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Robinson Crusoe Torts

Carl M. Sellinger
West Virginia University College of Law

ROBINSON CRUSOE TORTS

CARL M. SELINGER*

In *The Life and Strange Surprising Adventures of Robinson Crusoe of York, Mariner*,[1] the popular eighteenth century novel by Daniel Defoe, the shipwrecked Crusoe is stranded on an island with a friendly "savage" he calls Friday. As one might imagine, there is little reference to law in Defoe's novel, and clearly it would be difficult to have much of a legal system in a world with only two inhabitants. But the limitations such an imaginary world would necessarily impose on a law of torts seem all too important nevertheless. As I see it, many doctrinal conflicts in traditional tort law, and many current controversies about tort reform, including several fueled by the American Law Institute's erstwhile project on Compensation and Liability for Product and Process Injuries,[2] are products of our persistence in thinking about torts as though every injured person and his or her injurer were a Friday and a Crusoe alone on an island.

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* Professor of Law, West Virginia University College of Law. J.D., Harvard University, 1958; B.A., University of California at Berkeley, 1955.

1. DANIEL DEFOE, THE LIFE AND STRANGE SURPRISING ADVENTURES OF ROBINSON CRUSOE OF YORK, MARINER (1719).

2. At its October, 1991 meeting, the Council of the Institute decided to conclude the Compensation project, and to undertake instead the preparation of a Third Restatement of Torts. *See* 14-1 A.L.I. Rep. 1, 3 (1991).

I. THE ROBINSON CRUSOE PERSPECTIVE

To appreciate the limitations inherent in a Robinson Crusoe perspective on tort law, and the conflicts those limitations create, one need only consider how some possible scenarios involving Crusoe and Friday could be addressed legally.

Suppose that Crusoe had wrongfully made off with some property of Friday's. If only because corrective justice calls for the rectification of wrongful losses and gains,[3] we would probably have little hesitation in concluding that absent a return of the property, we ought to both (1) compensate Friday financially for his loss, and (2) make Crusoe pay financially for his wrongdoing. Further, we might well conclude that (3) the amount that Friday should receive and the amount that Crusoe should pay are the same: the value of the property taken at a particular point in time. So far so good.

But suppose instead that it was some third party interloper who had wrongfully taken Friday's property, and then sold it as his own to an unsuspecting Crusoe before departing the island. Friday has still suffered a wrongful loss, and in the first instance it seems as though he should be compensated. But what reason could there be to make Crusoe pay? Probably only one: on our island, there is simply no one *besides* Crusoe for compensation to come from. (By this reasoning, Crusoe might be required to share some of Friday's loss even if the interloper had taken the property with him, and Crusoe had never seen it). Indeed, the lack of other reasons to make an innocent Crusoe pay might conceivably make us think again about the desirability of compensating Friday.

Turning to a different kind of injury, suppose that Crusoe had bumped into Friday, causing him serious physical injury. Here again, Friday probably ought to get some compensation however the accident occurred, at least if it was not entirely his own fault. We may feel compassion for the burdens the injury is imposing on Friday; and the

3. Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 6 (1983) [hereinafter Coleman, *Moral Theories Part II*].

assurance of compensation might affect in desirable ways his attitudes and behavior before or after the accident.[4] But how about making Crusoe pay? That makes sense if he intended the injury, or was negligent: we want to deter such conduct. It may also make sense that he should bear losses as a cost of engaging in other conduct that created obvious risks of serious harm.[5] But what if his activities did not seem risky at all?

In the words of Professor Jules Coleman:

> An argument sufficient to justify a claim for recovery need not suffice to justify imposing liability on a particular injurer. In other words, there might be reasons of one kind to support the proposition that B (a victim) ought not to shoulder his own losses, without those reasons proving sufficient to warrant shifting B's losses to A (his injurer).[6]

Once more, however, if Crusoe doesn't pay, Friday can't be compensated.

Suppose that Crusoe ought on principle to pay in the accident situation. How much should he pay? The same amount whether his conduct was intentional, negligent, or merely risky? The same amount whether serious harm, or only minor harm, was foreseeable? And how likely is it that any amount we think Crusoe should pay will exactly

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4. With regard to pre-accident behavior, an assurance of compensation might encourage a person to act in a certain way notwithstanding a risk of being injured by others if he or she does so. Thus, it could be argued that compensating a dockowner for damage caused to his or her dock by a ship kept tied to the dock in a storm will encourage dockowners to allow ships to remain at their docks rather than cut the ships loose (which they might otherwise be tempted to do notwithstanding potential liability for any harm to the ships that eventuated). *See* CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 41 (2d ed. 1980). *But see infra* note 28.

The avoidance of post-accident acts of self-help recoupment or revenge by injured parties or their families or friends is a well-accepted goal of tort law.

5. Heading off acts of revenge by victims might provide a reason to inflict some financial pain on some injurers, as well as a reason to provide compensation. But is difficult to understand why, in the real world, injured parties would care who actually compensated them or who received payment from their injurers (or why any effort should be made to try to force an equalization or compromise of differences in the needed sums of compensation and payment).

6. Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 LAW & PHIL. 371, 383 (1982) [hereinafter Coleman, *Moral Theories Part I*].

coincide with the amount we think Friday should receive? If they don't coincide, on an island, what then?

