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SOCIAL THEORY AND JUDICIAL CHOICE: DAMAGES AND FEDERAL STATUTES

JANET S. LINDGREN*

The dominant mode of making choices in law, whether by legislators or judges, is a utilitarian calculation of the public good.¹ The persons for whom legal decisions are made are recognized in that calculation only to the extent that their interests coincide with those of the "public."² The prevalence of this mode of choice is

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1. The ideas that are part of utilitarian thought cluster and sometimes overlap, but they do not merge into any singular doctrine. Weber and Diesing explain utilitarian assumptions in describing a "rational bureaucratic society." M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* 349 (M. Rheinstein ed. 1954); P. DIESING, *REASON IN SOCIETY* 61 (1962). Richard Posner explains how economics rests on "the assumption that man is a rational maximizer of his ends in life, his satisfactions." He elaborates on the concept of efficiency: "a technical term; it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay." R. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (1972). Kenneth Arrow describes "social welfare functions," restating Bergson's formulation of the problem of making welfare judgments:

[T]he process [is] assigning a numerical social utility to each social state, the aim of society then being described by saying that it seeks to maximize the social utility or social welfare subject to whatever technological or resource constraints are relevant or, put otherwise, that it chooses the social state yielding the highest possible social welfare within the environment.

K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22 (1963). C. BAY, *THE STRUCTURE OF FREEDOM* 58 (1958) provides a concrete description of the consequences of a certain cut of utilitarian theory—Benthamites "tended to take it for granted that the greatest possible sum of happiness was to be achieved in an unequal society with a large and prosperous middle class." The primary factor I see in such thought, apparent in the contrast I draw between direct and vicarious treatment, is the willingness to exclude some individuals as a means of achieving the preferred society. For more general descriptions and discussion of utilitarian premises, see Grey's review of J. RAWLS, *A THEORY OF JUSTICE* (1971), in *The First Virtue*, 25 *STAN. L. REV.* 286 (1963), where he attempts to set the intellectual background against which Rawls writes. See also J. MILL, *UTILITARIANISM* (Fontana ed. 1962); A. QUINTON, *UTILITARIAN ETHICS* (1973); Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960).

2. I use the term "public" with the understanding that it means only some portion of the population that has the power to impose its views. R. WIEBE, *SEGMENTED SOCIETY* 168 (1975) expresses the variable nature of the term. "Public expresses an inclination rather than a formal state of affairs; it appears in degrees. As a leaning, it is measurable along a continuum—a range of publicness—that registers certain qualities of public behavior without insisting upon the simultaneous presence of all components."

constantly reinforced. First, with its continuing dominance, the understanding has often been lost that utilitarian assumptions are a choice, not a given—choices in law can be made on other bases. Without the awareness that a basic choice has been made, there is neither the desire nor the opportunity to develop or evaluate alternatives to that choice. Second, language reflects the uses to which it is put—both in the words and concepts that are available, and in the meanings that are attributed to them.³ The terms currently used in law have grown out of utilitarian expression and readily express utilitarian assumptions. Criticism is thereby limited because new terms are suspect, and unfamiliar words are less meaningful. Third, in developing alternative bases for choice in law, one must write incrementally and outside of familiar ground, for the growth and completion of these ideas comes with the reaction of others and with their testing in varying substantive areas. The development of alternatives is frustrated to the extent that response is reserved for writing within current assumptions or for fully developed alternatives.

Always present, and taken almost as a constant, the utilitarian assumptions that underlie legal choices tend to drop out of our consciousness and disappear from discussion. This article first unearths and describes these assumptions in one representative area of law. The next step, from description of current practice to developing alternatives, requires breaking a confining circle—concepts, language and questions that are free of the assumptions of the current model are needed, but that model has formed the language and concepts that are available and has determined which questions are important and which are trivial.⁴ The second portion of the article attempts to take an initial step in breaking that circle.

3. See S. MARCUS, ENGLER, MANCHESTER AND THE WORKING CLASS (1974); G. STEINER, LANGUAGE AND SILENCE (1967). Steiner deals with the phenomenon most directly in talking about the effect of the Nazi experience on the German language. Marcus describes a close relation between language and conclusion: "they are two parts of a single process." S. MARCUS, *supra* at 141.

4. See Homburger, *Private Suits in the Public Interest in the United States*, 23 BUFFALO L. REV. 343 (1974). Professor Homburger discussed the Eisen class action damage claim for \$65,000,000 for overcharges of \$70 per plaintiff by odd-lot brokers. "Thus enlarged in dimension, the lawsuit became a matter of public concern. The public is vitally interested in a serious charge which involves massive violations of the antitrust laws and affects millions of small investors in the United States and abroad." *Id.* at 345. The matter is "public" when it is large, and important when it is public. So we now find ourselves transforming persons into public entities, into "private attorneys general," before they can raise issues for the public, and relegating personal consequence to casual unconcern.

A basis for choice in law is described as the opposite of that currently prevailing—both public good and individual needs are defined in terms of the persons involved.⁵ It is for the courts, I argue, to implement that alternative, and it is crucial that they do so—crucial because implementation maintains the extremes within which other alternatives can develop, and because the values embodied in the alternative are important in themselves.

I. THE BASIS FOR CHOICE IN LAW

Legislators make choices in the creation of law. That fact is recognized without hesitation because the legislature is considered a political body.⁶ In making their choices, legislators have largely sought to “maximize the social utility or social welfare subject to whatever technological or resource constraints are relevant.”⁷ The desire to effect equality among individuals has seldom constituted such a constraint, and this willingness to exclude some individuals as a means of achieving the preferred society is characteristic of utilitarian efficiency.

Judges and legal commentators tend to suppress the political in their work, to assume that the basis for choice is settled. The assumption that the legal commentator is a neutral observer has prevailed almost as tenaciously as did the earlier natural law view that judges received or discovered the common law. Judges, especially when making decisions in a statutory context, still sometimes revert to the language of discovery and avoid the appearance of creation.⁸ Even when the existence of choice is recognized by

5. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969) described the basis for this view. “[W]e may insist that in our polity all be entitled to a measure of recognition simply because they are human.” The task then is to determine the content of that “recognition.” For example, C. BAY, *supra* note 1, at 11, makes the case for preferring those choices that facilitate each individual’s “health and growth toward the full attainment of his individuality.” Bay makes free expression the primary value and builds equality in by definition: “expression is not maximally free if some people are deprived of it or have less of it than others.” *Id.* at 59.

6. *E.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

7. K. ARROW, *supra* note 1, at 28.

8. Judges consistently act as though the legislature creates things—rights, interests, duties, obligations—which the courts simply receive. Gény early taught that what the legislature usually produces is generalities and principles from which the courts then build: As for other logical consequences to be deduced from these principles, the legislator has not suspected them In consecrating them, no one can claim either to be following his will or to be bowing to his judgment. All that one does

commentators or judges, the basis for making the choice—the social theory that informs choice—is still treated as a given, and it is the utilitarian assumptions, reinforced as I have described, that are regularly taken as the given. Judicial decisions, in opinion and outcome, thus tend to repeat the legislative effort to maximize the public good.

A. Damages Based on Federal Statute—A Useful Example

A person injured sometimes bases his or her claim for damages on a federal statute that neither provides for nor precludes such recovery.⁹ I have assumed that the parties injured in the instances that follow could have established the facts alleged. Each entry describes an injury, the statute on which a federal claim would have to be based, and the enforcement scheme provided by the statute. The

thereby is to develop a principle, henceforth isolated and independent of the will which created it, to transform it into a new entity, which in turn develops of itself, and to give it an independent life, regardless of the will of the legislator, and, most often in despite of it.

Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif* at xvi (1919), quoted in B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 144–45 (circa 1949). Thus from the requirement that “each person who engages in the transportation of gas or who owns or operates pipeline facilities shall comply with the requirements of such [Natural Gas Pipeline Safety] standards,” 49 U.S.C. § 1677 (a) (1) (1976), or from the prohibition against discharge for “garnishment for any one indebtedness,” it is the courts that create “rights” to employment, “obligations” to comply with procedure, “interests” in continued natural gas service, and “duties” to current employees.

9. Federal courts have exercised the power to determine whether damages will be available to persons basing their claim on violation of a federal statute that neither includes nor precludes damages. That exercise of power is usually based on “arising under” jurisdiction provided in 28 U.S.C. §§ 1331, 1337 (1976). Such jurisdiction would seem to have been clear since the Supreme Court in *Bell v. Hood*, 327 U.S. 678 (1946), concluded that federal courts had jurisdiction under § 1331 to determine whether they “can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments.” *Id.* at 684. See Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968). In most instances the courts, consistent with *Bell v. Hood*, go directly to determining whether the complaint states a claim for purposes of a FED. R. CIV. P. 12 (b) (6) motion to dismiss. See Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948). It is not my purpose to reinforce the case for the existence of that power nor to work out the possible remaining difficulties with its formulation. See *Cannon v. University of Chicago*, 438 U.S. 914 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Professor Hart, in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 332–35 (2d ed. 1973) [hereinafter cited as HART & WECHSLER], pushes the other side of the question: whether Congress can deny remedy by denying jurisdiction to any federal court to provide the remedy, and by prohibiting state court provision of remedy. The context of this article does not force us to that difficult question for these are all instances where federal question jurisdiction should be available and where Congress has not explicitly limited jurisdiction.

statutes cover occasionally overlapping problems of safety and health, labor, and economic planning. The statutory strategies vary from shared funding and statutory prohibition with penalties to administrative regulation with penalties. The claimants range from indigents in need of medical care to industrial users of regulated natural gas. These instances will provide the examples for subsequent argument.

Richard Doak was injured in a natural gas explosion at the Claxton Poultry Company where he was employed.¹⁰ Doak lost the use of one arm, ten years of expected life, and the use of his one good eye, leaving him legally blind. The natural gas distribution system was owned and operated by the city of Claxton, Georgia. The gas was distributed under pressure which exceeded safety standards established by the Department of Transportation under the Natural Gas Pipeline Safety Act of 1968¹¹ and adopted by the Georgia Public Service Commission.¹² Violators of these regulations are subject to a civil penalty of up to \$1,000 for each day that the violation continues, to a maximum of \$200,000 for any related series of violations.¹³ The Secretary of Transportation is given the power to require persons operating natural gas facilities to remove hazards to life or property.¹⁴

The trustees of the Wright Memorial Hospital obtained building grants of \$290,000 under the Hill-Burton Hospital Survey and Construction Act.¹⁵ The receipt of such funds is conditioned on the hospital providing "a reasonable volume of services to persons unable to pay therefore," though an exception to that requirement may be made if the provision of such services is "not feasible from a financial viewpoint."¹⁶ Floyd Stanturf, an indigent, was denied

10. *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975). The details were reported by his lawyers, Messrs. Merrill and Reeves, Clark & Merrill, Swainsboro, Ga.

11. 49 U.S.C. §§ 1671-1684 (1976).

12. *Id.* The Act does not apply to pipeline facilities within a state that, among other things, annually certifies that it "has adopted each Federal Safety Standard applicable to such pipeline facilities and transportation of gas established under this chapter as of the date of the certification." *Id.* § 1674 (a) (2).

13. 49 U.S.C. § 1678 (a) (1976). The penalty may be compromised by the Secretary, who may consider the size of the business, the gravity of the violation, and good faith in attempting compliance. 49 U.S.C. § 1678 (b) (1976).

14. 49 U.S.C. § 1672 (b) (1976).

15. *Stanturf v. Sipes*, 224 F. Supp. 883, 885 (W.D. Mo. 1963), *aff'd*, 335 F.2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S. 977 (1965).

16. 42 U.S.C. § 291c (e) (2) (1976). 42 C.F.R. § 53.111 (d) (1) (1979) sets the presumptive compliance guideline for uncompensated services for each year at "not less than the

services by employees of Wright Memorial and suffered injuries because of delayed treatment.¹⁷ The Surgeon General may withhold further federal payments if a hospital fails to meet the conditions of funding. If funding on the project that violated the statute has been completed, funds on related projects will be withheld "until the State repays or arranges for the repayment of Federal moneys to which the recipient was not entitled."¹⁸

The *Washington Post* employed Diana Powell as a part-time clerk.¹⁹ Powell notified officers of the *Post* on several occasions that some of the clerks they employed were working in violation of the Fair Labor Standards Act.²⁰ She was discharged by the *Post* when it learned of her intention to submit the matter to the Department of Labor. The Secretary of Labor investigated the operations of the *Post* and was unable to find any evidence of a violation of the statute. The Act prohibits discharge of, or discrimination against, any employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under . . . this chapter, or has testified, or is about to testify in any such proceeding."²¹ The penalty for retaliation is a maximum fine of \$10,000, or imprisonment for not more than six months for a second offense.²² Actions to restrain violations can only be brought by the Secretary of Labor.²³

Roger Breitwieser died at age sixteen when the forklift truck

lesser of 3 percent of operating costs or 10 percent of all Federal assistance provided to . . . the applicant under the Act."

17. It is not possible to draw a clear story from the trial judge's opinion. Stanturf claimed \$250,000 in actual damages and \$100,000 in punitive damages for the hospital's refusal to accept him as a charity or paying patient. He alleged that he had suffered severe exposure when his automobile was stuck in a snowdrift and that he was denied care at Wright Memorial the next day. Several days later he was admitted to another hospital and it was necessary to amputate both of his legs. Ironically, the trust agreement under which Wright Memorial Hospital was created provided that "[t]he purpose of this trust is to give free hospital, surgical and medical care to as many poor sick of the City of Trenton, Missouri, or of Grundy County, Missouri, as possible." *Stanturf v. Sipes*, 224 F. Supp. 883, 886 (W.D. Mo. 1963), *aff'd*, 335 F.2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S. 977 (1965).

18. 42 U.S.C. § 291 (g) (1976).

19. *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959).

20. 29 U.S.C. §§ 201-219 (1976).

21. *Id.* § 215 (a) (3). Because the court was unwilling to entertain a private action, it did not have occasion to decide whether a violation of § 215 (a) (3) exists when the employee has not complained to the Secretary of Labor and no investigation has commenced.

22. *Id.* § 216 (a). That section applies only to willful violation. "Retaliation" would seem to assume that state of mind.

23. *Id.* § 211 (a).

he was driving for KMS Industries turned over.²⁴ The Secretary of Labor had declared in an order that the operation of a high fork-lift truck was an occupation "particularly hazardous" for employees under the age of eighteen.²⁵ Employers who permit children to use such trucks violate the Fair Labor Standards Act.²⁶ Willful violation of the child labor provisions subjects a defendant to a penalty of \$10,000, and upon second conviction, to imprisonment for as much as six months.²⁷

Abelardo Flores and other slaughterhouse workers went on strike against the George Braun Slaughterhouse, largely on the issue of wages. Their employer hired Mexican nationals knowing they had entered the United States illegally. The strike was broken, and Amalgamated Meatcutters lost its union majority at George Braun when most of the striking workers either did not return or were not rehired.²⁸ The Immigration and Nationality Act²⁹ excludes aliens "seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined . . . that . . . there are not sufficient workers in the United States . . . , [and] the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."³⁰ Conviction for willfully or knowingly concealing, harboring or shielding from detection an illegal alien subjects the offender to a fine not exceeding \$2,000 and to imprisonment for a term not exceeding five years.³¹ The mere fact of employment is not "deemed to constitute harboring."³²

John Stewart was discharged by the Traveler's Insurance Company when his wages were garnished for one debt.³³ Such a

24. *Breitwieser v. KMS Indus.*, 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973).

25. *Id.* at 1392.

26. 29 U.S.C. § 212 (c) (1976).

27. 29 U.S.C. § 216 (a) (1976).

28. *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973). The cryptic *per curiam* opinion tells little of the story: plaintiffs based their claim on "employment of Mexican nationals who illegally entered the United States." *Id.* at 280. The details were provided by Frank Herrera, San Antonio, Texas, attorney for plaintiffs.

