

Second Best Damage Action Deterrence

Margo Schlanger

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DePaul L. Rev. 517 (2006)
Available at: <https://via.library.depaul.edu/law-review/vol55/iss2/11>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

SECOND BEST DAMAGE ACTION DETERRENCE

*Margo Schlanger**

INTRODUCTION

Potential defendants faced with the prospect of tort or tort-like damage actions can reduce their liability exposure in a number of ways. Prior scholarship has dwelled primarily on the possibility that they may respond to the threat of liability by augmenting the amount of care they take.¹ Defendants (I limit myself to defendants for simplicity) will increase their expenditures on care, so the theory goes, when those expenditures yield sufficient liability-reducing dividends; more care decreases liability exposure by simultaneously making it less likely that the actors will be found to have behaved tortiously in the event of an accident and subsequent lawsuit, and by shrinking the probability and perhaps the severity of accidents. What prior scholarship has not focused on is that even contemplated behavioral changes—in the type rather than amount of care defendants take, or the type rather than amount of harm they inflict—that do nothing to shift the probability or severity of accidents may, in many circumstances, limit expected liability by lowering the probability of claims or losses, or the expected amount of damages. In particular, I argue in this paper that potential litigation can induce potential defendants to favor more cognizable or demonstrable care, and less cognizable or demonstrable harm.

The circumstances in which I am interested abound. For example, in negligence law, some types of care are well suited to documentary proof, others need testimony, and still others are not well suited to

* Professor of Law, Washington University in St. Louis. Thanks to Steve Landsman for inviting me to participate in the 2005 Clifford Symposium on Tort Law and Social Policy. I received helpful comments from Symposium participants, as well as from participants in the faculty workshop at UCLA, Susan Appleton, Tom Baker, Mark Geistfeld, Doug Kysar, Laura Rosenbury, Cathy Sharkey, Steve Shavell, Nancy Staudt, Kent Syverud, and, as always, Sam Bagenstos. I also received helpful feedback on presentations of an early and very different version of this paper from participants in faculty workshops at Cornell, University of Minnesota, University of Texas, and Washington University in St. Louis. Errors that remain are of course my responsibility. Copyright © 2005 by Margo Schlanger. Permission is granted to copy for free or at-cost distribution to students enrolled in a class.

1. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 876 n.12 (1998) (citing sources spanning 1838 to the present).

courtroom proof at all. So because the substantive law of negligence is inevitably inflected by the litigation system, the expected value of damages varies, not only with the cost of care and the resulting level of accidents, but with that care's ease of proof. The result of this fact—stated most generally, that damages are not simply a function of the cost and yield of care—is what I term a “substitution effect”: in my example above, potential defendants are likely to anticipate the combination of tort law and litigation and respond by substituting accident-avoidance measures that are easier to prove up for those that are harder, all other things being equal.

Potential defendants should be expected to take advantage of myriad liability-minimizing substitution opportunities. I discuss several below. In each, defendants have incentives to substitute towards or away from a given type of care or a given type of harm, not because the substitute is more beneficial in terms of accident avoidance, but because it is more favorable in its expected litigation effects. As the example above suggests, potential defendants will favor types of *care* that are *more* demonstrable or (even more basic) legally cognizable. Conversely, potential defendants will prefer types of *harm* that are *less* demonstrable or legally cognizable. That is, they will avoid informing an injured party of the origin of his or her harm, and, more interestingly, prefer causing those types of harm whose origin or tortiousness is not evident or for which no liability is recognized. In short, the amount of care is only one of the many choices relating to compliance influenced by damage action deterrence. Substitution opportunities and the resulting substitution effects relating to the type of care and harm are also important and require attention.

The points I am making fit in the general category of applications of the theory of the “second best.”² That theory, foundational to modern welfare economics, if a bit underappreciated within *law-and-economics*,³ suggests that when economic systems suffer from inconsistent or otherwise nonoptimal features, correction of some subset of such features may well backfire:⁴ “In essence, the theory of the

2. For the first discussion of the general theory, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

3. See, e.g., Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 191 (1998) (“Neither private nor public law economic analysts, however, have paid much attention to a well-known proposition in welfare economics known as the General Theory of Second Best . . .”).

4. See, e.g., Lipsey & Lancaster, *supra* note 2, at 12 (“[I]n a situation in which there exist many constraints which prevent the fulfillment of the Pareteian optimum conditions, the removal of any one constraint may affect welfare or efficiency either by raising it, by lowering it, or by leaving it unchanged.”).

second best tells regulators to think twice about forcefully regulating one area of activity when those affected have access to a more-or-less substitutable area of activity that cannot be reached effectively with similar regulation.”⁵ Similarly, I am suggesting that interventions in torts that fail to take account of the substitution opportunities I describe may have problematic consequences. However, where many applications of the theory of the second best look extremely broadly at multiple markets and market participants, as well as the relevant legal frameworks,⁶ mine remains more manageably situated within torts as inflected by litigation processes.

In that realm, my work is mostly synthetic. Other scholars have noticed and analyzed the particular items I discuss, but prior scholarship has underplayed the importance of these substitution effects in several ways.⁷ First, that scholarship has failed to link the effects conceptually. Second, perhaps as a result of the first, it has failed to notice the high rate of occurrence of substitution opportunities and resulting substitution effects. Third, prior work has not appreciated the impact of that high rate. The fact that different types of care and harm produce different levels of expected damages means that the relationship between harm and damages is far more complex than much previous inquiry has assumed. Where prior scholarship has argued that optimal deterrence requires some multiplier mechanism to counteract underclaiming of various kinds,⁸ my substitution effect analysis demonstrates that in order to be even hypothetically sufficient, a multiplier regime would have to be much more comprehensive. It would have to offset each variation among alternatives that affects the probability of winning litigation, of reducing damages, and of being subjected to a claim altogether. Indeed, the complexity of the adjustments that would be necessary to preserve perfect *ex ante* correspondence between harm and damages is daunting enough to seem impracticable. More generally, the prevalence of substitution effects means that many proposed systematic interventions into tort deterrence are unlikely to work as anticipated. At the same time,

5. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1291-92 (1991).

