

ARTICLES

PERSONAL RESPONSIBILITY AND THE
LAW OF TORTS

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INTRODUCTION

“Personal responsibility” is not currently a term of art in tort law. It does not occur in tort literature with any great frequency, and certainly not with any uniformity of usage or meaning. One occasionally comes across a reference to “personal responsibility” when referring to the core tort notion of the putative defendant’s responsibility to conform his or her conduct to societally and legally required norms. For example, Professor John G. Fleming, writing that tort law is “fast shedding the last vestiges of any punitive function,” has identified “loss distribution,” not “personal responsibili-

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ty and guilt," as the focus of modern tort law.¹ Much more commonly, however, the ubiquitous term "duty" is employed to indicate a defendant's responsibility to potential plaintiffs. Thus, the well-known Prosser and Keeton hornbook on torts speaks of "[a] *duty* or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks."²

Given that the phrase "personal responsibility" is thus currently devoid of a recognized tort-law meaning and, therefore, available for use, I have appropriated it as a term to refer to a *plaintiff's* responsibility, or, rather, to what I propose should be recognized as a responsibility inhering in one who may suffer an injury. As used in this Article, "personal responsibility" refers to the notion that the person who bears primary responsibility for personal injury damages is the person who has been damaged, *not* the one who caused the damage. When a leg is broken, who initially bears the loss? The person whose leg is broken, of course. That person must, in the first instance, deal with the pain, the treatment, the inconvenience, and often the expense of the injury. Modern tort law is all about whether some or all of the monetary incidents of the injury should later be shifted to another party.³ But it is inescapable that prior to shifting

1. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1484 (1966). Professor Fleming also identified "enterprise liability" as an emerging focus of modern tort law, which, together with loss distribution, is "pushing into the background individualistic notions of personal responsibility and guilt." *Id.*; see *infra* note 3 and accompanying text (discussing enterprise liability).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 1 (5th ed. 1984) (emphasis added). This "duty" is one of four elements required to establish a negligence cause of action. *Id.* § 30, at 1-4. The three other required elements are: (1) a "failure on the [defendant's] part to conform to the standard required;" (2) a "reasonably close causal connection between the conduct and the resulting injury;" and (3) an "actual loss or damage" to the interests of the plaintiff. *Id.*

3. The other party to whom the loss would be shifted might be the tortfeasor, or the tortfeasor's employer under the doctrine of *respondere superior*, or even an entity in an appropriate cooperative business relationship with the tortfeasor under either the doctrine of enterprise liability or the doctrine of market-share liability. *Respondere superior* is the Latin term for a type of "imputed negligence," or "vicarious liability." *Id.* § 69, at 499. Through operation of this concept one person may be held liable for the negligent conduct of another merely because of a special relationship, such as master and servant. *Id.* § 69, at 500. See *Sindell v. Abbot Lab.*, 607 P.2d 924, 933-35 (Cal. 1980) (explaining "enterprise liability" as shifting the burden of proof of causation to multiple defendants in products liability cases only where industry is comprised of small number of manufacturers, all manufacturers had independently adhered to industry-wide safety standards, responsibility for safety was in part delegated to trade association, cooperation in manufacture and design was industry-wide, and plaintiff could establish by preponderance that one of manufacturers was source of product), *cert. denied*, 449 U.S. 912 (1980). See *id.* at 936-38 (explaining that traditional standard of negligence is inadequate to protect plaintiffs harmed by fungible goods that are not traceable to single manufacturer). The court accepted a theory of causation that would recognize a defendant manufacturer's liability for an untraceable defective product to roughly equal its market share,

any part of the loss, a large measure of damage, and the responsibility for coping with that damage, resides with the person who has been injured. Moreover, significant parts of a personal injury, for example, the pain and suffering, never really can be shifted at all. We engage in a fiction that such losses are imposed on tortfeasors through the payment of money damages, but in reality they are not shifted; the plaintiff, and only the plaintiff, suffers the physical pain and mental trauma of the injury and, therefore, is responsible for dealing with them.⁴

All of this may seem obvious, but the modern law of torts has focused not so much on the responsibility of the person injured as on the status of that person as a "victim." Victimhood is a relatively new status granted to plaintiffs or potential plaintiffs. In 1859, Francis Hilliard published the first American treatise on the law of torts.⁵ The term "victim" does not appear anywhere in that work. Nor is there any reference to tortiously injured persons as "victims" in the tort law discussions contained in *The Common Law* by Oliver Wendell Holmes, Jr., published in 1881.⁶ A turning point of sorts may have come in 1965, with the publication of Professors Keeton and O'Connell's seminal blueprint for no-fault legislation, *Basic Protection for the Traffic Victim*.⁷ Beyond its presence in the title, the term "victim" appears with great frequency in the text. One typical passage asks:

Why do we isolate automobile accidents for special consideration? The person injured in an automobile accident is, after all, only one of many kinds of *victims* of mischance and hazard. Why not include in our concern all of these *victims*—among others, the *victims* of the power lawn mower, cancer, and the fall at home?⁸

In modern legal writing, "victim" is the term of art applied to *any* person who has been injured and, therefore, may seek redress under

unless it can demonstrate that it could not have made the product that harmed the plaintiff. *Id.* at 937. For market-share liability to apply, a substantial percentage of all manufacturers of the indistinguishable goods complained of must be joined by the plaintiff. *Id.*

4. See *infra* notes 111-15 and accompanying text (developing concept that money is incapable of truly making plaintiff whole because pain and suffering are intangible).

5. 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* iii-iv (1859).

6. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

7. ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965). Professors Keeton and O'Connell proposed a new plan of basic protection for traffic "victims" that would include "a new form of compulsory automobile insurance" along with legislation that would preclude or lessen tort liability for insureds. *Id.* at 273.

8. *Id.* at 3 (emphasis added) (footnote omitted).

modern tort law.⁹

The distinction between viewing an injured person as a victim, on the one hand, or as the one who has primary responsibility for bearing his own losses, on the other, is perhaps subtle, but nonetheless significant. Webster's Third New International Dictionary lists the first two meanings of "victim" as "[(1)] a living being sacrificed to some deity or in the performance of a religious rite[, and (2)] someone put to death, tortured, or mulcted by another: a person subjected to oppression, deprivation, or suffering."¹⁰ A victim is, therefore, someone who is helpless—killed, tortured, or sacrificed. The presence of a victim cries out for the victimizer's identification and punishment. In this light, it is not surprising that compensation for the injured has become a primary goal of our tort system,¹¹ because forcing the victim to shoulder her own losses would be to victimize her again.

The thesis of personal responsibility, on the other hand, would view those injured in accidents not as helpless victims, but as resourceful human beings, often with vast monetary, social, and psychological systems available to assist them in coping with the consequences of injury, apart from any recourse to litigation. Take a hypothetical person injured in a two-car automobile accident. The person suffers physical injuries, for which he incurs medical expenses: doctors' bills, hospital bills, medication, and so forth. The person is likely covered by a group health insurance policy, which pays most or all of these expenses.¹² To the extent that there are gaps in this coverage, like deductibles and co-payments, the injured person's own automobile insurance will provide reimbursement for these losses.¹³ Moreover, as a result of the injury, the person may also miss work, resulting in lost wages. The person is probably covered by a disability income

9. See, e.g., Fleming, *supra* note 1, at 1478 (discussing collateral source rule and pointing out that modern "victims" of misfortune have numerous resources besides damages from tortfeasor to make them whole); Carla L. Harcourt, *Child Restraint Litigation: Compensating the Littlest Victims*, TRIAL, Apr. 1995, at 32, 36 (explaining issues surrounding civil suits alleging failure of automotive child restraints, and characterizing children injured or killed by defective restraints as "victims").

10. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2550 (1986).

11. See generally Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 938 (1994) (examining several schools of thought regarding goals and purposes of tort law and explaining that compensation is given as primary justification for tort law in one economically-oriented school).

12. See *infra* notes 118-27 and accompanying text (discussing extent to which most people have insurance coverage).

13. See JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 4902.25, at 249 (1981) (explaining that medical pay provisions usually cover insured owner while present in vehicle in addition to other persons, such as relatives and persons driving with owner's permission).

policy, however, which will reimburse him for all or a significant part of his lost wages.¹⁴ Our hypothetical injured party, therefore, is made whole without having to pursue any tort remedy, at least with respect to major monetary damages. Such an individual has exercised personal responsibility: recognizing in advance the possibility of incurring medical expenses or lost wages, from whatever cause, and choosing to provide for that eventuality by purchasing appropriate insurance protection. Such an individual deserves our approval, if not our applause.

This leads to the ultimate thesis of personal responsibility as applied to tort law and as that term is used in this Article. If all persons exercised personal responsibility, would there be any real need for tort-based compensation? The answer is no. Personal responsibility, carried to its logical conclusion, means that each individual should bear the responsibility for those personal injury losses that she suffers. Hence, the appropriateness of the term "personal responsibility." It is "personal" because individuals look to themselves as the source of provision, not casting about to others or to society at large; it is "responsibility" because it imposes on individuals an obligation to take appropriate and available steps to provide for their own future losses.