29. 8 U.S.C. §§ 1101-1503 (1976).

30. *Id.* § 1182 (a) (14).

31. *Id.* § 1324 (a).

32. *Id.*

33. *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974).

dismissal is prohibited by the Consumer Credit Protection Act.³⁴ The Secretary of Labor failed to seek reinstatement or damages for Stewart pursuant to his authority to enforce the provisions of the statute.³⁵ The penalty that Congress provided for a willful violation of the restriction on discharge from employment for garnishments was a fine of not more than \$1,000 and imprisonment for not more than one year.³⁶

Kansas-Nebraska Natural Gas Company provided process and boiler gas to Farmland Industries for the manufacture of anhydrous ammonia for use as fertilizer. The facilities used by Kansas-Nebraska were constructed under a certificate of convenience and necessity issued by the Federal Power Commission, and were the only source of natural gas in the region. In January 1971, during a contract dispute, Kansas-Nebraska abandoned boiler gas service for two weeks without obtaining permission as required by the Natural Gas Act.³⁷ The increased cost to Farmland of using fuel oil for the two week period was \$33,824.³⁸ The Commission can seek injunctions in district court whenever it appears that any person is engaged in, or about to engage in, any acts that violate the statute.³⁹ A maximum fine of \$5,000, or imprisonment for not more than two years, is the penalty for a knowing and willful violation, with an additional fine of \$500 for each day the offense occurs.⁴⁰

Maintenance, Inc. was the low bidder for a contract to furnish commercial janitorial services for the McDill Air Force Base at Tampa, Florida. The contract was a "small-business set-aside contract" for which only a small-business concern is eligible to bid.⁴¹

34. 15 U.S.C. § 1674 (a) (1976).

35. 15 U.S.C. § 1676 (1976) provides that "The Secretary of Labor, acting through the Wages and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter."

36. 15 U.S.C. § 1674 (b) (1976).

37. 16 U.S.C. § 717 (1976). *Farmland Indus. v. Kansas-Nebraska Natural Gas Co.*, 486 F.2d 315, 316-17 (8th Cir. 1973).

38. This was the sum awarded as damages by the district court for unlawful termination of service of boiler gas.

39. 15 U.S.C. § 717s (a) (1976).

40. 15 U.S.C. § 717 (T) (1976).

41. *Royal Serv. Inc. v. Maintenance, Inc.*, 361 F.2d 86 (5th Cir. 1966). The Aid to Small Businesses Act, 15 U.S.C. §§ 631-647 (1976), defines a small business as "one which is independently owned and operated and which is not dominant in its field of operation," *id.* § 632, and authorizes the administrator of the Small Business Administration to develop size criteria. Those criteria, enacted pursuant to § 634 (b) (6) of the Act, appear at 13 C.F.R. § 121.3 (1979). The Administration and the contract procurement or disposal

Maintenance and Royal Services each certified in writing to the procurement division of the Air Force, as required, that it was a small business concern within the rules and regulations of the Small Business Act.⁴² Maintenance did not qualify as a small business, and its misstatement violated the Act. Royal Services, the next lowest bidder, did qualify. Royal lost profits because it did not obtain the contract. The statute provides a penalty of \$5,000 or two years imprisonment for knowingly making a false statement for the purpose of obtaining benefits under the Small Business Act.⁴³

I find no cases that force judges to examine, much less to articulate, their fundamental assumptions. The fact of choice in assumptions can always be denied or ignored. The cases I have just described are nonetheless particularly useful ones for examining judicial assumptions about the relation of public and individual good, for the easiest avoidance techniques are unavailable in them and the issue is relatively clear and isolated.⁴⁴

The court cannot postpone consideration of the needs of individual parties in the cases that I have described. Damages are the last opportunity for a federal judge to decide how injury to individual good is to be related to the public good defined by the legislature.⁴⁵ It is the last point at which a judge can decide how

agency determine when contracts shall be set aside for small businesses pursuant to the criteria at 15 U.S.C. § 644 (1976), including "(3) . . . the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns"

42. 15 U.S.C. §§ 631-647 (1976).

43. *Id.* § 645 (a). Maintenance, Inc. and Royal Services were each required to certify in writing to the procurement division of the Air Force that they were a small business concern within the rules and regulations of the Small Business Act, 15 U.S.C. §§ 631-647 (1976).

44. The disadvantage of using these cases is that the question of the proper relation of the federal courts to Congress and to the states is so consistently analyzed and debated (*see, e.g.*, Cannon v. University of Chicago, 438 U.S. 914 (1979); and HART & WECHSLER, *supra* note 9—taught in law schools throughout the country), that these issues easily overshadow all others. It is clear from the contrast between judicial decisions before and after 1972, that these concerns need not preclude judicial activity in these cases. Instead, I suggest that current deference to the states and to Congress illustrates the strength of commitment to resolving cases on their "public issues."

45. When damages are claimed in state court, statutes are most often relied on to help in setting the standard of care for negligence. Sometimes the statute is given greater weight than others. Compare *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987, 300 N.Y.S. 1051 (1939) with *Daggett v. Keshner*, 284 A.D. 733 (1954). The nuances of state court use of statutes in tort are elaborated in Fricke, *The Judicial Nature of the Action on the Statute*, 76 L. Q. REV. 240 (1960); Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622 (1951); James, *Statutory Standards and Negligence in*

the statutory valuing of employment, free from pressure by illegal aliens, is to be related to Abelardo Flores and the other laborers who struck against George Braun Slaughterhouse in order to improve their bargaining position. It is the last point at which the judge can decide how the statutory valuing of medical care for indigents is to be related to the denial of medical services to Floyd Stanturf. The finality of these damage claims is apparent by contrasting them with claims for preventive relief.⁴⁶ The Supreme Court refused to recognize a cause of action when commuter passengers sought to enjoin a scheduled cut in railroad service in Illinois. The justices felt that interference by injunction would diminish the efficacy of the congressional scheme whereby Amtrak was to pare unprofitable routes to save viable ones.⁴⁷ After the Supreme Court's decision there was still the opportunity for the courts to provide damages in the future to commuters injured by any cut in service that violated the Rail Passenger Act.⁴⁸ Congress may have perceived the same difference between preventive relief and damages when it reserved equitable powers to the Secretary of Labor under the Fair Labor Standards Act and the Federal Hazard-

Accident Cases, 11 LA. L. REV. 95 (1950); Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189 (1965); Loundes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143 (1949); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948).

It is usually the extent of the development of tort doctrine in a particular jurisdiction that determines the likelihood that plaintiff will be able to seek damages. Distinct claims based on a federal statute in state court are rare.

[W]e have found no case, and counsel have cited none, wherein a state court has carved out the form, content and bounds of such a remedy from a federal statute when the statute is totally silent on the subject. On the contrary, the language of the federal cases would seem to direct that the form, nature and perimeters of the federal right are to be forged and defined by the federal courts

Larez v. Oberti, 23 Cal. App. 3d 217, 223, 100 Cal. Rptr. 57, 61 (1972). Occasionally, the state courts treat the question as one of implying a remedy from statute—though that hardly seems necessary for a court of unlimited jurisdiction with a general law of tort. In Kube v. Kube, 193 Neb. 559, 227 N.W.2d 860 (1975), the court talks in terms of an implied right of action but does not provide one.

46. Injunctive relief is often preferred, especially when the suit potentially involves the cumulated damages of many plaintiffs. Wright's first hypothesis for further study of remedies was that "[p]reventive relief is the most desirable kind of relief." Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 381 (1955). Whether more desirable or only more desired, this hypothesis has not been studied any more than in 1955, when Wright advocated such an inquiry.

47. National R.R. Pass. Corp. v. National Ass'n of R.R. Pass., 414 U.S. 453, 461-62 (1974).

48. 45 U.S.C. §§ 501-644 (1976).

ous Substances Act,⁴⁹ but imposed no limitation on who might seek damages.⁵⁰

In common law decisions, the judge both determines what is important enough to protect *and* whether damages for injury can be sought. When the court performs both roles, it seldom recognizes an interest until it is ready to provide relief to the persons injured. Thus it need never discuss the relation of private recovery and public welfare.⁵¹ By contrast, the body making choices about

49. 15 U.S.C. §§ 1261-1274 (1976).

50. 29 U.S.C. § 211 (a) (1976). In injunction actions to enforce 29 U.S.C. § 212 (1976), the child labor provisions, the Secretary's actions are subject to the direction and control of the Attorney General. Similarly, the Hazardous Substances Act, 15 U.S.C. §§ 1261-1274 (1976), provides: "all . . . injunction proceedings for the enforcement, or to restrain violations of this chapter shall be by and in the name of the United States." *Id.* § 1268.

When individuals are injured, or about to be injured, and seek injunctive relief, writers often voice concern that this will interfere with complex and delicate administrative planning, especially when the agency has a legislative mandate to obtain compliance informally. For example, the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684 (1976), directs that the Secretary, before seeking an injunction, should whenever practical, give notice to violators, afford an opportunity for the violator to present his views and provide a reasonable opportunity for compliance. *Id.* § 1679. The concern is described in detail in particular statutory contexts in Securities Investor Prot. Corp. v. Barbour, 421 U.S. 412 (1975); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998-1002 (D.C. Cir. 1973); and Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975). By contrast, especially when damages rather than injunctive relief are sought, some judges assume there is no conflict between the needs of the administrator and the desires of the private claimant. *Martinez v. Behring's Bearings Serv.*, 501 F.2d 104, 108 (5th Cir. 1974) ("Those employees wishing to sue in his or her own behalf can only lighten the burden of the Secretary and increase the effectiveness of the Act."); *Fagot v. Flintkote Co.*, 305 F. Supp. 407, 414 (E.D. La. 1969). The problem is less significant when damages after the fact of injury are sought, and can probably be resolved in either instance through the concept of primary jurisdiction in the relevant agency. That doctrine is summarized and applied in *Eisman v. Pan Am. World Airlines*, 336 F. Supp. 543, 547 (E.D. Pa. 1971), and in *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973). *Cf. Stewart v. Travelers Ins. Corp.*, 503 F.2d 108, 113 (9th Cir. 1974) ("The issues raised in § 1674 (a) claims are simple ones, not requiring special knowledge of a particular industry or type of employer.").

51. The Illinois Court of Appeals proved an exception when it dismissed a complaint by a child against a parent who caused the child to be born illegitimate. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1966). The court "designat[e]d the wrong committed herein as a tort," but dismissed the action "because of our belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here." *Id.* at 262, 190 N.E.2d at 859. Still, the judge writing for the majority was aware "that an action for damages is implicit in any wrong that is called a tort . . . [and] it may be inconsistent to say, as we do, that the plaintiff has been injured by a tortious act and then to question, as we do, his right to maintain an action to recover for this act." *Id.* at 259, 190 N.E.2d at 857-58. The circularity that can occur between right and remedy in common law—and which often does in tort—is apparent in the maxim *ubi jus ibi remedium*, "for every right there is a remedy"; for if there is no remedy, then there is no right. Likewise, J. FRANK, *COURTS ON TRIAL* (1940) collapsed questions of right and remedy, taking the eminently pragmatic view that a legal right is a lawsuit won. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), allows courts to determine rights "whether or not further relief is or could be sought," but 28 U.S.C. § 2202 (1959) provides for "[f]urther necessary or proper relief" based on the declaratory judgment.

what constitutes the public good in the federal statutory damage cases is separate from that determining whether the person injured is entitled to seek damages. The cases are ones where the statute neither grants nor precludes such suits. Congress' determination of what constitutes the public good is found in statutes that either prohibit or require certain conduct. The statute indicates that the risk dealt with is no longer one of the background risks that must be accepted as part of the price of living in a complex society.⁵² Thus, the legislature has determined that it is in the public interest that the abandonment of natural gas service be controlled by a public agency and that employees not be discharged for reporting statutory violations. What a court then does with these legislative messages is a judicial choice. Judges in the Eighth Circuit have permitted Farmland Industries to seek damages from Kansas-Nebraska Gas for the abandonment of natural gas service without Federal Power Commission permission. Judges in the District of Columbia Circuit have denied Diana Powell the opportunity to seek damages for her discharge in retaliation for reporting wage and hour violations. But whether or not they face what their answer says, judges in these cases must determine the relation between the public good and the individual claim. They cannot simply deny the former until they are willing to seriously consider the latter.

Since the institutional division of labor between Congress and court in these cases separates the determination of what constitutes the public good from the determination of the necessity of private recovery for injury, only the question of the relation between the two remains. The question is isolated in these cases, and cannot be postponed, whether or not it is faced.

B. *Utilitarian Assumptions in Operation*

Federal judges in deciding the cases described consistently focus on public concerns to the exclusion of the claims of the parties involved.⁵³ That they take this level of inquiry as a given

52. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 543 (1972).

53. Commentators have seldom gone further than the courts. The casenote tradition tends to prevail; such discussion as there is reacts to a case and thus to a particular statute. Longer articles tend to be multiple casenotes. Commentators thus largely describe and sometimes criticize judicial opinions. But since the criticism tends to go to the adequacies of judicial logic given judicial premises, or to judicial success in meeting the goals the

is reflected in the language used throughout the decisions. Judges ask in their opinions "does the statute imply a remedy?", not "do I choose to provide a remedy based on the statute?" The judges repeatedly use certain techniques in their opinions: (1) they treat the question about the relationship of public and individual good as one about the existence of a cause of action, which distances them from the parties; (2) they focus on the legislature rather than the parties, hoping to find a legislative answer; and (3) they treat public issues as determinative without explaining that choice. These techniques are detailed in the following sections and I argue that each is a choice, that the judges are not compelled to any of these approaches.

1. *Keeping distance from the parties*

It has been clear since *Bell v. Hood*⁵⁴ that federal courts have jurisdiction over cases in which the damages sought are based on violations of federal statutes that do not provide for damage actions. The courts have consistently acted on that assumption.⁵⁵ In disposing of these cases, judges must determine whether there is a cause of action and, if there is, whether damages are an appropriate remedy. Although each issue must be decided, emphasis and attention can and do vary among them.⁵⁶

judges set, there is little inquiry about questions the judges do not raise and about the basic role of particular sorts of remedies in our jurisprudence. Some articles go beyond reporting judicial formulations. See, e.g., Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963) (the oft-cited classic, for the author provided some clarity and sorted out basic problems before the courts had done so). O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231 (1964) worried generally about the unintended elimination of existing common law rights by the passage of statutes. In Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 389 (1976), the authors attempted to formulate a new test, suggesting that the test of Amtrak and Ash was too restrictive. In Comment, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413 (1972), the author described two modes of judicial decision which vary in their attitude toward statute. While I do not find the distinction particularly useful, it is an attempt to find some organizing principle for a large number of cases—beyond what the judges talk about.

54. *Bell v. Hood*, 327 U.S. 678 (1946). This is so despite the occasional opinion dismissing plaintiff's claim for lack of jurisdiction.

55. See, e.g., *Britton v. Grace Line Inc.*, 214 F. Supp. 295 (S.D.N.Y. 1962) (citing *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir. 1949)).