Finally, and conversely, suppose it seems clear that in the interests of deterrence or risk internalization, Crusoe should be required to pay a rather large sum for having engaged in the conduct he engaged in. But suppose it is not clear that Friday should receive nearly as much, if anything, by way of compensation: perhaps Friday's injury was very slight; perhaps he luckily and barely escaped any injury; or perhaps his own fault played a major role in the accident. What would we do with Crusoe's money? Throw it in the sea? Maybe that problem would prompt us to think again about holding Crusoe liable.[7]

Thus, on our fictional island, conflicts would arise whenever there was a discrepancy between the strength of the case for compensating the plaintiff in a certain amount and the strength of the case for holding the defendant liable for the same amount. There would be no way, again in Professor Coleman's words, to "separate the victim's claim to recompense from the grounds for imposing liability upon his injurer,"[8] or to deal with situations in which the victim's loss and the injurer's gain are not equal, which, when corrective justice applies, "they rarely are."[9] However, in the real world of American tort law, where plaintiffs can receive compensation from various sources, and defendants can be required to make payments to the public generally instead of to any particular individual, such conflicts should not exist. But in fact they have long existed.

II. THE CRUSOE PERSPECTIVE IN TRADITIONAL TORT LAW

Anglo-American tort law has had particular difficulty in dealing with situations in which a party who is innocent of any wrongdoing has been injured by another innocent party, and neither can bear the loss in question significantly better than the other, through insurance or

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8. Coleman, *Moral Theories Part I, supra* note 6, at 383.

9. Coleman, *Moral Theories Part II, supra* note 3, at 14.

by passing it on to users of its goods or services. As it is difficult for a court to either deny an innocent victim compensation or penalize an innocent actor, it is hardly surprising that we have something of a crazy quilt of decisional doctrine pertaining to such situations—doctrine that finds sometimes for plaintiffs and other times for defendants.

When the owner of property has lost it to a thief, the owner can recover its value from a bona fide purchaser, with the courts focusing on promoting security of ownership and not on the security of property transfers. But when the owner has lost the property by fraud to a con artist, the bona fide purchaser wins, with security of transfers now elevated above security of ownership.[10] Similarly, an actor who uses reasonable force against someone that the actor reasonably, but mistakenly, believes is attacking him or her is clearly not liable for tort damages;[11] but when an actor who causes injuries trying to defend a third person from an apparent attacker has made a reasonable mistake about who attacked whom, the actor is held liable according to at least some courts, as having stood in the shoes of the third person.[12]

Other well-known tort decisions hold that a bystander who is injured by a runaway taxi cannot recover from the taxi company whose driver had reasonably jumped from the cab in an emergency effort to protect himself from an armed robber passenger;[13] but a dog owner whose dog was killed by a hunter who reasonably believed it was a wolf can recover.[14] Lenient standards of care protect disabled persons and children, who were not able to act in less risky ways, from liability to those they injured, but do not protect the mentally ill.[15]

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10. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15 (5th ed. 1984) [hereinafter PROSSER & KEETON].

11. *Id.* at § 19.

12. *Id.* at § 20.

13. Cordas v. Peerless Transportation Co., 27 N.Y.S.2d 198 (N.Y. City Ct., N.Y. County 1941).

14. Ranson v. Kitner, 31 Ill. App. 241 (1888).

15. *See* PROSSER & KEETON, *supra* note 10, at § 32.

Certainly, there are factual and policy differences between some of these cases that can sometimes produce slight variations in the basic strength of the case for compensating the innocent plaintiff, or the basic weakness of the case for making the innocent defendant pay. When the law gives the courts no choice but to decide for one party or the other, and to do so on an all-or-nothing basis, these differences provide as good reasons as any for a decision. But it would be a delusion for judges, lawyers, law students, or commentators to imagine that the resultant decisions are correct in any ideal sense. Indeed, it is difficult for me to believe that in any of the cases in question the decision reached is really preferable to a compromise decision that would let each party bear half the loss, which Professor John E. Coons has proposed as a resolution of the conflicts presented by some disputes between innocent parties.[16]

But why should situations involving innocent victims and innocent actors present conflicts that need to be compromised? Why can't innocent victims be compensated in full (except perhaps in the case of true owners of stolen property and the like for some small reduction to discourage carelessness) without innocent actors having to pay anything (other than perhaps in the case of purchasers of stolen property and the like some small sum to, again, discourage carelessness)? The answer seems to be that the law has been operating from a Robinson Crusoe perspective that assumes that there is no one besides the actor for the compensation to come from.

American tort law has also acted as though it was confronting a conflict in dealing with situations involving two "guilty" parties: that is, situations in which a person was injured while engaging in wrongful conduct by another party whose actions were also wrongful. With regard to intentional torts, the classic example is the case of *Katko v. Briney*,[17] in which an injured burglar recovered full tort damages from the owner of an abandoned farmhouse who set up a spring gun inside the house, presumably because the actor's conduct was much

16. John E. Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250 (1980) (focusing on conflicts between the true owners of wrongfully taken personal property and bona fide purchasers).

