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# Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law

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# Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law

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We are most happy and honored to join in this tribute to Harvey Perlman, a former colleague of the senior author at the University of Virginia. His elevation into the world of administration was both good news and bad news for the type of reform proposed by the senior author in the following and other writings: Good news in the sense that he was less available to cast his penetratingly critical eye on such proposals; bad news in the sense that proposals for reform should always be subject to such a critic's eye.

At any rate, welcome back, Harvey.

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## I. INTRODUCTION

Richard Epstein's trenchant book *Simple Rules For A Complex World*<sup>1</sup> proposes an ideal legal regime characterized by "simple" rules that bear both a high degree of certainty and reasonable administrative costs.

The authors herein argue that a binding "early offers" neo no-fault system previously proposed by the senior author bears nearly all the virtues of such a simple rule for personal injury tort liability. Part I will discuss Epstein's approach to the source of tort law's failure: complexity in the law, which in turn breeds unhealthy uncertainty, perverse incentives, delay and prohibitive transaction costs. A sketch of the problem as framed by Epstein is followed by an account of his solution: "Simple rules," limited in ambition, that achieve reasonable results in most cases with manageable administrative costs and healthy incentive effects. Tort liability, on the other hand, is a complex rule by any definition, with its emphasis on two indeterminates: fault and economic evaluation of noneconomic losses. Epstein's solution would simply allow for widespread contractual opting-out of tort liability—an unlikely solution, we suggest, in contemporary legal clime.<sup>2</sup> Part II will discuss the "early offers" scheme as a much more plausible solution. Finally, Part III will explain in detail why, on Epstein's own terms, early offers is a suitably simple (if admittedly second-best) rule.

## II. COMPLEXITY, SIMPLICITY, AND TORT LAW

### A. Complexity

That the tort liability system for personal injury is troubled seems no longer all that controversial.<sup>3</sup> The next relevant question must be, how did we get there, and how can we fix matters? Richard Epstein thinks he knows, and has compiled a rollicking account of his legal theory in his provocative book, *Simple Rules For A Complex World*. In *Simple Rules*, Epstein surveys the motley landscape of American Law and sets forth an elegant operating principle: that "the level of aspiration for law in the United States . . . is simply too high."<sup>4</sup> Our law seeks perfect justice for all parties—with no wrong left unrighted. This is undertaken by ever more complicated, detailed, and intricate law. But even the most finely wrought law invariably finds its aims

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1. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

2. See 2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTER'S STUDY (1991) 536 [hereinafter ALI STUDY].

3. But see, e.g., Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205 (1994).

4. EPSTEIN, *supra* note 1, at x.

frustrated by some vexing remnant of cases. For Epstein, the manner in which the law addresses this remnant is what determines the success, and perhaps even the validity, of the law. He claims that American law, undaunted by the difficulty of achieving superoptimal outcomes, seeks to eradicate the occasional suboptimal result by honing, refining, and expanding the law until it governs all possible cases. This approach begets what Epstein regards as the fatal flaw of American law: legal complexity.

To Epstein, the crux of complexity is the "critical relationship between the legal rule and the socially ruled: what is the cost of compliance . . . with any given legal rule?"<sup>5</sup> Compliance costs vary inversely with indeterminacy: the less certain the rule, the costlier the compliance. The same is true for highly technical rules: tax lawyers are expensive because of the sheer volume and intricacy of the rules they must apply. Epstein points out, however, that even highly technical or highly indeterminate rules need not necessarily be complex or costly. Epstein illustrates his point by asserting that the infamously labyrinthine Rule Against Perpetuities (RAP) is a simple rule.<sup>6</sup> The RAP, in all its feudal intricacy, is perhaps the acme of technical rules—rules that are complex because they require expertise to unravel their application. If technicality were relevant to Epstein's analysis of complexity, the RAP would be at best a borderline case. Epstein thinks otherwise because RAP is not complex in an important sense: compliance with it does not consume substantial social resources. This is true for two reasons. First, the Rule (convoluted though it is) is a positive rule. If used correctly, it leaves no lingering fuzziness over whether a given transfer is valid or invalid. Second, the Rule is easily circumvented in almost all jurisdictions by the inclusion of a simple saving clause.<sup>7</sup> That is, one can effectively *opt out* of the Rule, and under Epstein's conception any rule that permits of voluntary alternatives is by definition simple; if the rule consumes unwarranted social resources, the parties will opt out of it.<sup>8</sup> The saving simplicity of voluntary opt-outs is the critical center of Epstein's theory, and he quite reasonably applies it to tort law. If one can make the

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5. *Id.* at 25. Epstein claims, unfairly, that Schuck overlooks compliance costs in his fourfold analysis. It is true that Schuck does not grant compliance costs their own category, but he does cite compliance costs as a major function of legal uncertainty. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 18 (1992).

6. See EPSTEIN, *supra* note 1, at 26. *But see* Schuck, *supra* note 5, at 5 (citing the Rule Against Perpetuities as a complex rule).

7. See *Uniform Statutory Rule Against Perpetuities*, reprinted in JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, *SELECTED STATUTES ON TRUSTS AND ESTATES* 674, 677 (John H. Langbein & Lawrence W. Waggoner eds., 1992), and quoted in Schuck, *supra* note 5, at 5 n.18.

8. See EPSTEIN, *supra* note 1, at 26-27.

RAP efficient by allowing opt-outs, one can similarly defuse the uncertainties of tort litigation using the same device.

Without such an escape hatch, a rule that seeks to assure perfect justice in the individual case is likely to become complex. Filling the gaps in a fishnet would make for an unwieldy device, and filling all the gaps in any given law tends to make for unwieldy laws. The real problem is that these efforts to assert control over the margins are by no means costless. Some costs, of course, are inevitable; even the best rules have costs. Problems arise because rulemakers rarely consider the impact of these costs in the aggregate. As Epstein puts it, “[t]he demand for justice is subject to the law of diminishing returns.”<sup>9</sup> At the margins, the costs of “perfect” rules are greater than the benefits they confer. These costs are various; Epstein includes among them the general costs of compliance (lawyers’ fees, time lost to compliance efforts, other costs of administering the rules, and so forth) and the costs of error.<sup>10</sup> Error creeps into complex rules, says Epstein, because, among other reasons, “with complexity come the opportunities for gamesmanship.”<sup>11</sup> Complexity, then, breeds intrigue in the form of strategic behavior.