56. Justice Douglas, dissenting from the denial of an injunction against the termination of certain railroad lines in *National R.R. Pass. Corp. v. National Ass'n of R.R. Pass.*, 414 U.S. 453, 467 (1974), observed that "[t]he Court phrases the question in terms of whether a 'right of action' exists, saying no question of 'standing' or 'jurisdiction' is

Federal courts now virtually always make the existence of a cause of action the only crucial question, and in so doing they keep their distance from the individuals who make the claim.⁵⁷ The existence of a cause of action is determined by looking to the legislature and to state law. The facts are treated hypothetically, if at all. The courts ask

[f]irst, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff . . . and finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?⁵⁸

The distance is increased by the assumption that determining the existence of a cause of action is only a matter of sorting among courts. The judge who denies a cause of action may view the decision as holding only that "there is no relief in this court," or that "there is no relief on this theory."⁵⁹

presented. Whatever the merits of distinction between these three concepts may be in some situations, the difference here is only a matter of semantics." I am inclined to think that the choice often makes a difference; that certain concerns are more easily raised under one concept than another. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

57. In *Cort v. Ash*, 422 U.S. 66, 69 (1975), a shareholder of Bethlehem Steel objected to the use that the Chairman of the Board of Directors had made of general corporate funds in the 1972 election. Cort had advertised for fair treatment of the business community in the campaign and mailed circulars on that topic. Ash claimed that this use of corporate funds violated the Corrupt Practices Act limitations on political contributions and purchases, and that Cort would have been liable under the Act for a fine of up to \$1,000 and imprisonment for up to one year; if the violation was willful, a fine of \$10,000 and two years imprisonment could have been imposed. 18 U.S.C. § 610 (1976). In deciding the claim against Cort, the Court found "no occasion to address the questions whether § 610 properly construed proscribes the expenditures alleged in this case." 422 U.S. at 69-70.

58. *Cort v. Ash*, 422 U.S. 66, 78 (1975). More recently, in *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 24-37 (1977), Justice Burger gave primary attention to finding the answer in the legislative history, afterwards using the analysis from *Cort* to confirm conclusions reached on the basis of the legislative history. 430 U.S. at 37. Justice Stevens questioned whether *Cort* provided the appropriate standards. 430 U.S. at 66.

59. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958) observe that:

English courts had never been accustomed to face the question of right of action or no right of action squarely and systematically. In denying relief they were used simply to saying "This form of action does not lie" or "There is no remedy for you in this court." With the advent of a single form of action, their tradition gave

There is an alternative to the distance that comes with letting legislative intent and the possibility of recovery "somewhere else" decide these cases. In elaborating that alternative it needs to be understood that while it is sometimes true that relief can be had in the state courts or on another federal basis, a federal judge in denying a cause of action based on federal statute can usually only guess whether that is true, and will sometimes effectively be saying to plaintiff, "you cannot ask for damages anywhere."⁶⁰ Realizing that, it is entirely possible to change the questions for determining the existence of a cause of action from ones of actual intent of the legislature to ones of possibility—could the legislature rationally have intended the statute to benefit the claimant, and was the injury caused by conduct that violated the statute.⁶¹ A court deciding a case similar to Farmland Industries' claim against Kansas-Ne-

them no body of systematic thought for dealing with the fundamental questions of remedy vel non. American courts inherited this vacuum of basic jurisprudential thinking.

Id. at 500.

60. A federal judge's decision to leave the plaintiff's claim to a state court is based on a "public issue," unrelated to the parties before the court, when it is based on concerns about federalism, *Cort v. Ash*, 422 U.S. 66 (1975); concerns about judicial resources, *Breitwieser v. KMS Indus.*, 467 F.2d 1391 (5th Cir. 1972); or about legislative primacy on questions related to statute, *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977). The federal courts that choose to leave the question of damages for injury defined by statute to the states cannot assume that state tort law will recognize and respond to the injury, for state courts too can choose to decide their cases on issues unrelated to the particular parties. The variability of state court treatment of injury defined by violation of statute insures that the federal courts cannot leave the case to the state courts because of the concerns listed above and still be assured that the interests of the particular parties will be attended.

When it is clear that there can be no recourse to the state courts, the federal choice is squarely presented. The judge in *Farmland Indus. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 681 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973), concluded that "[a]warding of damages for loss [not an increase in rates] arising from the unauthorized abandonment cannot be made, apparently, in any forum except the federal court." Likewise, in the cases where plaintiff claims a common law right to continued employment, there will often be no recognized state action. Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

61. This form of inquiry is similar to equal protection analysis, where the courts have asked whether there is a rational relation between the means used in the statute and the end of the statute—that "end" often intuited by the courts. Its use would have changed part of the opinion in *Cort v. Ash*, 422 U.S. 66 (1975), for there the court acknowledged that both a primary and secondary purpose could be derived from the statute through the legislative history. The court was unwilling to facilitate the purpose of protecting shareholder funds from corporate use in elections for it thought that purpose "at best . . . secondary." *Id.* at 81. Rather, the court focused on protection of the electoral process, which it took to be the "primary purpose." The existence of multiple purposes is more troublesome when the purpose on which plaintiff relies is *inconsistent* with what the court sees as the primary purpose. See *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977); *Moen v. Las Vegas Int'l Hotel, Inc.*, 402 F. Supp. 157, 161 (D. Nev. 1975), *aff'd*, 554 F.2d 1069 (9th Cir. 1977).

braska Gas could ask whether Congress could have rationally intended to benefit a commercial customer by requiring under the Natural Gas Act that a seller of natural gas, operating under a certificate of convenience and necessity, obtain Federal Power Commission permission before abandoning service. Evaluating a claim like Stanturf's against Wright Memorial Hospital a court could ask whether Congress could have rationally intended to benefit indigent patients by requiring federally funded hospitals, unless excepted for financial reasons, to provide a reasonable volume of services to indigents.⁶² Similarly, Doak's claim against Claxton could have depended on whether Congress could have rationally intended to benefit persons working near piped natural gas. When the legislature could have rationally intended to benefit a plaintiff in passing a statute—the case whenever a plaintiff's injury was a foreseeable consequence of a statutory violation⁶³—then the court would go on to consider whether the injured plaintiff should be allowed to seek damages.⁶⁴ Given this alternative, distance from

62. Since a "reasonable volume" does not necessarily provide care for all needs of all indigents, problems are created for any single plaintiff's claim. A plaintiff would have to establish that the failure to provide the services required by statute was the conduct that caused his or her injury. If the standardized percent of budget that constitutes by regulation a "reasonable volume" would have been exhausted by services given higher priorities, the indigent who is denied a lower priority service may not have been injured by the failure to provide the statutorily required amount of service.

63. So stated, this definition of rational legislative intention draws on tort concepts of foreseeability. That would seem to make sense if damages provided for by statutes are seen as part of tort. True, foreseeability as a limiting concept is often accused of providing little aid or comfort. But there are instances where its use would incline one to say that no legislature would rationally have chosen to benefit plaintiff by a particular statutory creation. In *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3rd Cir. 1975), first class passengers on a European tour complained that the accommodations and services provided were not those promised. They then alleged that "tourist class services were superior to their own 'first class' accommodations." *Id.* at 335. Their claim was that the Federal Aviation Act, which prohibits discrimination by a regulated air carrier, 49 U.S.C. § 1374 (b) (1976), provided a basis for their claim for damages. The court denied relief noting that "if it were discrimination, then every breach of a contract by an airline would give rise to a private cause of action under § 1374 (b). There would always be another unbreached contract to which the disgruntled air passenger could compare the services performed to him." 523 F.2d at 335 (footnote omitted). In terms of foreseeability, it seems unlikely that Congress would choose to try to stop breaches of contract by airlines by prohibiting them from discriminating against passengers.

64. *Fitzgerald v. Pan Am. Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), was a very early implied remedy case based on a statute prohibiting airline discrimination in provision of services. In subsequent cases the courts worked out the details of a cause of action: *Archibald v. Pan Am. World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972); *Williams v. Transworld Airlines, Inc.*, 369 F. Supp. 797, 803 (S.D.N.Y. 1974); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972); *Flores v. Pan Am. World Airways*, 259 F. Supp. 402 (P.R. 1966). This statutory area is one of very few where cases have come back to the courts for attention once the existence of a cause of action has been recognized.

the parties and attention to issues which transcend the parties is a judicial choice.

2. *Attributing the answer to the legislature*

When the legislature has made a choice in the statute about the treatment of persons injured, the courts do not have to undertake that task. Congress chose to allow injured parties to seek damages under the 1971 amendments to the Economic Stabilization Act of 1970⁶⁵ and the Age Discrimination Act of 1967.⁶⁶ Congress appears to have chosen to prohibit injured parties from recovering under the Occupational Safety and Health Act, the Federal Hazardous Substances Act, and the Natural Gas Pipeline Safety Act.⁶⁷ When the legislature has made no choice about damages explicit in the statute, judges and commentators continue to look for a legislative choice in the legislative history.⁶⁸ Sometimes the search is general, as when the Supreme Court, "[i]n determining whether a private remedy is implicit in a statute not expressly providing one," asks "is there any indication of legislative intent, explicit or

65. Pub. L. No. 92-210, § 210, 85 Stat. 743 (1971).

66. 29 U.S.C. § 626 (c) (1976).

67. *E.g.*, The Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 provides: [n]othing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease or death of employees arising out of, or in the course of, employment.

Id. § 653 (b) (4) (1976).

In the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684 (1976), Congress provided that "[t]he remedies provided for in this section shall be in addition to and not in substitution for any other remedies provided by law." *Id.* § 1675 (e). More important, it is provided that "[n]othing in this chapter shall affect the common law or statutory tort liability of any person." *Id.* § 1677 (b).

68. Sometimes judges urge caution in this search of legislative history. In *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977), Justice Burger warned about the difficulties in relying on legislative history before going on to do so. "Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously As Mr. Justice Frankfurter reminded us; 'We must be wary against interpolating our notions of policy in the interstices of legislative provisions'" A rare exception to reliance on legislative history is in *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603, 606 (E.D. La. 1970):

We do not feel that it is necessary to delve into the legislative history of the Hill-Burton Act in order to reach this conclusion. Rather, we are of the opinion that the act, by its own terms, makes it plain that persons unable to pay for medical services are one of the chief sets of beneficiaries of this legislation. It is a matter of the clearest logic that the only real beneficiaries of a hospital program are the people who need or may need medical treatment.

implicit, either to create such a remedy or to deny one?"⁶⁹ On the other hand, at times the search is for something very specific:

Did Congress by the pertinent provisions of the Small Business Act and the rules and regulations promulgated thereunder and the requirement that a bidder prior to the opening of the bids make a good faith certification respecting his status as a small-business concern manifest an intent, in the event that certification was untrue and such bidder was awarded the contract, to give a cause of action against such bidder to the next lowest bidder for loss of profits?⁷⁰

A court, in so determining the question to be answered, limits its task to pronouncing the legislature's choice about the public good. By so defining the judicial task, the court avoids examining the assumption on which it would act had the legislature not provided the answer. The limits to this approach become apparent when one examines further what the courts try to do and what they have to work with.

In their search for a legislative answer the courts treat legislative choice scientifically, as something that can be discovered and described. Discovery is taken to be a function of finding the right way to study the phenomenon and doing so with sufficient care and diligence.⁷¹ The increasing distribution of legislative hearings and documents reinforces the aura of scientific knowledge—"that it [is] public and not private, explicit and not 'secret', available in a common fund for use by all who can learn."⁷² But, contrary to the scientific ideal, legislative intent about damages for persons injured by statutory violation evades discovery and description. This is so because the process of passing a statute involves "legisla-

69. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

70. *Royal Serv., Inc. v. Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966).

71. For example, in *Rauch v. United Instruments, Inc.*, 405 F. Supp. 435 (E.D. Pa. 1975), *rev'd*, 548 F.2d 452 (3rd Cir. 1976), the judge faced a class action claim for \$75 per member based on the Federal Aviation Act, 49 U.S.C. § 1301 (1976). In reaching the decision to allow the claim, he observed, "what *slim evidence* of congressional intent there is suggests to this Court that a private right of action for violation of the Aviation Act was within the contemplation of Congress when it enacted the statute." 405 F. Supp. at 440 (emphasis added).

72. EVIDENCE AND INFERENCE 7 (D. Lerner ed. 1958). The instinct to avoid choice by seeing the answer as dictated by fact grows out of uncertainty about the basis for choosing among values. It is not a reaction confined to the courts. See Ackerman, Book Review, 103 DAEDALUS 119, 122-23 (1974) (J. FRANK, LAW AND THE MODERN MIND) "[T]he bulk of legal writing in the academy, lawyer's brief, and judicial opinions still follows the classic Harvard mode of conducting a reasoned search among legal materials for 'the' legally correct doctrine," assuming as fact that there is one.

tive choice" on only a core of issues, and remedies for private injury are usually subject to that part of the process where it is choice that is *avoided*.⁷³

The process of legislation is described as one of compromise among legislators and among interest groups by the writers who use that compromise to validate the choices made, and by those who attack it as undemocratic.⁷⁴ Evidence of compromise is taken to indicate "legislative choice." Avoidance of choice is the less evident part of the process, yet it is particularly important as a complement to compromise in getting legislation passed.⁷⁵ It is the less evident part of the process, less understood, and particularly important here. The interplay of avoidance and compromise is detailed in the following abstract of the legislative process.

A legislator can support a statute if he or she can put together

73. When this is so, inference is from silence. These inferences from congressional silence are drawn in two ways—that Congress was capable of clearly and directly providing that which is missing and therefore must have chosen to reject it, *expressio unius est exclusio alterius*, *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890, 894 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972); or that Congress could have provided that which is missing and in failing to do so choose to leave that issue open. Justice White in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), derived legislative intent from the overall structure of the Civil Rights Act where some titles provided for a private cause of action but others did not. In the final line up on this issue "[f]our Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for the purposes of this case." *Id.* at 379–80. Justice White was unwilling "merely to assume an affirmative answer," *id.* at 380, and from his discussion concluded that no private cause of action was intended for a Title VI claim.

The court in *Fagot v. Flintkote Co.*, 305 F. Supp. 407, 414 (E.D. La. 1969), suggested that "[i]nferences drawn from Congressional silence are rarely useful, and frequently wrong," and urged attention rather on "the legislative product . . . the language that was constitutionally enacted into law." The court in *Flintkote* and Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) criticize the former approach. The most elaborate discussion of congressional silence in Biklé, *Silence of Congress*, 41 HARV. L. REV. 200 (1924), where the author attempted to determine whether federal action on the commerce clause precluded subsequent state action in the same area or only required state action consistent with the congressional action.

74. T. LOWI, *THE END OF LIBERALISM* (1969) describes "interest-group liberalism" as the currently predominant public philosophy. It turns, as he describes it, on the assumption that "one organized group can be found effectively answering and checking some other organized group as it seeks to prosecute its claims against society." *Id.* at 71. The legislature is expected to represent the same process. Madison urged something like this view in what G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969), describes as a "kinetic theory of politics." "[S]uch a crumbling of political and social interests, such an atomization of authority, such a parcelling of power . . . creating such a multiplicity and a scattering of designs and passions," that no combination could control. "Yet out of the clashing and checking of this diversity Madison believed the public good, the true perfection of the whole, would somehow arise." *Id.* at 605. Lowi criticizes this view.

75. E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948) ("Agreement is then possible [in a legislature] only through escape to a higher level of discourse with greater ambiguity." *Id.* at 31.)

an acceptable and credible set of assumptions about what a statute means and the effect it will have. The larger the number of combinations of assumptions that exist, the broader the potential range of supporters. The initial combinations of assumptions about function, enforcement and audience for a statute are many and varied when silence is mixed with explicit provision.⁷⁶ The process of actually passing the statute is then one of narrowing these combinations. Certain issues become focused and critical. The first reduction of possible combinations occurs when those issues are explicitly dealt with in the statute, rather than left to silence and autonomous judicial or regulatory action.⁷⁷ Once an issue is written into the statute, the remaining combinations are determined by

76. Legislators may assume that the function of a proposed statute is to declare values for the collective, or to regulate conduct, or to regularize conditions, or to avoid more stringent regulation, or to facilitate collateral goals—one, some or all of these. For example, G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916* (1963) sees business as favoring and facilitating regulation for its own purposes, rather than regulation having been simply imposed upon business by reform efforts. A legislator may anticipate any of a variety of responses from the audiences to whom he or she takes the statute to be relevant. An executive agency may choose to enforce the provision rigorously, normally, or hardly at all, depending on its perception of legislative intent, its own evaluation of the situation, or the resources made available to it. It may accomplish the result without legislative authorization. A judge may choose to respond to a statute at any of the levels Pound describes, ranging from receiving the statute fully into the body of law, and reasoning from it in preference to judge-made rules, to giving it "a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly." Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 385 (1908). The choice may turn on perception of the importance of legislative creations, assumptions about legislative intent, assumptions about executive enforcement of judicial choices on the issue, assessment of the needs of a public or of the parties, or on plain personal preference. A court may reach the same result without a statute, relying on judicial rather than legislative creation. A beneficiary of the statute, depending on his or her perception of enforcement, may not change position, may rely on what he or she takes the statute's assurance to be or may never know of the statute's existence. Those controlled by the statute, depending on perceptions of enforcement and the costs of compliance, may comply, may enjoy the predictability the statute provides, may ignore the statute or may likewise never know of the statute. A state, under a federal statute, may take the statute as an imposition on its domain, as shifting considerable expense from the state and providing needed services or as insignificant.