This is not quite as radical as it may appear at first glance. Many kinds of losses in society are already handled in exactly this manner. For example, suppose one's home is struck by lightning,¹⁵ catches fire, and burns. Who bears the loss? Barring some extraordinary theory of negligent design in the building of the house, it is the homeowner who shoulders the loss. Usually, the homeowner has exercised personal responsibility by purchasing in advance a fire insurance policy that compensates for the loss.¹⁶ If she has not, however, most of us are still not tempted to try to shift the loss. This is a corollary of the personal responsibility thesis: even if a person takes *no* steps to insure against future loss, she still bears the loss. This is often called "self-insurance" or, as one of my law school professors was fond of saying, "no-insurance." It is, nevertheless, a choice we allow people to make with respect to many types of property loss, as well as other losses.

14. See *infra* notes 118-27 and accompanying text (examining insurance buying patterns).

15. A fire caused by someone's negligence can be viewed as "accidental." Our current legal system thus differentiates between these two types of accidents, mandating government-coerced compensation in one case (negligence), but leaving the lightning "victim" to his or her own devices.

16. Mortgage lenders require property insurance for all mortgaged property.

A full-blown application of such a personal responsibility thesis to personal injury law would be tantamount to the dismantling of our modern tort law. Such an abolition of the current tort system is an idea that has been discussed with increasing frequency and seriousness in recent years. For example, Professor Sugarman has written, "It is time, I believe, to focus academic and political attention once more on doing away with ordinary tort actions for personal injury."¹⁷ Notions of personal responsibility ultimately could support such an approach. In fact, an examination of historical and modern tort law and principles reveals that there are strains of personal responsibility already present and operating. Part I of this Article reviews, from a personal responsibility perspective, several areas of the law of torts, including mitigation of damages, the collateral source rule, and automobile no-fault legislation. Part II addresses some problems raised by the implementation of a personal responsibility model, including non-economic damages, insurance availability and utilization, and considerations of policy and morality.

I. PERSONAL RESPONSIBILITY IN THE LAW OF TORTS

The concept that injured persons themselves must bear the losses associated with their injuries is not foreign to American tort law. More than a century ago, in presenting his highly influential early analysis of tort theory, Justice Holmes stated with confidence: "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune."¹⁸ The context within which Justice Holmes arrived at this conclusion is somewhat remarkable. In the centuries preceding Justice Holmes' writing in 1881 of the work cited, *The Common Law*, it could scarcely be said that there existed a coherent legal system properly called the law of torts.¹⁹ In fact, the first American torts treatise was not published until 1859²⁰ and torts

17. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 558 (1985); see also William F. Foster, *Some Comments in Favour of the Abolition of Fault Law*, 8 AKRON L. REV. 57, 59-62 (1974) (arguing that system of accident compensation based on notion of fault, while appealing to laypersons' sense of justice, misconceives true source of most accidents, which is really human error rather than moral failure or calculated disregard of consequences).

18. HOLMES, *supra* note 6, at 94.

19. See generally G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3-19 (1980) (explaining development of tort law as result of changes in jurisprudential thought as well as spread of industrialization in late 19th century).

20. *Id.* at 3 (referring to FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* (1859)).

was not taught as a separate subject in law schools until 1870.²¹ Prior to the early nineteenth century, recovery for personal injury was available only for those able to bring themselves within the ambit of a discrete number of very specific writs.²² During this time period, therefore, personal responsibility, or the reality that injured parties shouldered their own losses, was the rule; liability in tort was the exception.

Even after the common law of torts matured into a fault-based system at the end of the nineteenth century,²³ there were (and still are today) a multiplicity of doctrines that had the effect of imposing on plaintiffs the responsibility for their own damages. At common law, a plaintiff who was aware of a negligently created risk and who nevertheless voluntarily confronted it, was barred from recovering damages under the doctrine of assumption of risk.²⁴ It is not a stretch, therefore, to say that under assumption of risk, having exercised an informed personal choice, the responsibility for the resulting damages rested with the injured party.²⁵ Again, at common law, the lack of any substantial duty owed to trespassers resulted in personal responsibility—the trespassers' responsibility for bearing their own losses.²⁶ The common law rule that no recovery was available for wrongful death²⁷ made an entire class of plaintiffs responsible for its own damages. Finding that a plaintiff's injuries

21. *Id.* Furthermore, no torts casebooks appeared until 1874, when J. Ames' A SELECTION OF CASES ON THE LAW OF TORTS was published. *Id.* at 3, 246 n.4.

22. *See* WHITE, *supra* note 19, at 3-19 (stating that no systematized body of law governed tort suits during first half of 19th century and that series of unrelated writs formed bases for suits).

23. *See* KEETON ET AL., *supra* note 2, § 75, at 535 ("Until about the close of the nineteenth century, the history of the law of torts was that of a slow, and somewhat unsteady, progress toward the recognition of the 'fault' or moral responsibility as the basis of the remedy.")

24. KEETON ET AL., *supra* note 2, § 68, at 481. Similarly, under the common law doctrine of contributory negligence, a plaintiff at fault was barred from recovering damages. *See id.* § 65, at 451-52 (explaining that theory of contributory negligence holds that plaintiff forfeits claim to recovery from defendant if plaintiff has engaged in conduct which "falls below the standard to which he is required to conform for his own protection"). Contributory negligence, however, is most accurately viewed not as a rule of personal responsibility, but rather as an extension of the fault principle; that is, the one whose fault caused the injury, even if he is the plaintiff, should bear the loss. *Id.* Comparative fault, which treats plaintiffs less harshly than the doctrine of contributory negligence, recognizes that fault may lie with the plaintiff as well as with the defendant, but that this fact does not necessarily preclude the plaintiff from recovering damages. *Id.* § 67, at 468-69.

25. KEETON ET AL., *supra* note 2, § 68, at 481 (noting that, in many cases, plaintiff's choice to encounter known and unreasonable risks operates as contributory negligence).

26. KEETON ET AL., *supra* note 2, § 58, at 393-95 (explaining that landowners have no duty to trespassers). Professor Prosser states explicitly that under the principles governing landowners' liability to outsiders, trespassers "are expected to look out for themselves." *Id.* § 58, at 393. Further, "the responsibility is theirs" for whatever risks trespassers encounter. *Id.*

27. KEETON ET AL., *supra* note 2, § 125A, at 940-42. This rule of non-liability was eventually overturned by statute in every U.S. jurisdiction. *Id.* § 127, at 945.

were not proximately caused by the defendant's negligence, either because they were not reasonably foreseeable, or because of the intervention of some superseding cause, such as an act of God, resulted in the injured party absorbing his or her own losses.²⁸ By statute or common law rule,²⁹ a majority of states imposed personal responsibility on non-paying automobile passengers.³⁰ In short, any doctrine or defense resulting in non-liability can be viewed as reaching a personal responsibility result. At least at common law, there was a plethora of such devices. The doctrine that contains the clearest expression of a personal responsibility policy, however, is the rule of avoidable consequences, also known as mitigation of damages.

A. *Mitigation of Damages and Personal Responsibility*

One popular formulation of the mitigation rule is set forth in the *Restatement (Second) of Torts* in the section entitled "Avoidable Consequences."³¹ It states:

(1) [O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.³²

*Collova v. Mutual Service Casualty Insurance Co.*³³ is a classic example of the mitigation rule. In *Collova*, the plaintiff was injured in an automobile accident.³⁴ Despite suffering from what she testified was severe and constant pain, she declined a variety of medical treatments and delayed visiting her doctor.³⁵ When she eventually did meet with her doctor, she refused his recommendations for hospitalization

28. KEETON ET AL., *supra* note 2, § 42, at 272-319.

29. For a comprehensive and chronological list of state statutes that have been repealed, see James J. Woods Jr., *Guest Statutes: Goodbye and Good Riddance*, 16 CUMB. L. REV. 263, 264, app. A, at 287-90 (1986).

30. For a comprehensive list of other statutes and their current invalidity, see *id.* (arguing for repeal of "guest statutes," which insulate drivers from any liability to injured guests, and commenting favorably on common law rule that drivers use reasonable care for safety of all passengers whether paying or not).

31. RESTATEMENT (SECOND) OF TORTS § 918 (1979) [hereinafter RESTATEMENT].

32. *Id.*

33. 99 N.W. 2d 740 (Wis. 1959).

34. *Collova v. Mutual Serv. Casualty Ins. Co.*, 99 N.W.2d 740, 741 (Wis. 1959).