17. 183 N.W.2d 657 (Iowa 1971).

worse than his victim's. By contrast, however, to two innocent parties situations, some courts in cases involving two intentional wrongdoers have rejected the all-or-nothing approach in *Katko*, and have compromised the conflicts by reducing the damages recoverable by the plaintiffs,[18] and forty-six states use the doctrine of comparative fault to reduce the amount that negligent defendants have to pay to negligent plaintiffs.[19] Still, why can't guilty actors be required to pay all that is necessary to deter the conduct in question without all of the money going to guilty victims?[20]

Further, tort law has had to deal repeatedly with situations in which there is no coincidence between the amount that an innocent plaintiff reasonably should receive as compensation and the amount that the defendant who injured him or her should have to pay in the interests of deterrence. Although in the real world such situations do not need to create conflicts, the law's desert island-like insistence on coming up with a single "right" amount, has led again to inconsistent patterns of either-or decisions. For example, there currently exists a deep split in authority whether parents whose lives have been disrupted by the unwanted birth of a child, albeit a healthy child, can recover from a physician who negligently performed a steriliation procedure

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18. *See* Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984); Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 123-24 n.3 (1993). Some commentators have argued strongly for the application of the doctrine of comparative fault in intentional tort cases. *See, e.g., id.*; Jeff L. Lewin, *Comparative Negligence in West Virginia: Beyond Bradley to Pure Comparative Fault*, 89 W. VA. L. REV. 1039, 1080-84 (1987).

19. *See* Hollister, *supra* note 18, at 123 n.2.

20. Abandoning the Robinson Crusoe perspective presents a challenge to the law generally, not just to tort law. For example, in *Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1476 (1992), the court relied on a Nevada statute that channels all claims on gaming debts through a state administrative process to dismiss a claim to a $1 million jackpot by a minor, who gambled in violation of state law. But suppose that the jackpot had already been paid by the casino to the minor in ignorance of his age, and then the casino tried to recover it. While the policy behind the law against gambling by minors might well justify stripping the young man of his gains, what justification could there be for permitting recovery by the casino (in excess of some reward, as it were, for bringing the suit)? Would it be other than fanciful to imagine that the casino had anticipatorily factored the possibility of such recoveries into its financial plans?

the costs of raising the child to adulthood, in addition to medical expenses and other damages directly related to the pregnancy.[21] As one basis for denying childraising expenses, the Wyoming Supreme Court has stated its belief that in at least some circumstances, "the injury is out of proportion to the culpability of the tortfeasors . . . ."[22] Thus, the courts are presented with an unnecessary choice between inadequate compensation or excessive penalization of defendants.

The same kind of conflict, though with the situations of the parties reversed, is apparent in cases in which negligent defendants created extremely serious risks to the lives of other people generally, but happened to kill only persons who would have died prematurely, or been severely injured, anyway. Again, not surprisingly, the decisions are inconsistent. In the well-known case of *Dillon v. Twin State Gas & Electric Co.*,[23] the New Hampshire Supreme Court held that the estate of a boy who was electrocuted by the defendant's dangerously exposed power line as he began to fall from a bridge on which he was playing could recover at most the loss of his potential future earnings as a cripple. On the other hand, when confronted recently with a case in which a landlord's negligence in failing to inspect the heating system in her duplex resulted in the asphyxiation death of a tenant who, unbeknownst to the landlord, had tested positive for HIV, the Missouri Court of Appeals was liberal in admitting both expert testimony that referred to possible future life-prolonging drugs, and standard life-expectancy mortality tables.[24] In this entirely avoidable conflict, deterrence seems for the moment to be winning out—but at the cost of providing arguably excessive compensation.

Returning to a two innocent parties situation, one of the most interesting examples of Crusoe thinking can be found in the reactions of commentators to a case familiar to generations of first-year law students, the 1910 Minnesota case of *Vincent v. Lake Erie Transporta-*

21. *See* Lovelace Medical Center v. Mendez, 805 P.2d 603, 617-18 & nn. 1-3 (N.M. 1991) (text and footnotes collecting the authorities, in New Mexico Court of Appeals opinion attached as Appendix to New Mexico Supreme Court opinion).

22. Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

23. 163 A. 111 (N.H. 1932).

24. Kilmer v. Browning, 806 S.W.2d 75 (Mo. Ct. App. 1991).

tion Co.[25] In *Vincent*, the defendant shipowner was held liable for damage to the plaintiff's dock caused by its ship, when the captain, in the exercise of "good judgment and prudent seamanship,"[26] kept it tied to the dock in a storm. Obviously, what makes the decision interesting, and worthy of inclusion in casebooks, is mainly the weakness of the case for making the shipowner pay for the damage. As one teacher has observed, students are inclined to ask, "Why if the shipowner had a privilege to destroy the dock, does he have to pay? Neither the shipowner nor the dockowner was culpable, and the latter [sic] did not benefit. He merely escaped impoverishment."[27]

But taking for granted for the most part that the plaintiff dockowner should *receive* compensation,[28] legal scholars and philosophers have seemed to assume that there must also be a good reason to make the defendant pay it—that compensation and liability are just two sides of the same coin—and they have struggled mightily, though rather unsuccessfully, to articulate such a reason.[29] They have proba-

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25. 124 N.W. 221 (Minn. 1910).

26. *Id.*

27. Dale W. Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L. J. 217, 218 (1965).

28. *But see id.* at 231 (rejecting the argument that an assurance of compensation is necessary to get the future cooperation of dockowners in not cutting lines, as assuming too much legal knowledge); Coleman, *Moral Theories Part I, supra* note 6, at 390 (distinguishing between "background risks," which people should be expected to bear, and "non-background risks," for the imposition of which they should be compensated if a loss occurs). Dicta in a later Canadian case endorsed the position of the dissenters in *Vincent* that the dockowner assumed the risk of non-negligent damage. Munn & Co. Ltd. v. M/V Sir John Crosbie, 1967 CAN. L.R. 94, 100 (Ex. Ct. 1966).

