect, test, assemble, or package a product is often costly and tedious."

soft-drink bottles did not ordinarily explode, she had the additional tasks of showing that the manufacturer had the techniques to determine whether a given bottle had been weakened, and whether the weakening and subsequent explosion could be traced to someone in the manufacturer's employ.[59] As Traynor put it in a 1963 decision, the purpose of strict liability was "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[60]

In summoning up the idea of powerlessness as a justification for strict liability, tort theorists were coming dangerously close to doing away with one of the deepest sources of the American system of tort law, the concept of moral answerability. From its origins, tort law had served as the principal mechanism in American culture by which individuals obtained a rough justice—or perhaps a rough vengeance—for the fact that they had been willfully or fortuitously injured.[61] The mechanism operated by identifying an answerable party, determining that party to be "at fault", or simply responsible for the injury, and finally securing vindication through a direct payment of money from the answerable party to the victim.[62] The appeal of fault as a prerequisite for tort liability was that it complemented this mechanism by ascribing behavior to the answerable party that had moral connotations. Prior to the emergence of strict liability in the defective products area, even those areas of tort law where liability was not conditioned on fault easily fit into the moral conundrum, because they involved activities—harboring wild animals, starting a fire, blasting—which were clearly dangerous if not contained and thus created a moral bur-

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Id. Such difficulties with the negligence theory, in turn, led plaintiffs to attempt recovery, whenever possible, under the more lenient implied warranty theory. *Id.* For under the implied warranty theory, in contrast to the negligence theory, plaintiff only had to prove "that the product was defective at the time it left the seller's or manufacturer's possession." *Id.* The need to prove breach of the manufacturer's duty to use reasonable care was thus obviated. *Id.*

For more extensive treatment of plaintiff's problems of proof under a negligence theory, see 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 28.11-14 (1st ed. 1956). For a more extensive treatment of the implied warranty theory, see *id.* §§ 28.15-25.

59. *Escola*, 24 Cal. 2d at 459-61, 150 P.2d at 439-40.

60. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

61. *See generally* W. PROSSER, *supra* note 7, § 1, at 1-7.

62. *Id.* at 7.

den for their perpetrators.[63]

Defective products, however, lacked a capacity for easy moral attribution. An "ordinary" product—a bar of soap, a soft drink, a child's toy—was not "ultrahazardous" in itself: it was only so when defective. If the defectiveness was no one's "fault"—because, for example, it could not be detected by ordinary testing methods—where was the moral answerability? The answer lay in the fact that the manufacturer of the product profited from putting it on the market, controlled the procedures for testing and distributing it, and was in the best position to know whether it was unsafe or not.[64] In contrast, the consumer, in most instances, had only the expectation that a product was "ordinary", e.g., safe if used in the conventional manner. The moral balance of the episode was tipped in favor of the injured party by the demonstration of two facts: the consumer's inability to ascertain why or how

63. *See* RESTATEMENT (FIRST) OF TORTS § 519 (1938). Section 519 stated "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent harm." *Id.* Prosser enumerates those activities which are paradigms for abnormally dangerous or ultrahazardous activities as: 1) water collected in quantity in an unsuitable or dangerous place; 2) explosives in quantity in a dangerous place; 3) inflammable liquids in quantity in the midst of a city; 4) blasting in the midst of the city; 5) pile driving with abnormal risk to surroundings; 6) release into air of poisonous gas or dusts and 7) drilling oil wells or operating refineries in thickly settled communities. W. PROSSER, *supra* note 7, § 78, at 509-10.

64. The rationales stated in the text to support the imposition of strict liability, have been variously formulated through the case law in this area. *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) ("Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built."); MacPherson v. Buick Motor Co., 217 N.Y. 382, 394-95; 111 N.E. 1050, 1055 (1966) (since the defendant was a manufacturer of automobiles "[i]t was responsible for the finished product . . . . Reliance on the skill of the manufacturer was proper and almost inevitable . . . . Both by its relation to the work and by the nature of its business, it is charged with a stricter duty"); *see also Escola*, 24 Cal. 2d at 462-63, 150 P.2d at 441-43. In *Escola*, the court stated:

> It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot . . . . An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be [as] familiar with the manufacturing process as the manufacturer himself is . . . . Manufacturing processes . . . are ordinarily either inaccessible to or beyond the ken of the public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.

24 Cal. 2d at 462-63, 150 P.2d at 441-43. (citations omitted).

he had been injured and the manufacturer's ability to control the process that determined his legal fault. It was the manufacturer, and his experts, who produced the battery of evidence demonstrating that the defectiveness of a given product could not be ascertained in advance; it was the manufacturer's marketing system that so muddled the process by which a product reached the consumer's hands that an injured person could not know where to lay blame. The manufacturer was thus using the fault system to hide his answerability: strict liability was restoring the elemental notion that an injured person could seek out his injuror.