35. *Id.* at 742. The accident happened on a Friday night, but the plaintiff did not see a doctor until Monday morning. *Id.*

and further evaluation.³⁶ When questioned about her behavior by the defendant's attorney, she bristled, "Don't talk about hospitals. I wouldn't go."³⁷ Upholding the request of providing the jury with a mitigation instruction in the context of the plaintiff's contention that inadequate damages were awarded, the court held:

No injured person is required to undergo surgery or treatment that is hazardous or unduly expensive, but one injured by the wrong of another is obliged to exercise reasonable care to minimize damages. This obligation includes the seeking of medical care as well as the following of the advice of the physician consulted in order to alleviate the injury.³⁸

The doctrine of mitigation of damages requires that plaintiffs take responsibility for their own damages, at least to the extent of taking steps to minimize the loss. Obviously, if a plaintiff could reasonably take action to *eliminate* the damages, rather than merely minimizing them, the law would require that he or she do so. In effect, purchasing appropriate insurance coverage before a loss occurs could eliminate the subsequent monetary burden of the loss. Personal responsibility, as defined above, is therefore consistent with the existing notions embodied in the rule of mitigation.

According to the *Restatement*, mitigation is required if it can be done with "reasonable effort."³⁹ Providing in advance for the eventuality of accidental loss requires no unreasonable effort. Purchasing of an insurance policy is not difficult. In fact, the kinds of coverages that would mitigate personal injury losses—medical and disability insurance—are already commonly purchased by the vast majority of Americans⁴⁰ because of the need to protect against non-accident-related illnesses. In that sense, such advance mitigation requires *no* additional effort at all.

The *Restatement* also indicates that mitigation is required if an individual can do so by means of a "reasonable expenditure."⁴¹ In

36. *Id.* at 743.

37. *Id.* at 742.

38. *Id.* at 743; *see also* *Ambrose v. Norfolk Dredging Co.*, 284 F.2d 802, 803 (4th Cir. 1960) ("It is the duty of a plaintiff to minimize his damages by submitting to reasonable treatment."). In *Ambrose*, the plaintiff seaman had been injured in the course of his employment while helping to raise an anchor. *Id.* at 802-03. Although the plaintiff claimed to suffer a back injury, he refused to submit to a diagnostic test or to corrective surgery. *Id.* at 803. The Fourth Circuit held that the plaintiff was not substantially prejudiced by the trial court's refusal to allow him to testify that a doctor had informed him that the diagnostic procedure was dangerous, thus causing him to reasonably fear the procedure. *Id.*

39. RESTATEMENT, *supra* note 31, at § 918(1).

40. *See infra* notes 118-27 and accompanying text (discussing widespread availability and purchase of various types of insurance coverage).

41. RESTATEMENT, *supra* note 31, at § 918 cmt. e.

analyzing this provision and its companion "reasonable effort" language, a comment to the *Restatement* provides:

A person whose body has been hurt or whose things have been damaged may not be unreasonable in refusing to expend money or effort in repairing the hurt or preventing further harm. Whether he is unreasonable in refusing the effort or expense depends upon the amount of harm that may result if he does not do so, the chance that the harm will result if nothing is done, the amount of money or effort required as a preventive, his ability to provide it and the likelihood that the measures will be successful. There must also be considered the personal situation of the plaintiff. A poor man cannot be expected to diminish his resources by the expenditure of an amount that might be expected from a person of greater wealth. So too, whether it is unreasonable for a slightly injured person not to seek medical advice may depend on his ability to pay for it without financial embarrassment. . . . If he has adequate resources, he must use them to minimize the loss.⁴²

In the same way that the effort involved in obtaining advance protection against accident losses is not unreasonable, likewise the expenditure required is not unreasonable. This is primarily because it is an expense that almost all of us undertake anyway.⁴³ That is, because it is so common to provide against non-accident-related illness and resulting disability via health insurance and disability income insurance, and because those policies also can provide coverage for medical expenses and disabilities arising out of an accident, no additional expense is required. Most people, therefore, have already engaged in this mitigation of damages. Even if the purchase of separate insurance coverage were for some reason required, the expense would still be reasonable. Under the language of the comment to the *Restatement*, there is an extremely high "likelihood that the measures [here, purchasing insurance] will be successful,"⁴⁴ and, barring insolvency of the insurer, advance mitigation of damages by means of insurance always "works." Moreover, accident insurance is relatively inexpensive.⁴⁵

42. RESTATEMENT, *supra* note 31, at § 918(1).

43. See *infra* notes 116-22 and accompanying text (discussing high percentages of population purchasing various types of insurance).

44. RESTATEMENT, *supra* note 31, at § 918 cmt. e.

45. See APPLEMAN & APPLEMAN, *supra* note 13, § 4902.55, at 278 ("From an actuarial point of view, accident insurance can be written much more cheaply than health insurance. Travel accident policies bear, perhaps, the lowest incidence of risk of all such contracts."). "Writing" the risk is an insurance term of art that refers to covering a class of losses, not the physical writing of the contract. Thus, insurance that can be "written" cheaply means insurance for which low premiums result.

Even beyond the practical application of personal responsibility involved in the purchase of insurance coverage, one must remember that my notion of personal responsibility at its core evolves from a view of each individual's more general obligation to provide for his or her own well-being.⁴⁶ The doctrine of mitigation of damages is consistent with that policy. For example, in *Ostrowski v. Azzara*,⁴⁷ a diabetic plaintiff had a sore toe that her podiatrist treated by removing an ingrown toenail.⁴⁸ The plaintiff subsequently alleged that the removal was ill-advised and unnecessary.⁴⁹ The site did not heal and later required multiple surgical interventions because of vascular problems.⁵⁰ One issue considered on appeal was whether the plaintiff's post-removal health habits could be considered under a mitigation theory.⁵¹ Specifically, plaintiff's doctors advised her not to smoke after the toenail removal, but she did not heed their advice.⁵² Trial testimony indicated that smoking may aggravate and accelerate vascular disease, thereby possibly increasing the severity of the plaintiff's problem by as much as fifty percent.⁵³ The New Jersey Supreme Court held that the doctrine of mitigation could properly be applied to these facts:⁵⁴

[O]nce the patient comes under the physician's care, the law can justly expect the patient to cooperate with the health care provider in their mutual interests. Thus, it is not unfair to expect a patient to help avoid the consequences of the condition for which the physician is treating her.⁵⁵

The court thus recognized that potential plaintiffs have an inherent responsibility to participate in the management of and, if possible, the minimization of their own damages.

One aspect of the mitigation rule, at least as formulated by the *Restatement*, may be problematic in the context of this Article. The *Restatement* provides that mitigation must occur "after the commission

46. See *supra* text accompanying note 4 (describing unrealistic notion in tort law that pain and suffering of plaintiff can be shifted).

47. 545 A.2d 148 (N.J. 1988).

48. *Ostrowski v. Azzara*, 545 A.2d 148, 149-50 (N.J. 1988).

49. *Id.* at 150.

50. *Id.* at 149-50.

51. *Id.* at 150-51, 153-55.

52. *Id.* at 150.

53. *Id.*

54. *Id.* at 155-57. The court was careful to limit the reach of its decision by stipulating that only post-treatment conduct may be submitted to a jury as evidence of the plaintiff's own contribution to her condition. *Id.* at 156. To allow any evidence of poor pre-treatment, self-care would effectively subject plaintiffs to a standard of a "normative life-style," which society has chosen not to impose as a matter of policy. *Id.* at 155.

55. *Id.* at 156.

of the tort.⁵⁶ This Article's proposal that personal responsibility as a type of mitigation may require advance purchase of insurance coverage, however, obviously contemplates action *before* the commission of the tort. At least one court has strictly maintained that mitigation of damages can only apply to a plaintiff's post-accident actions.⁵⁷ Other courts, however, have held that the concept of mitigation can properly be applied to pre-accident conduct. In *Halvorson v. Voeller*,⁵⁸ for example, the plaintiff suffered severe head injuries as a result of being thrown from his motorcycle while not wearing a helmet.⁵⁹ The defendant sought to invoke a mitigation theory to argue for a reduction in damages, contending that plaintiff's injuries would have been less serious had he been wearing a helmet.⁶⁰ The court described the legal issue as follows:

One of the major criticisms of considering a plaintiff's failure to use a safety device in mitigation of damages which has moved some courts to reject the helmet defense . . . is that the doctrine of mitigation of damages, sometimes called the doctrine of avoidable consequences, has been traditionally used by courts to reduce damages for injuries a plaintiff could have avoided or made less severe by reasonable conduct on his part *after* he has suffered an initial injury. Where the failure to minimize injury is allegedly due to a person's nonuse of a helmet, the criticism is that the omission to wear a helmet is an act which occurred before, and not after, the plaintiff sustained an injury.⁶¹

Nevertheless, the court adopted a mitigation approach, and concluded that "evidence of a person's failure to wear a protective helmet while traveling on a motorcycle is admissible to reduce the plaintiff's damages."⁶²

56. RESTATEMENT, *supra* note 31, at § 918(1) (emphasis added).

57. *See, e.g.*, *Dippold v. Cathlamet Timber Co.*, 225 P. 202, 205 (Or. 1924) (pointing out that doctrine of avoidable consequences, in contrast to contributory negligence, focuses on post-injury acts of plaintiff). The court in *Dippold*, therefore, recognized "the distinction between contributory negligence as a bar to an action for damages and mitigation of damages arising from the plaintiff's failure to exercise reasonable care in avoiding the results of injury after same has happened." *Id.* (citing *Theiler v. Tillamook County*, 158 P. 804 (Or. 1916)); *see also supra* note 54 (explaining that court in *Ostrowski* limited mitigation of damages to plaintiff's post-injury behavior).