6. I am thinking, especially, of the valuable but difficult work of Richard Markovits. See, e.g., Richard S. Markovits, *Monopoly and the Allocative Inefficiency of First-Best-Allocatively-Efficient Tort Law in Our Worse-Than-Second-Best World: The Whys and Some Therefores*, 46 CASE W. RES. L. REV. 313 (1996); Richard S. Markovits, *The Allocative Efficiency of Shifting From a “Negligence” System to a “Strict-Liability” Regime in Our Highly-Pareto-Imperfect Economy: A Partial and Preliminary Third-Best-Allocative-Efficiency Analysis*, 73 CHI.-KENT L. REV. 11 (1998).

7. See *infra* Part II.

8. See sources cited *infra* notes 10, 13, 14.

attention to the comparative element of damage action deterrence counsels in favor of a less ambitious set of interventions—one that tries at most to even out incentives among various options rather than to perfect them.

I begin with a short review of relevant prior scholarship, proceed to set out my examples of substitution opportunities and effects, and conclude by mentioning some policy implications.

II. *EX ANTE* DAMAGE ACTION INCENTIVES: PRIOR LITERATURE

Most deterrence scholarship takes for granted the general applicability of what I will call the “identity principle”—that optimal deterrence requires an *ex ante* identity between plaintiffs’ expected losses and defendants’ expected damages.⁹ If every tortiously injured victim could be expected to seek compensation, the identity principle would require a simple equality between the harm the victims experienced and the damages their injurers paid as a result. But even once analysis recognizes that not every injury is discovered and not every victim seeks compensation, the identity principle remains. For example, a much-remarked article by A. Mitchell Polinsky and Steven Shavell concerns litigation realities that tend to undermine deterrence even when damages are set equal to harm, such as “the difficulty of detecting harm, the inability to identify the injurer, problems in proving that the injurer is liable even if he can be identified, and the plaintiff’s failure to sue because of the costs of litigation.”¹⁰ These underclaiming problems led Polinsky and Shavell to propose that punitive damages routinely be awarded in an amount sufficient to make up for the *ex ante* probability that a defendant might have escaped liability for the harm it caused. For them, the identity principle was foundational: “Our conclusions . . . flow from the basic principle that, to achieve appropriate deterrence, injurers should be made to pay for the harm

9. Of course, if the liability assessment is unfailingly accurate and defendants cannot unintentionally violate the legal standard, damages for violation of a given legal standard may be set at an infinitely high level without fear of overdeterrence; no rational defendant will offend, but nobody will have to worry about either actual or attributed mistaken offenses. Cf. A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880 & n.3 (1979). This approach would, however, create new, marginal deterrence problems; anyone who decided to violate the rule could rationally decide that they were “in for a penny, in for a pound” and commit even a worse violation than they might otherwise have contemplated. Cf. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 178 (J.H. Burns ed., 1996) (1781) (“Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.”).

10. Polinsky & Shavell, *supra* note 1, at 874 n.7. For an earlier treatment, see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

their conduct generates, not less, not more.”¹¹ Polinsky and Shavell expanded on the need for an *ex ante* identity between the expected value of total damages and the expected value of total harm with a summary of the standard law-and-economics position:

If injurers pay less than for the harm they cause, underdeterrence may result—that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.¹²

Similarly, Judge Guido Calabresi explained in an opinion that a potential defendant’s “formal or informal, spoken or unspoken, cost-benefit analysis” of potentially tortious activity “cannot be even roughly accurate unless approximately all the costs of the activity are borne by the actor. . . . In such a case . . . the actor will not be adequately deterred from undesirable activities. And society will suffer.”¹³ Like Polinsky and Shavell, Calabresi’s opinion uses the identity principle as the justification for a proposal that punitive damages be used as a “multiplier” in situations in which compensatory damages are predictably less than the actual harm caused all injury victims, because of underclaiming of various kinds. A recent work by Keith Hylton and Thomas Miceli, which deepens the analysis by weighing the social cost of lawsuits against the social benefits of optimal deterrence, observes that the multiplier principle “has been accepted as one of the basic lessons of the law and economics literature.”¹⁴

Other work expands the reasons why a multiplier rather than simple equality of harm and damages might be required to implement the identity principle. In particular, Richard Craswell, with and without John Calfee, has written a series of articles exploring the implications for deterrence of defendants’ *ex ante* uncertainty, especially uncertainty about the application of legal standards to their harmful conduct.¹⁵ In the earliest and most pertinent of these articles, Calfee and

11. Polinsky & Shavell, *supra* note 1, at 873; *see also id.* at 888.

12. *Id.* at 873.

13. *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring).

14. Keith N. Hylton & Thomas J. Miceli, *Should Tort Damages be Multiplied*, 21 J.L. ECON. & ORG. 388, 410 (2005).

15. *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) [hereinafter Calfee & Craswell, *Effects of Uncertainty*]; Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986); Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463 (1996); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 MICH. L. REV. 2185 (1999) [hereinafter Craswell, *Deterrence and Damages*].

Craswell observed first that defendants “cannot be sure what legal consequences will attach to each of their possible courses of action,”¹⁶ and second that “in most situations where the defendant can choose from a range of possible actions, the probability of being held liable varies with the egregiousness of the defendant’s conduct.”¹⁷ In those circumstances, Calfee and Craswell pointed out, setting damages equal to losses (that is, implementing the identity principle without a multiplier) could produce either too much or too little care: “[U]ncertainty can produce incentives to over- or undercomply even when damages are calculated exactly”;¹⁸ and “[e]xcessive damage awards will not always produce overcompliance and insufficient awards will not always lead to undercompliance.”¹⁹ The two conflicting vectors are: too little care because even actors who comply with the relevant legal standard know that they may still face some liability exposure if someone is nonetheless injured, and therefore the gain from compliance and resulting incentive effect is undercut; and, alternatively, too much care because behavior that well exceeds bare compliance is less likely to mistakenly be adjudged noncompliant than behavior that is barely (which is to say, optimally) compliant.