29. The leading commentaries by legal scholars are cited in RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 56-60 (5th ed. 1990). *See also* Coleman, *Moral Theories Part II, supra* note 3; Peter Westen, *Comment on Montague's "Rights and Duties of Compensation,"* 14 PHIL. & PUB. AFF. 385 (1985). Commentaries by philosophers that discuss either *Vincent* itself, or the similar hypothetical of a backpacker in a severe storm who breaks into someone else's cabin and consumes its contents, include Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93 (1978); Phillip Montague, *Rights and Duties of Compensation*, 13 PHIL. & PUB. AFF. 79 (1984); Judith Jarvis Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101 (1984); Nancy Davis, *Rights, Permission and Compensation*, 14 PHIL. & PUB. AFF. 374 (1985); Phillip Montague, *Davis and Westen on Rights and Compensation*, 14 PHIL. & PUB. AFF. 390 (1985).

bly sensed correctly that if the court had concluded that the defendant should not have to pay for the damage, the court would have been presented with a conflict. But the commentators have not explained why such a conflict could not be compromised, or, more fundamentally, why such conflicts need to exist at all in other than a Robinson Crusoe world.

Further, in its exclusive focus on the injured party and the actor who caused the injury, the Crusoe perspective tends to foreclose consideration of the possibility that someone else ought to be required to pay for the damage in question. As regards storm damage by a ship to

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Some of the difficulties with some possible theories of shipowner liability have been pointed out by other scholars who nevertheless favor liability. *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 410, 426-27 (1959) (acknowledging that a shipowner who failed to pay compensation voluntarily is blameworthy only if it was enriched); MORRIS & MORRIS, JR., *supra* note 4 at 40 (arguing that the shipowner in *Vincent* was not enriched, but "merely escaped impoverishment," presumably in relation to its most representative distribution of wealth, which unjust enrichment doctrine seeks to preserve); Coleman, *Moral Theories Part I, supra* note 6, at 388 (pointing out that if simply imposing a nonreciprocal risk on another called for the imposition of liability for an injury, a non-negligent motorist ought to be liable to a negligent pedestrian); Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. at 112-15 (concluding that if the captain had been unaware that his actions would damage the dock, protection of the shipowner's freedom to make plans without fear of disruption should preclude imposing liability merely on the basis of causation); Phillip Montague, *Rights and Duties of Compensation*, 13 PHIL & PUB. AFF. 79, 84 (1984) (suggesting that it is inappropriate to view persons in the shipowner's position as incurring obligations of gratitude absent some reason to believe that the other party would have been willing voluntarily to aid them).

Additionally, as persons in peril in this country have traditionally not been called on to repay the provision of police, fire, and other emergency services, it is not at all clear that even if the shipowner was enriched the enrichment (without repayment) was unjust. (But the tradition may be changing due to government budget constraints. *See, e.g., Climbers to Pay for Insurance*, N.Y. TIMES, July 11, 1993, § 5 (Travel), at 3.) Nor is it clear that the fact that the captain in *Vincent was* aware that his emergency actions would damage the dock made paying for the resultant injuries sufficiently predictable for the shipowner that imposing liability could be equated with simply enforcing an express contract to make payment in case of injury. *But see, e.g.*, Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. at 102; Coleman, *Moral Theories Part II, supra* note 3, at 16. Indeed, it has been argued that even express "hurricane clauses" that require boatowners to remove their boats from marinas, on pain of paying for damages, may be invalid as contrary to public policy because of the danger of removal to the boatowners. James E. Mercante, *That Sinking Feeling—A Boat Owner's Liability in the Aftermath of a Hurricane*, 17 NOVA L. REV. 1053, 1069-70 (1993).

a dock for example, an argument might well be made that decisions in cases like *Ploof v. Putnam*[30] (which was discussed in *Vincent*), giving shipowners a privilege to tie up at private docks in a storm, constitute "judicial takings" of the dockowner's property for a public purpose, for which just compensation from the government for resultant damage is constitutionally required.[31]

The United States Supreme Court stated in its 1893 *Monongahela Navigation Company*[32] decision that the Just Compensation Clause "prevents the public from loading upon one individual more than his just share of the burdens of government,"[33] and the Court has reiterated on numerous occasions this "principle of fairness"[34] that the costs of measures that benefit the public as a whole should not be placed, or allowed to fall, disproportionately on particular individuals or discrete small groups.[35] The protection of cargo ships and the consequent promotion of shipping plainly benefits countless persons in addition to the owners of the ships that are eventually saved; and the public as whole would have had to pay for the construction of public docks, including the acquisition for them of private lakefront land, as a more costly alternative to permitting existing private docks to be commandeered.[36]

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30. 71 A. 188 (Vt. 1908).

31. *See generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

32. Monongahela Navigation Company v. United States, 148 U.S. 312 (1893).

33. *Id.* at 325.

34. "The Fifth Amendment expresses a principle of fairness . . . ." United States v. Dickinson, 331 U.S. 745, 748 (1947) (Frankfurter, J.).

35. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499, 502 (1945); Armstrong v. United States, 364 U.S. 40, 49 (1960); Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123, 147-48 (1978) (Rehnquist, J., dissenting); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 227 (1986); Keystone Bituminous Coal Assn. v. DeBenedictus, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting); Pennell v. City of San Jose, 485 U.S. 1, 19 (Scalia, J., concurring and dissenting) (1988); Christy v. Lujan, *cert. denied*, 490 U.S. 1114 (1989) (White, J., dissenting); Yee v. City of Escondido, Cal., 112 S. Ct. 1522, 1528 (1992). *See generally* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 583-88 (1972); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1707-11 (1988).