III. COMPARATIVE NEGLIGENCE

Just as workers' compensation had deflected charges that it was a radical break with tort principles by demonstrating that at another level it was a reaffirmation of those principles, so did strict liability theory elevate itself to a position of influence in defective products cases despite the belief of critics that it was an alien doctrine. Next in the series of radical departures came the principle of comparative negligence, which was established through a strategy similar to that used by strict liability advocates. Chronologically, comparative negligence surfaced approximately at the same time as strict liability for defective products, first being discussed in the literature in the late 1920's and thirties, and receiving support from prominent commentators by the 1950's.[65] But comparative fault systems were not implemented on a large scale until the 1970's.[66] As early as 1926, a student Note recog-

65. Dobbs, *Comparative Negligence*, 9 ARK. L. REV. 357 (1955); Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 OR. L. REV. 38 (1969); Leflar, *Comparative Negligence—A Study for Arkansas Lawyers*, 10 ARK. L. REV. 54 (1956); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Prosser, SELECTED TOPICS, *supra* note 6; Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950); Note, *Torts: Damages: The Rule of Comparative Negligence*, 12 CORNELL L.Q. 113, 116 (1926).

66. The breakdown of the comparative fault trend is as follows: 1969—Hawaii, Maine, Massachusetts and Minnesota; 1971—Colorado, Idaho, Oregon; 1973—Connecticut, Oklahoma, North Dakota, Utah, Wyoming, Vermont, Nevada, New Jersey, Texas and Washington; 1974—Kansas and New Hampshire; 1975—New York and 1976—Pennsylvania.

Although the trend toward comparative fault seems contemporary, the fact is that several states had adopted and applied comparative fault principles (either by statute or judicial decision) in the early part of this century. *See, e.g.*, FLA. STAT. § 4965 (1920); GA. CODE ANN. § 4426 (1914); MISS. CODE ANN. § 502 (1917); NEB. REV. STAT. § 8834 (1922); Tennessee Central R.R. v. Page, 153 Tenn. 268, 282 S.W. 376 (1926). Kansas and Illinois had flirted with the doctrine. *See* Missouri Pac. R.R. v. Walters, 78 Kan. 39, 96 P. 346 (1908); Chicago

nized that resistance to comparative negligence was emblematic of a more general response to reform of the tort system:

> [comparative negligence] has been rather generally criticized, most of the criticism going to its lack of definiteness, the difficulty of the jury in apportioning damages, the impossibility of enforcement in the courts, the openings for fraud, etc. It seems, however, that these are no more than the old stock arguments that are resurrected and pressed into service every time a new doctrine, embodying more flexible principles, is advanced.[67]

The radical feature of comparative negligence was not, as in the case of the two reforms previously discussed, its abandonment of the fault standard. Comparative negligence was radical in that it proposed to quantify degrees of negligence and compare them in what amounted to a mathematical fashion. One commentator pointed out in 1932:

> [W]e find the courts making much of the terms "slight," "ordinary," and "gross" negligence, and making comparisons of negligence by determining whether the negligence of the respective parties was slight, ordinary or gross in the technical and legal sense of these terms, and then making a sort of mathematical comparison of the degree in which one has been negligent with the degree of negligence displayed by the other. The absurdity of any attempt to introduce mathematical exactness into the uncertain and shifting problems of negligence needs no exposition.[68]

The problem of mathematical comparison troubled critics for several more decades. In a 1953 attack on comparative negligence, Judge William Palmer contrasted the "moral-mathematical proration of liability" featured in the doctrine with the "significant fact" that in "nearly all . . . true cases of contributory negligence, plaintiff would have avoided the accident if he had used ordinary care."[69] Palmer was incredulous as to why someone "who was . . . to blame for an accident that would not have happened if he had

B. & Q.R.R. v. Payne, 59 Ill. 534 (1871); Chicago & N.W. R.R. v. Des Lauriers, 40 Ill. App. 654, 39 N.E. 431 (1890).

67. *See* Note, *supra* note 65, at 116 (footnote omitted).