In a more recent piece, Craswell connected his earlier analysis to Polinsky and Shavell’s multiplier proposal, and explained that his earlier work implies that an effective multiplier would have to cancel out not only the kind of underclaiming that Polinsky and Shavell discussed, but also the changes in probabilities of liability caused by varying degrees of misbehavior.²⁰ In addition, Craswell expanded the scope of his earlier analysis and explained that the *ex ante* expected value of a penalty, and therefore the need for a multiplier, can vary not only with changes in the probability of an uncertain liability finding (which Craswell labelled “conviction”), but with changes in the probability of “detection,” “litigation,” and “different damage awards.”²¹ Accordingly, he found that the identity principle can deliver optimal deterrence only if it applies precisely (and is known, *ex ante*, to apply precisely)—and therefore differently—in each of the many possible care situations. This, Craswell suggested, is unlikely to be politically palatable, because “the case-by-case multiplier has to be largest for those defendants who behaved relatively well (to make up

16. Calfee & Craswell, *Effects of Uncertainty*, *supra* note 15, at 968.

17. *Id.* at 980.

18. *Id.* at 986.

19. *Id.*

20. Craswell, *Deterrence and Damages*, *supra* note 15, at 2210–23.

21. *Id.*; see also Hylton & Miceli, *supra* note 14.

for their low probability of punishment), and smallest for defendants who behaved relatively badly.”²²

Moreover, Craswell emphasized that the identity principle is far from necessary for optimal deterrence. The unnecessariness of the identity principle comes from the observation, by now seemingly mundane, that deterrence by anticipation of damages is *comparative*—a defendant compares the expected combination of the cost of care and of damages under one possible course of conduct to the same combination under another course of conduct.²³ Thus, only the comparative level of anticipated damages matters—the absolute level of anticipated damages is simply not pertinent to the choice of conduct. As Craswell summarized, “In economic terms, it is the marginal *change* in the expected penalty [given changes in a defendant’s behavior], and not its absolute level, that governs the firm’s incentives.”²⁴ If the change in expected damages matches the change in expected harm, it does not matter for deterrence purposes what the level of damages is. That is, the identity principle is not a necessary precondition for optimal deterrence.

Craswell’s insights are vital to this essay; it builds on his work about the analytic importance of behavior-related changes in the probability of litigation, liability, and damages, and about the comparative nature of deterrence. Still, Craswell’s analysis, like that of other deterrence scholars,²⁵ focuses on the *amount* of care taken by potential defendants. This, I hope to demonstrate, is too narrow a topic of inquiry, even accepting or assuming, as this essay does, the contestable proposition that damage actions function as a deterrent.²⁶

22. Craswell, *Deterrence and Damages*, *supra* note 15, at 2234.

23. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 68–94 (1970).

24. Craswell, *Deterrence and Damages*, *supra* note 15, at 2194.

25. See, e.g., Polinsky & Shavell, *supra* note 1, at 876 n.12 (citing sources spanning 1838 to the present).

26. The first argument to the contrary is that tort law’s deterrent effect is superfluous; the second, frequently made even by scholars extremely sympathetic to economic analysis, is that attempts at deterrence via tort are at least often futile. See, e.g., Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance With Law*, 2002 COLUM. BUS. L. REV. 71, 117 (“[L]egal standards that ask persons to act reasonably have weak deterrence power when the actor is convinced that he is acting reasonably.”); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–83 (1994) (discussing both arguments and citing many of their originators). See also W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998) (finding no empirical evidence that the availability of punitive damages deters safety or environmental torts, and attributing the absence of deterrent effect to the perceived randomness of punitive damages).

III. SUBSTITUTION EFFECTS

When scholars discuss *ex ante* deterrence, they choose (nearly always implicitly) among three analytical axes—responses to damage-action incentives are thought to induce changes in care geared towards (a) winning litigation, (b) reducing damages, and (c) avoiding litigation. These three interests comprise the ways in which defendants might seek, before any particular accident occurs, to minimize their liability exposure; they are, together, what I call the “risk management” interests. (*Ex ante* risk-management interests are joined by more typically *ex post* claim management interests in minimizing litigation’s cost, which I will not discuss here.²⁷ Similarly, I am not discussing the many ways in which defendants might try to reduce their liability exposure by changing the law, rather than their behavior, by advocating for political interventions like damage caps or other tort “reforms.”²⁸) I use the three risk-management interests to organize my presentation of situations in which potential defendants can be expected to substitute one type of care or harm for another.

A. *The First Risk-Management Interest: Winning Litigation*

Nearly all actors who anticipate being sued are going to try to position themselves to win those lawsuits.²⁹ Before any accident takes place (that is, *ex ante*), the deterrent effect of potential damages may, as prior scholarship has emphasized, be the straightforward reason that potential defendants take additional care. For example, perhaps doctors, some of whose patients inevitably experience adverse health outcomes and are therefore plausible tort plaintiffs, deal with the sali-

27. I have suggested in earlier work that various claim management techniques can have important spillover effects that cause potential defendants to make changes in their risk- and caretaking activities. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1557, 1668–72 (2003) (discussing ways in which prison and jail efforts to minimize litigation burdens affect their *ex ante* compliance with legal norms). I hope to explore this topic more fully in future work.

28. See Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, in *SUING THE GUN INDUSTRY* 292, 296 (Timothy D. Lytton ed., 2005) (explaining insurers’ advocacy for damages caps and other tort reform measures: “From a potential defendant’s perspective, ‘loss prevention’ is really ‘liability prevention,’ and the elimination of liability is just as effective as the elimination of the harm and, at least potentially, much cheaper”).

29. This is demonstrably true even for many individuals whose insurance pays resulting judgments, for example doctors (notwithstanding that medical malpractice insurance is mostly not experience rated). See David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 980–81 (2005). It may be less true, however, for off-budget judgments against *organizational* rather than individual defendants, for example, federal agencies. Telephone Interview with Paul Figley, United States Department of Justice, Civil Division, Torts Branch (Feb. 12, 2005). See 31 U.S.C. § 1304 (1994) (establishing a permanent indefinite appropriation for payment of “judgments, awards, and compromise settlements”).

ent threat of malpractice liability by making sure to stay informed about and to use treatments suggested by current clinical practice guidelines, because when adverse outcomes eventuate, compliance with such practices helps them defeat malpractice claims.³⁰ This may or may not be the optimal level of care, but that is not the point for present purposes; only that the effort is one of taking care, and that it is at least partially motivated by the interest in winning litigation.