Variables such as obligations owed for votes given on other legislation, party loyalty, loyalty to individual legislators or interests, or campaign pressures—all unrelated to the substance of an act—can multiply the possible combinations of assumptions about a statute still further. A. McADAMS, *POWER AND POLITICS IN LABOR LEGISLATION* (1964) provides a wealth of examples. See also E. REDMAN, *THE DANCE OF LEGISLATION* (1973). Other statutes, particularly those for appropriations, provide later opportunities to reinforce or negate earlier commitments.

77. Legislators chose affirmatively to provide that the Occupational Safety and Health Commission give consideration in assessing penalties to "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666 (i) (1976). Thus legislators considering the bill could no longer assume that the enforcement agency might or might not think itself free to vary penalties on those considerations.

the maximum and minimum expansion the language chosen for the provision will bear—and that may be considerable.⁷⁸ On some occasions, in an attempt to escape some of the vagaries of language, legislators set out both the minimum and maximum expanses for the language used. Thus Congress provided in the Occupational Safety and Health Act⁷⁹ that “nothing in this Act shall be construed to . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of or in the course of employment.”⁸⁰

78. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). J. FRANK, COURTS ON TRIAL 292-309 (1940) contains a chapter on “Words and Music: Legislation and Judicial Interpretation.” In the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), the process by which the Secretary of Labor is to produce regulations was explicitly described, as was the standard by which the courts were to review them. The procedures provide for notice and comment and allow for public hearing on request. *Id.* § 655 (b). Any person adversely affected by a standard issued may petition for judicial review wherein “[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.” *Id.* § 655 (f). But the House and Senate had agreed in conference that they would adopt the Senate’s informal mode of producing regulations and the House’s standard of review of those regulations—“substantial evidence” on the record. H.R. Rep. No. 91-1765, 91st Cong., 2d Sess. 36 (1970). The trade-off is described in Note, *Judicial Review Under the Occupational Safety and Health Act: The Substantial Evidence Test as Applied to Informal Rulemaking*, 1974 DUKE L.J. 459 and in *Associated Indus. of N.Y. State, Inc. v. United States Dep’t of Labor*, 487 F.2d 342, 349 (2d Cir. 1973), *cert. denied*, 416 U.S. 942 (1974). Unfortunately, the informal method of production did not provide the record traditionally required for that standard of review. The courts have managed nonetheless to rework the meaning of “substantial evidence on the record” so that this standard of review can be applied to the regulations. See cases cited in Currie, *OSHA*, 1976 A.B.F. RESEARCH J. 1126-33 (esp. n.112); *Society of the Plastics Indus. v. OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975); *Synthetic Organic Chem. Mfr. Ass’n v. Brennan*, 503 F.2d 1155 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); *National Roofing Contractors Ass’n v. Brennan*, 495 F.2d 1294 (7th Cir.), *cert. denied*, 419 U.S. 1105 (1974); *Florida Peach Growers Ass’n v. United States Dep’t of Labor*, 489 F.2d 120 (5th Cir. 1974).

79. 29 U.S.C. §§ 651-678 (1976).

80. *Id.* § 653 (b) (4). This has been construed to exclude the possibility of a federal court creating a remedy in damages. *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974); *Otto v. Specialties, Inc.*, 386 F. Supp. 1240 (N.D. Miss. 1974); *Hare v. Federal Express & Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973); *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff’d per curiam*, 483 F.2d 67 (5th Cir. 1973).

If it were meant to preserve the traditional judicial choice to use the regulations and the statute to help set a standard of care in a state law action in negligence, it has only sometimes done so. In *Otto v. Specialties, Inc.*, 386 F. Supp. 1240, 1245 (N.D. Miss. 1974), a case in federal court because of diversity jurisdiction, Chief Judge Keady determined that under Mississippi negligence law, OSHA standards may not be taken into account as evidence of what constitutes due care. He assumed that the reason for reliance on doctrines of negligence per se is “a judicial addition to statutory penalties thought to be inadequate to the purposes the legislative branch sought to promote.” Since he thought that same reason

In the reductions just described, legislators confined and limited the combinations of possible assumptions about the statute, and their "choices" are to some degree accessible.⁸¹ When multiple interpretations are not confined, there is no singular legislative "choice," "desire," or "intent" to be discovered beyond the desire, purpose or intent to assure passage of the provision.⁸² Committee reports and statements made by sponsors on the floor only tell us the views of the committee or the sponsor.⁸³ But the point of not cementing that view into the statute is often to allow those who disagree with it to support the bill nonetheless.⁸⁴ I suggest that it

was the basis for the implied remedy cases, he felt controlled by the outcome of the federal question cases based directly on OSHA. See generally Comment, *The Occupational Safety and Health Act of 1970: Its Role in Civil Litigation*, 28 SW. L.J. 999 (1974); Comment, *Federal Common Law Remedies Under the Occupational Safety and Health Act of 1970*, 47 WASH. L. REV. 629 (1972). Blumrosen, Ackerman, Kligerman, Van Schaick & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702 (1976) argue that private actions in state courts by employees to enjoin unsafe working conditions under traditional principles of equity are not precluded by OSHA.

In passing the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684 (1976), Congress provided that "[n]othing in this chapter shall affect the common law or statutory tort liability of any person." *Id.* § 1677 (b). That could be read to prohibit enlargement or diminution of liability. But see H.R. REP. NO. 1390, 90th Cong., 2d Sess. 23, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 3223, 3239 ("This language is designed to assure that the tort liability of any person existing under common law or any statute will not be relieved by reason of the enactment of this legislation or compliance with its provisions." (emphasis added)).

81. It can be said that Congress chose to relate OSHA penalties to the character and history of the defendant, produce and review OSHA regulations by a particular method and set the extent to which the courts could build on OSHA. It was not necessary for passage of OSHA to confine choice on many other issues.

82. There is a long standing debate on this issue between Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) and Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930). The writers who have been drawn to each side of the debate are described in MacCullum, *Legislative Intent*, YALE L.J. 754 (1966).

83. Justice Brandeis, in *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937), describes the classical hierarchy of useful legislative sources:

reports of Congressional committees which have considered the measure
 exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation comparison of successive drafts or amendments of the measure debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology

Id. at 464 n.8 (citations omitted). For descriptions of the use of legislative history, see Chamberlain, *The Courts and Committee Reports*, 1 U. CHI. L. REV. 81 (1933); Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737 (1940); Note, *Conference Committee Materials in Interpreting Statutes*, 4 STAN. L. REV. 257 (1952).

84. For example, Representative Hays, Chairman of the Conference Committee on the Federal Election Campaign Act Amendments of 1974 which created the Federal Election Commission, stated that "[t]he delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein." 120 CONG. REC. 35, 134 (1974) (emphasis added). If

is in this area of unconfined choice that remedies for injured individuals will usually fall. Except in compensation statutes, remedies for injured persons are an addendum—a complement to some other problem of primary concern. At any rate, I have chosen to consider those instances where the choice of remedy is not confined by language in the statute.

Assuming the open ended nature of the legislative process, the absence of legislative choice combined with actual choice, and the likelihood that damages for persons injured by statutory violation will usually not be the subject of any choice, then whichever party is told to produce persuasive evidence of legislative intent about damages will lose. The court, in relying on legislative choice, effectively determines outcome by the question it chooses.⁸⁵ So it appears when one sorts the cases—when the court says that it will not provide damages unless there is evidence of legislative intent that they be made available, the plaintiff will usually lose. Judge Barrett for the Tenth Circuit, denying a cause of action under the Farm Labor Contractor Registration Act⁸⁶ explained that “[i]n the absence of congressional intent to the contrary, we hold that the penal sanctions in the act are exclusive.”⁸⁷ The same judge, denying a cause of action under the Immigration and Nationality Act concluded that “[t]here is no indication that Congress intended to create a private cause of action under the Act.”⁸⁸ Judge Christie in the Southern District of West Virginia, denied a cause of action under the anti-garnishment provisions of the Consumer Credit

that statement was not accompanied by statutory limitations making the procedures and remedies exclusive, then the bill could be supported both by those who thought the procedures and remedies should be exclusive and by those who assumed the courts might provide another procedure or remedy when appropriate. As passed, the bill did provide that “[t]he Commission shall have exclusive primary jurisdiction with respect to the civil enforcement of such provisions.” 2 U.S.C.A. § 437b(1) (Cum. Supp. 1977). As passed, the statute leaves open whether damage actions will be taken by the courts to be part of “civil enforcement.” Only so much cement was added.

85. Gunther describes the same sort of correlation between the question asked and answer found in equal protection doctrine. When the Court had asked whether there was a relation between the statute passed and the end set, the answer was almost always yes. When the Court had asked whether conduct falling under strict scrutiny as affecting a fundamental interest or a suspect classification was justified, the answer was almost always no. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

86. 7 U.S.C. §§ 2041-2055 (1976).

87. *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890, 894 (10th Cir.), cert. denied, 409 U.S. 1042 (1972).

88. 456 F.2d at 894.

Protection Act,⁸⁹ because "a private right of action for violation of the anti-garnishment provisions of Subchapter II of the Act was neither provided for nor contemplated by Congress in enacting this legislation."⁹⁰

When, on occasion, a court says that it will make damages available unless there is evidence of legislative choice to preclude them, the defendant will usually lose.⁹¹ Judge Brown, in dissent, explained that he would find a cause of action under the anti-retaliation provisions of the Fair Labor Standards Act because "[t]he intent of the Act . . . fails to *limit* Ms. Martinez' claim."⁹² In a case that acknowledged a cause of action under the act creating the Federal Employment Service,⁹³ Judge Brown ruled that it is not decisive that there is "no explicit indication in the regulations or the Act that the workers were to have the opportunity to protect such conferred interest . . . since the existence of such an explicit grant of a remedy is not necessary."⁹⁴

There is an obvious alternative to attributing choice to the legislature when the statute does not settle the relation between public pronouncement and individual claim, and when the evidence of legislative intent on the issue is ambiguous. A judge might describe what the legislature seems to have valued generally and ask how it should relate that to an individual who has been

89. 15 U.S.C. §§ 1601-1691 (1976).

90. *Western v. Hodgson*, 359 F. Supp. 194, 200 (S.D. W. Va. 1973), *aff'd*, 494 F.2d 379 (4th Cir. 1974). In *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), *vacated*, 488 F.2d 450 (5th Cir. 1973), the court took it to be axiomatic that in the absence of congressional intent to the contrary, a federal statute under certain conditions implies a private right of action, but nonetheless found "a cognizable and purposeful omission." *Id.* at 1059.

91. *See, e.g., Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970) ("In the absence of clear congressional intent to the contrary, the courts are free to fashion the appropriate civil remedies." *Id.* at 1033.); *Abernathy v. Schenley Indus.*, 420 F. Supp. 1 (W.D. N.C. 1976), *cert. denied*, 436 U.S. 927 (1978) ("If any defendant is able to supply any legislative history that tends to show Congress did *not* intend to allow a private right of action under the statutes, I will reconsider the motions." *Id.* at 2.); *Kerber v. Kakos*, 383 F. Supp. 625 (N.D. Ill. 1974) ("[t]he legislature may withhold from injured parties the right to recover damages arising from the violation of a statute, but the right is so fundamental and so deeply ingrained in the law that where it is not expressly denied, the intention to withhold should appear very clearly and plainly." *Id.* at 627.); *Brown v. Bullock*, 194 F. Supp. 207 (S.D. N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961) ("Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention." *Id.* at 224.).

92. *Martinez v. Behring's Bearings Serv.*, 501 F.2d 104, 108 (5th Cir. 1974).

93. National Employment System (Wagner-Peyser) Act § 1, 29 U.S.C. § 49 (1976).

94. *Gomez v. Florida State Employment Serv.*, 417 F.2d 569, 576 (5th Cir. 1969).

injured.⁹⁵ Asking that, judges may still respond to deeply engrained notions of constitutionally defined roles for court and legislature, but arguments that cut against those concerns or that support the complementarity of the two will not have been precluded. Again, the existence of an alternative approach means that a judicial choice is being made, if not discussed.

Judges who attempt to attribute the choice to the legislature accept the legislature's basis for choice—and that basis is not often one focused on the needs of individuals who may be injured. In fact, it is the judicial placing of the burden of producing evidence of legislative choice that has tended to determine the outcome of these cases. The question posed by the judge, not a choice by the legislature, provides the answer. The allocation of the burden, usually to the claimant, and the ramifications of imposing it are not discussed, nor are the alternative questions.

3. *Formulating questions in terms of the public*

When courts make the existence of a cause of action their primary concern, and when they attempt to derive an answer from the legislature, they effectively confine their attention to concerns beyond the particular parties involved. Their concern with the public is *implicit*. The preference to respond to public concerns is *explicit* when judges base their decisions on the adequacy of enforcement resources, on needed respect for the states, or on the necessity of a separation of powers.

For some courts, the explicit characterization of a statute as

95. When legislative choices are complex, conditional or contradictory, so is the valuing. For example, while health care for indigents was important enough to require hospitals constructed with federal funds to provide "a reasonable volume of services" to indigents, Stanturf could claim no such services if "a reasonable volume" of such services had already been given, or the hospital had been granted an exception. Again, although opportunities for small businesses were thought important enough for certain government contracts to be set aside for them, the valuing is not unconditional. Regulations promulgated by the Small Business Administration provide that a government contracting agency can proceed with what has been designated a "small business set-aside contract," despite questions about whether the party obtaining the contract is a small business, where "further delay in awarding the contract would be disadvantageous to the government." 41 C.F.R. § 1-1.703 (2) (e) (1979). Thus, Royal Services, once it establishes that Maintenance, Inc. is not a small business, may have no claim based on the Small Business Act for the profits that Maintenance earns if it has been allowed to continue with the contract because of government necessity. The same complexity in determining what it is that is valued exists whether the choice is made by a legislature in statute, an executive in executive order, or an administrative agency in regulation.

public is the end of the matter. Individual claims based on it are denied. Royal Services was told that it would not be able to recover from the company that falsely claimed under the Small Business Act to be a "small business," and thereby won the contract that Royal would have otherwise received. "We think the purpose [of the statute] was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security"96 Doak was denied damages for his injuries from the explosion of a natural gas pipeline in part because the court determined from the legislative history that "[i]t is clear . . . that the purpose of the [Natural Gas Pipeline Safety Act] is the safety and protection of the *public*."97 Leonel Sanchez and other migrant workers unsuccessfully sought damages on the claim that Great Western Employment Agency "induced them to come to Colorado by misrepresenting the amount of wages to be paid, the conditions of housing to be provided, and the conditions for return transportation, all in violation of the Farm Labor Contractor Registration Act." They were told by Judge Barrett for the Tenth Circuit that "this court will not fashion civil remedies from federal regulatory statutes except where compelling federal interest of a governmental nature exists."98

More often judges separate the characterization of the statute as public from the conclusion about individual claims, and elaborate their notions of the public import of private claims. The first and most focused of these more detailed public inquiries concerns the adequacy of enforcement of the underlying statute.⁹⁹ This in-

96. *Royal Serv., Inc. v. Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966). The Ninth Circuit rejected this conclusion in *Savini Constr. Co. v. Crooks Bros. Constr. Co.*, 540 F.2d 1355 (9th Cir. 1974). "Since the public interest is furthered under the Act only by protecting individual small businesses, it cannot be said that the latter are not the intended beneficiaries." *Id.* at 1358 n.7.