36. Is one possible justification for the decision in *Vincent* that damage costs can be

No-fault insurance schemes, under which injured parties can get compensation for their economic losses from their own, or their injurers', insurance companies, without showing that the injurers themselves should pay, do represent a departure from Crusoe thinking—in the interest of both compensating victims of non-negligent conduct, and reducing the costs for lawyers and expert witnesses and other "overhead" costs of administering the traditional tort system. However, the Crusoe perspective continues to make it difficult for legal professionals, as well as the public generally, to recognize the connection between tort law and the presence or absence of national health insurance and other social insurance programs.[37]

III. REQUIRING DEFENDANTS TO PAY, BUT NOT TO PLAINTIFFS

In their two-volume study, entitled *Enterprise Responsibility for Personal Injury*,[38] the ALI Compensation Project's Chief Reporter, Professor Paul Weiler, and his Associate Reporters, offered controversial tort reform proposals relating to punitive damages, pain and suffering damages, and the judicial treatment of payments from collateral sources—each of which was hotly debated at the ALI's 1991 Annual Meeting,[39] and each of which represented a foregone opportunity to abandon the Crusoe perspective and look separately at the amount that

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passed along more effectively to the public generally by holding shipowners liable than by "leaving" them on commercial dockowners? Requiring the public, through the government, to pay on a taking theory is, of course, different from simply allowing an injured party to collect from a government fund set up to provide compensation when no one in particular should be held liable. *See infra* part IV.

37. *See* Henry J. Reske, *Study: Quayle Was Right . . . and Wrong*, 78 A.B.A. J., June 1992, at 42 (discussing WERNER PFENNIGSTORF & DONALD G. GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES (1991)); Joel Havemann, *Safety Net for Malpractice Has Fewer Holes in Europe*, L.A. TIMES, Dec. 31, 1992, at 1.

38. A.L.I. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, Vol. I, *The Institutional Framework* (1991) [hereinafter REPORTERS' STUDY, Vol. I]; A.L.I. REPORTERS' STUDY, ENTERPRISE RESPOINSIBILITY FOR PERSONAL INJURY, Vol. II, *Approaches to Legal and Institutional Change* (1991) [hereinafter REPORTERS' STUDY, Vol. II].

39. *See* 68 A.L.I. PROC. 153-78 (1991) [hereinafter 1991 PROCEEDINGS]. As a member of the American Law Institute, the author attended the 1991 Annual Meeting, May 14-17, in San Francisco, and was present at the discussions of the Reporters' Study.

a defendant should be required to pay and the amount of compensation a plaintiff should receive.

With regard to punitive damages, the Reporters proposed in their study to limit the punitives that could be levied against a defendant to a proportion of the compensatory damages recovered by the plaintiff.[40] But at the Annual Meeting, observations were made from the floor that, contrary to the proposal, large punitive exactions might be justified, and indeed most needed, when highly dangerous conduct had caused relatively minor injuries.[41] The Reporters did not really seem to disagree with this point.[42] However, they were concerned in their study about "the appearance of a windfall profit going to the plaintiff."[43]

But why in other than a Robinson Crusoe world (a Crusoe world in which payments by a defendant that did not go to the plaintiff would have to be thrown into the sea) should a fully compensated plaintiff collect any punitive award? If the answer is to prevent dangerous conduct by encouraging persons who have suffered minor injuries to sue as private attorneys general to punish and deter those who hurt them,[44] why at least in theory shouldn't the Reporters' suggested possible *minimum* punitive award of $25,000[45] also be the *maximum* that any plaintiff would be allowed to keep, with any higher exaction going into a government fund? To insure effective legal representation against wrongdoing defendants, winning plaintiffs' attorneys might, again at least in theory, be permitted to collect a reasonable percentage of the sums received by the government, as well as those awarded to their clients. Though rejected by the Reporters,[46] systems of punitive damages that channel some of the award to the state have already been adopted in nine states.[47]

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40. REPORTERS' STUDY, Vol. II *supra* note 38, at 257-59.
41. 1991 PROCEEDINGS, *supra* note 39, at 174.
42. *Id.* at 174-75.
43. REPORTERS' STUDY, Vol. II, *supra* note 38, at 259 n.49.
44. *See id.* at 238; REPORTERS' STUDY, Vol. I, *supra* note 38, at 26-27.
45. REPORTERS' STUDY Vol. II, *supra* note 38, at 259.
46. *See infra* notes 78-80 and accompanying text.
47. *See* Debra Cassens Moss, *The Punitive Thunderbold*, 79 A.B.A. J., May, 1993, at 86, 91; 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE

However, in a strikingly Crusoesque decision, a divided Colorado Supreme Court has held that legislation requiring a victorious plaintiff to pay a third of whatever punitive damages he or she actually collected into a state fund constituted an unconstitutional taking of his or her property.[48] According to the court, the plaintiff developed sufficient expectations to acquire a property interest in the third of the damages in question mainly by virtue of a statutory provision ("[The state shall not have] any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due") designed simply to insure that the state would not be competing with the plaintiff during the lawsuit for a punitive award, or later for the defendant's assets:

> [The existence of the channeling legislation] might be read to defeat any reasonable economic expectation on the part of the [plaintiff] . . . to the whole judgment . . . . [But] given the legislative disaffirmance of any stake in the exemplary damages award prior to collection, it would border on the fanciful were we to characterize the [plaintiff's] . . . expectation to a full satisfaction of the judgment as unreasonable . . . .[49]

Well, of course Friday would expect to receive it all.[50]

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§ 21.16 and App. 21A (1992) (reprinting statutes); Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 88-89, 96-142 (appendix with excerpts from punitive damages reform legislation nationally) (1992).