This intrigue is the product of the other, less considered aspect of legal rules: incentive effects.<sup>12</sup> Every rule breeds incentives to human action, just as it incurs administrative costs. There are, says Epstein, four possible outcomes with respect to costs and incentives in rulemaking:

1. An increase in administrative costs will lead to the creation of superior incentive structures;
2. An increase in administrative costs will lead to the creation of inferior incentive structures;
3. A decrease in administrative costs will lead to the creation of superior incentive structures; or
4. A decrease in administrative costs will lead to the creation of inferior incentive structures.<sup>13</sup>

The trouble with modern lawmaking, says Epstein, is that “[t]oo often we treat the second [outcome] as though it were the first, and aim to create more complex legal structures that in fact lead to inferior social outcomes.”<sup>14</sup> Higher costs and perverse incentives—these are the wages of a complex justice.

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9. *Id.* at 38.

10. *See id.* at 30-31.

11. *Id.* at 38.

12. *See id.* at 31.

13. *Id.* at 34-35.

14. *Id.* at 35. A classic example, as stated above, is the Internal Revenue Code, which is massively complex both in terms of technicality and compliance costs, and breeds similarly massive evasion both legal and otherwise. Encouraging criminality by taxpayers is clearly a perverse incentive effect, and the incentive to in-

## B. Simple Rules

For Epstein, the road out of complexity begins with recognition of several foundational principles on which a framework of simple rules may be constructed. These principles include "autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; and takings of property for public use on payment of just compensation."<sup>15</sup> It should be noted that Epstein in fact regards these six<sup>16</sup> principles as the simple rules in and of themselves. But as John Harrison has pointed out, they are not rules in the ordinary sense of the term, and they certainly do not compose anything like a system of private law. Rather, such "rules" (or principles) are merely a foundation; what Epstein "apparently means to say [is] that he could write a highly comprehensible and determinate code" composed of simple rules.<sup>17</sup> What follows is a modest attempt to posit one such simple rule to govern the unruly province of personal injury tort claims.<sup>18</sup>

## C. Personal Injury Tort Law is a Complex Rule

The complexity of personal injury tort liability,<sup>19</sup> and its failure as a legal rule, "stems from *the unpredictability of its imposition.*"<sup>20</sup> Negligence is a notoriously amorphous concept, subject—and not only at the margins—to wildly variant judgments.<sup>21</sup> Two tort claims may present similar injuries and similar facts but often result in totally different determinations of liability. Worse yet, tort piles uncertainty atop uncertainty: not only is liability unpredictable, but damage awards arising from liability are arguably even more so because of the greater range of possible result. The proliferation of nonpecuniary damages for pain and suffering, which have no economic referent and

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vest huge social resources in efforts to legally evade the tax collector is not much better. *See supra* text accompanying note 11.

15. *Id.* at 53.

16. *Cf.* John Harrison, *Richard Epstein's Big Picture*, 63 U. CHI. L. REV. 837, 861, 847 n.16 (1996) (book review) (questioning whether indeterminacy should be considered an aspect of complexity, given that complex rules can be determinate and simple rules, indeterminate). Harrison points out that Epstein actually sways between six and seven rules, with the seventh being the limited redistribution of wealth by flat taxes. *See id.* at 897 n.16. Harrison views this rule as a corollary of the eminent domain power, and limits the list to six. *See id.* at 846-47.

17. *Id.* at 865.

18. Whether this is the beginning of a "Benthamite paradise of codification," only time will tell. *Id.*

19. *See* Schuck, *supra* note 5, at 3, 5. Schuck describes tort law as only "moderately complex," an overly moderate view itself in our eyes. *See id.* at 5.

20. Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871, 871 (1992) (emphasis added) [hereinafter O'Connell, *Two-Tier Tort Law*].

21. *See id.* at 871.

no widely agreed-on means of determination, have rendered the degree of a potential defendant's exposure almost completely unknowable *ex ante*.<sup>22</sup> With unpredictable pain and suffering damages composing such a substantial portion of all tort damage awards,<sup>23</sup> total damages are similarly unknowable. Given that tort awards for personal injury are "inherently open-ended and subjective,"<sup>24</sup> defendants are unable accurately to predict their exposure, and often thereby are forced both to take superoptimal care to avoid liability and to over-insure against the risk of an extraordinarily large award.<sup>25</sup> Defendants who engage in risky activity are thus saddled with prohibitive costs even absent any finding of negligence.<sup>26</sup> The uncertainty of tort litigation can thus foster enormous and inefficient compliance costs. Its incentive effects are pernicious in various other ways. Plaintiffs (and their counsel), encouraged by the possibility of massive nonpecuniary awards, are spurred to prolong and exaggerate, or even fake, injuries.<sup>27</sup> Defendants, forced to take inefficient levels of care, may withdraw worthy products and services from the market, as has ar-

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22. See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 N.W. U. L. REV. 908, 923-24 (1989); David W. Leebron, *Final Moments: Damages For Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 274-278 (1989); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?* 8 INT'L REV. L. & ECON. 203, 213-214 (1988).
  23. See GARRY L. ANDERSON ET AL., *MEDICAL MALPRACTICE POLICY GUIDEBOOK* 132-42 (Henry G. Manne ed., 1985).
  24. TORT POLICY WORKING GROUP, U.S. ATT'Y GEN., *REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY* 39 (1986) [hereinafter *ATTORNEY GENERAL REPORT*].
  25. Nonpecuniary damages were also in large part responsible for the "litigation explosion" of the 1980s. The Department of Justice has found that the economic effects of the litigation explosion are due less to an increase in claim frequency than to a meteoric rise in large verdicts: "the explosion in damages has come largely at the high end of the awards scale." *ATTORNEY GENERAL REPORT, supra* note 24, at 39. The rise in large verdicts can only have come from increases in the amount of nonpecuniary damages awarded; there is no reason to believe that plaintiffs suffered exponentially larger economic losses in the 1980s.
  26. The uncertainty and expense of tort litigation harms not only defendants. George L. Priest, among others, has argued that the expense of tort liability may lead to a reduction in the availability of insurance coverage, especially to the poor. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1524 (1987).
  27. See KEN DORNSTEIN, *ACCIDENTALLY ON PURPOSE: THE MAKING OF A PERSONAL INJURY UNDERWORLD IN AMERICA* (1996); see also Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment For Pain and Suffering in Return For Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 334-35 (1981) (recounting in detail the results of a lengthy *Chicago Sun-Times* series on personal injury fraud).

guably happened with vaccines, obstetrics, and breast implants.<sup>28</sup> At the least, products and services can become unnecessarily expensive. Auto-insurance companies, faced with uncertain and pervasive liability claims, have been forced to raise rates to prohibitively high levels; this leads to huge numbers of uninsured motorists. Furthermore, a recent study of "low-income insured motorists in . . . Arizona[ ], found that 44% were forced at some point to postpone buying food in order to pay their auto insurance premium."<sup>29</sup>

Epstein's response to the complexity and waste of personal injury tort in the context of consensual relationships is a centerpiece of his theory. He proposes supplementing tort, the complex rule, with a rule that is inherently "simple": contract. Epstein proposes that whenever tort rules prove inefficient, the parties be given free rein to contract out of them to their mutual satisfaction. Tort prevails, in other words, unless otherwise agreed.