Another kind of effect is, however, equally possible. Because litigation is an institution better able to process some kinds of issues than others, the interest in winning lawsuits will often induce potential tort defendants to think about care in terms not of its efficacy and corresponding payoff in decreasing the chance of a liability finding, but of the care's evidentiary certainty (and the litigation cost of achieving evidentiary certainty). Therefore, all other things being equal—and possibly even without that constraint—in many situations potential defendants will prefer precautions that lend themselves to documentary rather than testimonial proof, because these are more likely to help on summary judgment rather than requiring a trial.³¹ And even if the stage of adjudication is the same, some kinds of evidence simply tend to be more convincing than others to decisionmakers. Doctors deciding whether to supplement a detailed heart examination with an EKG might decide to provide care that leaves a more objective evidentiary record—the EKG. Alternatively, they could devote more time to charting observations than they otherwise might.³² These

30. See Andrew L. Hyams, Jennifer A. Brandenburg, Stuart R. Lipsitz, David W. Shapiro & Troyen A. Brennan, *Practice Guidelines and Malpractice Litigation: A Two Way Street*, 122 *ANNALS INTERNAL MED.* 450 (1995) [hereinafter Hyams et al., *Two Way Street*]; Andrew L. Hyams, David W. Shapiro & Troyen A. Brennan, *Medical Practice Guidelines in Malpractice Litigation: An Early Retrospective*, 21 *J. HEALTH POL. POL'Y & L.* 289 (1996) [hereinafter Hyams et al., *Early Retrospective*]. For context on this issue, see Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 *U. PA. L. REV.* 645, 662–67 (2001).

31. Obviously defendants can introduce testimonial evidence on summary judgment. See, e.g., *FED. R. CIV. P.* 56(b), (e) (discussing affidavits in support of motions for summary judgment). But testimonial evidence is easier than documentary evidence for plaintiffs to oppose by simple contradictory testimony. On the other hand, in arenas in which plaintiffs have little credibility with decisionmakers (such as inmate litigation), this effect may lose power.

32. See Jerry R. Green, *Medical Malpractice and the Propensity to Litigate*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 193, 197 (Simon Rottenberg ed., 1978). Green observes: “The attributes of care readily observable in court typically would be those procedures for which records are kept: tests ordered, X-rays, frequency of reexamination, length of hospital stay. Focusing on these aspects of care when others that would be more efficient are bypassed is defensive medicine.” *Id.* at 197. Other analyses of defensive medicine self-consciously focus on a narrower swathe of practice: avoidance of high-risk patients or procedures or performance of extra tests or procedures. See, e.g., *OFFICE OF TECHNOLOGY ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE* 21 (1994). In any event, the adjective “defensive” is a

could well be very good treatment decisions—EKGs are valuable diagnostic tools, and good (though not excessive) charting is widely believed to be essential for high quality healthcare.³³ Indeed, in general one would expect that the kinds of evidence that potential defendants believe lend themselves to error-free adjudication in the event of litigation-provoking accidents would, for exactly the same reasons, lend themselves to other quality control systems. The point, however, is that when we examine the regulatory effects of damage actions, we should expect to see some responses that are geared as much towards evidentiary certainty as towards efficacy.

The general point—that potential defendants will tend to favor the types of care that pay higher dividends in terms of winning cases—has other applications as well. In negligence cases, for example, some aspects of caretaking are omitted from the calculus of care used by legal decisionmakers. These are bound to be stunted in favor of other kinds of care that are included. Defendants will tend to direct their precautionary efforts in ways that earn them litigation credit. Steven Shavell's important insight that efficient deterrence will suffer if decisions about activity levels are invisible to decisionmakers in a negligence regime is one example of this effect,³⁴ but far from the only

negative label; it implies that the measure is not appropriate. My point does not depend on this judgment; the substitution effect may often lead to good results.

33. See, e.g., Douglas L. Wood, *Documentation Guidelines: Evolution, Future Direction, and Compliance*, 110 AM. J. MED. 332 (2001).

34. See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980) [hereinafter Shavell, *Strict Liability Versus Negligence*]. Shavell concludes that because for a defendant, negligence law takes no account of his "choice of whether to engage in his activity or, more generally . . . the level at which to engage in his activity," potential defendants facing negligence liability will "not be motivated to consider the effect on accident losses" of those choices. *Id.* at 2 (emphasis omitted). In strict liability, by contrast, Shavell argues, all that matters is whether an injurer is involved in an accident, so potential strict liability defendants are appropriately "induced to consider the effect on accident losses of both his level of care and his level of activity." *Id.* at 3. It is not clear to what extent the negligence standard of care actually does omit activity-level effects. Indeed, in a later treatment Shavell himself concedes that at least in some limited circumstances negligence law may include activity level as part of the calculus of care. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 26 & n.33 (1987) (citing RESTATEMENT (SECOND) OF TORTS § 297 (1965)). See also Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 320 (1992) ("My fundamental conclusion is that modern American negligence law regulates activity levels to a considerably greater extent than has previously been recognized."); Howard Latin, *Activity Levels, Due Care, and Selective Realism in Economic Analysis of Tort Law*, 39 RUTGERS L. REV. 487, 505 & n.50 (1987); Joseph A. Page, *Liability for Unreasonably and Unavoidably Unsafe Products: Does Negligence Doctrine Have a Role to Play?*, 72 CHI.-KENT L. REV. 87, 96 (1996) ("[A] potential injurer, in order to avoid potential liability for negligence, would need to consider both the reasonableness of the activity to be undertaken and the reasonableness of the manner in which he engages in the conduct in question."). Regardless of the positive accuracy of the activity level argument, the analytic point I want to emphasize is that omitted features of caretaking are apt to be disfavored by potential negligence defendants, but not by potential strict liability defendants.

one.³⁵ For example, the negligence doctrine is often said to make no excuses for isolated inadvertence.³⁶ The necessary correlate of this doctrinal point is that negligence law gives no credit for *noninadvertence*—for the cost and effort of avoiding lapses in attention. Accordingly, actors who could prevent many accidents by paying attention, but who know they may nonetheless occasionally lapse into inadvertent negligence (and therefore be subject to suit) may instead substitute other methods of care—they may take what Mark Grady has called “durable precautions” rather than softer, more personal precautions.³⁷ They may, for example, substitute some sort of safety switch for a sustained effort to be careful. As with observable care (such as EKGs or good charting), durable precautions may very well be both more effective and more efficient than the nondurable precautions for which they substitute. This is apparently true, for example, in much of hospital medicine.³⁸ But it is not *necessarily* the case, and again, the point is that the availability of damages pushes potential defendants towards substitution to the kinds of precautions that “count” in litigation, rather than those that do not, regardless of their relative efficacy. Indeed, in circumstances in which the defendant and the plaintiff cannot observe each other, durable precautions may be beneficial for defendants not only because they are visible to tort litigation but because their *alteration* by plaintiffs is similarly visible. For a product manufacturer, evidence that a plaintiff disabled

35. Shavell's own brief discussions of this issue have been far less noticed than his distinction between activity-level and care-level. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 181–82, 189 (2004) (discussing deterrence when care has several dimensions, some of which are more difficult than others for courts to assess); Shavell, *Strict Liability Versus Negligence*, *supra* note 34, at 23 (“Any other variable omitted from the standard would also be inappropriately chosen in many of the circumstances in which we said the same of the level of activity.”).