97. *Doak v. City of Claxton*, 390 F. Supp. 753, 755 (S.D.Ga. 1975) (emphasis added).

98. *Sanchez v. Great W. Employment Agency*, 456 F.2d 890, 894 (10th Cir. 1972).

99. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), Chief Justice Warren determined that the resources of the Attorney General alone were not adequate to enforce the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974 (1976); for the provisions of that Act extended to actions by all the states and all their subdivisions. "The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government." 393 U.S. at 556. In *Miller v. Mallery*, 410 F. Supp. 1283 (D. Or. 1976),

the remedy sought by plaintiff's class is one which would test the legality of actions by the very officials themselves who are charged with the duty of preventing harm to Bull Run water by 'trespassers.' But here those very officials have authorized—indeed welcomed—the alleged 'trespass,' namely, commercial, large-

quiry usually involves the autonomy and efficiency of the administering agency. Occasionally, there is evidence about enforcement needs. The Securities and Exchange Commission, as amicus in *J.I. Case v. Borak*,¹⁰⁰ argued that “[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action . . .” and “advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited.”¹⁰¹ The Supreme Court allowed suits by individuals who had been or would be injured by inadequate proxy statements. In a later case, *Piper v. Chris-Craft Industries*, the Securities and Exchange Commission argued at length that it was essential to enforcement that tender offerors be able to sue for damages for violations by the opposing offeror. This time the majority of the Supreme Court refused to allow such suits.¹⁰² Justice Stevens in dissent agreed with the Commission, noting that few individual shareholders would have had the capacity to effectively litigate the case “through a preliminary injunction, discovery, trial on liability, another trial on damages, three appeals to the Second Circuit, including an en banc, and two petitions to [the Supreme] Court.”¹⁰³ The Department of Labor as amicus provided evidence about enforcement of the Consumer Credit Protection Act’s prohibition against discharge for one garnishment, and advocated allowing suit by individuals so injured. That evidence persuaded one court to allow individual suits, but three others refused.¹⁰⁴ More often judges have no evidence about enforcement and simply assume either that no agency

scale, ongoing logging operations. And their legal advisor . . . is the one whose duty is the prosecution of violations of criminal statutes, including the Bull Run Trespass Act.

Id. at 1289. The court concluded that private actions are needed “where the alleged law breaker is also the law enforcer.” *Id.*

100. 377 U.S. 426 (1964).

101. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). Cases dealing with such suits under the securities laws are collected in 2 Loss, *SECURITIES REGULATION* 932-56 (1961); 5 Loss, *SECURITIES REGULATION* 2879-926 (Supp. 1969). See also Crane & Walker, *Who Can Sue and Be Sued Under Section 36(a) of the Investment Company Act of 1940*, 32 Bus. LAW. 417 (1977).

102. The Court acknowledged in *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977), that the SEC operates under the same constraints in enforcing the Williams Act that it did in the context of *J.I. Case v. Borak*, 377 U.S. 426 (1964), but concluded that “institutional limits alone do not lead to the conclusion that any party interested in a tender offer should have a cause of action for damages against a competing bidder.” 430 U.S. at 41.

103. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 68 (1977).

104. The brief, filed in *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), vacated on other grounds, 488 F.2d 450 (5th Cir. 1973), is described in *Stewart v. Travelers Corp.*, 503 F.2d 108, 113 n.15 (9th Cir. 1974).

ever has enough resources to fully meet its task or that enforcement is adequate unless shown to be otherwise. Judge King assumed that "it is not enough for [the statute] to have some enforcement mechanisms; the initial question is whether the statute's protection might be enhanced by allowing private civil relief."¹⁰⁵ For Judge Thornberry "a comprehensive enforcement scheme . . . including substantial criminal penalties for violations of child labor laws," but without provision for private suit, was enough.¹⁰⁶

When judges discuss enforcement in terms of deterrence, the value of private actions is likewise usually left to assumption. If the judge assumes that actions by injured individuals will deter others from causing injury, and thereby benefit the public, the plaintiff will usually win. The Fifth Circuit allowed individual damage actions for violations of the act which created and funded the Federal Employment Service. "What more effective way will there be to eradicate conditions so deplored? . . . What better way will there be to eliminate the problem of poor workers responding to 'Clearance Orders,' journeying hundreds of miles across the country to accept work and the advantage of the benefits promised by the laws of the United States only to find that the promise is a fraud?"¹⁰⁷ If the judge asks for proof that the possibility of a damage award will deter statutory violations, the plaintiff will usually lose. Justice Burger took that position in *Piper*, refusing to allow the losing tender offeror to sue the winner for statutory violations: "Nor can we agree that an ever-present threat of damages against a successful contestant in a battle for control will provide significant additional protection for shareholders in general. The deterrent value, if any, of such awards can never be ascertained with precision."¹⁰⁸ Once again, the placing of the

105. *Stewart v. Travelers Corp.*, 503 F.2d 108, 112 (9th Cir. 1974). Judge Wisdom in dissent in *Breitwieser v. KMS Indus.*, 467 F.2d 1391 (5th Cir.), cert. denied, 410 U.S. 969 (1972), assumed that "the Labor Department [does not] have the manpower or the time that complete enforcement of the law by it alone would require." 467 F.2d at 1396.

106. *Breitwieser v. KMS Indus.*, 467 F.2d 1391, 1392 (5th Cir.), cert. denied, 410 U.S. 969 (1972).

107. *Gomez v. Florida State Employment Serv.*, 417 F.2d 569, 576 (5th Cir. 1969). Likewise, in *Rauch v. United Instruments, Inc.*, 405 F. Supp. 435, 441 (E.D. Pa. 1975), rev'd, 548 F.2d 452 (3rd Cir.), modified, 405 F. Supp. 442 (1976), the court assumed that "[l]iability to private suit is or may be as potent a deterrent as liability to public prosecution."

108. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 39-40 (1977). Burger added that if shareholder protection is enhanced at all by damage awards, the same result can be obtained by

burden of persuasion about an uncertain phenomenon, this time deterrence, determines outcome. But none of the judges explain why they should choose to assume or doubt the deterrent effect of individual actions, nor why they should so often allocate the burden of proving its effectiveness to the claimant.¹⁰⁹

When judges make the role of the state courts determinative they are again deciding for "the public good." The courts in these cases do that in two ways. *First*, the courts, in deciding whether to allow damage claims based on federal statutes, express concern about impinging on areas that are traditionally controlled by the states. Regarding this concern, judges either assume that state law provides the framework for decision into which federal law only sometimes ventures,¹¹⁰ or that, though some areas may traditionally be the concern of the states, the passage of the federal statute on

"less drastic means more closely tailored to the precise congressional goal underlying the Williams Act." *Id.* at 40.

109. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 252 (1968) states that "we have no reason to think that [private suit] would have anything but the most oblique and marginal effect on the objectionable conduct." Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Compensation and General Deterrence*, 34 U. CHI. L. REV. 239 (1967) oppose an auto compensation plan that places the cost of accidents solely on motorists. Their opposition largely grows out of "what we don't know" about general deterrence. "To put the disagreement in a nutshell: when we know as little as we appear to know about the prophecies of general deterrence, it is unjust to tax motorists on behalf of it." *Id.* at 265. They suspect a small social gain would be achieved and intensive individual burdens would be imposed.

The Supreme Court, in recent cases where damages are based on federal statutes, has taken a strange view of the function of deterrence. In *Cort v. Ash*, 422 U.S. 66 (1975), the Court, in discussing deterrence, looked back to the event in question rather than forward to future similar conduct, whether by that defendant or another.

[I]n this instance the remedy sought would not aid the primary congressional goal [to assure that federal elections are 'free from the power of money.']. . . . Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to 'borrow' corporate funds for a time; the later compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.

Id. at 84. F. ZIMRING & G. HAWKINS, *DETERRENCE—THE LEGAL THREAT IN CRIME CONTROL* (1973) provide an extensive survey of what we do know, and in the last chapter set up "An Agenda for Research in Deterrence." See Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259 (1972); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J. LEGAL STUD. 35 (1977); Ziesel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 S. CT. REV. 317.

110. *Cort v. Ash*, 422 U.S. 66 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Id.* at 84.)

which the claim is based breaks the tradition.¹¹¹ Nothing is said about the choice between these assumptions. We know as little about why one or the other is chosen as we know about the choice to address these particular questions in the first place. *Second*, the federal courts sometimes rely on the possible existence of state remedies to remove the pressure for creating their own.¹¹² This alleviates their concern about the possible squandering of limited federal court resources. But the availability of a state remedy is often uncertain. When a case is resolved on this basis, the plaintiff chances that state law has developed and will be applied in a way that will take into account his or her injury.

Finally, the separation of powers between the federal courts and Congress is sometimes discussed and made determinative, rather than simply left implicit in the usual search for a legislative answer. In a recent and extended discussion in *Cannon v. University of Chicago*,¹¹³ Justice Powell in dissent observed that "Cort allows the Judicial Branch to assume policy-making authority vested by the Constitution in the Legislative Branch."¹¹⁴ . . . [It] encourages, as a corollary to the political default by Congress, an increase in the governmental power exercised by the federal judiciary."¹¹⁵ He was of the opinion that "the mode of analysis we have applied in the recent past cannot be squared with the doctrine of the separation of powers."¹¹⁶ The opinion for the majority, which allowed private suit on Title IX,¹¹⁷ was based on the context in which that statute was passed. At that time, and until 1972, Justice Stevens observed, "this Court had consistently found implied remedies—often in cases much less clear than

111. *Rauch v. United Instruments, Inc.*, 405 F. Supp. 435 (E.D. Pa. 1975), *rev'd*, 548 F.2d 452 (3rd Cir.), *modified*, 405 F. Supp. 442 (1976). As to the Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1976), the court concluded:

It is true . . . that if the allegations of the complaint can be proved, plaintiffs will be able to recover in state court under strict tort liability or negligence theories, or for breach of warranty. However, aviation is not 'an area basically the concern of the states' . . . and the Federal Aviation Agency provides the primary regulatory scheme for maintaining safety in the industry.

405 F. Supp. at 441.

112. *Doak v. City of Claxton*, 390 F. Supp. 753, 758 (S.D. Ga. 1975).

113. 441 U.S. 677 (1979).

114. *Id.* at 743.

115. *Id.* at 743-44. A majority of the justices seem to share Justice Powell's dissatisfaction with current doctrine.

116. *Id.* at 730.

117. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

this."¹¹⁸ Whichever approach one prefers, the existence of these different modes of treatment establishes the existence of an alternative to making separation of powers determinative, and makes it clear that concern about separation of power can be and indeed has been, overcome, freeing the courts to consider the needs of the parties.

Even if the determinative questions are to be formulated in terms of the public, individual claims have a broader significance than as deterring weapons, or as weights in the state-federal or court-Congress balance. That significance is explored in the final section of this paper.

C. *Understanding Judicial Choice of Utilitarian Assumptions*

That judicial decisions about statutory damages on federal statutes should track legislative choice and attempt to maximize social utility or public good, without much consideration of consequences to the individual, should not be surprising for at least two reasons. First, it allows the courts to avoid consistent doubts about the legitimacy of judicial choice by returning attention to the legislature. Second, it is consistent with the way judicial choices are increasingly being made, and with a pervasive acceptance of social efficiency as a goal.

The judiciary's effort to decide statutory damage claims on the basis of public need, as defined by the legislature, helps to avoid the perennial problem of the uncertain legitimacy of judicial choice—a problem that is particularly acute when the judicial choice is made in a statutory context. The process of producing a statute requires that legislators make choices. They made the choice in the Economic Stabilization Act Amendments of 1971¹¹⁹ and in the Age Discrimination in Employment Act of 1967¹²⁰ to provide

118. 441 U.S. at 698. Other justices also recognized the shift in treatment with *Cort*, though Justice Powell denied it.

119. Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 743.

120. 29 U.S.C. § 626 (c) (1976). Mashaw, *Private Enforcement of Public Regulatory Provisions: The Citizens Suit*, 4 CLASS ACT. REP. 29 (1975) describes federal legislation containing citizen enforcement provisions and proposed legislation allowing such actions. The statutes that provide such actions include: Clean Air Act, 42 U.S.C. § 1857 (h)-2 (1976); Noise Control Act, 42 U.S.C. § 4911 (1976); Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1976); Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (g) (1976); Consumer Product Safety Act, 15 U.S.C. § 2073 (Supp. 1976). The difficulties with such suits are set forth in Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 ECOLOGY L.Q. 407 (1972).

a civil action for legal or equitable relief to any person aggrieved by violation of either statute. We need only know that such choices were embodied in the statute and approved by a certain portion of the members of the legislature to anticipate that under prevailing assumptions the courts will accept them as legitimate choices, formally binding on all of us.¹²¹ This equation of election and legitimate choice has been supported by a range of assumptions—that representatives in making collective choices are in fact able to discern a single good for a relatively homogeneous public,¹²² or, as a bottom line, that artificial choices of the good are necessary “[b]ecause there are no conceptions of the good that stand above the conflict [of individual wills defining their own good] and impose limits on it.”¹²³ Whether the equation is taken as factually true, or as justification for a necessarily artificial definition of the good, it gives the choice embodied in statute as much legitimacy as can be had under current political theory.¹²⁴ Even though choices of the legislature may in fact be made for the benefit of some—to the exclusion of others—they are formally taken to be for us all.

The process of electing legislators validates their collective choices. Since federal judges are not elected, their choices are not accorded this formal assumption of legitimacy. Gordon Wood describes a concept of agency representation of the people by the courts in the late 1700's, but neither judges nor commentators

121. K. ARROW, *supra* note 1, at 1, describes voting as one of only two methods by which social choices can be made. It is typically used to make “political” decisions, whereas the market is used to make “economic decisions.” Though one may argue that there are other ways of making social choices, voting (and thereafter the votes of representatives) is commonly taken to be one of them. However, E. FREUND, *STANDARDS OF AMERICAN LEGISLATION* (1917) argues that the legislature must be principled for legitimacy and develops standards to accomplish that goal.

122. D. BOORSTEIN, *THE GENIUS OF AMERICAN POLITICS* (1953) approached this position. This view seems often to be implicit in law review writing.

123. R. UNGER, *KNOWLEDGE AND POLITICS* 68 (1975).

124. I state this in a way that tries to avoid what appears to be a futile debate about how much more democratic, and therefore legitimate, the legislature is than the court. See Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974). Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1045 (1968) manages to avoid treating the anti-democratic nature of judicial action as “a problem” by noting that “democracy in our tradition emphasizes citizen participation as much as it does majority rule.” By contrast, Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1688 (1975) views the ultimate problem in this area to be the control and validation of “the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.”

have developed that as a source of legitimacy for judicial choice.¹²⁵ Judges, neither elected nor omnipotent, do not find any settled and singular values that dictate judicial choices;¹²⁶ normative premises are chosen rather than somehow "given."¹²⁷ The judiciary must search further for legitimacy for its choices. The extent to which commentators have undertaken that search indicates their deep concern about the legitimacy of judicial choice.¹²⁸

125. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 605, 596-99 (1969) ("Therefore all governmental officials, including even the executive and judicial parts of the government, were agents of the people, not fundamentally different from the people's nominal representatives in the lower houses of the legislatures." *Id.* at 598.) A move in that direction can be seen in Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193 (1952).