The trouble is, of course, as Epstein admits, that "the contractual response [to inefficient tort rules] has been effectively thwarted by the law, which views any disclaimers of tort liability with deep suspicion and distrust, especially as they apply to bodily injuries."<sup>30</sup> Courts, wielding the cudgel of unconscionability, have cast grave doubts that providers of goods and services could offer expanded warranty coverage or lower prices in exchange for waiver or reduction of tort rights, even where such an arrangement would arguably benefit consumers as a class.<sup>31</sup>

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28. See, e.g., 1 COMMITTEE TO STUDY MED. PROF'L LIAB. AND THE DELIVERY OF OBSTETRICAL CARE, INSTITUTE OF MEDICINE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 38-42 (1989); THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991); Scott Harrington, *Liability Insurance: Volatility in Price and in the Availability of Coverage* 47, 55-68 in TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE (Peter H. Schuck ed., 1991); Edmund W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation*, REG., May/June 1985, at 11; Priest, *supra* note 26, at 1521; Schuck, *supra* note 5, at 42.
  29. Jeffrey O'Connell, *Allowing Motorists A Choice to Be Legally Uninsured by Surrendering Tort Claims for Noneconomic Loss (With Some Further Thoughts On Choices Between PIP and Tort Coverage)*, 1 CONN. INS. L.J. 33, 41 (1995).
  30. EPSTEIN, *supra* note 1, at 227.
  31. See, e.g., *Collins v. Uniroyal, Inc.*, 315 A.2d 16 (N.J. 1974); Richard A. Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 VA. L. REV. 1451 (1988); Jeffrey O'Connell, *Pragmatic Constraints on Market Approaches: A Response to Professor Epstein*, 74 VA. L. REV. 1475 (1988). *But see* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 14 cmt.d (1998) (acknowledging, without approving, the possibility of limited waivers of tort liability in exchange for adequate consideration). For a statutory proposal, beyond the scope of this article, allowing motorists to opt out of the tort system for personal injury, see Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 MD. L. REV. 160, 207-213 (1996).



A compromise, however, exists.

### III. "EARLY OFFERS"<sup>32</sup>

The senior author of this paper has proposed a personal injury tort reform plan that arguably holds the middle ground between Epstein and the status quo. The proposal, called "early offers,"<sup>33</sup> bears most of the hallmarks of a simple rule while avoiding the legal roadblocks that Epstein's contractual scheme faces.

Early offers<sup>34</sup> is premised on the notion that tort litigation frequently threatens false outcomes—both false findings of liability ("false positives") and false findings of nonliability ("false negatives").<sup>35</sup> Focusing for the moment on false positives, as suggested above they tend to spur *ex ante* efforts by potential defendants to defeat the second-guessing of courts.<sup>36</sup> (False negatives, on the other hand, far from over-internalizing costs, externalize them.) This is precisely the deterrent effect tort aims at, of course, but such efforts are both enormously expensive and often futile, given courts' tendency to second-guess with the corrupt clarity of hindsight. Worse still, as indicated above, the problem of uncertain liability is exacerbated by the frequent but unpredictable assessment of noneconomic damages, including pain and suffering and occasionally punitive damages, for personal injury. Thus, as suggested above, not only is liability itself uncertain, but the damage total is even more so.

To mitigate the pernicious effects of false positives, one can manipulate two variables: burden of proof and standard of care. By defining the "appropriate standard of care with sufficient clarity and requiring that sufficient evidence be adduced as to whether that standard is satisfied, one can minimize . . . false positives."<sup>37</sup>

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32. The senior author has promulgated neo no-fault plans over the past many years. See, e.g., JEFFREY O'CONNELL & C. BRIAN KELLY, *THE BLAME GAME* 130-35 (1987); Jeffrey O'Connell, *Offers that Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589 (1982) [hereinafter O'Connell, *Offers that Can't be Refused*]; O'Connell, *Two-Tier Tort Law*, *supra* note 20.

33. See O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 883.

34. For a federal bill incorporating the early offers system, see S. 1861, 104th Cong. (1996).

35. See O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 871.

36. See *id.*

37. O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 887. In a stunning—and convincing—decision, the Supreme Court of Montana recently ruled that a Montana criminal statute mandating only that motorists drive in effect with reasonable care (essentially the common law standard) was unconstitutionally vague and therefore a denial of due process as permitting "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Montana v. Stanko*, 974 P.2d 1132, 1136 (Mont. 1998) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Although, of course, the decision has no legal

Early offers purports to accomplish all this by providing that a defendant would be given 180 days to make an "early offer" to compensate the plaintiff's *economic* loss<sup>38</sup> to the extent it is not already covered by collateral sources. If the plaintiff accepts this offer, she waives her tort rights.<sup>39</sup> If she rejects it, the parties proceed to litigation as in the present system, with two significant impediments. First, the relevant burden of proof will be heightened to clear and convincing evidence.<sup>40</sup> Second, the relevant standard of care will be lowered, to 'wanton misconduct' (as well as intentional misconduct). Manipulating the litigation variables this way vastly reduces the probability of false positives.

On the other hand, thus stacking the deck in defendants' favor might be seen as causing false negatives along with concomitant significant externalities from substandard behavior. But note that the defendant gains an advantage only by first agreeing to internalize the claimant's economic losses; noneconomic damages remain in the equation only if the offer to pay economic losses is declined. In effect, noneconomic damages act as leverage for encouraging prompt payment of economic losses, thus avoiding false negatives. The theory is that the uncertainty of pain and suffering damages makes them unsuitable for use at the compensatory level,<sup>41</sup> but that their very indeterminacy makes them suitable for optimal deterrence.<sup>42</sup> Noneconomic damages (primarily pain and suffering awards) actually become much more desirable in this system, because the threat of them encourages prompt payment of economic losses where ordinary negligence is at least arguable, but are allowed only if the defendant is found liable for "wanton misconduct" or worse. Thus, pain and suffering awards serve a punitive function in a way that, while deterring clearly egregious behavior with the threat of massive damages, does not overdeter behavior that is arguably non-negligent. (A defendant can relatively easily avoid wanton behavior provable by a heightened burden of proof, whereas avoiding behavior that may be characterized

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effect in civil cases, it nonetheless arguably speaks volumes about the civil standard as well.

38. The early offers plan includes attorney fees, medical and rehabilitation expenses, and lost wages in the category of economic loss. See O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 883. The compensation offered by the early offer plan is, one should note, thereby more generous than most insurance plans.