48. Kirk v. Denver Pub. Co., 818 P.2d 262 (Colo. 1991).

49. *Id.* at 272. The Colorado court cited *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) which struck down on equal protection grounds a Georgia channeling statute that applied only to products liability cases. *Id.* at 272 n.8. The court in *McBride* also observed that if punitive damages were channeled to the state, they would become subject to the U.S. Constitution's prohibition against excessive fines, which the Supreme Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 489 U.S. 1007 (1989), held inapplicable to punitive damages collected by plaintiffs. The 7-2 decision in *Browning-Ferris* may of course strike the reader as also reflecting a Crusoe perspective, in not giving weight to the identical impact on defendants of fines and punitive damages. In any event, the *McBride* case was settled out of court before it could be appealed. *See* Milo Geyelin, *States Claim Share of Awards in Liability Suits*, WALL STREET JOURNAL, March 3, 1993, at B1, B11.

50. A Florida appellate court also found sarcasm irresistible in responding to the claim that that state's channeling statute was unconstitutional. Gordon v. State, 585 So.2d 1033, 1035 n.3 (Fla. App. 3d Dist. 1991). Subsequently, the Florida Supreme Court upheld the Florida statute. Gordon v. State, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647

Equally striking, however, in its abandonment of Crusoe thinking, was a recent decision by an Alabama trial judge. Even without a statute, the judge directed that half of the punitive damages assessed against a health insurance company for fraudulently inducing a plaintiff with a cardiac condition to purchase a policy that did not cover the condition should be paid to the American Heart Association (after the plaintiff's attorney's fees were deducted).[51] The judge relied on a provocative earlier concurring opinion by Alabama Supreme Court Associate Justice Janie L. Shores, based on her LL.M. thesis at the University of Virginia, in which two other justices had joined:

> I believe it is true that sometimes [a punitive] . . . award does constitute an undeserved windfall to the plaintiff . . . . In such cases, the court has the discretion to order the defendant to devote a portion or all of the amount to efforts to eliminate the conditions that caused the plaintiff's injury.
>
> In my opinion, the court may also order the defendant to pay part of the award either to the state general fund or to some special fund that serves a public purpose or advances the cause of justice . . . .
>
> [Some states] . . . allocate punitive damages [to the state] pursuant to statute. The courts, however, have inherent authority to allocate punitive damages . . . .[52]

On appeal of the Heart Association decision, Justice Shores and her two colleagues voted to uphold the allocation, though they would have preferred in that case to see the punitive damages go to the state.[53] But the majority reversed, concluding simply that "viewed from the plaintiff's perspective, the trial court's judgment effected a remittitur" that was unauthorized[54]—in other words, a taking of something the plaintiff could already have expected. The possibility of adopting Justice Shores' position only prospectively was not mentioned.[55]

(1993).

51. *See* Smith v. States General Life Ins. Co., 592 So. 2d 1021 (Ala. 1992).

52. Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 886-87 (Ala. 1991) (concurring opinion). *See also* Shores, *supra* note 47, at 89-95.

53. Smith v. States General Life Ins. Co., 592 So. 2d at 1025, 1028-29 (concurring and dissenting opinions).

54. *Id.* at 1025.

55. Absent a statutory or common law rule denying plaintiffs some portion of punitive damages awards assessed against defendants, or at least an adequate judicial warning that

A second recommendation in the ALI Reporters' study was that only seriously injured plaintiffs be allowed to recover pain and suffering damages,[56] and then only in accordance with guidelines that described particular injuries and attached dollar figures to them.[57] Observing, however, that this proposal might both underpenalize defendants in terms of prevention, and overcompensate plaintiffs,[58] the Reporters also discussed, but ultimately rejected, "a potential institutional resolution of the tension between the compensation and preventive functions of pain and suffering"[59]: imposing on defendants "tort fines" for causing pain and suffering that would be payable to the government, instead of to the plaintiffs who sued them.[60]

Finally, the ALI Reporters urged abolition of the traditional common law collateral source rule, which permits a plaintiff to recover compensation from a defendant for losses that have already been reimbursed by public or private insurance, even when the plaintiff is not required to hand over the duplicate compensation to the insurer.[61] On the floor of the Annual Meeting, some supporters of the present rule defended double recoveries by plaintiffs as having been contracted for through previous payments of insurance premiums;[62] other speakers, however, seemed willing only to excuse such recoveries as an unavoidable consequence of making defendants bear the full cost of the harms they caused.[63]

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such a rule might be adopted, a plaintiff *would* probably expect to receive the entire amount, and might even rely in some way on receiving it all, however dubious the justification. Thus, an intermediate appellate court in California held recently that a plaintiff whose lawyer failed to take steps to preserve a cause of action that probably would have yielded punitive damages may recover the punitives as compensatory damages in an action for legal malpractice. Merenda v. Superior Court of Nevada County, 4 Cal. Rptr. 2d 87 (Cal. Ct. App., 1992).