68. Mole and Wilson, *supra* note 65, at 333-34.

69. Palmer, *Let Us Be Frank About Comparative Negligence*, 28 L.A. BAR BULL. 37, 64 (1953).

exercised only ordinary care, should have a cause of action against anyone else . . . ."[70] Even Prosser, who argued on behalf of comparative negligence in an article that appeared in 1954,[71] spent the bulk of his presentation on the administrative difficulties a rule of comparative fault would produce. He argued that damage apportionment among multiple parties, or in cases where one party was insolvent or beyond the reach of the jurisdiction, or in cases where insurance coverage was uneven, were formidably complex tasks.[72] In this regard, Prosser was echoing a nineteenth century commentator's belief in the "inability of human tribunals to mete out exact justice."[73]

The "mathematical" emphasis of comparative negligence thus posed more than administrative difficulties for critics: it was fundamentally unsound. The touchstone of recovery in tort should be whether the plaintiff was at fault. If one was, one should not be allowed to recover; if one was not, the law should search out and find the answerable person. By comparing degrees of negligence, the doctrine not only fostered an elusive exactness about nonquantifiable conduct, it conveyed the wrong message; fault did not disqualify one from recovery. This message, critics believed, would encourage lawless conduct. As Palmer put it:

> [T]he law of contributory negligence is one of several rules that stem from a basic disciplinary policy, attitude and dignity of our jurisprudence. It is a policy that both reflects and contributes to the moral fibre of a people, that provides disciplinary measures, without necessity of criminal action, for certain wrongdoing, that keeps in the foreground for the attention of all concerned, standards of conduct known to be necessary for the preservation of a decent civilization.[74]

In this attack, critics of comparative negligence were resorting to the same moral language that had been employed to criticize workers' compensation and strict liability. Just as in those examples, proponents of the reform sought to trump critics by injecting a moral issue of their own. In the case of comparative

70. *Id.*

71. PROSSER, SELECTED TOPICS, *supra* note 6, at 1-69.

72. *Id.* at 61-67.

73. C. BEACH, A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 12 (1892).

74. Palmer, *supra* note 69, at 58.

negligence, that issue was once again answerability, presented in the guise of elemental fairness. As Charles Gregory argued in a 1936 article, it was "self-evident" that comparative negligence "furnish[es] a theoretically fairer basis for loss distribution in negligence cases than the accepted principles of the common law."[75] Gregory particularized: "[It needs] no argument to establish that if two people unintentionally cause damage for which both are responsible and one discharges the entire obligation, the other ought to share the loss . . . in proportion to the extent to which he effected the loss."[76]

The moral principle being asserted in this excerpt was that responsibility begat answerability. Contributory negligence, being a complete defense, may have had the virtue of simplicity, but it assured that a portion of the losses inflicted by a negligent defendant on a negligent plaintiff would not be borne by the defendant. The defendant, in short, was blameworthy, but not answerable, and the plaintiff was answerable out of proportion to his blameworthiness. The elemental principle that a person deserved the opportunity to be compensated for that portion of his injuries that another had inflicted upon him was thus being violated by any rule of liability that did not equate answerability with blameworthiness. To be sure, the logic of the argument was more satisfactory in a setting where fault was the standard of liability, but it could be employed in a strict liability context as well by the device of ascribing blameworthiness to that party in the litigation who had the greater opportunity to avoid harm to the injured party. Eventually, after some conceptual difficulties, courts were able to factor strict liability into a comparative fault structure of recovery, instructing juries to compare the defectiveness of a product with the negligence of an injured plaintiff.[77]

75. C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 4 (1936).

76. *Id.*

77. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975) (applying Missouri law) (in action for defective design of automobile tires causing plaintiff to be involved in fatal car crash, if jury found deceased was contributorily negligent but that defendant's negligent design of tires also proximately caused or contributed to his death, damages could be recovered but must be reduced to reflect decedent's own contributory negligence); Rodrigues v. Ripley Indus., Inc., 507 F.2d 782, 785 (1st Cir. 1974) (applying New Hampshire law) (court upheld low jury award under comparative negligence principles because there was ample evidence that low award could have resulted from jury's comparison of plaintiff's negligent use of heel molding machine with defendant's defective design of machine); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 601-03 (D. Idaho 1976) (applying Idaho law) (jury's special verdict comparing airline plaintiff's negligent operation of plane with defend-

Over time, even the "elusiveness of mathematical comparisons" arguments have lost strength, as courts and commentators have come to recognize that the comparisons made in comparative fault cases are simply rough—one might even say arbitrary—efforts to apportion degrees of blameworthiness.[78] By having the jury make such comparisons, the principle of moral answerability is being implemented in a stark fashion: how much one pays to others in a comparative fault system is being made a function of how "responsible" a jury thinks one is. No doubt "external" factors come into play in jury comparisons, such as the resources of the parties and the degree to which each is able to identify how and why an injury took place. But if one believes that the elemental principle being affirmed in the process is that of every person's right to seek out and demand compensation from those who have injured him, those considerations seem appropriate.[79]

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ant-manufacturer's defective design of plane was proper extension, under Idaho law, of comparative fault principles to defective products cases).