36. See, e.g., Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 *Nw. U. L. REV.* 293 (1988); Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 *HARV. L. REV.* 1, 17–26 (1927). Seavey cites a number of cases that explicitly develop this point. See, e.g., Seavey, *supra*, at 25 n.20 (quoting *Wood v. Richmond & Danville R.R.*, 13 So. 552, 553 (Ala. 1892) (holding that “inattention, thoughtlessness, forgetfulness . . . constitute . . . contributory negligence *per se*”); *Brett v. S. H. Frank & Co.*, 94 P. 1051, 1052 (Cal. 1908) (rejecting plaintiff's suggestion that “inadvertence and forgetfulness . . . [be] excused” given special circumstances)).

37. Grady, *supra* note 36.

38. See INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda T. Kohn et al. eds., 2000); Frederick W. Cheney, *The American Society of Anesthesiologists Closed Claims Project: What Have We Learned, How Has It Affected Practice, and How Will It Affect Practice in the Future?*, 91 *ANESTHESIOLOGY* 552 (1999).

some safety device is more valuable than an unproveable accusation of more generic contributory negligence.³⁹

As to both substitution of observable for nonobservable care, and of durable for nondurable care, the substitution effect should not be total, because even unobservable or uncredited care avoids accidents, if not liability for those accidents that nonetheless occur. Nonetheless, the effect is an important one to include in any analysis of damage action deterrence, except in the rare areas of strict liability.⁴⁰

It may be that damage action incentives are particularly likely to apply differentially to alternate care choices when care crosses firm boundaries, because those boundaries typically receive a good deal of respect in litigation. Two final examples illustrate the issues. Sometimes entities are interested, perhaps because of vicarious liability or indemnification obligations, in winning cases brought nominally against their employees. For example, a hospital might have an interest in cases brought against its residents (new doctors in training) who are employees rather than contractors. Such a hospital will prefer the kind of care that minimizes those residents' liability exposure—even if that is not the kind of care that is most effective. Suppose hospital investment in a computerized follow-up system reduces certain bad outcomes but persuades malpractice juries to find for the defendant resident doctors less often than less effective, but more doctor-focused training. Hospitals under those circumstances will tend to prefer the care that is most closely connected to the litigation defendants—the doctors—even if that care is not as effective in life as it is in litigation.

We can expect to see the opposite effect in arenas in which firms are *not* liable (vicariously or otherwise) for torts committed by their agents. As Jennifer Arlen and W. Bentley MacLeod have elaborated in a recent paper, this setup may discourage potential defendants from exercising control over their contractors, even where such control would be the best method of minimizing risk, because acts of control might well persuade legal decisionmakers that liability should attach to the firm and not just its contractor.⁴¹ This is yet another litigation-

39. See, e.g., *Robinson v. Reed-Prentice Div.*, 403 N.E.2d 440 (N.Y. 1980); Gerald A. Stein, Comment, *Product Design and Post-Manufacture Alteration: The Law of Subsequent Modification in New York State*, 13 PACE L. REV. 269 (1993). I thank Doug Kysar for suggesting this point, which nicely expands my argument to cover defendants' anticipation of plaintiff-side effects.

40. See Craswell, *Deterrence and Damages*, *supra* note 15, at 2217–19 (explaining that for purposes of economic deterrence analysis, strict liability is even rarer than noneconomic doctrine might find).

41. See Jennifer H. Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, in *EXPLORING TORT LAW* 240 (Stuart Madden ed., 2005).

related substitution effect that renders consequentially different choices that cost the same and engender similar amounts of risk.

Note that defendants' decisionmaking in each of the above examples is comparative rather than absolute. In other words, the issue for a potential defendant is the probability of winning litigation given one choice about type of care compared to the probability of winning litigation given a different choice, not compared to some optimal probability. Likewise, any obstacle to appropriate deterrence exists in the comparison among choices—not in the absolute level of damages. Acknowledgment of the comparative perspective tends to undermine one common mode of analysis of deterrence, under which nonoptimal litigation incentives are said to be over- or underdetering. For example, one could attach the label "overdeterrence" to the result in the last example, about liability that discourages otherwise optimal firm control over contractors; this would signal a diagnosis of the problem as *too much* liability exposure for the firm. The evident solution would then be to decrease that exposure. But once we notice that firms think about damage action incentives by comparing their liability exposure under each of the available caretaking choices, it becomes clear that any purported overdeterrence can equally and accurately be labeled *underdeterrence*—in our example, *too little* liability for the firm's nonoptimal failure to exercise control over contractors. This is a classic baseline problem.⁴² Unless one or the other side of the status quo is privileged, whatever incentive problem exists is properly considered neither overdeterrence nor underdeterrence, but *differential* deterrence—solvable from either side of the balance by adjusting the relationship between the two alternatives.

B. *The Second Risk-Management Interest: Reducing Payout*

Potential tort defendants are interested not only in entirely beating cases that are brought against them, but in reducing how much they must pay in either settled or litigated damages. Compared to the interest in winning cases, it is harder to think of ways in which defendants, *ex ante*, can structure the care they take or the harm they cause in ways calculated to reduce payouts. But two substitution opportunities come to mind. First, because plaintiffs cannot get blood from a stone, undercapitalization may appeal to potential defendants as a

42. Cf. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996) (discussing the omnipresent baseline problems in constitutional law).

method to cap tort liability and other exposure.⁴³ Liability risk accordingly may induce potential defendants to structure their finances in less than otherwise optimal ways; they may, for example, spin off a new and undercapitalized corporate entity to conduct their risky business, or contract with such an entity.⁴⁴ This is neither a change in amount or type of care, nor in type of harm—but it is a substitution of one method of transacting business for another method with less favorable damage action results. A caveat bears emphasis, however. The pressure towards otherwise inefficient firm decisionmaking provided by the law's respect for corporate form may well be swamped by potential defendants' belief that they are better off preventing accidents (which requires control) and thereby avoiding even a small chance of liability for those accidents.⁴⁵ (Similarly, the substitution effect of observable for unobservable care might be swamped if the unobservable care produced better accident-avoidance, and therefore fewer claims.)