58. 336 N.W. 2d 118 (N.D. 1983).

59. *Halvorson v. Voeller*, 336 N.W.2d 118, 119 (N.D. 1983).

60. *Id.*

61. *Id.* at 120 (citations omitted).

62. *Id.* at 121. In reaching its conclusion, the court relied on the New York Court of Appeals' reasoning in *Spier v. Barker*, which held that the availability of a seat belt was such a unique opportunity for plaintiffs to minimize damages beforehand that a departure from the general rule limiting mitigation considerations to post-injury conduct was justified. *Id.* (citing *Spier v. Barker*, 323 N.E.2d 164 (N.Y. 1974)). The North Dakota Supreme Court analogized motorcycle helmets to seat belts to reach the same conclusion. *Id.* The issue of pre-incident

The issue of pre-accident mitigation also has arisen in the so-called "seat belt defense" cases.⁶³ In those cases, the contention is that the plaintiff, who was not wearing a seat belt, would not have been as seriously injured had he been wearing one, and that the damages, therefore, should be reduced.⁶⁴ A number of courts have adopted such a rule.⁶⁵ Accordingly, it has become apparent that the courts are advancing a fundamental principle of personal responsibility: the potential plaintiff's obligation to take steps prior to an accident to reduce or eliminate the adverse impact of the subsequent loss.

A leading "seat belt defense" case is *Spier v. Barker*.⁶⁶ In *Spier*, the New York Court of Appeals held that

nonuse of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider . . . in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain.⁶⁷

The opinion further explained that: "[I]n our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident."⁶⁸ The court was persuaded that, unlike other types of injured plaintiffs, "an automobile occupant may readily protect

mitigation also arises in the context of employees' suits against their employers. See *Johnson v. Farmers Union Cent. Exch.*, 414 N.W. 2d 425, 433 (Minn. Ct. App. 1987) (maintaining that employee's failure to wear goggles was properly considered as basis for mitigating damages paid by employer where employee had been trained in workplace safety and had been instructed repeatedly to wear goggles); *Collins v. Boeing Co.*, 483 P.2d 1282, 1289 (Wash. Ct. App. 1971) (holding that worker's failure to take advance security precautions with regard to his tools, which were later stolen, raised mitigation issue with respect to employer's liability to secure premises).

63. See, e.g., *Insurance Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 453 (Fla. 1984) (holding that seat belt defense is "viable" in Florida); *Thomas v. Henson*, 696 P.2d 1010, 1016 (N.M. 1984) (changing course from prior decisions and recognizing seat belt defense in context of pre-accident mitigation); *Spier*, 323 N.E. 2d 164, 167 (N.Y. 1974) (referring to "the seat belt defense"). Evidence of failure to wear a seat belt has been excluded by some courts on the ground that plaintiffs should not be subjected to such a standard of care. See *Johnson*, 414 N.W.2d at 433 (referring to *Clarkson v. Wright*, 483 N.E.2d 268 (Ill. 1985); *Amend v. Bell*, 570 P.2d 138, 143 (Wash. 1977) (excluding evidence that plaintiff wasn't wearing seat belt because "the plaintiff need not predict the negligence of the defendant").

64. See *Spier*, 323 N.E.2d at 166 (noting that defense expert testified at trial that seat belts were most effective safety improvement in automobiles in past 20 years and that plaintiff probably would not have been seriously injured if she had worn one).

65. See, e.g., *Dudanas v. Plate*, 358 N.E.2d 1171, 1175-78 (Ill. App. Ct. 1976) (upholding lower court's jury instruction on seat belt non-use as basis for reduction of damages because competent evidence established causal connection to severity of plaintiff's injuries); *Vredeveld v. Clark*, 504 N.W.2d 292, 297-98 (Neb. 1993) (stating that jury instructions allowing reduction in damages for seat belt non-use are permissible, but finding instruction improperly given because defendant offered no proof to establish causation between plaintiff's non-use and injuries).

66. 323 N.E.2d 164 (N.Y. 1974).

67. *Spier v. Barker*, 323 N.E. 2d 164, 167 (N.Y. 1974) (footnote omitted).

68. *Id.* at 168.

himself, at least partially, from the consequences of a collision."⁶⁹ The court, therefore, recognized that a potential plaintiff has a significant responsibility with regard to his or her own damages, even to the point of planning in advance how to eliminate or reduce those damages.⁷⁰

The Supreme Court of Florida has also adopted the mitigation approach to seat belt cases, observing that the result is dictated by that court's "underlying philosophy of *individual responsibility*."⁷¹ Moreover, an Arizona court, in recognizing a seat belt defense based on a mitigation theory, observed that "the victim of a tort has the duty to exercise due care and act diligently to protect his or her own interests."⁷² The court disclaimed any novelty in its approach, stating that "[t]he principle that a plaintiff must undertake reasonable measures to protect his own interest is a paradigm judicial principle of historic origins."⁷³

This Article seeks to draw from these mitigation cases an analogy between the obligation to take precautions, like fastening a seat belt or wearing a motorcycle helmet in advance of an accident, and the responsibility to insure against or otherwise provide for the monetary loss associated with an accident in anticipation of such an event.⁷⁴ In one unusual case, a state supreme court justice made just that

69. *Id.*

70. See Mark L. McAlpine, Comment, *A Realistic Look at the Seat Belt Defense*, 1983 DETROIT C.L. REV. 827, 830 ("The seat belt allows the user to protect himself before an accident occurs. It affords *insurance* against the probable consequences of unpredictable accidents. . . . Seatbelts, then, provide an opportunity for protection at a time when it really counts before the accident occurs.") (emphasis added).

71. *Insurance Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 451 (Fla. 1984) (emphasis added). The court limited the idea of personal responsibility, however, by carefully stating that failure to use an available and operational seat belt is not per se negligent or unreasonable. *Id.* at 454. In this court's formulation, a defendant must prove both that the non-use was unreasonable under the circumstances and that it was causally linked to some portion of the plaintiff's damages. *Id.*

72. *Law v. Superior Court*, 755 P.2d 1130, 1133 (Ariz. Ct. App. 1986), *aff'd*, 755 P.2d 1135, 1145 (Ariz. 1988). Because of this principle, the court held that the non-existence of a mandatory seat belt law in Arizona did not foreclose a finding that the plaintiff was partially responsible for her own injuries. *Id.*

73. *Id.*

74. One may argue, however, that there is a substantive difference between the two situations. In the seat belt cases, the precautions actually prevent a part of the physical injury itself; buying insurance in advance merely lessens or eliminates the expense associated with the injury. With regard to the compensatory function of tort law, however, this is a difference without a distinction. When a compensatory damage award is made in a tort case, it is not in reality a compensation for the *injury*. The tort award does not take an injury away; an intact leg is not awarded for a fractured leg. Rather, the compensation is for the *monetary losses* resulting from the injury. In that sense, the two situations, seat belt mitigation and "personal responsibility," are the same.

equation, albeit in dissent.⁷⁵ In *Security Insurance Agency, Inc. v. Cox*,⁷⁶ the defendant, Security Insurance, acted as a property insurance broker for Cox.⁷⁷ Specifically, Security had procured a policy covering Cox's rental property, a house.⁷⁸ The coverage lapsed, and the house subsequently burned.⁷⁹ Cox contended that Security had been negligent in not obtaining other coverage.⁸⁰ The Supreme Court of Mississippi affirmed a judgment against Security.⁸¹ Justice Broom, dissenting, saw the case differently. He emphasized that Mr. and Mrs. Cox were "well educated people," who knew that their annual policy would expire when it did.⁸² Therefore, according to Justice Broom, "for almost half a year before the fire loss, the appellees, Mr. and Mrs. Cox, had in their very own possession a policy which was all the time saying to them by explicit terms, 'I am lapsed—do something if you want coverage.'"⁸³ Justice Broom concluded that the doctrine of avoidable consequences should bar recovery because "a party cannot recover damages flowing from consequences which that party could reasonably have avoided."⁸⁴ He continued:

Appellees' wounds (their uninsured fire loss) may be realistically viewed as self-inflicted rather than resulting from any tort legally attributable to Security. During the four months following the July 12 expiration date of their policy:

- (1) Appellees made no inquiry about their coverage.
- (2) They made no effort to obtain coverage from Security or any other source.
- (3) They failed to offer any payment of premium.
- (4) They took no action whatever.
- (5) Appellees could have avoided the consequences of negligence alleged against Security.

....

75. See *Security Ins. Agency, Inc. v. Cox*, 299 So. 2d 192, 197 (Miss. 1974) (Broom, J., dissenting) (arguing for reduction of damages where plaintiffs failed to renew insurance policy and basing argument on applicability of doctrine of avoidable consequences).

76. 299 So. 2d 192 (Miss. 1974).

77. *Security Ins. Agency*, 299 So. 2d at 193.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 194-95. The court found against Security because it believed Security had failed to use reasonable care and due diligence to warn the plaintiffs that their coverage would not be renewed. *Id.* The facts of the case were not clear as to what notice the plaintiff had either received or requested. *Id.* at 193.