39. *See id.*

40. One might better use "beyond a reasonable doubt," although political opposition to such a burden might be substantial. But for an example of punitive damage legislation adopting the reasonable doubt standard, see COLO. REV. STAT. ANN. § 13-25-127(2) (West 1999).

41. See Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1435-36 (1987); O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 887-88.

42. *See id.* at 886.

as negligence by a mere preponderance of evidence cannot easily be done.) More optimal deterrence is thereby achieved by what Jason Johnston calls "punitive liability."<sup>43</sup> At the same time, prompt compensation and the appropriate activity level are addressed by the pseudo-strict liability of the early offer itself which, by making the defendant internalize some significant but lesser sum in a large number of cases, should encourage efficient—while deterring inefficient—activity levels.<sup>44</sup>

The early offers scheme would, in sum, do precisely what Epstein would seem to want a tort liability regime to do: "serve the goals of both internalization and compensation and . . . result in: (1) less overdeterrence of injury; (2) lower insurance premiums; (3) prompt payment of real losses; and (4) lower transaction costs."<sup>45</sup>

#### IV. "EARLY OFFERS" IS A SIMPLE RULE

The early offers plan, then, serves as a simple rule under Epstein's criteria to govern personal injury tort litigation. There are three major justifications for the identification of early offers as a simple rule: first, it creates a system that reflects Epstein's underlying rationale for tort rules, namely "protection from aggression"<sup>46</sup>; second, it both lowers administrative costs and improves incentive effects in ways that dramatically reduce the social costs of the tort system; and third, it represents a ready means of circumventing full-scale tort liability more palatable than Epstein's preferred alternative, permissible total abolition of tort by contract.

##### A. Epstein's Simple Rule for Torts: Protection From Aggression

In Epstein's conception, the simple rule that "forms the basis of the law of tort"<sup>47</sup> is, as just indicated, "protection against aggression."<sup>48</sup> It is not at all clear, however, that "aggression" is what Epstein actually means. Most torts are accidental, and it is curious to think of most accidents as products of "aggression" which carries connotations of moral blameworthiness. Epstein's simple rule for torts is better characterized as "prevention of force," or more simply, "keep off."<sup>49</sup> Prevention of such untoward force, Epstein notes, "will generally work to

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43. Johnston, *supra* note 41, at 1388.

44. As to those who suffer serious injury without much resulting economic loss (such as a homemaker), the bill could provide that a claimant is entitled to a choice of either a lump sum of, say, \$250,000 or periodic payment of economic loss.

45. O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 890.

46. *See infra* Part IV.A.

47. EPSTEIN, *supra* note 1, at 91.

48. *Id.* at 53.

49. *See id.* at 91-92.

the mutual advantage of all parties."<sup>50</sup> Even under this less extreme characterization of tort law, the early offers system would seem to contribute to Epstein's goal of such a positive-sum game by providing better results than the tort system in two critical criteria for administering a legal rule: administrative costs and incentive effects.<sup>51</sup>

In applying tort law, Epstein points out, there are two basic alternatives: negligence liability and strict liability (or no-fault liability).<sup>52</sup> Both systems, economists argue, theoretically yield optimal results, if we assume away informational asymmetries and transaction costs.<sup>53</sup> But, as Epstein recognizes, in the real world, such asymmetries and transaction costs are always with us. Given this, Epstein refers back to the "central heuristic tradeoff"<sup>54</sup> of his simple rules: that any system that consumes administrative costs "must be justified by some improvement in overall incentive effects."<sup>55</sup> The negligence system inherently consumes far more administrative resources than does strict liability in the no-fault sense because the negligence system must determine complex issues of fault.<sup>56</sup> Moreover, the principal administrative advantage of negligence liability is that, theoretically, it "reduces the number of legal disputes that do require adjudication by weeding out from the legal system cases of unavoidable accidents."<sup>57</sup> But in practice, this filter does not work all that well: in accidents involving strangers, Epstein argues, it will always be possible "to point to something that went wrong" and to purport to assign blame for it.<sup>58</sup>

50. *Id.* at 92.

51. Note that the early offers approach, by reserving full-scale tort damages even after an early offer is made for egregious conduct proven by a higher standard of proof, does comport with Epstein's criteria of protecting against "aggression." See text accompanying note 48; see also O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 871-94.

52. Such strict liability must be distinguished from strict products liability, which by requiring proof of product defect is really fault-based.

53. See EPSTEIN, *supra* note 1, at 95.

54. *Id.* at 96.

55. *Id.*

56. See *id.*

57. *Id.*

58. *Id.* at 96-97. Epstein gives a brief example of the indeterminacy of negligence liability in such cases using the Hand theorem:

[the] supposed filter [of negligence liability] is likely to be very porous in cases involving strangers, for wherever there is an accident, it will be possible after the fact to point to something that went wrong. Since the calculations are often on the knife's edge ( $P = 0.01$ ,  $L = \$1000$ ,  $B = \$11$ , no negligence;  $P = 0.01$ ,  $L = \$1000$ ,  $B = \$9$ , negligence) [where  $P$  = probability of the accident,  $L$  = magnitude of the loss, and  $B$  = the cost of prevention], there will be few cases clean enough for the filter to work.

*Id.* at 97.

So negligence liability incurs costs without effecting sufficient improvement in administration or incentives. For this reason, Epstein favors the ostensibly clear-cut and simple administration of a strict liability regime.<sup>59</sup>

As Anthony Ogus has pointed out, however, "to substitute strict liability for negligence as the general regime would create intolerable causation problems."<sup>60</sup> Just who is to be liable for what once fault is no longer a factor? Epstein's solution would be a simple pie-cutter attribution of liability: divide the total harm by the number of defendants, and attribute to each an equal share.<sup>61</sup> Even if this solution is seen as solving the fundamental difficulty of deciding issues of causation (which it doesn't), as Ogus points out it is not at all clear that individuals behind a veil of ignorance—Epstein's favored heuristic for decisionmaking—would ever choose such an arbitrary scheme.<sup>62</sup> In addition, Epstein's rule of strict liability does nothing to ease the burdens of defining the economic value of noneconomic losses.

Early offers, on the other hand, avoids the intractable causation problems associated with defining strict liability *ex ante* while also avoiding the evaluation problems of noneconomic damages, thereby achieving the effect we have emphasized that Epstein claims to seek: the lowering of administrative costs and the improving of incentive effects. It is these effects to which we now turn.

## B. Administrative Costs and Incentive Effects

Epstein defines administrative costs as comprising "all costs necessary to run the legal system," including the costs private parties must bear in bringing themselves into compliance, public costs of enforcing legal norms, the general overhead for the legal system, and the costs of error.<sup>63</sup>

The administrative costs of tort litigation are legion. Early offers reduces such expenses in a variety of ways, including (but not limited to) eliminating: (1) the collateral source rule; (2) damages for pain and suffering; and (3) the perverse incentives born of tort.