Another example is perhaps not entirely plausible, but instructive nonetheless. Observers have occasionally observed that, "under the common law . . . it was financially less burdensome to tortfeasors to kill than merely to maim their victims."⁴⁶ The idea is that because of the sharp damages limits incorporated into the law of wrongful death actions,⁴⁷ defendants' interest in reducing payout may, perversely, encourage them to kill their victims rather than injure them.⁴⁸ It is perfectly plausible that wrongful death damage limits underdeter

43. See Richard R.W. Brooks, *Liability and Organizational Choice*, 45 J.L. & ECON. 91 (2002); see also sources cited *id.* at 92 n.3.

44. If the out-of-house contractor were not undercapitalized, it would face the same liability exposure as the first firm and would presumably demand adequate compensation for that exposure. Of course, this is merely an example of the kind of "make or buy" decisions that are crucial to firm boundaries. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA*, N.S. 386 (1937), reprinted in R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988). The contracting, undercapitalized entities may themselves face nonoptimal incentives for care—see Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 *CAL. L. REV.* 1345 (1982); S. Shavell, *The Judgment Proof Problem*, 6 *INT'L REV. L. & ECON.* 45 (1986); Alan O. Sykes, Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 *YALE L.J.* 168 (1981)—but that is not the point here.

45. See Brooks, *supra* note 43.

46. *Mosier v. Carney*, 138 N.W.2d 343, 353 (Mich. 1965).

47. For a list of the wrongful death statutes of all fifty states, see Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 *B.U. L. REV.* 1, 25–26 nn.129–31 (2005). The statutes allow only limited liability; at common law, the rule was against any liability at all. *Id.* at 18–20; see also Wex S. Malone, *The Genesis of Wrongful Death*, 17 *STAN. L. REV.* 1043 (1965).

48. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 187 (1987); Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 *NOTRE DAME L. REV.* 57 (1990).

accidents in general. But to the extent anyone really takes seriously the argument about defendants preferring to kill than merely to maim, that argument seems overblown for three reasons. First, intentional killing is obviously deterred by far more stringent sanctions than those provided by damage actions—criminal law being the most obvious example. Second, the kinds of conditions that cause accidental deaths rather than accidental injuries probably also cause more, not fewer, injuries. Finally, deaths create large opportunities for associated damages not covered by the wrongful death limits.⁴⁹ Yet notwithstanding how implausible it is that wrongful death damages caps cause potential defendants to prefer to kill rather than to injure, I present the argument to demonstrate that the search for substitution effects needs to look not just for features of doctrine or litigation practice that potentially encourage the substitution of one type of care for another, but also for features that encourage the substitution of one type of *harm* for another. I pursue this point in the next section.

C. *The Third Risk-Management Interest: Avoiding Litigation*

Because litigation is costly both in terms of outlay and other external effects such as reputational damage, potential damage-action defendants even have an interest in avoiding litigation they can handily win. One good way to avoid litigation is to avoid causing harm. Sometimes, as already stated, potential defendants can avoid imposing injury by exercising augmented care. Moreover, the interest in winning litigation is obviously tied to the interest in avoiding litigation altogether; the more likely a case is to lead to a defense verdict, if it reaches trial, the less likely a plaintiffs' lawyer will agree to take it on contingency. Perhaps this is what is behind the finding of a recent study that obstetricians in one medical center who followed current standard clinical practice—later crystallized into an explicit “clinical pathway” document—were nearly six times less likely to be made a defendant to a malpractice claim, compared to a control group of doctors with a similarly high rate of caesarean section and assorted complications.⁵⁰

49. See David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989); Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 432–35 (2005).

50. See Scott B. Ransom, David M. Studdert, Mitchell P. Dombrowski, Michelle M. Mello & Troyen A. Brennan, *Reduced Medicolegal Risk by Compliance With Obstetric Clinical Pathways: A Case-Control Study*, 101 OBSTETRICS & GYNECOLOGY 751 (2003); see also Hyams et al., *Two Way Street*, *supra* note 30; Hyams et al., *Early Retrospective*, *supra* note 30.

But as I argued above with respect to defendants' interests in winning cases and minimizing damages, other strategies may prove effective for litigation avoidance as well. Instead of augmenting care and thereby avoiding harm, for example, potential defendants have reason instead to hide the harm they cause, or to shift to a type of harm whose victims cannot transform themselves into plaintiffs.⁵¹ In some circumstances, this set of incentives can simply induce secrecy, either as to the source of potentially compensable harm or as to its existence at all.⁵² For example, some observers believe that fear of malpractice litigation renders doctors more reluctant to tell patients that the harm they are experiencing was preventable.⁵³ Such suppression of information-production for fear of resulting litigation⁵⁴ has no *necessary* deterrent impact; there are not necessarily more accidents because those that occur are kept secret (although secrecy will tend to lead to underclaiming, which may undermine deterrent incentives, depending on the expected damages of taking less or otherwise cheaper care). But if the information that would otherwise have been generated would somehow have been used by a potential defendant organization to reduce harm, its underproduction can be problematic. In a recent paper, Omri Ben-Shahar made this point with respect to product safety research.⁵⁵ Ben-Shahar argued that new information about safety problems (and the resulting action, for example a product recall) can provoke a deluge of new suits by plaintiffs who learn that their injury might be compensable, and therefore vastly increased liability for the producer. The result, he suggested, is so much liability that it discourages socially useful product research. Jennifer Arlen has

51. Cf. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1981).

52. See, e.g., Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 *RAND J. ECON.* 341 (1990).

53. A recent article cites sources that make this accusation, while refuting its accuracy. Hyman & Silver, *supra* note 29, at 909–14, 923–28. And even if liability encourages information suppression, the strategy may well backfire. See, e.g., Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L.J.* 1447 (2000) (suggesting that plaintiffs bring medical malpractice lawsuits in part in order to get an explanation of what went wrong). Jennifer Arlen has explored a similar phenomenon in which corporate entities avoid monitoring their agents, for fear of uncovering corporate liability-inducing misconduct. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. LEGAL STUD.* 833 (1994).