82. *Id.* at 195 (Broom, J., dissenting).

83. *Id.* at 196 (Broom, J., dissenting).

84. *Id.* (Broom, J. dissenting) (quoting 22 AM. JUR. 2D *Damages* § 30 (1965)).

. . . [U]pon the facts and circumstances presented by appellees to the lower court, the avoidable consequences doctrine should have been recognized and applied as an insuperable barrier to recovery by appellees.⁸⁵

Admittedly, this was a different sort of tort action, where the very tort committed by the defendant was the failure to procure a policy of insurance. But Justice Broom's point can be viewed as transcending the peculiar facts. It is obvious in this case that plaintiff's obtaining of insurance would have eliminated the loss flowing from defendant's negligence. Yet, in virtually every tort case, insurance is available in advance to cover the monetary losses associated with the injury.⁸⁶ Personal responsibility suggests that we should expect people to take advantage of the opportunity to insure, thus eliminating the need for superfluous tort recovery.

B. *The Collateral Source Rule and Personal Responsibility*

Under the collateral source rule, post-injury payments received by a plaintiff from collateral sources, such as the plaintiff's medical and disability insurance, do not reduce the damages otherwise recoverable from the tortfeasor.⁸⁷ The rule plays a curious role with regard to notions of personal responsibility. Many courts have recognized personal responsibility as one policy reason explaining and supporting the collateral source rule. For example, according to the California Supreme Court, the collateral source rule expresses "a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities."⁸⁸ Other cases have used virtually identical language.⁸⁹ Purchasing first-party

85. *Id.* at 197 (Broom, J., dissenting). Note that Justice Broom's analysis is harsher toward the plaintiff than the reasoning typically cited in seat belt and helmet cases because it would bar recovery, not merely reduce damages.

86. *See, e.g., Helfend v. Southern Cal. Rapid Trans. Dist.*, 465 P.2d 61 (1970) (noting medical expenses in torts case paid by medical insurance).

87. *See* RESTATEMENT, *supra* note 31, § 920A(2) and accompanying comments (a)-(c), at 513-15. Section 920A(2) states that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." *Id.* *See generally* Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) (discussing operation of rule with regard to various sources of recompense, such as insurance proceeds, employment benefits, and social benefits legislation, and concluding that allowing multiple recoveries for plaintiffs' losses may be at odds with compensation function of tort law but performs needed function of simplifying litigation).

88. *Helfend*, 465 P.2d at 66.

89. *See, e.g., Younts v. Baldor Elec. Co.*, 832 S.W.2d 832, 836-37 (Ark. 1992) (Brown, J., dissenting) ("As applied to insurance benefits, the collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance . . .") (quoting JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGE* § 10:2, at 416 (2d ed. 1991)); *Pacific Gas & Elec. Co. v. Super. Court*, 33 Cal. Rptr. 2d 522, 524 (Cl. App. 1994) ("The collateral source

insurance in advance of an accident to mitigate personal injury damages is, of course, central to personal responsibility as this Article has used that term. Furthermore, at least one commentator has recognized that benefits from collateral sources are in fact a type of potential mitigation of damages. Professor Fleming noted that “[h]igh ranking among the oddities of American accident law is the so-called ‘collateral source’ rule which ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, *even though they have partially or wholly mitigated his loss.*”⁹⁰

In application, the collateral source rule works at cross-purposes with a theory of personal responsibility. By refusing to even acknowledge the presence of collateral insurance benefits for purposes of tort recovery, the doctrine sends a clear signal that such insurance, and the commendable personal responsibility evidenced by it, is irrelevant to the tort system. If the courts truly want to provide an incentive to the purchasing of insurance as a policy goal,⁹¹ a system based on personal responsibility would be more effective; in such a system, one’s own insurance would be the sole source for recovery of damages.⁹²

C. *Automobile No-Fault and Personal Responsibility*

The closest American law has come to implementing a system based on personal responsibility is in the area of automobile no-fault legislation. Approximately a dozen states have comprehensive no-fault systems in place.⁹³ Under a no-fault regime, drivers purchase first-

rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and other eventualities.” (quoting *Helfend v. Southern Cal. Rapid Transit Dist.*, 465 P.2d 61 (Cal. 1970)); *McGlohon v. Ogden*, 299 S.E. 2d 581, 583 (Ga. Ct. App.) (finding that “[t]he collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance . . .”), *rev’d*, 308 S.E. 2d 541 (Ga. 1983).

90. Fleming, *supra* note 1, at 1478 (emphasis added); see also Maxwell, *supra* note 87, at 669-70 (stating that collateral source rule operates as limitation on doctrine of “avoidable consequences” and related principle that benefits to plaintiff flowing from wrongful act should be credited to defendant).

91. See *supra* text accompanying note 88 (quoting California Supreme Court’s explanation of policy rationale underlying collateral source rule).

92. More than half of the states have engaged in legislative elimination or modification of the collateral source rule. See JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ’S CASES AND MATERIALS ON TORTS 522-23 n.5 (9th ed. 1994) (citing legislative initiatives in Arizona, California, Kansas, New Hampshire, and New York).

93. COLO. REV. STAT. §§ 10-4-701 to -725 (1987 & Supp. 1995); FLA. STAT. ch. 627-730 to -7405 (1993 & Supp. 1994); HAW. REV. STAT. §§ 431:10C-103 to :10C-408 (Supp. 1992 & 1994); KAN. STAT. ANN. §§ 40-3101 to -3121 (1993 & Supp. 1995); KY. REV. STAT. ANN. §§ 304.39-010 to -350 (Baldwin 1987 & Supp. 1995); MASS. GEN. L. ch. 90, §§ 34A to 34R (1989 & Supp. 1995); MICH. COMP LAWS §§ 500.3101 to 500.3179 (1994 & Supp. 1995); MINN. STAT. §§ 65B.41 to .71

party insurance policies to cover their own accident losses.⁹⁴ Benefits are payable under these policies regardless of who was at fault in causing the accident.⁹⁵ These first-party benefits act as a substitute for what might otherwise be available as a tort recovery—that is, at least below certain thresholds, persons injured in automobile accidents are precluded from suing in tort.⁹⁶

At first blush, no-fault legislation may appear to embody the essence of personal responsibility. Two common facets of these statutes, however, render them less than ideal models of personal responsibility theory in practice. First, all of the statutes have thresholds above which the tort preclusion does not occur. For example, Florida's no-fault statute still allows tort actions where there is "[s]ignificant and permanent loss of an important bodily function, . . . [p]ermanent injury, . . . [or s]ignificant and permanent scarring or disfigurement."⁹⁷ Kansas allows tort actions where the injured party's medical expenses total \$2000 or more.⁹⁸ The number of actions actually removed from the tort system, therefore, is limited. Second, only a relatively narrow category of minor accidents has any personal responsibility principle imposed. From a theoretical perspective, it is important to understand how the no-fault states handle the potential presence of uninsured motorists. Under every no-fault statute, the first-party insurance that supports the system is compulsory—all motorists must purchase the basic coverage.⁹⁹ A pure personal responsibility model would leave up to each individual the choice of whether to insure his or her own potential losses. Most no-fault statutes create a state fund or pool to provide compensation to persons who are not covered by first-party coverage.¹⁰⁰ In practice,

(1994 & Supp. 1995); N.J. REV. STAT. §§ 39:6A-1 to -35 (1990 & Supp. 1995); N.Y. INS. LAW §§ 5101-5109 (McKinney 1985 & Supp. 1995); N.D. CENT. CODE §§ 26.1-41-01 to -19 (1995); 75 PA. CONS. STAT. §§ 1701-1725 (Supp. 1995); UTAH CODE ANN. §§ 31A-22-301 to -315 (1994 & Supp. 1995).

94. KAN. STAT. ANN. §§ 40-3104, 40-3107 (1993 & Supp. 1995).

95. N.J. REV. STAT. ANN. § 39:6A-4 (1990 & Supp. 1995).

96. MICH. COMP. LAWS. § 500.3135(2) (1994 & Supp. 1995).

97. FLA. STAT. ch. 627-737(2) (1993 & Supp. 1994).

98. KAN. STAT. ANN. § 40-3117 (1993 & Supp. 1995).

99. See N.D. CENT. CODE § 26.1-41-02 (1995) ("The owner of a motor vehicle required to be registered in this state . . . shall continuously provide . . . security for payment of basic no-fault benefits and the liabilities covered under the motor vehicle liability insurance."). Such compulsory coverage is redundant and duplicative for most motorists. See Frederic G. Levin, *Visiting Florida's No-Fault Experience: Is It Now Constitutional?*, 54 FLA. B. J. 123, 124 (1980) (explaining that Florida's no-fault law requires drivers to buy personal injury protection coverage for their losses arising from accidents, but 90% of Floridians already have private medical and wage loss insurance).