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59. *See id.*

60. Anthony Ogus, *The Power and Perils of Simple Ideas and Simple Rules*, 17 *Ox. J. LEG. STUD.* 115, 119 (1997). Ogus points out that Epstein actually criticizes both uncertain rules and technical rules, and argues that Epstein's hostility to both uncertainty and technicality leads to "untenable conclusions," because regulation of any complicated activity must be a trade-off between discretion (which breeds uncertainty) and highly detailed rules (which are technically complex). *See id.* at 119-20 (citing Michael Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 *SAN DIEGO L. REV.* 929, 986-90 (1987)).

61. *See EPSTEIN, supra note 1*, at 97-100.

62. *See Ogus, supra note 60*, at 120.

63. *See EPSTEIN, supra note 1*, at 30-31.

American jurisdictions traditionally follow the collateral source rule, which states that evidence of the plaintiff's right to recovery from sources other than the tortfeasor is not admissible in court.<sup>64</sup> The effect of the rule is to allow plaintiffs to recover both from first-party accident insurance and third-party tort liability insurance. As long ago as 1963, a study found that accident victims received collateral compensation for 45% of their total losses, a figure likely to be greatly exceeded today.<sup>65</sup> Given that most plaintiffs<sup>66</sup> total recoveries are some multiple of their actual loss,<sup>67</sup> the rule has two likely pernicious effects. First, it exacerbates the already troubling problem of over-compensation for injury. Defendants, and in the final analysis society as a whole, are paying too much to recompense some of the injured.<sup>68</sup> Second, the opportunity that the rule presents for plaintiffs to recover amounts in excess of their loss inevitably leads to increased claim frequency and severity. An American Law Institute (ALI) Report estimates that abolishing the rule would reduce both the frequency and the severity of tort claims by about fifteen percent.<sup>69</sup> Moreover, the ALI Study concludes that the drop in claim frequency would likely involve "cases involving small sums, which had marginal litigation value to begin with . . . [so] the impact on such claims of adopting the collateral source offset might well be considered salutary."<sup>70</sup> Abolishing the collateral source rule, when coupled with early offers, would not only cut the costs of injury compensation, it would allow much more efficient use of the available resources.<sup>71</sup>

Abolishing the collateral source rule would incur benefits beyond those of merely reducing dubious claims. If one assumes that the compensation of tort injuries is something like a zero-sum game, it follows that reducing double and triple payments to victims would free up resources for the payment of real needs: "[t]he duplicative recovery permitted by the current rule results in overinsurance for some injured

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64. See John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

65. See *id.* at 1481 (citing ALFRED CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964)).

66. Except those whose losses exceed very high amounts. See 2 ALI STUDY, *supra* note 2, at 161-82. The ALI STUDY recommends a virtual abolition of the collateral source rule.

67. See ALI STUDY, *supra* note 2, at 161-182.

68. See PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 169-70 (1985) (estimating that about 35% of all medical malpractice payments represent expenses already covered by first-party insurance).

69. ALI STUDY, *supra* note 2, at 168 (citing Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 72, 77 (1986)). The 15% figure applies only to medical malpractice.

70. *Id.* at 174.

71. See O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. F. 591, 600-01.

victims and prevents the use of scarce dollars for nonduplicative compensation.<sup>72</sup> "Early offers" will fill real needs in that liability dollars will be used to cover actual economic losses when by definition they outstrip any other sources of compensation, whether from health or disability insurance. By also outlawing subrogation when early offers are made,<sup>73</sup> the early offers plan vastly reduces payments to and between insurers, further reducing administrative difficulty and expense.<sup>74</sup>

Of course, it also is clear that early offers, by abolishing pain and suffering at the compensatory level, would aid substantially in cutting costs in the legal system. The authors of a study commissioned by the Florida Medical Association have suggested that about fifty percent of all damages paid in medical malpractice cases are awarded for pain and suffering.<sup>75</sup> By encouraging compensation for only economic loss in all but the most deserving (i.e., egregious) cases, early offers will reduce the cost of the tort system significantly.

The most significant cost of pain and suffering damages, however, is not their total expense. Whether or not pain and suffering awards are viewed as systematically excessive,<sup>76</sup> as indicated earlier the present pain and suffering regime breeds unacceptable administrative costs:<sup>77</sup> "Lack of uniformity [of payment] introduces an element of unpredictability into the tort system, thereby increasing litigation and insurance expenses while undermining the principle of fairness that like parties be treated alike."<sup>78</sup> Litigation is increased, in part, because "[o]ne consequence [of the unpredictability of noneconomic damages] is that in litigating individual cases, the parties and their lawyers find it only too easy to disagree about the . . . element of pain and suffering," making settlement more difficult.<sup>79</sup> Thus, eliminating compensatory pain and suffering awards will not only reduce litigation and its attendant costs, but also reduce settlement costs at the

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72. ALI STUDY, *supra* note 2, at 179.

73. A corollary of the elimination of the collateral source rule should be the elimination of the practice of subrogation. *See id.* at 176.

74. *See* Fleming, *supra* note 64, at 1536 n.236 (noting the inefficiency of shifting costs by subrogation).

75. *See* ANDERSON ET AL., *supra* note 23, at 132-47. *But see* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 235-37 n.84 (1993) (concluding that all the published empirical studies of pain and suffering awards should be viewed with great suspicion as to their validity).

76. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method For Helping Juries Determine Tort Damages For Nonmonetary Injuries*, 83 CAL. L. REV. 773, 777 (1995) (noting "the lack of evidence . . . establishing that [pain and suffering awards] . . . tend to be excessively high").

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

78. Geistfeld, *supra* note 76, at 777.

79. ALI STUDY, *supra* note 2, at 202.

same time. But note that the early offers approach, as with eliminating the collateral source rule, does not merely eliminate payment for pain and suffering; rather, it uses the possibility of such payment as leverage to encourage relatively prompt and efficient payment for real economic losses.

Still another administrative cost savings that would result from eliminating noneconomic damages is a reduction in marginal behavior, including outright chicanery by unscrupulous plaintiffs and counsel.<sup>80</sup> Because pain and suffering damages are often set as some multiple of economic loss,<sup>81</sup> plaintiffs and counsel have a strong incentive<sup>82</sup> to unnecessarily and even illicitly augment medical bills and other economic losses (already paid by collateral sources) to increase their total award.<sup>83</sup> Such practices impose significant costs not only on the legal system, but also on society's health care expenditures—costs that are a direct function of the availability of pain and suffering damages.