78. For the most part, the task of guiding juries in working out these rough comparisons is left with the trial courts. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 439-40 (Fla. 1973) ("[W]e feel the trial judges of this state are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.") Besides, argue commentators, it isn't as if juries have never had to apportion fault before. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 208 (1974). Professor Schwartz states:

> It is true that the jury might have some difficulty in making the calculation required under comparative negligence when defendant's responsibility is based on strict liability. Nevertheless, this obstacle is more conceptual than practical. The jury should always be capable, when the plaintiff has been objectively at fault, of taking into account how much bearing that fault had on the amount of damage suffered and of adjusting and reducing the award accordingly. Triers of fact *are* apparently able to do this.

Id. (emphasis in original); *see also* Note, *supra* note 65 at 116-17 (criticizing critics of comparative negligence for resorting to same old arguments of administrative difficulty whenever new concepts enter law, when in reality, it is not so difficult for jury to apportion fault when jury already can and does place monetary value upon damages).

79. The principle of moral answerability could also serve to explain the reform of no-fault, although in a reverse fashion. If one believes that the elemental force of the tort system in twentieth-century America has emanated from a deep cultural commitment to the values of accountability and rough justice, the emergence of a no-fault standard in the area of automobile accidents, where it first originated, can be seen as an implicit recognition that the complexities of automobile driving in a modern industrialized society had blurred the concept of moral responsibility in automobile accidents.

IV. SOME OBSERVATIONS ON PAST REFORMS

If the cultural context of prior tort reforms and the principle of moral answerability are kept in mind, it is possible to offer some general comments. Each reform appears to have stemmed from a perception that something "new" in American culture was operating to dilute the principle that injured persons had a right to know their injurers and to demand redress. In the case of workers' compensation, the perception was that an industrial society had created a series of occupations that were sufficiently dangerous to be outside the parameters of the established system of negligence principles. In the case of defective products, the perception was that the modes of manufacturing and distribution employed by technologically advanced enterprises prevented consumers injured by defective products from having sufficient information about the risks of potential injury or sufficient opportunities to identify the parties accountable to them. In the case of comparative fault, the perception was that industrialism and modernization had transformed the character of most interactions that resulted in civil injuries from simple two-party encounters, in which the doctrine of contributory negligence served as a means of assigning causal responsibility, to complex encounters involving multiple parties, where an injured plaintiff's "fault" might be disproportionate to that of others who participated in the process through which injury resulted. In each instance these perceptions, coupled with the principle of moral answerability, produced a reform that, while described as radical, was restorative in character: its purpose was to penetrate the complexities of modern life and reaffirm the idea of injurer accountability.

Another general feature of the reforms was that while each was criticized as a fundamental departure from existing tort principles, none resulted in a major dislocation of the established tort system. The gravamen of the criticism of the reforms was that they sought to dilute the vitality of fault as a prerequisite for liability and as a disqualification for recovery. Yet while each reform did replace pristine fault theory, the replacement was of a piecemeal character, and fault principles not only survived, they came to permeate the area governed by the reform. Workers' compensation, originally designed as an alternative to the tort system, evolved into a specialized system of its own, with discernible boundaries;[80] outside those boundaries workers retained their

80. For example, depending upon the particular jurisdiction, certain groups of workers are excluded: farm laborers, domestic servants, railway work-

tort remedies.[81] Strict liability has not replaced negligence theory in the area of defective products, but has simply become an alternative ground on which to base liability.[82] As strict liability doctrine has been operationalized in case law, courts have drawn freely upon negligence analogies, so that crucial terms such as "defect" and "ordinary use" have been defined according to a cost-benefit calculus that looks remarkably like the calculus of reasonable conduct employed in negligence theory.[83] Comparative

men, corporate officers and working partners and casual employees. In addition, certain types of injuries are excluded: damage caused gradually over a period of time, damage resulting from usual work under usual conditions and some occupational diseases. W. PROSSER, *supra* note 7, § 80, at 532-33.

81. *See, e.g.*, Echord v. Rush, 124 Kan. 521, 261 P. 820 (1927) (prior finding that injury was not compensable under workmen's compensation act did not bar plaintiff's subsequent wrongful death action); Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923) (even though workmen's compensation statute did not cover plaintiff's occupational disease contracted over time, plaintiff could still seek recovery under common law); Triff v. National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E.2d 232 (1939) (same); Billo v. Allegheny Steel Co., 328 Pa. 97, 195 A. 110 (1937) (same); Jones v. Rinehart & Dennis Co., 113 W. Va. 414, 168 S.E. 482 (1933) (plaintiff could still seek recovery under wrongful death statute despite inapplicability of workmen's compensation statute to plaintiff's occupational disease contracted gradually over time).