100. See MINN. STAT. § 65B.63 (1994 & Supp. 1995) (requiring insurance providers to participate in "assigned claims plan" whereby claims against uninsured motorists are assigned to insurers so as to allocate costs).

all that the no-fault states have done, however, is to transfer accident compensation from one state-regulated system (tort law) to another state-imposed system (no-fault).¹⁰¹

II. IMPLEMENTING PERSONAL RESPONSIBILITY

A. *The Problem of Non-economic Damages*

Aside from the generally revolutionary nature of enacting a system based on personal responsibility, by necessity the proposal raises a number of specific issues, not yet addressed in this Article.¹⁰² Perhaps the most significant matter is how to deal with non-economic damages, especially damages for pain and suffering. Under the personal responsibility model as this Article has introduced it, each individual is responsible for taking care of his or her own damages in what might otherwise be a tort liability context. For most, this would involve the purchase of appropriate medical and disability insurance coverage, which would cover the monetary impact of the personal injury. This proposal, however, does not envision any recovery from any party for pain and suffering.

This Article does not deny either the existence or the seriousness of physical or mental pain and suffering. These are, however, very personal matters. As this Article has described above, personal responsibility springs from the notion that personal injury and its consequences "belong" to the individual injured party.¹⁰³ This proposition is in no context more true than for pain and suffering. Each person is unique. Each person's pain is unique. Each person deals with suffering in his or her own way, and only that individual can determine the best way for that individual to handle the trauma. Accordingly, notions of personal responsibility would dictate that the law not attempt to interfere with the individual's responsibility to deal with the psychic consequences of his or her own loss.

A few examples from case law emphasize the responsibility that each person has with regard to his or her own losses. In *Casimere v.*

101. For additional discussion of this issue in a broader context, see *infra* notes 128-31 and accompanying text.

102. There are also many potential constitutional problems with changing to a system based on personal responsibility. See *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 13-15 (Fla. 1974) (upholding constitutionality of substantial portions of Florida's no-fault statute, but only because statute provided "reasonable alternative" to tort action that was being abrogated). See generally Kenneth Vinson, *Constitutional Stumbling Blocks to Legislative Tort Reform*, 15 FLA. ST. U. L. REV. 31 (1987) (discussing substantive due process challenges to Florida's no-fault statute).

103. See *supra* notes 2-4 and accompanying text (proposing that personal responsibility means injured party should be primarily accountable for loss regardless of assignment of fault).

Herman,¹⁰⁴ the plaintiff was injured in an automobile accident, which resulted in continuing emotional trauma.¹⁰⁵ At issue on appeal was the damage award to plaintiff for "future pain and suffering" due to the emotional disorder.¹⁰⁶ At trial, the plaintiff's psychologist testified that the emotional trauma needed treatment, otherwise it could persist for a lifetime.¹⁰⁷ In overturning the jury's award for future pain and suffering, the court observed:

[T]he testimony of [plaintiff's psychologist] is pregnant with the admission that the mental condition from which the respondent suffers is reversible. [The psychologist] states that the disability will persist "as long as treatment is not instituted."

....

Moreover, the record is devoid of any attempt on the part of the respondent to mitigate damage by undergoing the treatment allegedly required to cure or ameliorate her mental problems.

....

The appellant cannot be expected to pay for a lifetime's disability or pain if proper medical treatment or psychotherapy can reasonably correct the respondent's ailments.¹⁰⁸

As in the mitigation cases discussed earlier, the core notion is that a large measure of responsibility for damages lies with the individual who has suffered those damages.¹⁰⁹ This is especially true with regard to pain and suffering. Similarly, in a case contemplating damages for a plaintiff's fear that paralysis might occur in the future, the New Hampshire Supreme Court held that the proper inquiry for mitigation of damages is "[w]hether the one entertaining the fear has done all he reasonably could to control his apprehension"¹¹⁰

We have long engaged in the fiction that we are compensating plaintiffs for their pain and suffering by allowing the payment of monetary damages; but such compensation is just that—a fiction. In fact, recent tort theorists have shown a marked willingness to do

104. 137 N.W. 2d 73 (Wis. 1965).

105. *Casimere v. Herman*, 137 N.W.2d 73, 77 (Wis. 1965).

106. *Id.* at 74.

107. *Id.* at 77.

108. *Id.* at 77-78 (citations omitted).

109. See *supra* notes 32-85 and accompanying text (discussing theory that injured party is personally responsible for mitigating damages).

110. *Smith v. Boston & Me. R.R.*, 177 A. 729, 738 (N.H. 1935).

without monetary compensation for pain and suffering.¹¹¹ One commentator observed:

We have come to accept almost without question the monetary evaluation of the immeasurable perturbations of the spirit. But why should the law measure in monetary terms a loss which has no monetary dimensions? . . . The pain I have suffered may leave me a better or a worse man, it may leave me with a memory of pain or a sense of gratitude for pain departed. To put a monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise.¹¹²

Another commentator's perspective is, if anything, even more strident:

[T]here should be no compensation for intangible harm. Despite propaganda campaigns by trial lawyers' associations seeking to convince the public that pain and suffering damages are the inalienable birthright of every freedom-loving American, virtually inscribed in the Constitution, surveys of victims repeatedly demonstrate that most do not want it, though they do want defendants to acknowledge the wrong inflicted. Just as the present system of compensating pecuniary loss treats equals unequally (all people are created equal), so compensation for intangibles treats unequals equally (every human experience is unique). Nonpecuniary damages also dehumanize the response to misfortune, substituting money for compassion, arousing jealousy instead of sympathy, and treating experience and love as commodities.¹¹³

A third commentator emphasized that the willingness to forego compensation for pain and suffering "does not mean that we are indifferent to the experience of pain and suffering, but rather only that money does not make up the difference."¹¹⁴ From a personal responsibility perspective, this means allowing the individual most capable of dealing with the loss to sustain and manage the damage.

111. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 781-85 (1985) (suggesting only pecuniary damages be paid to compensate pain and suffering losses); Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 348-50 (proposing elimination of pain and suffering damages in personal injury cases). No-fault statutes also either abolish or limit damages for pain and suffering. See, e.g., FLA. STAT. ch. 627.737(2) (1993 & Supp. 1994).

112. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 222 (1953).

113. Richard L. Abel, *A Critique of Torts*, 2 TORT L. REV. 99, 111 (1994).

114. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 274 (1989).

Perhaps we would ultimately find that "a certain toughening of the mental hide is a better protection than the law could ever be."¹¹⁵

To the extent that an individual's pursuit of post-accident mental and emotional well-being involves assistance and treatment by medical, psychiatric, and psychological professionals, such expenses are readily covered through an individual's own medical insurance, which places these expenses on the same footing as other medical expenses for purposes of personal responsibility. Moreover, it is not clear that pain and suffering itself could not be the subject of a first-party insurance contract,¹¹⁶ although most people would be unlikely to purchase such coverage.¹¹⁷

B. *Insurance Utilization and Availability*

Another key issue is whether a sufficient combination of private insurance and social programs exists to make a personal responsibility regime realistic. Most commentators think the answer is yes. Professor Fleming provides an historic perspective:

In olden days an accident victim would rarely have been able to draw to any substantial extent on outside sources for meeting his expenses and making up for his loss of earnings during disability. Very occasionally he might have possessed an accident policy, and perhaps a little life insurance. Even then, it makes no undue demand on one's imagination to surmise that, at any rate, prior to the advent of the automobile, most people who stood in the way of torts belonged—as they still largely do—to the lower orders who would rarely have had the providence, even if they had commanded the means, to pay for insurance. However that may be, the accident victim would ordinarily have had to resign himself to drawing upon his own savings or throwing himself upon charity—which at best was random in incidence and meager in dimension. Other sources there were none: tort law provided the principal, usually the sole, source of compensation for injuries suffered.¹¹⁸

115. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) (attributing common law's reluctance to recognize mental distress damages to policy decision that law would be ineffective in dealing with what is essentially social control problem).

116. See Leebron, *supra* note 114, at 273-74 (discussing possibility of insuring against loss of "freedom from pain and suffering").

117. See Leebron, *supra* note 114, at 273-74 (concluding that insurance coverage for pain and suffering is unlikely given that money cannot fully compensate such losses).