54. On the topic of tort law's incentivization of *ex ante* evidence manipulation, see Jason S. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 *S. CAL. L. REV.* 137, 157 & n.32 (1987).

55. Omri Ben-Shahar, *How Liability Distorts Incentives of Manufacturers to Recall Products*, (Social Science Research Network, Working Paper No. 655804, 2005), available at <http://ssrn.com/abstract=655804>.

made a similar point in a parallel, corporate criminal context,⁵⁶ and it is a recurrent claim of those who oppose the current medical malpractice liability system.⁵⁷

Other times, the interest in avoiding litigation can push potential defendants not just to conceal harm and its tortious origins from victims, but to prefer those types of harm that are more easily concealed. Some harms, that is, are less easily demonstrable than others, and where a potential defendant can substitute less demonstrable for more demonstrable harm, damage action incentives may induce that substitution, in whole or in part. One prominent example is the documented tendency of employers to discriminate against job applicants whose treatment, if they are hired, is regulated under the civil rights laws.⁵⁸ Because failure-to-hire violations are extremely difficult for the affected applicants to detect or prove, and are therefore not often the subject of lawsuits,⁵⁹ it turns out that in order to avoid the potential of a fair employment action by a person of color or a person with a disability, many employers violate the fair employment laws in hiring.

Finally, the possibility of future damage actions can cause regulated parties to substitute away from cognizable harm towards harm that, even if demonstrable, is not legally cognizable. That is, just as potential defendants will tend to substitute care for which they receive credit for care that is unrecognized by the tort system, they will tend to substitute harm that is unrecognized for harm cognizable in tort.

56. See Arlen, *supra* note 53.

57. See, e.g., INSTITUTE OF MEDICINE, *supra* note 38, at 109–31. For example, “[T]he prominence of litigation can be a substantial deterrent to the development and maintenance of the reporting systems discussed in this report.” *Id.* at 110.

58. See e.g., Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987) (explaining that the prospect of civil rights litigation makes African American employees more costly to hire); Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996) (“[F]ar from producing hiring quotas that induce employers to discriminate in favor of minorities, disparate impact liability may actually induce hiring discrimination against minorities (and other protected groups).”); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000) (analyzing the economic impact of targeted antidiscrimination and accommodation rules governing hiring and work terms); Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire?*, 45 J.L. & ECON. 41, 41 (2002) (finding empirical support for Title VII’s hypothesized “sorting effect, which causes firms that are more susceptible to discrimination litigation to substitute away from protected workers”).

59. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015–21, 1023–32 (1991) (documenting shift in antidiscrimination enforcement actions away from failure-to-hire cases toward discriminatory firing cases). To be clear, I am not suggesting that the *net* effect of fair employment laws is negative, but merely that there are some negative effects along with some positive ones. How they sum is a difficult question well beyond the scope of this essay. For analysis of the question, see Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004).

Again the medical system provides an example. Doctors must deal with the risk of malpractice liability by choosing among a combination of responses. They can do just what they would have done in the absence of liability threat; they can change the care they provide in some way; they can buy malpractice insurance; and they can turn away high-risk patients. Because the quality of care is regulated by tort but the acceptance or rejection of patients is not,⁶⁰ the last choice amounts to the substitution of an unregulated activity for a regulated one. We should expect to see such substitutions as a result of anticipated damage actions. Again, my point is not that this substitution is necessarily problematic. Whether doctors' turning patients away harms social welfare requires much more analysis. Perhaps not; high risk patients may be best seen by others who can develop increased expertise in their care, and therefore fear malpractice liability less. But maybe there is indeed a problem; maybe the patients cannot find alternative treatment.⁶¹ In either event, the substitution effect exists.

In the arena of constitutional torts, commentators and policymakers have analyzed the damage action incentives pushing defendants to substitute noncognizable harm for cognizable harm; both scholars and courts have speculated that fear of liability will "chill" vigorous action by public officials.⁶² The pioneering investigations of this topic premised their concern about a constitutional tort chilling effect on the nonregulation, or at least the *relative* nonregulation, of governmental inaction.⁶³ To reorient this "chilling effect" argument towards the analysis I am using here, the concern is that because harm caused by

60. Note that in some limited circumstances, a medical professional's rejection of patients is, in fact, regulated. See Americans with Disabilities Act, 42 U.S.C. §§ 12181(7)(F), 12182(a), 12182(b)(3) (2000) (banning discrimination, including by doctors, against people with disabilities unless, *inter alia*, treatment poses a "direct threat to the health or safety of others"); Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2000); *Abbott v. Bragdon*, 163 F.3d 87, 90 (1st Cir. 1998) (holding that HIV-infected patient did not pose a sufficient "direct threat" to treating dentist to justify his refusal to treat her); see also Tiana Mayere Lee, *An EMTALA Primer: The Impact of Changes in the Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS HEALTH L. 145 (2004).

61. See PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 85 (1991).

62. The classic scholarly presentations of this argument are by Peter Schuck and Jerry Mashaw. Schuck, for example, wrote in depth in 1983 of "society's interest in encouraging officials to act promptly, decisively, and without excessive self-regard or calculation" in order "to accomplish the public's business in socially efficient, cost-minimizing ways." PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 21 (1983). He described how damage actions might threaten these interests and labeled the threat "overdeterrence." *Id.* See also Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26-29 (1978).

63. See SCHUCK, *supra* note 62, at 64-65; Mashaw, *supra* note 62, at 26-29.

inaction is often noncognizable in constitutional tort suits,⁶⁴ but harm caused by action is cognizable, potential constitutional tort defendants will substitute unregulated *inaction* for regulated action. This problem has been considered one of overdeterrence⁶⁵—too much liability, which produces not, in this instance, too little care, but too little activity. But, again, it is equally plausible to see the problem inhering in the constitutional doctrine that bars official liability for *inaction* and the poor incentive that creates to oversupply *inaction*. That is, the comparative nature of the problem means it would be just as accurate to label it *underdeterrence* as overdeterrence (and, as in the contractor control example above, more accurate than either to label it *differential* deterrence). After all, the solution could be more rather than less regulation; if *inaction* were regulated, its substitution for action would be far less attractive.