82. W. PROSSER, *supra* note 7, § 96, at 641. Prosser lists the strict liability theory as the third alternative, after negligence and warranty theory, upon which to base liability for defective products. *Id.* § 97, at 650. For further discussion of the strict liability theory as a basis for liability in the defective products area, see *supra* notes 44-48 and accompanying text. *See also* W. PROSSER, *supra* note 7, §§ 98-99, at 656-62. For further discussion of the negligence theory as a basis for liability in the defective products area, see *supra* notes 57-59 and accompanying text. *See also* W. PROSSER, *supra* note 7, § 96, at 641-50. For further discussion of the warranty theory as a basis for liability in the defective products area, see *supra* notes 53-54 & 58 and accompanying text. *See also* W. PROSSER, *supra* note 7,§ 97, at 650-56.

83. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In *Barker*, the California Supreme Court held that "a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design." *Id.* at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228. The court then went on to list relevant factors for jury consideration, including:

1) the gravity of the danger posed by the challenged design;
2) the likelihood that such danger would occur;
3) the mechanical feasibility of a safer alternative design;
4) the financial cost of an improved design; and
5) the adverse consequences to the product and to the consumer that would result from an alternative design.

Id. at 431, 574 P.2d at 455, 143 Cal. Rptr. at 237. Compare this analysis to Learned Hand's analysis in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In *Carroll Towing*, Judge Hand stated that liability "is a function of three variables: (1) The probability [the accident will occur]; . . . (2) the gravity of the resulting injury; . . . (3) the burden of adequate precautions." *Id.* at 173.

fault has actually strengthened the role of negligence in tort actions. Under traditional contributory negligence principles, a finding of "fault" on the part of a plaintiff barred recovery, so courts and juries developed doctrines, such as last clear chance[84] or res ipsa loquitur,[85] whose effect was to minimize the consequences of a finding that a plaintiff had been a small amount at fault. Comparative negligence has rendered those efforts superfluous. Thus, contrary to the fears of critics that traditional tort

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In fact, the *Barker* court acknowledged the similarity between its risk-benefit analysis and straight-forward negligence analysis. 20 Cal. 3d at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. However, the court asserted that the focus of its analysis was on the "condition of the product" and not the "reasonableness of the manufacturer's conduct." *Id.*; *see also* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1071-73 (4th Cir. 1974) (trial court's failure to use reasonableness standard when evaluating if defendant negligently designed microbus was exclusive grounds for reversal); Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 875 (Alaska 1979) (no liability will attach if "on balance the benefits of the challenged design outweigh the risk of danger inherent in such design") (quoting Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 458, 143 Cal. Rptr. 225, 240 (1978)); Wilson v. Piper Air Craft Corp., 282 Or. 61, 68, 577 P.2d 1322, 1326 (1978) (before trial court can allow question of design defect go to jury it must conclude whether proposed alternative design had been shown to be practicable); Morning Star v. Black & Decker Mfg. Co., 162 W. Va. 857, __, 253 S.E.2d 666, 682-83 (1979) (determination of what constitutes defectively designed product involves traditional tort analysis centering on whether physical condition of product renders it unsafe if used in reasonably intended manner).

Federal statutes also utilize a reasonableness standard in establishing design standards. *See, e.g.*, The National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(f) (1982); The Consumer Product Safety Act, 15 U.S.C. §§ 2506(a) & 2058(c) (1982).

84. According to Prosser, the first formulation of the last clear chance doctrine which is still most often cited is "that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a 'proximate cause' of the result." W. PROSSER, *supra* note 7, § 66, at 427. For a detailed discussion of the last clear chance doctrine, see generally *id.* at 427-33; 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS §§ 22.12-14, at 352-84 (2d ed. 1986); *see also* G. WHITE, *supra* note 41, at 45-50.

85. Res ipsa loquitur evolved as a rule of circumstantial evidence to counter the rule that negligence can never be presumed. If its elements are met, then breach of defendant's duty is inferred. Before res ipsa loquitur can apply, plaintiff has the burden of proof as to the following three conditions:

> (1) the apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in control of the party charged; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured.

J. WIGMORE, EVIDENCE § 2509, at 507 (McNaughton rev. ed. 1961). According to Prosser, "it is not necessary that he [plaintiff] be completely inactive, but merely that there be evidence removing the inference of his own responsibility." W. PROSSER, *supra* note 7, § 39, at 224. For a detailed discussion of res ipsa loquitur, see *id.* §§ 39-40, at 211-35. For examples of California Supreme Court's liberal use of res ipsa loquitur to avoid strict liability, see *supra* note 47 and accompanying text.

law would be transformed by the reforms, traditional tort law has survived and even expanded in the face of the reforms.