56. REPORTERS' STUDY, Vol. II, *supra* note 38, at 220-21.

57. *Id.* at 221-30.

58. *Id.* at 212-13, 229.

59. *Id.* at 213.

60. *Id.* at 213-16, 228.

61. *Id.* at 179-82.

62. 1991 PROCEEDINGS, *supra* note 39, at 153-55.

63. *Id.* at 156-60.

But why, outside of a Crusoe world, are double recoveries unavoidable if defendants are to be held fully accountable? In the real world, the collateral source rule and double recoveries could be eliminated, *and* defendants could still be required to pay full damages, if the sums attributable to previously covered losses were to be paid into a government fund instead of to plaintiffs.

IV. COMPENSATING INJURED PARTIES FROM GOVERNMENT FUNDS

A tort system free of Robinson Crusoe limits could utilize government funds created out of collateral source, tort fine, and punitive damages payments from defendants generally to benefit deserving plaintiffs who might otherwise be left uncompensated or undercompensated because of weaknesses in the case for making the particular defendants who injured them pay at all or as much as the plaintiffs should receive[64]. In Missouri, for example, fifty percent of every punitive damage award goes toward building up a "Tort Victims Compensation Fund."[65]

One potential use of a government compensation fund is suggested by the ALI Reporters' recommendation that proof of a defendant's compliance with all relevant standards prescribed by a public regulatory agency should be a defense to some forms of tort liability.[66] On behalf of such a regulatory compliance defense, the Reporters argued that adding possible tort sanctions to government regulatory requirements can pose a "risk of overdeterence of socially valuable activities";[67] but they also recognized that allowing such a defense against claims for compensatory damages could deprive an uninsured injured

64. *See* discussion *supra* part II.

65. MO. ANN. STAT. § 537.675 (Vernon 1988). Channeling statutes typically allocate the state's share to a special purpose fund. Andrew Blum, *States Want Share of Punitives*, NAT. L.J., March 8, 1993, at 5, 35. Additional payments into tort compensation funds could come from the exaction of damages for purposes of deterrence from tort defendants who intended harm, or created serious risks of harm, but whose acts did not eventuate in any actual injury. Examples might include "attempted battery" defendants, *see supra* note 7, and dock owners who wrongfully "took their chances" on cutting free ships that ended up not suffering damage, *see supra* note 30 and accompanying text.

66. REPORTERS' STUDY, Vol. II, *supra* note 38, at 110.

67. *Id.* at 95.

plaintiff of any compensation.[68] Payments to a plaintiff from a government compensation fund could fill that kind of gap.

Examples of tort law, or at least compensation law, already freed from Robinson Crusoe limits are provided by state and federal statutes setting up crime victims compensation funds.[69] Persons who are convicted of crimes pay into the funds,[70] sometimes according to the seriousness of their offenses[71] or numbers of previous convictions,[72] whether or not anyone was actually injured; and otherwise uncompensated victims can recover their economic losses from the funds,[73] usually even if the person who injured them has not been apprehended.[74]

Some attendees at the ALI's Annual Meeting were very concerned that the Reporters had paid insufficient attention to principles of corrective justice;[75] and one comment might be taken to imply that departures from Robinson Crusoe thinking violate such principles.[76] But as long as wrongful losses and gains are rectified, even by non-tort payments from or to the government, or some other third party, that would not be the case. As Professor Coleman has observed,

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68. *Id.* at 101-103.

69. *See* John R. Anderson & Paul L. Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 223-226 (1985); Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 57 (1985) (referring to "the separation of offender and victim" as "inherent in a victim compensation program"). The National Conference of Commissioners on Uniform State Laws has recently drafted model legislation, called the Uniform Victims of Crime Act, under which victims could receive up to $25,000 in state funds for physical or emotional injuries. *See* Henry J. Reske, *Helping Crime's Casualties*, 78 A.B.A. J., Nov. 1992, at 34.

70. Fines and penalty assessments collected from federal offenders are deposited in a Crime Victim's Fund. 42 U.S.C. § 10601(a) & (b) (1988). Grants are made from the Fund to state operated crime victim compensation programs. § 10602. States also surcharge state offenders for the benefit of compensation programs. *See* Smith, *Victim Compensation: Hard Questions and Suggested Remedies, supra* note 69, at 85-87.

71. *See e.g.*, 18 U.S.C. § 3013 (a) (1988).

72. *See, e.g.* W. VA. CODE § 14-2A-4 (1991).

73. As of 1985, thirty-nine states had compensation programs. *See* Smith, *Victim Compensation: Hard Questions and Suggested Remedies, supra* note 69, at 52-55.

74. *See* Anderson & Woodard, *supra* note 69, at 223.

75. 1991 PROCEEDINGS, *supra* note 39, at 27-28, 31-32, 45-46.

76. *Id.* at 27-28.

> Nothing in the principle of corrective justice requires the tort system as the mode of rectification . . . . [Some] claims to repair (for example, those that arise from accidents—automobile and other) may be most efficiently and appropriately dealt with in some other way—perhaps through a no-fault system or through the general tax coffers.[77]

V. PROBLEMS IN ABANDONING THE CRUSOE PERSPECTIVE

In their study, the ALI Reporters identified some practical difficulties in melding private lawsuits and government claims against defendants into a workable system. Plainly, it would be hard to expect plaintiffs to assert voluntarily claims from which they would receive no benefit, much less to invest substantial resources in pursuing such claims.[78] If plaintiffs were permitted to receive only a portion of whatever non-economic loss damages the defendant might pay, with the government getting the rest, they would probably, given a choice, prefer to receive a smaller sum in increased economic loss damages, all of which they could keep. Thus, with respect to tort fines for causing pain and suffering, the Reporters were concerned that especially when cases were settled privately "the immediate parties would find it only too much in their mutual interest to settle on an award distribution that sharply downplayed the government's appropriate share."[79]

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77. Coleman, *Moral Theories Part II, supra* note 3, at 36. *See also id.* at 10-11 (pointing out that whatever wrongful gain a negligent motorist obtains is completely independent of the occurrence of any loss to another).