126. J. FRANK, *COURTS ON TRIAL* 346 (1940) traces the historical origin of the natural law concept and attempts to demonstrate "the unavoidability of considerable diversity in the man made legal rules, no matter how much agreement there may be about basic principles and their corollaries." *Id.* at 365.

127. "Thus by dropping formalism we (quite rightly) fell into the responsibility of good and evil." Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *VA. L. REV.* 451, 454 (1974).

128. Justifications of judicial choice still largely go to formal structuring of the judicial decision, drawing legitimacy from the *process* of decision. In the classical model of judicial decision, the outcome of the particular case follows mechanically from the application of a rule produced by a "substantively rational decision-making" process. Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351, 355 (1973). See also Friedman, *On Legalistic Reasoning—A Footnote to Weber*, 1966 *WIS. L. REV.* 148. Formality is in the assumption that some single rule will govern a particular situation, that the rule will dictate the result when a judge applies it to a particular case and that judicial action is actually mechanical. Ackerman, *supra* note 72, further describes this resort to process.

Abandoning in large measure its efforts to justify decisions by reference to a substantive tradition rooted in a comprehensive vision of a good society, legal scholarship concerned itself with the ways in which the structure of the existing legal process of dispute resolution limited the extent to which each decision-maker could properly impose his own particular social ideals upon the world around him.

Id. at 123. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959) may be the best known of those who have described the proper structure of, and appropriate process for, judicial decision. Writers who have worked at the implications of reliance on process include: Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955); Clark & Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 271 (1961); Griswold, *Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 *HARV. L. REV.* 81, 88 (1961); Hart, *The Time Chart of the Justices*, 73 *HARV. L. REV.* 184 (1959); Henson, *A Criticism of Criticism: In re Meaning*, 29 *FORDHAM L. REV.* 553 (1961); Kurland, *Egalitarianism and the Warren Court*, 68 *MICH. L. REV.* 629 (1970); Meuller & Schwartz, *The Principle of Neutral Principles*, 7 *U.C.L.A. L. REV.* 571 (1960); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. CHI. L. REV.* 661 (1960); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *HARV. L. REV.* 769 (1971).

Balancing is the process that permeates contemporary decisions. For an indication of the prevalence of balancing—equilibrium theory in law and generally—and for criticism of it, see Katz, *supra* note 9, especially at 23. Fletcher, *supra* note 52, at 542-643 describes

When court and legislature are jointly involved in making a set of decisions, assumptions about legislative legitimacy and questions about judicial legitimacy become exaggerated. This has most noticeably occurred with judicial review of the constitutionality of statutes.¹²⁹ It has likewise happened, as already described, when a statute is the basis for jurisdiction, but leaves open the question of damages. In those cases both courts and commentators act as though the legislature has made a choice, and ask the sort of questions about enforcement and public need that would be asked in legislative session. This method of avoiding questions about the legitimacy of judicial choice helps insure the continued dominance of utilitarian assumptions in law.

In addition to avoiding problems of legitimacy, the choices made by the courts in the statutory damage cases are not surprising because they are consistent with the way judicial choices are increasingly being made. It is, of course, difficult to generalize about how "judicial choices are increasingly being made," for the exceptions come easily to mind. Still, a general emphasis on concerns that transcend the parties seems to be apparent. In making precisely that point, writers tend to describe for contrast a time when that was not so, when it was thought that the court's task was to

reliance on balancing in tort. Balancing is likewise prevalent in the narrower cut of tort cases that I have discussed.

In *Cort*, the four factors to be considered in determining the existence of a cause of action are presented without any indication of the relationship among them. Some courts have explicitly proceeded to balance them; most have done so implicitly. In *Miller v. Mallery*, 410 F. Supp. 1283, 1289 (D. Or. 1976), the court reasoned: "Three of the four factors mentioned in *Cort v. Ash* militate in favor of the implication of a civil remedy while only one—the legislative record—factor is essentially neutral. . . . [T]herefore, a remedy, consistent with the legislative purpose, should be, and is, granted and fashioned." In *Love v. Temple Univ.*, 366 F. Supp. 835, 841 (E.D. Pa. 1973), the court found the competing policies evenly balanced and determined that judicial restraint should be exercised and the matter left to Congress. In balancing interests, the court can acknowledge and accommodate complex and multifaceted problems—there is no need to identify a single rule to govern. The formality of the conception is in the assumption that it is the balance which determines the result when a judge uses it in a particular case, rather than the selection and description of the values to be weighed.

129. While this concern with the process of decision has been most apparent in the context of constitutional decisions, *supra* note 128, it has not been confined there. A pluralist theory of legitimacy for the legislature, described as interest group liberalism by T. Lowi, *supra* note 74, at 71, and the same theory transferred to administrative agencies, Stewart, *supra* note 124, at 1712, indicate the prevalence of process solutions. Clark & Trubeck, *supra* note 128, capture the common criticism of process justifications: "[e]scape from this hard task [of contemplating the consequences of an act] by reliance on neutrality and certainty to avoid forthrightness is itself a decision, albeit one of negation." *Id.* at 271. But, it is not a decision that is acknowledged.

settle private issues between private parties. Samuel Thorne, in his discussion of early English statutes, described the medieval conception of the judge's task—"the simple administration of justice between party and party."¹³⁰ He also described the attendant difficulties courts had in dealing with statutes from that perspective.¹³¹ Morton Horwitz suggests that 18th century judges "almost never self-consciously employed the common law as a creative social instrument for directing men's energies toward social change."¹³² Abram Chayes draws on "our received tradition" and "late nineteenth century vision of society" for the conception that the lawsuit was "a vehicle for settling disputes between private parties about private rights."¹³³ A lawsuit so traditionally conceived, he says, is bipolar, retrospective, self-contained, party-initiated and party-controlled, and in it the right and remedy are interdependent.¹³⁴ The contrast with the current trend to "public law litigation" is probably not so clear as it is made to appear.¹³⁵ But my effort here is not to question the historical contrasts these writers work from, but to confirm their sense that, by contrast, modern courts *are* concerned with, and are easily—though not always—involved in the resolution of what they take to be public issues.¹³⁶

130. *Introduction to A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDING OF STATUTES* 3, 22 (S. Thorne ed. 1942).

131. *Id.* at 54.

132. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971). It is not always clear whether Horwitz means that judges never *explained* their choices as ones to accomplish social change, or that they never *attempted* to affect social change. Surely, judges did increasingly take a part in attempting to affect social change, but the contrast before and after 1820 seems too stark unless Horwitz means only to chronicle a change in reasons given.

133. Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281-83 (1977).

134. *Id.* at 1282-83.

135. *Id.* at 1283. Chayes admits that his capsule description "is no doubt overdrawn" as a description of reality, but notes his belief that it nonetheless "has been central to our understanding and our analysis of the legal system." *Id.*

136. The assumption that courts confine themselves to the provision of justice for individuals lingers, but it is seldom enunciated. Judge Bergan in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), provides a rare statement of the position:

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private

I increasingly see the concern with public issues in common law tort—the analogue of damage claims in federal court based on federal statute. Leon Green, early on, taught that decisions in tort cases are made with the understanding that other parties will appear before the court on the same issues, that the desires and practices of other people are molded into a decision, that tort law is public law in disguise.¹³⁷ Certainly, that has been explicit in the formulation of negligence, where personal action is measured by social utility. Walter Blum and Harry Kalven continued to describe tort law as “private law,”¹³⁸ despite Green’s teaching, but they did so in a different context. While Green was describing tort as a distinct entity, Blum and Kalven were talking about it in contrast to “insurance funds and compensation plans [where] the matter becomes alchemized into public law.”¹³⁹

From being acknowledged to be “public law in disguise,” tort law seems increasingly to be emerging simply as “public law.” That has occurred despite efforts such as Robert Keeton’s to explain the imposition of liability for non-negligent, risky conduct as simply a variation in the meaning of fault and not “the substitution of social responsibility for individual responsibility.”¹⁴⁰ In-

litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests of the court.

Id. at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314. This view is reflected in recent efforts to place the teaching of administrative law in a larger and more realistic context. Mashaw and Merrill claim “the public law system” as their domain for that purpose. J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* (1975). Their division between public and private is largely a division by institution. Mashaw and Merrill define “the public law system” as “the legal structure within which the primary actors—legislators and administrators, formulate and apply policy—the institutional structure that defines the legal relationship of citizens with their government.” *Id.* at xix. Private law, on the other hand, is “the law governing the rights and duties of individuals in their relations with one another” and “has been the product largely of judicial decision, developed and articulated through the analogical application of principles embodied in prior cases.” *Id.* at 935. Although the authors acknowledge that “the public law system . . . shares important points of connection, reenforcement and tension with the private law system,” *id.* at xx, they are not involved in an enterprise that forces them to reconsider their basic division.

137. Green, *Tort Law Public Law in Disguise*, 38 *TEX. L. REV.* 1 (1959), reprinted in L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 115 (1965).

138. W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM* 3 (1964). In their first footnote, the authors note that Green appeared to have used “public law” in a somewhat different sense than they use it.

139. Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 *U. CHI. L. REV.* 239, 265 (1967).

140. Keeton, *Conditional Fault in the Law of Torts*, 72 *HARV. L. REV.* 401 (1959). He explained: “[r]ather, concepts of individual responsibility, with moral content, remain

creasingly, concern transcends the individuals involved. Individual interests are absorbed into a calculus which assumes that some individuals may be excluded from receiving certain benefits in order to achieve maximum social utility. That is built into the economic analysis being used to determine the cost of accidents, and is acknowledged by economists.¹⁴¹ Guido Calabresi suggests "that justice is a totally different order of goal from accident cost reduction,"¹⁴² and Richard Posner describes the accident itself as a closed chapter in the enterprise of preventing future accidents, and thus reducing accident costs. "The issue becomes what is a just and fair result for a class of actions."¹⁴³ Such analysis has been finding its way from the journals into court opinions.¹⁴⁴

George Fletcher, writing of fairness and utility in tort theory, summarizes the pervasiveness of current concern for the public that transcends concern for the individual in his "paradigm of reasonableness." That paradigm, which he sees as currently dominant, "provides the medium for tying the determination of liability to maximization of social utility"¹⁴⁵ As he puts it, "[t]he fashionable concerns of the time are instrumentalist."¹⁴⁶ Dissatisfied with this system, Fletcher describes and advocates a contrasting paradigm of reciprocity that assesses liability on the basis of the relative risks created by the parties. Yet, at the same time that Fletcher criticizes the current view, he illustrates the strength of its hold on us. He acknowledges a deep political clash between the paradigms he describes; between choices made by comparing the risks undertaken by the parties, and choices based on the usefulness of plaintiff's activity to society. "The question posed by the

vital to an understanding of tort decisions and trends. Such concepts underlie liability of non-negligent risky conduct as well as liability in the more familiar areas of negligence and intentional torts." *Id.* at 444.

141. L. ROBBINS, *THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY* 177 (1952) ("A theory of economic policy, in the sense of a body of precepts for action, must take its ultimate criterion from outside economics.")

142. G. CALABRESI, *THE COST OF ACCIDENTS* 25 (1970).

143. R. POSNER, *supra* note 1, at 7.

144. *E.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

145. Fletcher, *supra* note 52, at 557.

146. Fletcher, *supra* note 52, at 538. Epstein is also dissatisfied with the nature of the current question. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151 (1973), which undertakes "to develop a normative theory of torts that takes into account common sense notions of individual responsibility." R. RABIN, *PERSPECTIVES ON TORT LAW* 212 (1976), sees these two writings as "almost certainly an expression of the pervasive unrest created by the relentless assault on the fault principle in both the judicial and legislative forums."

conflict of paradigms was whether traditional notions of individual autonomy would survive increasing concern for the public welfare. If the courts of the time had clearly perceived and stated the issue, they would have been shaken by its proportions."¹⁴⁷ Having recognized the intensity of the conflict, Fletcher nonetheless does not go far beyond asserting the importance of the concerns of the non-utilitarian paradigm of reciprocity. He mentions the importance of the "autonomy of the individual" and incorporates by reference the argument in criminal law against the sacrifice of individual interests.¹⁴⁸ He asserts that *surely* there are some situations in which society cannot ask the individual to sacrifice his interest in damages.¹⁴⁹ Having reached the point where one wants to know *why* that cannot be asked, Fletcher shifts to a discussion of the "interplay of substance and style," suggesting that the appeal of the paradigm of reasonableness "might well be *more* one of style than of substance;" the questions of reasonableness and utility lend themselves to precise, multistep calculations, and balances that appear rational and scientific. The alternate paradigm of reciprocity requires, he says, the use of metaphors and images—"a way of thinking that hardly commends itself as precise and scientific."¹⁵⁰ While provocative, an explanation based on style is unsatisfying when the underlying conflict is as fundamental as he suggests. One hesitates to complain, for few writers have even acknowledged these questions, much less attempted the answers.¹⁵¹ Nonetheless, that task remains.

Preoccupation with public needs in law is consistent with the theory dominant outside law. Utilitarian choices for the greatest good do not involve defining a minimum share for each of society's members.¹⁵² That current choices in one area of law will

147. Fletcher, *supra* note 52, at 566.

148. *Id.*

149. *Id.* at 568.

150. *Id.* at 571-72.

151. Leff, *supra* note 127, at 482, thinks "we shall have to continue wrestling with a universe filled with too many things about which we understand too little and then evaluate them against standards we don't even have."

152. Michelman describes, though he does not rely on, this sort of reasoning: [Realities] impel us to believe that, even though particular measures cannot be shorn of capriciously redistributive consequences, we can arrive somehow at an acceptable level of assurance that over the life of a society (and within the expectable lives of any of its members) burdens and benefits will cancel out leaving something over for everyone, and that society ought, therefore, to proceed to

tend to be largely consistent with others in law, and with predominant social theory outside law, is hardly surprising and is useful in understanding judicial choices in a particular area. It is an observation about similarity and leaves open the question of how change in basis for choice in law might come about.

II. ANOTHER BASIS

I began by suggesting the pervasiveness of utilitarian assumptions and argued that such pervasiveness had a circular effect which made it extremely difficult to escape those assumptions. That is, to criticize current utilitarian assumptions in legal choice, and to build alternatives, we need concepts, language, and questions that do not build in the assumptions of the current model. But it is that very model which forms the language and concepts that are available, and distinguishes the important questions from the trivial ones. Judicial choice in the cases just detailed confirms the pervasiveness of that model. There is one debate in one set of terms: is it in the public interest to allow individual claims for damages? The debate is about societal needs and it effectively absorbs any separate question about the persons involved in the case.

In trying to begin to break that circle, I want to communicate with those who continue to operate within it and to provide room in which to build alternatives. I attempt this by defining a basis for judicial choice that is the opposite of current assumptions, and describing the relation between these extremes. Where public and individual interests are now defined in terms of maximum public good, the other extreme is to define both public and individual interests in terms of the individual interests.

Inclusive or direct treatment of parties is the extreme: a court, in making its choices, would decide the consequences of its decision for communities that realistically include the parties before the court. It is critical to this approach that although the court's attention would be extended beyond the parties, it would still include the parties. This would avoid totally individualized, nongeneralizable decisions as well as decisions based only on perceptions of the

economize its resources, using governmental coercion where necessary and not agonizing too much over compensation.

Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1179 (1967).

public good. Flores and the other slaughterhouse workers on strike with him sought damages from the George Braun Slaughterhouse because it had used illegal aliens to break their strike. The judge, in treating the parties directly, would decide whether to allow a claim for damages by looking at the needs of the community of striking workers and the needs of the community of employers. The judge would not look to the needs of the agency responsible for detecting and returning illegal aliens, nor would his concern be with the manpower needs of employers who require workers in numbers not locally available.