V. CURRENT REFORM IN HISTORICAL PERSPECTIVE

Can we expect that current reform will follow the same patterns of the past? Will traditional tort law in its twentieth-century version, with an emphasis on the fault standard and the principle of moral answerability, co-exist with and even subtly influence any changes that follow from the current sentiment for reform? As an initial matter, two differences between current reform proposals and those of the immediate past should be noted. First, the current reforms are "defendants' " reforms,[86] whereas the earlier versions were designed to improve the lot of plaintiffs. Workers' compensation was intended to make it easier for injured employees to have their injuries redressed;[87] strict liability in defective products performed the same function for injured consumers;[88] comparative fault the same function for a class of negligent plaintiffs.[89] By contrast, caps on damage awards and the influx of federal law into the products liability area are reforms designed to make it more difficult for injured persons to be made whole.[90] The justice arguments being advanced on behalf of reform are thus arguments seeking justice for injurers, not justice for the injured. The arguments seek to deflect rather than to facilitate the principle of moral answerability.

Second, the moral arguments made on behalf of defendants are not denying their responsibility for injuries to others, but asserting that they are being victimized by a system that imposes heavy damage costs on them but makes it difficult for them to meet those costs.[91] Such defendants, the arguments run, are vic-

86. Essentially, proponents of tort reform advocate modification of the contingency-fee system which is utilized by plaintiffs' attorneys, adoption of statutes of repose, and caps on all types of non-economic damages. Each one of these "reforms" would adversely affect the injured plaintiffs' ability to be made whole, by limiting his ability to bring an action as well as by limiting his compensation. *See* Kindregan & Swartz, *The Assault on the Captive Consumer*, 18 ST. MARY'S L.J. 674, 711 (1987).

87. *See* 1 W. SCHNEIDER, WORKMEN'S COMPENSATION 6 (2d ed. 1932).

88. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 434-35, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978).

89. C. GREGORY, LEGISLATION LOSS DISTRIBUTION IN NEGLIGENCE 4.

90. *See* Kindregan & Swartz, *supra* note 86.

91. *See Attorney General Comm'n Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance & Availability & Affordability*, 1-5 (Feb. 1986) (professionals and business experiencing a crisis in obtaining affordable liability insurance); *see also* S. REP. No. 476, 98th Cong., 2nd

tims of a "squeeze": the high costs and unpredictability of damage awards raises the cost of their liability insurance, so that they have to pay out large sums whether they injure persons or not; and when they do injure someone they are either saddled with higher insurance premiums or put at risk of losing insurance coverage altogether.[92] Their plight, in short, is based on an "insurance crisis" that high damage awards have precipitated.

Notice the use of the answerability principle in these arguments. Those arguing on behalf of "victimized" defendants are suggesting that insurance has transformed the concept of answerability in tort suits: while the defendant remains technically answerable to the plaintiff, the defendant's insurance company actually compensates the plaintiff, and the defendant's true answerability is to the insurance company. Thus insurance companies can muddle the role of answerability in tort cases by raising rates independent of any damage awards, which means that a defendant has to pay out large sums of money whether he injures others or not. But if insurance company behavior is not in fact tied to tort claims, then it would seem, first, that defendants are truly being "victimized," and, second, that substantive reform of tort doctrines would not be an effective way of alleviating a "crisis" in the liability insurance industry.

Are we in fact undergoing a liability insurance "crisis"? If so, has the crisis been brought about by developments in tort law?[93] Exploration of these questions requires some background exposure to the liability insurance industry. Liability insurance is an investment industry, such as banking. Insurance companies are interested in attracting large numbers of premium holders who contribute money that the companies then invest. Like all such industries, insurance is subject to investment cycles. A rough generalization about investment industries is that when interest rates are high, returns on investment make it possible for such

Sess. 76 (1984) (recent increases in liability insurance premiums due to tort system).

But see Boffing, *Report Says Malpractice Insurance Is a Small Part of Medical Costs*, N.Y. Times, Sept. 23, 1986 SA at 17, cols. 1-6 (malpractice premiums constitute about 1% of average hospital operating costs, calculated on per patient-day basis and about 9% of physician's response); Kirchner, *Is Your Practice Begging for More Money*? MED. ECON., Nov. 12, 1984 at 230 (average doctor spends 2.9% of gross income on insurance).

92. INSURING OUR FUTURE: REPORT OF THE (NEW YORK) GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE 6 (1986) *reprinted in* K. Abraham, *supra* note 2, at 97.