As a result, abolition of pain and suffering damages may create significant savings in that the "significant arbitrary component of pain and suffering damages" forces insurers to "treat the resultant 'risk ambiguity' as an additional cost to be added to the expected value of the loss . . . [making] it even more likely that the premiums paid by a policyholder . . . reflect [more than] the actual cost of the injuries caused by her activities."<sup>84</sup> In other words, such uncertainty encourages further padding (this time on the defendants' side), in the form of excessively conservative pricing by insurers in setting their rates. In turn, the risk ambiguity problem may aggravate "the problem of unaffordable (or unavailable) insurance coverage."<sup>85</sup>

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80. See MARTIN MAYER, *THE LAWYERS* 269 (1967) (pointing out that the availability of damages for pain and suffering has "corrupt[ed] . . . a good fraction of the bar, the medical profession, and the citizenry"), quoted in O'Connell, *Two-Tier Tort Law*, *supra* note 20, at 888.

81. See Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors With Legal Professionals*, 78 *IOWA L. REV.* 883, 894 (1993) (citing a coefficient of between three and seven times economic damages in North Carolina cases).

82. Note here the interrelationship between administrative costs and incentive effects. In a way, perverse incentives are themselves administrative costs as Epstein has defined them. See EPSTEIN, *supra* note 1, at 31.

83. For an account of such seamy practices, see O'Connell, *supra* note 27, at 334-35 (recounting in detail the results of a lengthy *Chicago Sun-Times* series on personal injury fraud).

84. Geistfeld, *supra* note 76, at 787-88.

85. Kenneth S. Abraham et al., *Enterprise Liability for Personal Injury: Further Reflections*, 30 *SAN DIEGO L. REV.* 333, 338 (1993); see also Bovbjerg et al., *supra* note 22, at 926 & n.98 (pointing out that "insurance markets may contract" because of unpredictable pain and suffering liability); JOINT ECON. COMM. STUDY, *AUTO CHOICE: IMPACT ON CITIES AND THE POOR* 43 (March 1998) (arguing that the



Third, early offers, by turning tort law's "massive, costly, and uncertain inquiry"<sup>86</sup> into a simpler, more determinate regime, should help reverse other perverse incentives bred from tort's caprices. Those incentives fall primarily into the category of overdeterrence of salutary activity. As previously mentioned, the most celebrated instances of tort-induced market withdrawal have occurred in the areas of vaccines and obstetrics.<sup>87</sup> Less visible, but perhaps more disturbing, are the dogs that do not bark—producers of goods and services who, fearing liability and inability to predict exposure, decline to enter the marketplace at all. Edmund Kitch, for example, pointed out the failure of vaccine producers, fearful of massive tort liability, to seek a more effective pertussis vaccine, and cited a general lack of industry effort to develop vaccines for AIDS and herpes.<sup>88</sup>

A more recent example of tort-induced market withdrawal occurred in the silicone breast implant industry. Silicone breast prostheses entered the U.S. market in 1962.<sup>89</sup> The medical community has long accepted the fact of minor silicone-related health problems, including "capsular contracture" and impedeance of mammography.<sup>90</sup> Much more controversial, however, are claimed causal links between silicone implants and autoimmune diseases and connective-tissue disorders. In the early 1990s, three lawsuits alleging such injuries resulted in several large verdicts against implant manufacturers.<sup>91</sup> Although "almost no reliable scientific information" then existed,<sup>92</sup>

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tort system "makes all consumers losers" in part by unnecessarily increasing insurance premiums); O'Connell, *supra* note 20, at 890-91.

86. EPSTEIN, *supra* note 1, at 25.

87. See *supra* note 28 and accompanying text.

88. See Kitch, *supra* note 28, at 17. AIDS medicines are now entering the market, but only a full decade after the crisis began.

89. See Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 *TEX. L. REV.* 1, 18 (1995).

90. See *id.* at 18-19.

91. See, e.g., *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994) (awarding \$840,000 in compensatory damages and \$6.5 million in punitive damages); *Toole v. McClintock*, 778 F. Supp. 1543 (M.D. Ala. 1991) (awarding \$350,000 in compensatory damages and \$5 million in punitive damages; the Eleventh Circuit subsequently ordered a new trial in the case).

92. See MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* 97 (1997). Note that the absence of evidence up through 1994 may itself be an unwelcome by-product of the tort system: fearing liability if any negative evidence should surface, "the manufacturing community appears to believe that safety research regarding latent harms invites, rather than wards off, litigation. Defense lawyers tout the effectiveness of ignorance of long-term product effects as a defense to litigation, and this advice appears to be followed, in some cases successfully." Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 *CORNELL L. REV.* 773, 820-21 (1997). A system that encourages manufacturers to avoid knowledge about the safety of their products surely raises questions about the system's efficacy in protecting the citizenry.

the Food and Drug Administration subsequently imposed a moratorium on silicone implant procedures,<sup>93</sup> and the volume of litigation became so heavy that the cases were consolidated into a massive class action with Baxter Healthcare and Dow Corning as major defendants.<sup>94</sup> The implant manufacturers offered a settlement of \$4.25 billion to the plaintiff class's compensation fund, but the class of claimants grew so quickly that \$7.3 billion would have been required to make minimum restitution under the settlement. The judge, therefore, dissolved the settlement. Dow Corning, facing multi-billion dollar liability, declared bankruptcy on May 15, 1995.<sup>95</sup>

These developments might be viewed as salutary if there existed clear evidence that silicone breast implants pose severe health risks. But does such evidence exist? As the executive editor of the *New England Journal of Medicine* has put it, "none of the epidemiologic studies has been able to demonstrate a clear link between breast implants and connective tissue disease or suggestive symptoms."<sup>96</sup> The many scientific studies of silicone implants performed over the past ten years have yielded results that are ambiguous at best. As Heidi Li Feldman has pointed out, studies have come out both supporting and refuting the causation issue and all the studies suffer from various methodological weaknesses.<sup>97</sup> The authors are in no position to claim that breast implants are indubitably safe; rather, we merely point out that there is no preponderance of evidence, much less proof, showing that implants are a serious health risk. Nevertheless, the tort system has rung up almost \$10 billion dollars in liability (including punitive

93. It should be noted that the FDA ban was at least partly motivated not by the possibility of serious health risks but by the high rate of implant rupture and shoddy manufacturing processes. See generally David Kessler, *The Basis of the FDA's Decision on Breast Implants*, 326 *NEW ENG. J. MED.* 713 (1992).

94. See Feldman, *supra* note 89, at 20.

95. See *id.* at 22.

96. ANGELL, *supra* note 92, at 27; see also Jack. W. Snyder, *Silicon Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts Be Reconciled?*, 18 *J. LEG. MED.* 133, 218 (1997) ("[E]pidemiologic studies do not indicate that women with implants are more likely to have or to develop these [connective tissue] disorders than women without implants.")