118. Fleming, *supra* note 1, at 1478.

Professor Fleming further posits that the modern welfare state, with its numerous social funds and programs, has significantly altered this historical reliance on tort law for compensation.¹¹⁹ He explains:

Tort recovery has thus long ceased to be the only, or even the principal, source of repairing accident losses, besides the private resources of the victim himself. More typically today, some or all of the losses will have been taken care of by one or more [public social insurance systems or "private sector" welfare provisions such as health care fringe benefits] long before the injured party gets within the reach of what the slow and cumbrous common-law process may eventually afford him by way of tort damages.¹²⁰

Moreover, according to Professor Sugarman, who has documented the status of private American insurance coverage,¹²¹ approximately two-thirds of working Americans are covered by formal private employee benefit plans that provide for income replacement upon disability,¹²² and about eighty-five percent of all Americans are covered by adequate medical insurance.¹²³ The state of Florida provides a typical example. In 1980, nine out of ten Floridians had medical insurance, which covered more than eighty-eight percent of their medical expenses incident to an accident.¹²⁴ More than ninety percent of civilian employees were protected by private disability income insurance.¹²⁵

Although the current levels of utilization of such insurance, as described above, are significant, even more important for personal responsibility purposes is the widespread availability of these types of insurance coverage.¹²⁶ For example, according to Professor Rahdert:

First-party health and/or accident insurance is now widely available to many potential victims, usually through the relatively efficient mechanism of group policies maintained by employers. First-party insurance for accidental death is also widely available. Life insurance of one form or another is very common. Disability insurance is also widely available and usually very inexpensive, although it is notably underused. Together, these kinds of

119. Fleming, *supra* note 1, at 1478-80.

120. Fleming, *supra* note 1, at 1480.

121. See Sugarman, *supra* note 17, at 645-50 (examining current status of collateral sources for tort victims for lost income, medical expenses, and other damages, including rehabilitation expenses and general damages for pain and suffering).

122. Sugarman, *supra* note 17, at 645.

123. Sugarman, *supra* note 17, at 647.

124. Levin, *supra* note 99, at 124.

125. Levin, *supra* note 99, at 124.

126. See MARK C. RAHDERT, COVERING ACCIDENT COSTS 133 (1995) (noting that some types of first-party coverage against accident costs are widely available).

insurance could cover the most immediate costs that accidents cause

. . . .

. . . Most Americans probably either have or could purchase most of these kinds of insurance.¹²⁷

Insurance coverage might never be available to all. The uninsurable, such as those with preexisting medical conditions, and those in poverty, for example, remain problematic. Where would a personal responsibility system leave them? The short answer is that it would leave them in the same position in which they are now with regard to illnesses, injuries, and disabilities that are not currently within the scope of the tort compensation system.¹²⁸ If society determines that the poor and uninsurable should be provided with basic medical expenses, then perhaps state or federal legislation is appropriate; but it makes little sense to use one segment of the population as a justification for leaving in place a tort system that is increasingly unwieldy.¹²⁹ This raises the larger question: Is it the government's responsibility to assure that persons suffering personal injuries are compensated for their losses? Many modern tort theorists assume that the answer is yes.¹³⁰ Even those who advocate the abolition of the current tort system do so only with the understanding that it will be replaced by some sort of comprehensive alternative reparation system.¹³¹ Personal responsibility, on the other hand, would place the responsibility for losses on those who suffer the losses, rather than on the government or government-managed legal systems.

C. Policy and Morality

In the minds of many, tort law is more than just a system of accident compensation. Some view tort law as serving a deterrent

127. *Id.* at 42, 133.

128. Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 81 (1993). Professors Abraham and Liebman explain that "it is important to recognize that people who have no health insurance are not necessarily denied health care. Many of the uninsured are treated at public and nonprofit hospitals, which do not collect most of the charges billed to uninsured patients." *Id.*

129. See KEETON & O'CONNELL, *supra* note 7, at 1-3 (discussing problems with and need for reform of laws, institutions, insurance arrangements, and practices governing automobile claims system).

130. See generally James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 787-92 (1981); Richard Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1288-89 (1980); Sugarman, *supra* note 17, at 622-44.

131. See Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 795-814 (1967) (promoting use of social insurance and selective reimbursement in lieu of fault-based compensation system).

function.¹³² Others view it as a mechanism for punishing wrongdoers.¹³³ A system based on personal responsibility, where those injured would shoulder their own losses, would accomplish neither deterrence nor punishment. There is a two-fold response, however. First, with regard to the vast majority of tort actions, that is, those based on negligence and strict liability, modern tort law is ineffective with regard to advancing deterrence and punishment goals.¹³⁴ Second, to the extent that those goals need to be pursued, other societal mechanisms can be utilized to accomplish those ends.¹³⁵

Another rationale for the existence of a tort remedy, however, is perhaps not so easily dismissed. Professor Epstein and others argue that fundamental fairness and morality require one who causes harm to another to compensate the injured party.¹³⁶ Such a view is often termed "corrective justice."¹³⁷ It could be somewhat troubling that a system of personal responsibility might eliminate this moral component. But would it? Assuming, *arguendo*, that there is a moral duty to compensate one to whom you have caused injury, such a moral duty is not necessarily incompatible with a system of personal responsibility. Under a personal responsibility regime, the law would not require the injuring party to pay compensation, but instead would leave it to that party to exercise his or her moral duty to do so. The concept of a moral duty, the existence of which is undisputed, but which the law does not enforce, is not foreign to the law of torts. For example, there is no duty in tort to rescue one in peril: "The expert swimmer, with a boat and a rope at hand, who sees another drowning before his

132. See STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 3-4 (1989) (explaining commonly held view that tort law deters undesirable and dangerous conduct). Deterrence theory is fundamental to the "law and economics" approach to tort law. *Id.* at 3.

133. See *id.* at 62-63 (describing common view of tort law as punishing person that caused harm, but noting that typically that person does not pay).

134. See *id.* at 559-91, 609-11 (explaining that tort law has failed to become meaningful deterrent of dangerous conduct, and that punishment imposed by tort law does not necessarily cause tortfeasor to suffer); see also Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 167 (1993) (concluding that "none of the mainstream theories of human behavior support the likelihood that tort sanctions appropriately deter unsafe behavior").

135. See Sugarman, *supra* note 17, at 651-59 (suggesting more ways that regulatory agencies can promote safety). Further, most instances of tort liability today arise from so-called objective wrongdoing and not from conduct most would deem to be morally culpable and, therefore, deserving of punishment. See Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 441-42 (1992) (explaining that, typically, "the fault or wrong is in the doing, not in the doer," and that actor is not always blameworthy).

136. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 159-60, 187-88 (1973) (concluding that question of liability under tort should be based on fairness and that person who causes harm should pay); see also Weston, *supra* note 11, at 956-95 (1994) (discussing moral theories of tort law advocated by Professors Jules Coleman, Richard Epstein, George Fletcher, and Ernest Weinrib).

137. See Weston, *supra* note 11, at 979 (defining corrective justice as "set of moral requirements that ground and justify tort law").

eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown."¹³⁸ That is, the putative rescuer cannot be mulcted in tort on a theory that his or her inaction caused the death or other injury.¹³⁹ Yet, there is clearly a moral duty to effect the rescue.¹⁴⁰

In the same way, we might recognize a moral duty of compensation, but not enforce that duty through the legal system. Freed from the constraints of being forced to respond in tort, individuals and businesses might act out of a moral and societal sense of doing the right thing. Placing such a response in the context of personal responsibility makes it much less daunting than it might first appear. For the reasons previously discussed, non-economic damages would not be viewed as appropriate for compensation.¹⁴¹ With regard to economic losses (medical and disability), however, individuals would still be expected to satisfy most or all of their own losses through their own insurance and other private resources. The moral duty to compensate, therefore, would be limited to merely filling in the gaps in the injured party's ability to shoulder his or her own loss. For example, if an individual's health insurance coverage contains a deductible and a co-insurance provision, the party causing the injury may view it as appropriate to reimburse for the deductible and the co-payment percentage, so that the injured individual has no out-of-pocket losses. Other incidental expenses suffered as a result of the injury might also be appropriate for compensation. As a secondary benefit, paying voluntary compensation could serve as a healing mechanism for the two parties, as opposed to fostering the bitterness and adversity often engendered by the modern tort litigation process.¹⁴²

One might doubt that such a voluntary compensation system would ever work; that is, no one would participate without being forced to do so. At least one modern societal system already exists whereby huge amounts of money are transferred on a completely voluntary basis: tipping. Almost everyone tips. Fifteen percent of a restaurant bill, as a voluntary offering to the server, is almost universal. Barbers,

138. KEETON ET AL., *supra* note 2, § 56, at 375.

139. KEETON ET AL., *supra* note 2, § 56, at 375.

140. KEETON ET AL., *supra* note 2, § 56, at 375 ("The remedy in such cases is left to the 'higher law' . . .") (quoting *Union Pac. R.R. v. Cappier*, 72 P. 281, 282 (Kan. 1903)).

141. See *supra* text accompanying notes 104-15 (asserting that victim should bear primary responsibility for pain and suffering because he or she is most able to cope with such non-pecuniary losses and money can never compensate victim fully).

142. See generally Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4 (1988) ("Tort law needs to be more of a system of response and caring than it is now.").

taxicab drivers, delivery persons, newspaper carriers—the list goes on. And it is purely voluntary.¹⁴³ There are few, if any, adverse consequences to not tipping.¹⁴⁴ One might argue that a tip today will assure good service at the same restaurant next time.¹⁴⁵ But most of us tip without ever expecting to visit the establishment again.

In 1985 in the United States, consumers tipped more than nine billion dollars.¹⁴⁶ In the same year, compensation paid to injured parties through the tort system was about fifteen billion dollars.¹⁴⁷ Because the volume of voluntary payments would be much less under a personal responsibility system than coerced payments under the tort system, it appears that, at least in the aggregate, voluntary payments are a realistic alternative.