93. *See* Stewart, *The Tort Reform Hoax*, 22 TRIAL 89, 93 (1986) (data shows no logical nexus between health of insurance industry and health of tort system).

industries to offer their services at lower rates. Indeed, when investment rates are extraordinarily high, as they were in the mid and late 1970's, investment industries may engage in fierce competition to attract purchasers of their services, as did banks and insurance companies in those years.[94] The result may be that customers of such industries acquire services at what might be called artificially low rates. Then, when investment rates fall to a more "normal" range, insurance companies, like other such industries, will glean less interest from their investments, and need to adjust their rates upward to maintain their profit margins.[95] Interest rates have fallen significantly in the 1980's, and liability insurance rates have risen significantly in the same time period.[96]

Another feature of the insurance industry is that it does not represent a "free" market in the conventional sense of that term. On a federal level, the McCarran-Ferguson Act[97] exempts the insurance industry from anti-trust laws (except in instances of boycott, coercion or intimidation) and places it under the regulatory aegis of the several states.[98] State-imposed compulsory insurance for certain kinds of activities,[99] and the obligation of certain professionals, such as doctors and lawyers, to offer services (such as delivering babies or representing child abusers) regardless of their profitability has resulted in "pure" competition not existing in certain sectors of the insurance market.[100] If, to take an area of

94. The problem was exacerbated by the insurance industry's acceptance of high-risk insureds at reduced premium rates. As one committee report put it: "the insurance industry's lemming-like abandonment of sound underwriting practices in pursuit of investment income, and its subsequent march into a sea of red ink, . . . could hardly be described as prudent." INSURING OUR FUTURE: REPORT OF THE (NEW YORK) GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE 11 (1986), *reprinted in* K. Abraham, *supra* note 2, at 102.

95. Insurance Services Office, Inc., Insurer Profitability—The Facts: A commentary on the financial condition of the property/casualty insurance industry, 16, 25 (Feb. 1986), *reprinted in*, K. Abraham, *supra* note 2, at 59, 68.

96. Some data on the health of the insurance industry is useful. Between 1977-1987, the insurance industry earned profits in excess of $72 million and an additional $63 million in federal tax credits. Insurance Information Institute, Insurance Facts (1984-85). In 1984, insurers reported underwriter losses of $20.5 billion, but they also realized capital gains of $300 million. *Industry Creates Illusion of "Crisis"*, ATLA ADVOCATE, Aug. 1986.

97. The McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (1945).

98. Each state employs processes to approve insurance rates and policy provisions. The competence of the regulators and stringency of the regulation varies widely from state to state. K. ABRAHAM, DISTRIBUTING RISK 37 (1986).

99. In many states, insurance is compulsory for those who own or drive a car. *See, e.g.*, HAW. REV. STAT. § 294 (1982).

100. K. Abraham, *supra* note 2, at 13, 33, & 39.

current visibility, only a few carriers in a given state offer malpractice insurance to obstetricians, and those carriers raise their rates dramatically, there is really no alternative for obstetricians but to pay the rates or stop providing the service. Since there are limits on the willingness of a state to allow the service of delivering babies to be sharply reduced, "artificial" market conditions have been created.

The above features of the liability insurance industry might suggest that the present insurance "crisis" resembles the energy crisis of a decade ago: while a factor (falling interest rates or a shortage of oil) can be identified that affects market behavior, when the factor is alleviated the market does not quite return to "normal" because of the interaction of industry regulation with oligopolistic tendencies in the industry.[101] It would seem to follow from this analysis that one way to respond to the present liability insurance "crisis" would be to compel carriers to offer insurance at more reasonable rates, especially when their clients are forced to carry insurance because their services are perceived to be essential ones. But insurance carriers might argue that their rates are not being affected only by the investment cycle. Their argument might take the following form.

The insurance business can be described as a business based on anticipated risks. Insurance companies determine how likely it is that a given event will result in injury and how much the damage claims produced by that injury are likely to be.[102] They then set premiums for the coverage of such claims at rates designed to allow them to pay out the claims and still retain a profit margin. In the case of the liability of an individual or enterprise for injuries produced by their torts, a series of factors would affect the projected coverage. One would be how often the policyholder is likely to commit torts, another would be the projected seriousness of the damages resulting from those torts, a third, the likelihood that the policyholder would be sued successfully for torts committed. It is obvious that these factors would vary with the nature of the policyholder's work, the ease with which plaintiffs recover damages in tort cases, and the size of damage awards. Thus, a carrier providing liability insurance coverage could be ex-

101. For example, insurance commissioners may be slow to correct market imbalances through rate adjustments, and the industry may have no incentive to encourage such corrections.

102. K. Abraham, *supra* note 2, at 2.

pected to base rates, in important part, on projected expectations about the frequency and amount of claims.