The strength of direct treatment is its capacity to communicate the value on which the decision is based to the appropriate communities.¹⁵³ Because they were directly included in the decision, it need not remain an abstraction for them. The weakness in this potential is that community can be defined at varying levels of generality, and the level of generality will determine the reality of saying that the parties to the particular case have remained a part of the court's concern. If the Flores claim for damages was evaluated in terms of a very broadly defined community of "those affected economically by the presence of working aliens," the striking employees would be grouped with sellers of services to aliens, employers who rely on aliens to supplement a numerically inadequate supply of labor, and even employers who rely on them to avoid unionization. The outcome of that analysis might favor plaintiffs, but that result would be coincidental, and unlikely to communicate other than a general dedication to economic stability.

Once a judge identifies the relevant communities to be considered, he or she must determine whether there is any difference between the opposed communities that will warrant imposing legal consequences on one or the other. That is, can Stewart and the community of workers who may suffer economically from the loss of their jobs after a single garnishment of wages, be distinguished from employers who may suffer economically from having to continue to employ those workers having difficulty managing their own resources? The legislative policy that employees should be

153. Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972), applies communication theory to judicial opinions, suggesting that "it should be possible . . . to treat the phenomenon of *stare decisis* as a problem in human communications rather than as exclusively one of logic and/or obfuscation." *Id.* at 134.

secure from discharge for one garnishment could provide the basis for distinguishing the two, for it undercuts the assumption that one garnishment means an employee is unable to manage his own resources, and it reinforces the value placed on stable employment. If the communities cannot be distinguished by the value on which the statute is based, the loss would either be left where it had landed, or shifted on some other basis. If there are inconsistent statutory messages, or if the statute's protection of the interests of one party is ambiguous or incidental, it may provide no basis for distinguishing the two.

To understand this alternative it may help to return again to its opposite—to courts that treat the parties *vicariously* by making decisions in the public interest. By treating parties vicariously, a court adopts the utilitarian assumptions predominant in our rational bureaucratic society—that efficiency is the primary value, that the decision whether to allow a party to seek damages can be based on a calculation of consequences unrelated to the particular party, because that method best assures the greatest benefit in the long run. Farmland Industries sued Kansas-Nebraska Natural Gas Company for \$33,824 for abandoning its service without the permission of the Federal Power Commission. If the suit had occurred during a national crisis over the allocation of energy, Judge Bright might have concluded that the public would be best served if all remedies and penalties against natural gas companies were controlled by the Commission.

The strength of vicarious treatment is its potential to produce an efficient society. Although all persons theoretically benefit from vicarious treatment by obtaining the chance to live in an efficient society, the equality is only theoretical. The same benefit is given equally to persons who have either suffered or face very real injuries and those who have neither suffered nor risk injury. A vicarious decision that private suits should not be allowed because they would interfere with Federal Power Commission decision-making would apply equally to Farmland and to natural gas users in areas with multiple suppliers who would not suffer nor even risk suffering Farmland's injuries.

The choice for courts between direct and vicarious treatment of parties is a real one. It would evaporate if the interests of individuals and the public coincide, and some authors assume that

consistency.¹⁵⁴ But our knowledge about the uniformity of those interests is so limited that at best we can focus on only one and must leave the other to an assumed, but uncertain, connection. If the greater value is placed on producing a decision comprehensible to the parties, and capable of communicating to a community of which the party is a member, then parties will be treated directly and the "public interest" will be left to an assumed connection. If the court's primary concern is to protect and further what it sees as the public interest, then it will assume that the parties and their communities will benefit by a decision in the public interest. This uncertainty is part of normal working conditions for courts when they select the basis for a decision.¹⁵⁵ The temptation seems to be constant to find certainty where it does not exist rather than to accept the existence of uncertainty and choose how to act in the face of it.¹⁵⁶ When the interests of person, community or public

154. Hurst's frequent use of the general "we," and his level of general discussion seem to assume this consistency. *E.g.*, J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) ("[P]eople in the nineteenth century United States had already sighted the promise of a steeply rising curve of material productivity as the dynamic of a new kind of society." *Id.* at 6. "All had in common a deep faith in the social benefits to flow from a rapid increase in productivity; all shared an impatience to get on with the job by whatever means seemed functionally adapted to it, including the law." *Id.* at 70. "Law thus ratified values early and deeply instilled the behavior of the people . . ." *Id.* at 130.) Tushnet, *Lumber and the Legal Process*, 1972 *Wis. L. Rev.* 114, 115, refers to "social and historical theories which assume that societies are united by a set of values widely shared among the population," and adds that "Hurst's explanation of the development of the law begins by assuming just that sort of consensus. Still, the complexity of the picture Hurst draws diminishes any impression of simple consensus or a simple society and, as Tushnet notes, there is much we can learn from it before going to work at "the legal process as the expression of social conflict." *Id.*

155. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), reported this in dramatic terms:

As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Id. at 166-67. Clark & Trubeck, *supra* note 128, at 271, observe that "a natural consequence of stress on certainty is to put a premium on judicial conservatism."

156. A common technique for avoiding uncertainty is the balancing of societal, community and personal needs to obtain a value free result. That choice of technique seems regularly to result in a choice for the "public," for the interests of the public tend to be described very generally to fully encompass it. By contrast, "individual interests" in such a balance are usually made to coincide with the particular party before the court. Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 *HARV. L. REV.* 755 (1963) cured this predetermined outcome of balancing by suggesting that courts work on the assumption that "the individuals of the society, in

are thought to conflict, courts are forced to make a choice without the comfort of even an assumed connection.¹⁵⁷

III. DIRECT TREATMENT OF DAMAGE CLAIMANTS

The preceding sections have shown the federal courts in a set of tort cases choosing between direct and vicarious treatment of the parties before them. The choice cannot be avoided: (1) The judicial determination is final for the parties when damages are sought, even if the choice is made about the existence of a cause of action. (2) The legislature has not made the choice. At most it has left pieces that can support a judicial decision to allow or to deny damages and the question the court asks determines the answer it gets. (3) The common judicial focus on public concerns and the vicarious treatment it produces is a choice, not a given. It is both possible and important for the courts to choose to attend directly to damage claimants.

A. *The Values Furthered by Direct Treatment*

Changing the basis for choice in law requires having available alternatives derived from a range of concepts and ideas—a “market place of ideas” in which challenge and debate strengthen the end chosen.¹⁵⁸ Currently, there are developed concepts about public

being accorded liberties of speech, association and conscience, are in fact accorded a certain [societal] role to play.” *Id.* at 768. But in so doing he moved the entire debate to a public level, setting aside considerations of person. The choice to balance, rather than avoiding choice among interests of person, community and public, will usually constitute a choice to decide the public issue and to leave the parties to vicarious treatment.

The same point is made in R. POUND, *JURISPRUDENCE* 328–29 (1959): “If the one [claim] is thought of as a right and the other as a policy, or if the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide.”

157. Fletcher, *supra* note 52, at 569–70, suggests that the interests of persons and of the public are often inconsistent: “The major divergence is the set of cases in which a socially useful activity imposes nonreciprocal risks on those around it. These are the cases of motoring, airplane overflights, air pollution, oil spillage, sonic booms—in short, the recurrent threats of modern life.” (footnote omitted). Fletcher maintains his opposition throughout the article: “The conflict is whether judges should look solely at the claims and interests of the parties before the court, or resolve seemingly private disputes in a way that serves the interests of the community as a whole.” *Id.* at 540. “The courts face the choice. Should they surrender the individual to the demands of maximizing utility? Or should they continue to protect individual interest in the face of community needs?” *Id.* at 573. Fletcher is not alone in acknowledging that public interests and the interests of particular persons are likely to conflict.

158. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 52 (2d ed. 1966).

needs, but not about the legal system's response to persons. The courts only erratically consider and articulate the desires and demands of individuals. It is important for at least three reasons that the courts instead provide direct attention to individuals. First, the courts are well situated for the task. By their limitation to cases and controversies, courts have before them always "the piece," a part of a broader social problem. Neither class actions nor multi-district combinations of litigation overcome the fact that it is not the whole problem, seldom even a substantial portion of it, that is before a court. Nor have the courts the investigative capacity to study such questions fully. The familiar limiting argument that grows out of this observation about capacity of courts is that judges should restrain themselves from becoming involved in broad questions which they do not have the means to explore.¹⁵⁹ I reach the same conclusion but for an affirmative reason—courts are the legal institution best situated to keep alive thinking about response to persons. Thereby they can provide a distinctive part of the full range of concerns out of which theories of social choice might be built. Second, the desires and demands of individuals need to be raised and worked out institutionally. A systematic means needs to be available by which persons can force these issues. Some writers have suggested alternatives to current assumptions, but their work has remained outside the daily use of lawyers and courts, and thereby outside most legal commentary. The isolation of such work will likely continue unless alternatives to current assumptions become a standard part of our consciousness, expressed in familiar terms. Courts are in a position to accomplish this. Third, although a continuum of public to person hardly exhausts the ways one might think about alternative bases for choice, its development adds to the tools available for building other alternatives. Every additional alternative should help raise consciousness that very fundamental choices are being made in every legal decision, whether or not on the surface.

B. *The Individual's Claim to Judicial Solicitude*

A party's claim to judicial attention need not succeed or fail on the preceding arguments. It rests independently on the finality

159. See H. HART & A. SACKS, *supra* note 59.

of judicial choice for the party, the certain role of damages for the parties and their uncertain relation to the public, and the relative inability of claimants to get the court's choice reviewed.

First, a plaintiff seeking damages who does not, or may not, have any other forum in which to seek damages has a particularly compelling claim, stronger than a plaintiff seeking injunctive relief. This idea does not appear in the cases or commentary,¹⁶⁰ in part because of the tendency to focus on the existence of a cause of action. The existence of a cause of action based on a statute does not vary by the remedy sought. A denial of a cause of action equally precludes injunctive relief and damages. The failure to distinguish among remedies may also be due to the absence of much of a jurisprudence of remedies.¹⁶¹ We are not used to thinking in those categories; rather, questions of remedy are fragmented. They are treated as the last issue in a particular body of substantive law, or simply neglected.¹⁶²

160. For example, in *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603, 606 (E.D. La. 1970), the court draws the parallel between the Hill-Burton Act and the Wagner-Peyser Act, but never notes that an injunction is sought on Hill-Burton and damages under Wagner-Peyser.

In two instances the courts seemed to prefer injunctive relief to damages. In *Poirrier v. St. James Parish Police Jury*, 372 F. Supp. 1021, 1023 (E.D. La. 1974), *aff'd*, 531 F.2d 316 (5th Cir. 1976), the court noted that the decision to deny a private action for damages in *Stanturf* "is not necessarily inconsistent with these later holdings permitting private suits asking injunctive relief to enforce the assurance [of services to indigents.]" The court in *Farmland Indus. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 678 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973), suggests that "[e]quitable remedies may be inferred more readily than damage remedies."

161. There is a covering maxim for questions of remedy: *ubi jus, ibi remedium*, "for every right there is a remedy." It is an impressive generalization that has been embodied in the constitutions of some states. See Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964). But it has no independent life—it nicely provides emphasis for choices made but it does not break the circular process of defining rights and remedies. Wright, *supra* note 46, at 376, confirms the absence of a jurisprudence of remedies. "Much can be said about the law of remedies as a social institution. The most important thing to say is that there is no law of remedies . . . there is no place where we can find the whole subject put in perspective, with the many specific remedies dealt with in theory." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) views this gap from another perspective:

The fact is that we do not have a systematic body of theory about the kinds of sanctions available to reinforce the primary norms of conduct that the law seeks to promote, or about their distinguishing characteristics, their strengths and weaknesses, the anticipated benefits from their use, and the social costs that their invocation incurs.

Id. at 251.

162. This is reflected in miniature in most of the casebooks prepared for the teaching of "remedies," a course that would seem by its title to seek learning common to various substantive areas. After at most a scanning of the general principles of equity, the division is by "interests in property," "personal interests," and "business interests." R. CHILDRES &

Second, although the amount of a damage award is always problematic, it has real significance for the injured party. It would pay medical expenses and the cost of rehabilitation for Doak and Stanturf. It might support Flores and other former slaughterhouse workers after their unemployment benefits ended. It would pay Farmland Industries' \$33,824 oil bill. Damages are equally significant for the party who has to pay them. Maintenance, Inc. would lose much of the profit on its contract to supply janitorial services. Traveler's Insurance would have to pay an additional wage. By contrast, we usually know little about the effect that allowing damages has on the public. We do not know whether they aid or hinder agency enforcement, though guesses are often made. The agency affected only occasionally provides information to aid in this assessment. The Securities and Exchange Commission, as amicus, described at length why private damage actions were necessary to insure enforcement of the tender offer disclosure provisions of the Williams Act.¹⁶³ We know even less about whether the specter of damages deters violation of statutes.¹⁶⁴

Third, direct treatment of parties should more often leave the burden of getting the court's choice changed on the party with the capacity to accomplish that change.¹⁶⁵ Whether a court allows or denies a statutory damage claim, Congress is free to change the rule by amending the statute. Institutions such as gas companies, hospitals, newspapers and insurance companies are more likely to be in a position to change the result of a court's decision by resort to Congress than are their employees or customers.¹⁶⁶

W. JOHNSON, *EQUITY, RESTITUTION AND DAMAGES, THE STUDY OF LITIGATION THEORY* (1974). K. YORK & J. BAUMAN, *REMEDIES, CASES AND MATERIALS* (1973) provide somewhat more introduction to equitable remedies, then move through remedies for injuries to tangible property interests and then to intangible business and relational interests. The authors then proceed to actions for defamation and business disparagement, for injuries to interests of personalty, and others. O. FISS, *INJUNCTIONS* (1972) and K. PARKER, *MODERN JUDICIAL REMEDIES* (1975) organize first by remedy (with Fiss limiting his concern to injunctions) rather than by substantive area.

163. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 64 (1977).

164. Deterrence from criminal sanctions has at least been studied and we still know rather little about it. See generally note 109 *supra*.

165. Direct treatment of parties will more often, but not always, result in recovery for the claimant. See text accompanying notes 172-187 *infra*.

166. Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1068 (1966). Macaulay further suggests, as to direction of error, that when we lack data about the likely consequences of proposals and the actual consequences of legal action . . . we have to consider the risks of shooting in the dark. Sometimes this is

C. *Legitimacy for Judicial Decisions*

No source of legitimacy for judicial choice has been found beyond the stability of incremental and rulebound decisions in common law contexts, and the neutrality and generality of judicial process for choices involving legislation.¹⁶⁷ The generality and neutrality of process required for this judicial claim to legitimacy fails in two ways. First, it does not address the hard questions of substantive choice.¹⁶⁸ Second, it tends to merge the judicial function into the legislative one, as courts imitate legislatures in making their choices for the public good.

In undertaking to provide direct treatment to parties, courts could provide information for legislative choice by articulating the existence and needs of persons injured by activity in violation of statute. If there were numerous damage suits based on violations of the Farm Labor Contractor Act, that evidence would be available to proponents of more stringent enforcement tools, of more appropriations for enforcement and of an explicit statutory right to sue. If damage claims for the termination of natural gas service turned out to interfere with the regulatory planning of the Federal Power Commission, the Commission would have that experience available in attempting to persuade Congress to preclude private suits. In providing direct treatment of parties, courts would reinforce

the only sensible course open; often it is not. If it must be done, the risk can be minimized by adopting approaches that particularize rather than approaches that work like a shotgun.

Id. at 1121.