Furthermore, there already exists a quasi-voluntary payment system which operates concurrently with the tort system—the first-aid and so-called Medical Pay (or “med-pay”) insurance coverages contained as a part of many liability policies.¹⁴⁸ A first-aid clause allows an insured to volunteer assistance to the injured party, in recognition of “the humanitarian impulses which motivate one to see that prompt attention is given to those at the scene of an accident.”¹⁴⁹ Even more to the point is the med-pay coverage contained in most automobile liability policies, which allows an insured and his insurer to pay initial medical expenses, without any determination of actual liability.¹⁵⁰

143. Michael Lynn et al., *Consumer Tipping: A Cross-Country Study*, 20 J. CONSUMER RES. 478, 479 (1993) (“Tipping is voluntary behavior. Although the decision about whether or not to leave a tip is largely determined by social norms and customs, these norms provide a fair amount of latitude regarding how much should be tipped.”).

144. See *id.* at 487 (stating that electing not to tip service provider, or tipping less than social standard, results in “social disapproval” and personal guilt).

145. *Id.* at 479.

146. *Id.* at 478.

147. SUGARMAN, *supra* note 132, at 40 (citing J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (Rand Corp. Inst. for Civil Justice ed. 1986)).

148. See APPLEMAN & APPLEMAN, *supra* note 13, §§ 4899-4903.85, at 200-340 (discussing medical pay provisions in various insurance policies).

149. APPLEMAN & APPLEMAN, *supra* note 13, §§ 4900-4901, at 216-17.

150. APPLEMAN & APPLEMAN, *supra* note 13, § 4902, at 224-25.

Under this provision, any passenger or occupant of the insured’s car who is injured in an accident, and often pedestrians, may recover medical expenses up to a stipulated amount, anywhere from five hundred dollars to several thousands of dollars per person. Since such recovery is completely independent of liability on the part of the insured, insurance under the medical indorsement [sic] clause is closely akin to a personal accident policy

Medical provisions of liability, or homeowner’s policies are a form of minimal group accident insurance provided at minimal cost with a named insured as the entity through whom the coverage is issued

Generally, medical payment clauses are considered to constitute separate accident insurance coverage. Such coverage is divisible from the remainder of the policy, and

As a related matter, if the tort system were replaced by a personal responsibility regime, there would be another forum available for accomplishing some of the same goals that the tort system seeks to accomplish: the existing criminal law system, as discussed below. There is a certain amount of discomfort associated with the notion that one who commits an intentional tort, like battery, or a reckless act, like driving while intoxicated, should escape being forced to pay in some way for the consequences of his or her conduct. We would perhaps hesitate to free such an individual from having to pay compensatory, as well as punitive damages, especially because the batterer or the drunk driver would probably be among the least likely injurers to be forthcoming with voluntary compensation. The tort system should not be left in place, however, solely to deal with these relatively infrequent instances.¹⁵¹ Instead, we should utilize the existing criminal law system as a vehicle already in place. For example, in the case of an injury caused by a drunk driver, the injurer will usually be prosecuted criminally for the offense. To the extent that the injured party's own resources did not completely cover the monetary loss, the defendant could be forced to pay restitution.¹⁵² Similarly, if there is a need to retain the equivalent of tort punitive damages, a criminal fine could be imposed in lieu of punitive damages.¹⁵³

CONCLUSION

The mantra of "personal responsibility" is on the lips of prominent Americans across the political spectrum, in a variety of contexts that

creates a direct liability to the contemplated beneficiaries. The purpose is to grant peace of mind and create a fund for the payment of medical services so that those injured will not necessarily be contemplating how to impose liability upon the insured.

....

Medical payments provisions are found in almost every type of liability insurance. . . . The purpose is not only the salutary one of alleviating the mind of the one injured from concern over resources with which to pay such obligations, but to dissuade the one injured from thinking up theories upon which to sue the insured. And since the reduction of litigation is a desirable objective, certainly that is not improper.

Id. §§ 4902, 4902.05, at 224-32 (footnotes omitted).

151. See JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 1-14 (1988) (suggesting that bulk of tort litigation is found in products liability, medical liability, and motor-vehicle accidents).

152. Restitution is becoming more common in a variety of contexts. For example, restitution is now available for any federal criminal conviction. 18 U.S.C. § 3663 (1994). If restitution is not ordered, there must be a statement in open court of the reason. *Id.* at § 3553(c).

153. Such a fine would, of course, be paid to the state, not to the injured party. There exists some discomfort with the payment of punitive damages as a windfall to the plaintiff in tort cases. See COLO. REV. STAT. § 13-21-102(4) (1987 & Supp. 1995) (requiring that one-third of exemplary damages awarded to plaintiff be paid into state fund).

have little or nothing to do with tort law.¹⁵⁴ What would happen if a system based on personal responsibility were to replace the current tort system? Consider the following:

Scenario 1: The year is 2015. Fred is driving home from the office. Jim, also driving home, inadvertently runs a stop sign and crashes into Fred's car. Fred suffers a sprained neck and misses three days of work before recovering completely. Under his employer's disability and sick leave policy, Fred is fully compensated for the days off from work. In addition, his group medical policy pays his doctors' bills, except for a \$100 deductible. Fred's own automobile collision coverage pays for the damages to his car. Fred has significant neck pain for a few weeks, which he endures; it never occurs to him that somebody should have to pay him money because of his pain. One night, Jim comes to Fred's house for a visit. He apologizes for running the stop sign and injuring Fred. He voluntarily gives Fred a check for \$100 to pay for the medical expenses left uncovered because of the deductible.

Scenario 2: Same year. Jill is out for a walk in the morning. Bob has been drinking and is intoxicated; nevertheless, he is driving. Because of his inebriation, he veers onto the sidewalk and runs into Jill, who suffers a compound fracture of her right leg. Jill is between jobs, but she has purchased an individual health insurance policy. The policy has an eighty percent/twenty percent co-insurance provision, however, so Jill must pay twenty percent of her medical expenses, which amounts to \$1500. Bob is prosecuted criminally for drunk driving and reckless operation of a vehicle. He is fined, given a suspended sentence, and ordered to pay \$1500 restitution to Jill.

Scenario 3: The year is still 2015. John is an occasional patron at the Grill Room restaurant. One night, while at the Grill Room, he slips and falls on a dinner roll dropped earlier by a waiter. John suffers a concussion, but all his medical expenses are covered by his own health insurance policy. John is self-employed as a building

154. According to House Majority Leader Richard K. Arney, "[A]s soon as we ask what government should do about a problem, it releases us from our personal responsibility." David S. Broder, *Arney's Axioms*, WASH. POST, June 21, 1995, at A21. As a part of the dialogue surrounding last year's Million Man March in Washington, D.C., "[President] Clinton and [Minister] Farrakhan . . . both stressed the need for personal responsibility." David Maraniss, *A Clear Day, a Cloud of Contradictions*, WASH. POST, Oct. 17, 1995, at A21. "Everyone knows that Republicans preach smaller government, less regulation and more personal responsibility." Robert J. Samuelson, *The Public Trust: Handle with Care*, WASH. POST, Jan. 4, 1995, at A15. Former presidential candidate Lamar Alexander claimed, "We need a strong voice in Washington . . . who believes that the two most important words in our country's future are personal responsibility." Jeffrey M. Peyton, *Road to Victory '95 Inspires and Inspires Christian Activists*, CHRISTIAN AM., Oct. 1995, at 11.

contractor. Accordingly, his inability to supervise his crew while recovering costs him approximately \$300 profit in the form of a timely completion bonus that he would have made on his current job. The Grill Room reimburses John for the \$300. John continues to frequent the restaurant. The Grill Room, not wanting to develop a reputation as a dangerous restaurant, institutes new waiter training and stricter floor sweeping and inspection policies.

Welcome to the future world of personal responsibility. People who are injured expect as a matter of course to pay for or cover their own medical and disability expenses. Society has abandoned the notion that you can compensate for pain and suffering by paying money. Persons and entities who play a causal role in accidents help pay for uncovered expenses and losses not because the law forces them to do so, but because it seems like the right thing to do. Moreover, because tort actions have been abolished, the judge who presides over Bob's criminal trial does not have a docket clogged with civil cases. None of the parties in the above-mentioned scenarios, except Bob, need to get a lawyer. The yellow pages in 2015 no longer contain page after page of multi-color advertisements¹⁵⁵ by personal-injury lawyers.

The doctrinal underpinnings of such a system are already present in the law of torts. The rule of mitigation of damages, or avoidable consequences, if followed to its logical conclusion, dictates that injured parties should be required to make appropriate advance arrangements to cover accident losses. The collateral source rule is already in the process of being discarded and, therefore, should not preclude personal responsibility from assuming its proper place. Eventually, society may progress in a direction where the first words uttered after an auto accident or other injury are "Can I help?" rather than "Can I sue?"

155. The greater Norfolk (Virginia) Bell Atlantic yellow pages for 1995-96 contains more than 50 pages of such ads. BELL ATLANTIC, 1995-96 YELLOW PAGES (SOUTH HAMPTON ROADS) 616-71 (1995).