97. See Feldman, *supra* note 89, at 18. Some studies have found no relationship between breast implants and serious disease. See, e.g., Jorge Sanches-Guerrera et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 *NEW ENG. J. MED.* 1666, 1669 (1995) ("In this large cohort study, we did not find an increased risk of any connective-tissue disease . . . [occurring] among women with any breast implant or with specific types of breast implant . . . [but] our study cannot be considered definitively negative."); Sherine Gabriel et al., *Risk of Connective-Tissue Diseases and other Disorders After Breast Implantation*, 330 *NEW ENG. J. MED.* 1697, 1701 (1994) ("[O]ur results do not support the hypothesis that women with breast implants have an increased risk of connective-tissue [disorders] or other disorders . . ."); *Silicone Implants Pose No Danger, Nurse's Health Study Shows*, MEALEY'S LITIG. REPORTS: BREAST IMPLANTS, June 19, 1995, at 18, 19.

damages), driving a large company into bankruptcy and doubtless deterring many others from entering the medical implantation field.<sup>98</sup> This represents a significant social cost.<sup>99</sup> One cannot be sure whether early offers would have been made in the aftermath of breast implants in particular, but given all that has been spent otherwise, that certainly seems possible. More generally, the availability of early offers for defendants as a class would in all likelihood lessen the overall draconian threat of tort liability, with a concomitant lessening of tort law's unnecessary discouraging of marketing innovative products.

Early offers, then, by making liability and damages more determinate, should help substantially to eliminate producers' incentive to abandon worthy avenues of production and research. At the same time, the continued availability of potentially massive noneconomic damages (including both pain and suffering and even punitive damages) against highly culpable defendants should provide sufficient deterrence against genuinely reprehensible behavior, providing a prophylaxis against the social costs of *underdeterrence*.

Finally, early offers will save on administrative costs simply by encouraging more and earlier settlements of personal injury tort cases. Litigation, as Epstein himself notes, is too often a wealth-wasting activity.

### C. Early Offers as Almost-Contract: An Argument From the Political Economy of Complexity

Regardless of these salutary effects and their resemblance to the effects of a simple rule, Epstein would perhaps be skeptical of early offers' status as a simple rule given the necessity of its statutory (as opposed to contractual) imposition. Epstein himself might further object to the structure of early offers as it affects claimants. Early offers is, after all, initiated by defendants. It is defendants who have the

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98. One notable casualty of the frenzy of implant litigation has been Norplant, a passive birth-control device consisting of small silicon-coated rods implanted under the skin of the arm. Only four years after its introduction (and FDA approval), Norplant has been the subject of over 50 class-action lawsuits alleging that it causes disorders similar to those allegedly caused by breast implants. Although no scientific evidence exists to support such allegations, the lawsuit activity and associated bad publicity has caused a vast reduction in the use of this highly effective medical device. See ANGELL, *supra* note 92, at 83 (citing G. Kollata, *Will the Lawyers Kill Off Norplant?*, N.Y. TIMES, May 28, 1995, § 3, at 1). Angell also notes that unpredictable liability has caused the withdrawal from the market of several large suppliers of biomaterials crucial in the production of medical devices. See *id.* at 84-85.

99. For those who regard the loss of silicone breast implants as an insignificant one, consider that 40% of such implants are used for non-cosmetic medical reasons. See Sanchez-Guerrera et al., *supra* note 97, 1670.

option of making the offer.<sup>100</sup> Early offers does not give that initial option to plaintiffs and, in effect, strongly encourages plaintiffs to accept the offer by imposing upon them otherwise formidable hurdles at trial. This would seem to undercut Epstein's principle of voluntary exchange (and incidentally the principle of autonomy).<sup>101</sup> The "basic mechanism" of exchange, as Epstein puts it, "involves your surrendering something that you value in exchange for something else that you value even more. If both sides allow the trade to occur, there will be an enormous increase of overall well-being . . ." <sup>102</sup> In early offers, of course, one side seeks to make a bargain, and the state weighs in heavily to press the other party to accept it. This is not a completely voluntary exchange in Epstein's terms (although an option of refusal—at some cost, it is true—is preserved for the offeree).

Let us recall, however, the status quo. As tort litigation for personal injury exists today, as a practical matter, no *ex ante* opt-out is possible at all. Plaintiffs cannot normally waive their tort rights *ex ante* in exchange for lower prices, longer warranties, or surer if lesser compensation, even if it is in their rational self-interest to do so.<sup>103</sup> Recognizing this, early offers is a compromise solution: rather than offering total freedom to bargain, early offers presents plaintiffs with what a rational plaintiff, *ex ante*, would arguably bargain for: prompt payment of economic loss.<sup>104</sup> As Professor Jason Johnston has put it,

The theoretical argument is that optimal compensation is that which a sufficiently wealthy and well-informed individual would purchase in a first-party insurance policy. Given the low marginal utility of income for an injured person relative to that person's utility in a healthy state, such an individual would prefer spending the income when healthy rather than spending it on a premium for pain and suffering payments later. This theoretical observation seems borne out by the empirical fact that there is no first-party insurance policy that provides for any form of pain and suffering payment.<sup>105</sup>

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100. Although the choice to do so could be influenced by a provision denying non-offering defendants the benefit of contributory fault defenses. As to the reasons early offers are limited to defendants, see O'Connell, *Offers that Can't Be Refused*, *supra* note 32, at 604-09.

101. See EPSTEIN, *supra* note 1, at 71-90.

102. *Id.* at 72.

103. See *supra* notes 30-31 and accompanying text.

104. See O'CONNELL & KELLY, *supra* note 32, at 133-34.

105. See Johnston, *supra* note 41, at 1435. For the economic analysis underlying this claim, see STEVEN SHAPELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 228-31 (1987) (arguing that the value of insuring for nonpecuniary loss depends in part on whether or not the nonpecuniary loss will alter the person's marginal utility of money). For empirical support for Johnston's claim, see W. Kip Viscusi and William N. Evans, *Utility Functions That Depend on Health Status: Estimates and Economic Implications*, 80 AM. ECON. REV. 353, 371 (1990) (asserting that injury does in fact reduce the marginal utility of wealth). These two analyses together suggest that since injury reduces the marginal utility of money, rational actors would not insure against nonpecuniary loss. Such a conclusion would go far toward validating the common conclusion that the absence of a market for first-

One might object that such a compromise is fine for the hypothetical, rational plaintiff who will receive his desired bargain without actually having to bargain. But what of the idiosyncratic plaintiff who is not risk-averse or even risk-neutral? Surely there are people whose preferences tend away from prompt payment of economic loss and toward delayed and disputed payment of some multiple of that loss. Such an idiosyncratic party would be out of luck in an early offers system. The trouble with early offers, and with any centralized scheme, is precisely that it presumes to know better than the individual what that individual wants and needs. Epstein and legions of market economists too, might well argue that the very point of their autonomy-based, free-exchange system is that it allows the idiosyncratic to bargain for their preferences.