Insurance rates are based on an extrapolation of data from the present to make predictions about the future. It is possible to argue that the present data about tort claims virtually guarantees high projected rates. First, between 1945 and the 1970's, tort reforms resulted in doctrines being in place—strict liability and comparative fault being prominent examples—that made it easier for plaintiffs to recover against defendants. Second, developments in technology during that same time period made possible certain mass claims, especially in the area of toxic torts, that have spawned the potential of very significant damage judgments.[103] Third, the plaintiffs' bar developed the resources to litigate complex claims, such as products liability and toxic negligence, through the evolution of large, specialized firms that could afford to engage in lengthy and expensive litigation. Fourth, as insurance became pervasive in cases involving enterprises, juries became aware of it and became less restrained in imposing large awards on defendants, reasoning that the insurance carrier would be responsible for payment. One might add to those factors the general tendency in modern American society for injured persons to seek redress through the form of a lawsuit.[104] Finally, insurance companies could advance an argument that might at first blush appear perverse. A significant component of damage awards is based on out-of-pocket medical expenses, which include the cost of medical services and hospitalization. Those costs have skyrocketed since 1945, in part because of the presence of insurance. Doctors and hospitals can assume that a significant number of their patients have some form of medical insurance, and will

103. I am thinking here of the recently emerging awareness of the role of latency in certain diseases, such as asbestosis or chemically-based cancers. This awareness has enabled claims to be brought that would have previously been barred on causation or statute-of-limitations grounds. *See, e.g.*, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (insurers whose policies were in effect during plaintiff's exposure to asbestos, during periods of latency and manifestation of asbestosis were jointly and severally liable).

104. *But see* Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (And Things We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (claim that Americans are unusually litigious is based more on myth and undocumented folklore than careful analysis of data); *cf.* D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, Civil Litigation Research Project, Final Report 129 (March 1983) (Univ. of Wis. Law School) ("[I]n litigation, trials are the exception, not the rule. Bargaining settlements were the prevailing means of case disposition—88% of the cases studied were settled with little, if any, substantial discovery. Only 9% went to trial.").

thus not be actually paying for their expenses, thus, rates become inflated. The inflated rates are used as a basis for damage judgments, and in most states a losing defendant in a tort suit will be accountable for all of a winning plaintiff's medical expenses, whether or not the plaintiff had been compensated by a collateral source. If the defendant has liability insurance, the cost of those expenses will be passed on to the defendant's insurance carrier.[105]

All of this might suggest to insurance companies that they can expect to pay some very large claims in the decade ahead, and that they should set their rates accordingly. But by so doing, of course, they tighten the "squeeze" on certain defendants, making it more likely that the operations of their enterprise will be more costly whether they engage in tortious behavior or not. If reforms should come to pass that respond to defendants' and carriers' concerns about large damage awards, but "artificial" market conditions result in carriers not significantly lowering their rates—I'm not saying this *will* happen, but it could—the paradoxical situation would exist that the persons "victimized" by the situation would be the injured plaintiffs in tort cases. Defendants would be better off because they could expect to win more cases and pay less when they lost; insurance companies would be better off because they would be paying out less in claims and receiving the same amounts in premiums. But the force of the answerability principle would have been significantly depleted.

For this reason, I do not think that reforms which are generated by a perceived "crisis" in liability insurance will retain their legitimacy unless, first, they demonstrate that the crisis is real rather than artificial; second, they preserve the principle of moral answerability. If it is truly the case that the rise in liability insurance rates is a response to projected fears about massive claims and astronomical verdicts, then lowered rates should reflect the assuagement of those fears by the reforms. If, on the other hand, rates do not respond to the less vulnerable position of carriers and their clients, observers may come to believe that the "crisis" was caused by phenomena not linked to the tort system, or that it was self-generated.

In addition, if the reforms have the effect of reducing the

105. These consequences of inflated insurance rates have been modified by statutes in some states that allow subrogation of claims by carriers or preclude some double recovery by collateral source provisions. *Cf.* CAL. INS. CODE §§ 10370-10398 (West 1987).

ability of the tort system to serve as an agent of moral answerability, history suggests that some other institution will emerge to perform that function. Prior to the reforms previously discussed, injured persons were finding the tort system deficient as a vehicle for answerability and redress; as a result, the system was modified or an alternative created. In a sense, caps on damage awards or doctrines designed to make it more difficult for plaintiffs to recover fly in the face of the answerability principle, which suggests that damages are the instrument of squaring accounts between an injured person and the injurer, and should not be diluted or denied. The fact is that in American society, people have become accustomed to believing that they have a right to be made whole, that the right is measured in terms of tort damages, and the strength of the right varies not only with the injury but with the moral obloquy of the accountable party's conduct. Regardless of whether that right is constitutionally based, it is widely and deeply implanted in the public consciousness. History suggests that if one mechanism of the legal system fails sufficiently to respond to a collective belief in the existence of a right to compel an injurer to answer to his victim, another will emerge to take its place.