167. See note 128 *supra*.

168. Consider the possible rules suggested by the alternative ways of relating value and damages to the person injured: "plaintiff can recover damages for injury from violation of statute only if that award furthers the public interest," or "plaintiff can recover damages for injury from violation of statute if there is a community of interest to which the statutory value will be communicated, and the value embodied in statute distinguishes plaintiff from defendant in a way that makes it fair to impose the burden of damages on defendant." Either rule could be chosen so long as the process of choice "transcended any immediate result." Each rule could be defended if the choice could be traced as gradually emerging, being worked out in a series of cases. But neither explanation tells us how to choose whether the person, community or public should have the benefit of focused judicial attention—whether the person, community or public should bear the burden of the uncertain connections among them. The judicially created rule that "plaintiff cannot recover damages unless defendant failed to act as a reasonable man," and a judicially created rule that "plaintiff can recover damages if defendant imposed a non-reciprocal risk on plaintiff," equally "transcend any immediate result that is involved." Each has been gradually and carefully filled out in the cases in which it is applied. Having concluded that, we still do not know how to choose between them. It is not surprising that process solutions are no help in making substantive choices about how courts will exercise their power: they are solutions created to avoid questions of substance.

legislative choice by communicating legislative values to parties.¹⁶⁹ That communication seems preferable to the dissonance created when a legislature says "it is important that employees not suffer retaliation for helping implement Fair Labor Standards Act requirements," and a court says "but not for you" to employees claiming damages from retaliation.¹⁷⁰

The judicial claim to legitimacy on this basis would be built on participation, on interaction between court and legislature.¹⁷¹ The importance of that interaction is reinforced by the uncertain relation between person and public. This view would take judicial activity in a statutory context as a "good," rather than as an intrusion.

D. *Different Questions and Decisions*

The choice to treat parties directly would produce different questions from those currently asked and often different outcomes. On Doak's claim, the court would inquire whether Congress in the Natural Gas Pipeline Safety Act might have valued the safety of gas workers, and whether that value distinguishes between employees working with piped natural gas and the companies transporting such gas. Damages could communicate the statutory value to employers, and to employees who might organize around it. The court would have to determine whether the statute precludes dam-

169. Shapiro, *supra* note 153, bases his theory of *stare decisis* on communication theory. The extent of communication in the situations I have described would vary enormously. Communication might be facilitated within a community—by union and trade association newsletters, by press reports of damage awards, by lawyers who specialize in particular areas of litigation, by shareholders, by business and social meetings and by organizations of indigents.

170. As a result of that message the individual may become insignificant in his own eyes—a result which Madison saw as "the really great danger to liberty in the extended republic of America." Madison's concerns are recounted and set in political context in G. Wood, *supra* note 5, at 612.

There are varying estimates of the importance of consistency in individual experience, and these are largely gathered in *THEORIES OF COGNITIVE CONSISTENCY* (R. Abelson ed. 1968). Jonathan Freedman questions whether human beings fit "consistency models [of] . . . a very cognitive man who is extremely concerned about and devotes a great deal of energy to maximizing cognitive consistency." *Id.* at 498. He suggests rather that "when they do notice inconsistencies, people seem to endure them without being particularly troubled." *Id.* at 502.

171. I have found that sort of interaction occurring between court and legislature in New York State during the period 1870-1920, after the courts declared statutes unconstitutional under open-ended provisions. J. Lindgren, *Judicial Choice in New York, 1870-1920* (unpublished ms. 1978).

ages when it provides that “[n]othing in this chapter shall affect the common law or statutory tort liability of any person.”¹⁷² That decision would reflect how important the court considered individual claims and how careful it would require Congress to be in precluding them.

On *Stanturf*'s claim, the court would inquire whether Congress in the Hill-Burton Act might have valued the health of indigents, and whether that value distinguishes between the indigents denied services and hospitals constructed with federal funds. Damages could communicate the statutory value to the hospitals, which might comply or begin to seek exceptions under the Act, and to indigents, who might organize around that issue to force hospitals to comply with the statute. The court would not, as it did, deny the claim for lack of jurisdiction.¹⁷³

On the claim by the parents of Roger Breitweiser, the court would inquire whether Congress in the Child Labor provisions of the Fair Labor Standards Act might have valued the physical safety of children, and whether that value distinguishes between children operating such equipment and their employers.¹⁷⁴ It might not distinguish the two if Roger Breitweiser had been operating the forklift in violation of KMS orders.¹⁷⁵ Damages could communicate the statutory value to employers and to child laborers. The court would not consider the case resolved by the observation that “Congress’ determination that sixteen year olds shall not be assigned to fork-

172. 49 U.S.C. § 1677 (b) (1976). The court in *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975) refused to allow an action for damages.

173. Most actions based on the Hill-Burton Act have been for an injunction requiring the hospital to provide services to indigents. The courts split when that is the remedy sought, sometimes resorting to primary jurisdiction in the agency. The court in *Stanturf* refused an action for damages, but the theory of the case was not squarely set on an action implied from the Hill-Burton Act.

174. Even if a court found that Congress had adopted this value, it might still deny Diana Powell damages because she did not in fact contact the Department of Labor before she was fired, but only threatened to do so. *Powell v. Washington Post Co.*, 267 F.2d 651, 652 (D.C. Cir.), cert. denied, 360 U.S. 930 (1959). By contrast, Martinez had filed a complaint in 1969 which resulted in a payment of \$445.22 for back wages. Another complaint was filed for a similar amount in 1970. *Martinez v. Behring's Bearings Serv.*, 501 F.2d 104, 105 (5th Cir. 1974).

175. This issue is important in cases under the Occupational Safety and Health Act of 1971, 29 U.S.C. §§ 651-678 (1976), when the employer is cited for failure to provide a safe workplace and claims that the danger was produced by the failure of employees to use safety equipment or to comply with safety rules. See, e.g., *Brennan v. Occupational Safety and Health Review Comm'n*, 502 F.2d 946 (3rd Cir. 1974); *National Realty and Constr. Co. v. Occupational Safety and Health Review Comm'n*, 489 F.2d 1257 (D.C. Cir. 1973).

lifts will not be subverted if we fail to read a civil damages remedy into the act,"¹⁷⁶ or by the fact that "we can find no indication that Congress intended the FLSA which was passed to deter oppressive child labor and contains substantial enforcement provisions, to form the basis for an expansion of state wrongful death liability."¹⁷⁷

On the claim by Flores, the court would inquire whether Congress in the Immigration and Nationality Act might have valued the security of American citizens' jobs against the knowing and willful hiring of illegal aliens, and whether that value distinguishes between citizen and employees and their employers. Damages could communicate the statutory value to the hiring industries, and the employees whose efforts to force the Immigration Service to end such hiring would be encouraged. The court would not refuse to allow a claim for damages simply because "Congress has revealed no intention to [create a private right of action and a private remedy] under the immigration laws."¹⁷⁸

On Stewart's claim the court would inquire whether Congress in the anti-garnishment provisions of the Consumer Credit Protection Act might have valued jobs secure from one garnishment, and whether that value distinguishes between the garnishees and their employers. Damages could communicate the statutory value to employers and to employees trying to hold jobs under circumstances where they are vulnerable. The court in *Stewart* accepted this reasoning despite Traveler's assertion that "there is ample evidence of a clear congressional intent against private actions for civil remedies . . . and further that the criminal sanctions and agency enforcement explicitly authorized . . . adequately protect

176. *Breitwieser v. KMS Indus.*, 467 F.2d 1391, 1393 (5th Cir. 1972).

177. *Id.* at 1394. Cases that concur with the decisions in *Powell* and *Martinez* that a private cause of action is not available when damages are sought include *Bonner v. Elizabeth Arden*, 177 F.2d 703 (2d Cir. 1949), and *Britton v. Grace Line, Inc.*, 214 F. Supp. 295 (S.D.N.Y. 1962). The court in *Fagot v. Flintkote Co.*, 305 F. Supp. 407, 413 (E.D. La. 1969), in allowing suit by the person retaliated against, concluded that "[a] private suit simply to collect damages for a past violation would not interfere with the Department of Labor's enforcement efforts under the [Fair Labor Standards Act] nor would it present questions requiring administrative expertise that could not be decided by a court of law." Judge Harper in *Boll v. Federal Reserve Bank of St. Louis*, 365 F. Supp. 637, 650 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974), found the opinion in *Fagot* persuasive, but concluded that the plaintiff in *Boll* was not discharged in retaliation for complaints about wages and hours. See Annot., 93 A.L.R.2d 610 (1964).

178. *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973); *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890, 893 (10th Cir. 1972); *accord*, *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Larez v. Oberti*, 23 Cal. App. 3d 217, 100 Cal. Rptr. 57 (1972).

Stewart's statutory interest."¹⁷⁹ Three other courts found those arguments persuasive.¹⁸⁰

On Farmland Industries' claim, the court would inquire whether Congress in requiring the permission of the Federal Power Commission before terminating a customer's service, might have valued the ability of consumers of regulated services to rely on continued service, and whether that value distinguishes between consumers and their suppliers. Damages could communicate the statutory value to sellers of regulated natural gas, and to buyers, who might be encouraged to resist when threatened with the termination of their gas services. The court would treat the Natural Gas Act as straightforward in its prohibition and find that "[w]here there exists a federal right, there must be a concurrent remedy."¹⁸¹ It would not need to make the case turn on the fact that "[a]warding of damages for loss [not an increase in rates] arising from the unauthorized abandonment cannot be made, apparently, in any forum except the federal court."¹⁸²

On Royal Maintenance's claim, the court would inquire whether Congress in providing for the "set-aside contracts" for small businesses might have valued the viability of small businesses. While it seems clear enough that this was the case, the valuing of small business is so conditioned by exceptions in the Act that a court might find that the value never survives the situation in which a plaintiff might be injured. A contract can only be wrongly granted as to size of the winning bidder if the government agency determines that "further delay in awarding the contract would be disadvantageous to the government."¹⁸³ Regulations then provide that "it shall be presumed that the protested bidder or offeror is a small business concern."¹⁸⁴ If there were no governmental necessity, then the size issue would be determined before the contract

179. *Stewart v. Travelers Corp.*, 503 F.2d 108, 110 (9th Cir. 1974).

180. *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W. Va. 1973), *aff'd*, 494 F.2d 379 (4th Cir. 1974); *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972), *vacated*, 488 F.2d 450 (5th Cir. 1973); *Oldham v. Oldham*, 337 F. Supp. 1039 (N.D. Iowa 1972).

181. *Farmland Indus. v. Kansas-Nebraska Natural Gas Co.*, 486 F.2d 315, 317 (8th Cir. 1973).

182. *Farmland Indus. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 681 (D. Neb. 1972).

183. 41 C.F.R. § 1-1.703 (2) (e) (1979).

184. *Id.* That presumption may be consistent with other purposes listed in 15 U.S.C. § 644 (1)-(2) (1976): to maintain or mobilize the nation's full productive capacity and to protect the interests of war or national defense programs.

was given and no damage would result.¹⁸⁵ But the court would not have found that awarding damages to Royal would be inconsistent with a public purpose to preserve and expand full and free competition to insure "the Nation's well-being and security,"¹⁸⁶ and the court would have denied recovery if it found, as the Comptroller General did, that "the administrative record . . . [did] not indicate that the certification made by Maintenance was lacking in good faith."¹⁸⁷

IV. LITIGATION AS CONTEXT

I have suggested why courts need to respond to parties directly. By doing so they help meet the need, for purposes of building theory, to keep alive questions of what it means to fairly treat persons and the communities to which they belong. The suggestion that such a choice may contribute to the development of theory requires faith that we can consciously work at changing society.¹⁸⁸ The suggestion that recovery of damages makes a difference for the injured party is a matter of fact rather than faith.

But the limitations that the context of litigation imposes on

185. The threat of damages to be granted while the contract was being performed might subject the Air Force to the risk that Royal would refuse to continue work once the size determination went against it, or fail to perform the work quickly and well. This risk was confined to instances where the false certification was knowingly made and offset by the apparent inability of the government to sanction the conduct by anything short of criminal prosecution. The court of claims has held that the government cannot rescind a validly awarded contract even if the bidder is later declared not to be a small business. *Allen M. Campbell Co. v. United States*, 467 F.2d 931 (Ct. Cl. 1972); *Midwest Constr. Ltd. v. United States*, 387 F.2d 957 (Ct. Cl. 1968). The court in *Savini Constr. Co. v. Crooks Bros. Constr. Co.*, 540 F.2d 1355, 1358 (9th Cir. 1974), found that "[t]he public interest obviously requires that Congress first insure the contracts for governmental projects are performed in a timely and competent manner."

In *Jenkins v. Fidelity Bank*, 365 F. Supp. 1391, 1401 (E.D. Pa. 1973), the court likewise dismissed a claim because 15 U.S.C. § 645 "provides no civil remedy." In *Raitport v. Chase Manhattan Capital Corp.*, 388 F. Supp. 1095 (S.D.N.Y. 1975), plaintiff sought extensive damages from various lending institutions, licensed by the Small Business Administration as Small Business Investment Corporations, which had refused to finance his business. The court relied on *Royal Services* for the proposition that "[n]either the Small Business Act, nor the Small Business Investment Act create a private right of action in favor of a frustrated borrower against a small business investment company." *Id.* at 1097.

186. *Royal Serv. Inc. v. Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966).

187. *Id.* at 91.

188. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 19 (1970), expresses this view of progress though he would not have been likely to applaud the role suggested here for the courts. "To the extent that progress is man-made, however, the discovery of its proper direction is crucial, and that discovery would at some stage be seen to be quite as much an act of faith as the optimistic reliance on automatic progress."

the conclusion about consequences for parties need to be clear. No social reform or scheme of compensation can be worked out of this. The value is limited to those persons who accept the prospect of an expensive, unfriendly, impersonal experience in court.¹⁸⁹ If class actions were more readily allowed, or if attorneys' fees were awarded to the winning party, then the numbers who could afford to take advantage of my arguments might increase. But those changes would only eliminate the financial barriers, and such changes are unlikely to the extent the courts are themselves part of the bureaucratic structure.¹⁹⁰

These limitations indicate the importance of legislative action to deal with the underlying problem,¹⁹¹ but they do not suggest that in the interim we ignore those plaintiffs who do bring their claims to the courts. The lesson of this paper should apply to it—the fact that judicial choice about damages from statute does not seem directly to solve large problems for the public does not mean that we should fail to deal with the question directly.

189. Felstiner, *Influence of Social Organization on Dispute Processing*, 9 L. & Soc'y Rev. 64 (1974) indicates factors which

reduce the utility of adjudicating interpersonal disputes in government courts. To the extent that such courts are staffed by specialists . . . the rules they apply will tend to become specialized, importantly procedural and alien from everyday norms. Specialized rules require litigants to hire professional counsel. Professional counsel means added expense, inconvenience and mystification.

Id. at 82. The pro se plaintiffs have not fared well. *Raitport v. Chase Manhattan Capital Corp.*, 388 F. Supp. 1095 (S.D.N.Y. 1975); *Jenkins v. Fidelity Bank*, 365 F. Supp. 1391 (E.D. Pa. 1973).

190. The position of judges may be part of "the basic architecture of the legal system," which Galanter suggests "creates and limits the possibilities of using the system as a means of redistributive (that is, systematically equalizing) change." Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974).

191. The uneasy thought has occurred to me that if legislators did consider the question of individual redress they would often deny it—it would be an easy trade off, having no coherent and vocal constituency. Still, I would hope that the reasons I have presented why judges should provide individual redress would likewise persuade legislators. Spanogle, *The U3C—It May Look Pretty, But is it Enforceable*, 29 OHIO St. L.J. 624 (1968) argues that it is important that the legislation be clear about private enforcement:

There are tort theories which are developing to deal with such situations [as all-night telephone calls by creditors, or a job in jeopardy]. But if the U3C regulates this conduct through administrative action only, the growth or even availability of these doctrines may be limited. Thus the statute should either undertake to provide an effective statutory cause of action to redress such unconscionable conduct, or should expressly disclaim any intention to limit the development of the tort doctrines.

Id. at 663. This view prevailed and UCCC § 6.115 explicitly provides for private suit.