IV. CONCLUSION: POLICY IMPLICATIONS AND FUTURE RESEARCH

This essay has examined ways in which the expected value of damages varies not only with the frequency and amount of harm inflicted but also with the type of care and harm. I have suggested that potential defendants contemplating their liability exposure under substantive law, as it is inflected by procedural practice and rules,⁶⁶ are encouraged to substitute cognizable and demonstrable care for less cognizable and demonstrable care, and to substitute noncognizable and nondemonstrable types of harm for more cognizable and demonstrable harm. Sometimes the results are favorable for social welfare; other times not.

What then is the appropriate policy response to the insight I have described? A multiplier solution is certainly theoretically possible, and could put every decision about care or harm on the same metric with the same baseline. But it is difficult enough to contemplate, as Polinsky and Shavell did, multipliers that counteract the simpler phe-

64. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989) (refusing to hold county agency liable under the Due Process Clause for failure to intervene to save an abused child from his abuser).

65. See SCHUCK, *supra* note 62.

66. Lawyers, repeat litigants, and policymakers understand that these work in concert to establish the range of expected outcomes in damage actions; that is why "tort reform" statutes so often effect procedural rather than substantive changes. Yet scholarship about deterrence has stunted the ways in which the litigation process affects expected litigants' incentives for compliance with legal norms. As Lewis Kornhauser has summarized the economic literature on adjudication, "Economic analyses of substantive legal rules generally suppress the adjudication of factual and legal disputes that a legal rule might engender." Lewis A. Kornhauser, *Judicial Organization and Administration*, in V ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 27, 27 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

nomenon of underclaiming, particularly because it seems that many participants in experimental jury simulations are reluctant to award punitive damages that correspond with the identity principle's requirements.⁶⁷ And a multiplier solution seems even less attractive once it includes, as Craswell has pointed out that it must, the result that damage awards vary inversely with the egregiousness of a defendant's conduct, because less egregious violations of a legal norm are more likely to go unsanctioned.⁶⁸ Moreover, the legal doctrines and factors that produce the substitution opportunities with which I have been concerned are not so easily set aside. To line up every care and harm choice in terms of its harm-avoidance yield requires eliminating (or counteracting), for example, the rules that official inaction is not tortious, that firm boundaries are to be respected in litigation, and so on.⁶⁹

It seems to me that targeted interventions that take the varied substitution opportunities into account would be far more fruitful than interventions that pay no such attention. The general theory of the second best weighs heavily in favor of piecemeal rather than wholesale policy change.⁷⁰ This essay's examples similarly counsel in favor of modesty in ambitions for deterrent optimality. It is hard enough to use *ex ante* anticipation of damages to get *close* to a chosen policy outcome, much less to do any fine regulatory calibration. Moreover, because the substitution opportunities vary greatly depending on the legal and factual context, interventions should nearly always be piecemeal ones—they might well go astray if they are not. For example, consider the problem of the so-called "chilling effect" in the arena of constitutional torts. Recall that this problem occurs because officials face liability when they act but do not face liability when they fail to act.⁷¹ The Supreme Court's response has been the transubstantive doctrine of qualified immunity, which exempts from suit individual officials whose conduct, though unlawful, was not objectively unreasonable.⁷² This is, indeed, an intervention designed to solve a substitution

67. See generally Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000).

68. See *supra* note 22 and accompanying text.

69. For example, Omri Ben-Shahar's paper about the distortion of product recall decisions caused by the jump in claiming that occurs after a manufacturer does a recall suggests as a solution a damage rule that "reduce[s] the manufacturer's liability when he does recall the product, to offset the 'floodgates' effect and thus eliminate the advantage for the manufacturer of leaving the product on the market too long." Ben-Shahar, *supra* note 55, at 24.

70. See *supra* text accompanying notes 2–6.

71. See *supra* text accompanying note 63.

72. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); see also *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) (rejecting qualified immunity

effect. But it goes too far. The policy payoff of the comparative analysis suggested here is that although it is reasonable to be concerned about a harm substitution—a chilling effect—where there are available to defendants categories of harm beyond the reach of damages liability, in contexts where regulation via damage action is more uniform, this substitution problem fades. In prisons and jails, unlike in the social state at large, governmental actors do have enforceable affirmative obligations, and inaction can be extremely costly. Failing to protect inmates from assault or rape by other inmates, failing to provide medical care, failing to prevent a predictable suicide—these are often the fact patterns in the small sliver of successful inmate lawsuits.⁷³ So in correctional settings, substituting inaction for action is actually likely to be a very ineffective method of avoiding liability risk, and one that does not tempt officials. Correspondingly, there is unlikely to be a “chilling effect” problem in need of the qualified immunity solution.⁷⁴ The point is that transsubstantive deterrence fixes are likely to create their own difficulties, as they attempt to solve problems that are in fact fairly narrow.

One final policy point will suffice. This essay’s airing of substitution effects evidences the many levers available to policymakers interested in fine-tuning damage action deterrence. There are a huge variety of rules—about damages, or proof, or any other of the parameters that factor into the generation of *ex ante* damages expectations—that are available as targets for reform-minded tinkering. This ought to render us particularly skeptical of policy proposals that too readily sacrifice compensatory goals on the altar of optimal deterrence.

for private prison staff, but describing caselaw relating to Court’s desire to avoid “unwarranted timidity” by government officials).

73. See Schlanger, *supra* note 27, at 1674–75; see also Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding that the failure to protect inmate plaintiff from foreseen harm by other inmates may constitute cruel and unusual punishment); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (same, for failure to provide medical care); Gregoire v. Class, 236 F.3d 413, 417 (8th Cir. 2000) (same, for failure to respond to known risk of suicide).

74. John Jeffries has made a similar plea against transsubstantive application of overdeterrence fears, advocating that courts “abandon the ‘one-size-fits-all’ approach and adapt remedies to specific rights.” See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 259 (2000). Jeffries argues, “[T]he conditions that make overdeterrence a realistic fear in the realm of search and seizure do not necessarily obtain elsewhere.” *Id.* at 270.