The retort to this objection lies within Epstein's own account of the virtues of substituting contract for tort (in the context of medical malpractice). The crucial issue is transaction costs. Even in the limited context of medical malpractice, with a relatively limited number of parties to bargain with, Epstein admits that group contracts may sometimes be necessary.<sup>106</sup> In the broader context of personal injury tort in general, there exist a nearly infinite number of potential defendants and plaintiffs. The transaction costs of bargaining among such vast aggregates are prohibitive. Even large groups probably could not reach a large enough number of potential defendants to make opting out of tort efficient, and even if they could, tort law might still not be avoided. As a practical matter, as we have seen, courts have shown little disposition to allow parties to opt out of it.<sup>107</sup> It is

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party insurance against pain and suffering is an accurate indicator of the inefficiency of nonpecuniary awards in tort. See also Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 810-11 (1982) (suggesting that tort damages should be set according to the plaintiffs' prior self-assessment of the value of his loss, as measured by the first-party insurance coverage of the victim. Levmore suggests such a scheme as a means to reduce administrative costs of determining appropriate damages); Jeffrey O'Connell and Rita James Simon, *Payment For Pain & Suffering: Who Wants What, When and Why?*, 1972 U. ILL. L.F. 1 (1972).

For arguments against the proposition that the nonexistence of first-party insurance coverage for noneconomic losses indicates the incompatibility of tort compensation for such losses with consumers' insurance preferences, see Steven P. Croley & D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1787-92 (1995) and Randall R. Bovbjerg et al., *supra* note 22, at 931-33.

106. See Epstein, *supra* note 31, at 1462-63; see also *infra* note 111 and accompanying text.

107. See *supra* note 2 and accompanying text. Note also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 14 cmt.d (1998) (citing Jeffrey O'Connell, *Elective No-Fault Liability by Contracts: With or Without an Enabling Statute*, 1975 U. ILL. L.F. 59, 65-71).

not necessary, however, to view judicial intransigence as the end of the matter. Rather, it can be viewed as just another (very large) transaction cost that is imposed politically. The only group large enough to bargain around such a cost is arguably the body politic itself, overriding judicial resistance by statute. As Ogus has argued, "there are limits to the efficacy of private rights and actions to deal with many forms of market imperfections."<sup>108</sup> The judiciary itself has skewed the market, and statutory action can be viewed merely as a kind of market corrective.

To put this differently, Peter Schuck has argued that the main problem of legal complexity is that the producers of that complexity—judges, lawyers, legislators—prefer complexity because they benefit from it and bear few of its costs.<sup>109</sup> Those who do bear the costs—plaintiffs, defendants, and the citizenry—have an incentive to simplify the rules, but they constitute a prohibitively large and diverse group that cannot organize effectively.<sup>110</sup> In the face of a large-scale collective action problem, a statutory solution may be the only one available. Epstein himself has admitted that, to solve the prisoner's dilemma of the "lawyerization" of human relations (a key factor in complexity), "[s]ome collective method of control must take place."<sup>111</sup>

Another reason that early offers makes an appealingly simple rule is a direct corollary of its very failure to address the needs of the idiosyncratic plaintiff. The root of legal complexity according to Epstein's account is legal overreaching—a law that attempts to do too much, too well. A juggler who can comfortably manage three cantaloupes might well drop them all if he tries to juggle a fourth.<sup>112</sup> Similarly, the law, in promulgating rules that are 95% effective, may well destroy the aggregate benefits of the law by extending the law to reach the stubborn 5%. Simple rules, Epstein tells us, "are rules of thumb that work most of the time, but are known and expected to fail some of the time."<sup>113</sup> It is the felicity of the 95% solution that drives Epstein's analysis; it is the dignity of the "good enough."<sup>114</sup> If we assume, as seems justified, that the great mass of people would, *ex ante*, prefer prompt and full payment of economic loss to the high-stakes (mis)adventure of the tort

108. Ogus, *supra* note 60, at 120.

109. See Schuck, *supra* note 5, at 26-27.

110. See *id.* at 27. See generally MACUR OLSON, THE RISE AND DECLINE OF NATIONS (1971) (discussing the role of special interest groups in directing resources away from the general public interest, which has too broad a constituency to be effective, and toward their own narrow—and often antisocial—advantage).

111. EPSTEIN, *supra* note 1, at 14.

112. And the net result would be rather poor for the cantaloupes, not to mention an embarrassed juggler.

113. EPSTEIN, *supra* note 1, at 38.

114. Indeed, Epstein dedicates SIMPLE RULES FOR A COMPLEX WORLD "[t]o the memory of Walter J. Blum, . . . for whom, in law, 95 percent was perfection."

game, then early offers would seem to fit the mold of the 95% solution, especially given the proposal's advantages in terms of administrative costs and incentive effects.

Finally, the manner in which Epstein formulates his theory of simple rules encourages the conclusion that early offers be considered a viable simple rule. Epstein's entire foundation is laid on the "the great trade-off" between administrative costs and incentive effects.<sup>115</sup> If, indeed, the key to a simple rule is its performance in this trade-off, then a rule may qualify as beneficial under Epstein's theory regardless of its precise fit with all of his libertarian preferences, so long as it reduces administrative costs without creating perverse incentives.<sup>116</sup> Early offers does precisely that.

It is idle to pretend that early offers is an ideal simple rule. Early offers is, however, a practical compromise between Epstein's arguably impracticable contract theory and the realities of American law. If we cannot tomorrow wipe the slate clean and start a new legal edifice rooted in Epstein's six grand principles, we can at least act thoughtfully in light of Epstein's insight and implement a simple (if, under his criteria, second-best) early offers rule.<sup>117</sup>

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115. EPSTEIN, *supra* note 1, at 30.

116. *Cf.* Harrison, *supra* note 16, at 860 (arguing that Epstein's account of his theory is flawed, because he could not possibly intend that only a simple rule precisely fitting all of his libertarian preferences qualifies).

117. Much of the foregoing applies even more to proposals by the senior author, along with co-authors, for allowing motorists to opt out of the tort system for personal injury claims in return for more sensible, if less elegant, insurance arrangements. See O'Connell, *supra* note 29; see also O'Connell et al., *supra* note 31. Indeed, by imposing fewer changes on the recalcitrant, auto choice plans are more in consonance with Epstein's libertarian criteria. For a recent report from the Committee for Economic Development ("CED"), endorsing both the early offers and the auto insurance proposals, see COMMITTEE FOR ECONOMIC DEVELOPMENT, *BREAKING THE LITIGATION HABIT: ECONOMIC INCENTIVES FOR LEGAL REFORM* (2000).