In a very recent article, Professor Coleman seems suddenly to have abandoned his frequently reiterated position that corrective justice can require the rectification of wrongful losses even when it does not demand payment from the person who caused the injury. Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992). He makes clear, however, that even when the injurer has a duty to pay, there would be no *violation* of corrective justice for someone else to do so "for example, through the general tax coffers." *Id.* at 444. *A fortiori*, there would be no violation when the injurer has no duty to pay.

78. In its decision striking down the Colorado statute that gave the state a one-third share in punitive damages collections as an unconstitutional taking of a plaintiff's property, *see supra* text accompanying notes 48-50, the Colorado Supreme Court emphasized that the plaintiff had invested "time, effort, and expense in the litigation process without any assistance whatever from the state." *Kirk*, 818 P.2d at 272.

79. REPORTERS' STUDY Vol. II, *supra* note 38, at 214. On the other hand, a

Given this tendency, the Reporters rejected giving plaintiffs' attorneys a share of punitive damages awards channeled to the state because that would create a potential conflict with the interests of the plaintiff.[80]

These are real difficulties, and not susceptible to easy answers. But a predisposition on the part of the Reporters themselves not to challenge the Robinson Crusoe model is suggested by their apparent readiness to rule out anything *but* easy answers:

> Presumably the introduction of a tort fine [for the infliction of pain and suffering] would not be accompanied by additional changes in the claims process such as requiring that every case be disposed of in a trial in which a jury could specify the amount of the fine, or that the government be present at and consent to every negotiated settlement in order to protect its own claims.[81]

Further, the Reporters registered a philosophical objection to the "basic idea" of tort fines. They argued that it would be unfair to the purchasers of goods and services if they had to pay higher prices now to cover a providers' future tort fine payments not to themselves but to the government.

> [T]he current beneficiaries and potential victims of a product, service, or activity would, in effect, be required to pay the premium (incorporated in the price of a good they were buying) for a form of disability insurance from which none of them would collect any benefit in the event that injuries occurred.[82]

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spokesperson for the Association of Trial Lawyers of America has been quoted as saying that, "One reason lawyers may find [channeling statutes] . . . acceptable is that the state provides a party of interest or an amicus to get something out of the award [on appeal]." Blum, *supra* note 65, at 35.

80. REPORTERS' STUDY, Vol. II, *supra* note 38, at 259 n.49. ("We are *not* in favor, then, of paying punitive damages to the state."). *See also* American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 19-20 (1989).

81. REPORTERS' STUDY, Vol. II, *supra* note 38, at 213-14. The Reporters also rejected the possibility of setting tort fines as a flat percentage of compensatory awards, on the ground that such a scheme would ignore "the gap between such a crude figure and the actual pain and suffering inflicted on victims in different kinds of cases . . . ." *Id.* at 214.

82. *Id.* The Reporters observed that the unfairness they discerned could be corrected by rebating the tort fine increment to the purchasers, but said that implementing such a rebate system would present a "daunting challenge." *Id.*

But this, too, is Crusoesque. Tort fine payments by providers who injured people and caused pain and suffering would not be thrown into the sea, and need not even be put into general state revenues (which some people would view as more or less the same thing). If the fines were to go into a government compensation fund, they *would* be returned to injured purchasers of goods and services in the form of benefits for which they had not previously paid a "premium": *i.e.* full economic loss compensation benefits even when the particular providers who injured them are not required to pay damages at all, or the full amount of the loss.

* * *

By far the most striking argument in favor of re-creating a desert island-like system in the real world has come from a feminist legal scholar, Professor Leslie Bender. In a thought-provoking article,[83] Professor Bender contends that from a feminist perspective, the legal responsibility of tort defendants, including corporate officers, should not be limited to paying damages, but should include also the non-delegable *personal* performance of physical and emotional caregiving work for injured victims—either for the persons that they themselves injured or for other similarly situated victims.[84] Such broadened responsibility is necessary, Bender says, if the law is to take adequate account of the caregiving burdens that are otherwise imposed on an injured victim's family and friends (or on "lower class women who are paid too little"),[85] and of the day in-day out hardships suffered by the victim.[86]

Most of us may be inclined to disagree with Bender, feeling that the law's traditional reluctance to force people to perform services for

83. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848.

84. *Id.* at 904-908.

85. *Id.* at 904-905.

86. *Id.* at 906-907.

others against their will is as important to women as it is to men—that reluctance would seem to be very supportive, for example, of the pro-choice position on abortion[87]—and that new community programs to relieve families of excessive caregiving burdens by providing professional assistance represent a better approach. But however one comes out on the merits of that issue, neither Professor Bender nor anyone else would argue that merely because on a fictional island Crusoe would have to be the one to mop Friday's brow, a similar arrangement is necessary in the real world of torts.

87. *See, e.g.*, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).