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Elizabeth A. Weeks

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BEYOND COMPENSATION: USING TORTS TO PROMOTE PUBLIC HEALTH

ELIZABETH A. WEEKS*

This article began as my comments for a panel on Public Health in Law, at the 2006 Association of American Law Schools Annual Meeting, co-sponsored by the Sections on Law, Medicine and Health Care; Socio-Economics; and Torts and Compensation Systems. Our panel was charged with the task of suggesting methods and approaches to incorporating public health themes into traditional law school courses, namely: Administrative Law, Constitutional Law, Health Law, Contracts, and Torts. My co-panelists, whose articles also appear in this issue, covered the first four of these topics, and I was asked to address the fifth: Public Health in Torts. At my institution, I teach Torts and also have the luxury of teaching an entire dedicated seminar on Public Health Law. Recent headlines—Hurricane Katrina, Avian Flu, Vioxx—amply demonstrate the importance of teaching public health and piquing students' interests on pressing areas of public concern. Therefore, these articles are particularly timely and provide guidance for teaching public health law in both traditional law school courses and expanded specialty curriculum.¹

Among the substantive law school courses through which the panel suggested addressing public health themes, Torts is arguably the poorest fit and least intuitive.

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* Associate Professor, University of Kansas School of Law (Lawrence, KS). This article is adapted from the author's lecture at the Association of American Law Schools' Annual Meeting in Washington, D.C., *Empirical Scholarship: What Should We Study and How Should We Study It?*, which was co-sponsored by the AALS Sections on Law, Medicine and Health Care; Socio-Economics; and Torts and Compensation Systems, entitled *Public Health in Law* (January 2006). The author acknowledges Professor Larry Levine, University of the Pacific-McGeorge School of Law, for allowing her to fill his place, but certainly not his shoes, on this panel. Anne Bloom, Assistant Professor, University of the Pacific-McGeorge School of Law, and Gary Gwilliam of Gwilliam, Ivary, Chiosso, Cavalli & Brewer, Oakland, CA, provided substantial insight to the discussion in Section V, for which the author is grateful. Great appreciation also goes to Michael Wells for teaching me Torts and reading a draft of this article.

1. See also Wendy E. Parmet & Anthony Robbins, *Public Health Literacy for Lawyers*, 31 J.L. MED. & ETHICS 701, 701 (2003) (discussing the increasing importance of public health in society and legal practice and urging development of law school curriculum focused on public health concerns).

Edward Richards, in his article, will suggest that Administrative Law *is* public health law; they are one and the same, unavoidably coterminous.² At the opposite end of the spectrum, it is initially difficult to see the overlap of torts and public health. A narrow view of tort law suggests that the principal goal is compensation: to make the victim whole—to return him, as close as possible, to the position he would have occupied but for the injury. That objective is accomplished through civil litigation and the return of a verdict ordering the defendant-tortfeasor to pay a sum of money to the plaintiff-victim as damages.³ Some view the substantive, procedural, and evidentiary rules of tort litigation as directed toward the singular goal of facilitating the tort victim's recovery. Any ancillary policy objectives are secondary, at best. That perception of tort law comports with the general public's pejorative view of shyster personal injury, or "ambulance-chasing," lawyers.⁴ How can a system geared so heavily toward individual compensation comport with broad communitarian objectives essential to public health? How can serving the interest of individual compensation serve the greater good of society?

2. Edward P. Richards, *Public Health Law as Administrative Law: Example Lessons*, 10 J. HEALTH CARE L. & POL'Y 61, 61-63, 88 (2007).

3. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1114 (1996) (noting that "juries are instructed to award damages to make victims 'whole,' but both the wholeness of victims and the means to make them whole have been changing" as salaries, life expectancies, and range and cost of medical and rehabilitative services increase).

4. See, e.g., Stuart Taylor Jr. & Evan Thomas, *Civil Wars: Doctors. Teachers. Coaches. Ministers. They All Share a Common Fear: Being Sued on the Job. Our Litigation Nation—and a Plan to Fix It*, NEWSWEEK, Dec. 15, 2003, at 42 ("Americans will sue each other at the slightest provocation . . . Many of these cases do not belong in court. But clients and lawyers sue anyways, because they hope they will get lucky and win a jackpot . . ."); Krysten Crawford, *New Worry for Vioxx Victims—Scams*, CNNMONEY.COM, Dec. 1, 2004, http://money.cnn.com/2004/12/01/news/fortune500/vioxx_ads/index.htm; Power of Attorneys, Stupid Lawsuits and Other Funny Stuff, <http://www.power-of-attorneys.com/StupidLawsuit.htm> (last visited Nov. 26, 2006) (cataloguing "stupid" lawsuits and warning labels and noting that they represent just a fraction because "[t]here are just too many crackpot lawyers and lame brain clients to keep up with all the stupid lawsuits in America"); see also Galanter, *supra* note 3, at 1094-96 (describing examples of the public's "widespread discontent with the tort system" and the perception that the system is "demented, with freakish punitive damage bonanzas for persons who pour coffee on themselves or ricochet golf balls into their own foreheads"). *But see id.* at 1099-1104 (describing objections and public perceptions with alternative data and information about the tort system); Jon Greenbaum, *McDonald's Hot Coffee Lawsuit and Beyond: The Tort Reform Myth Machine*, COMMON DREAMS NEWSCENTER, Jan. 22, 2005, <http://www.commondreams.org/views05/0122-11.htm>; Neil deMause, *Trial by Anecdote: Newsweek's "Lawsuit Explosion" Blown Away by Facts*, EXTRA!, Mar./Apr. 2004, <http://www.fair.org/index.php?page=1174> (pointing out factual errors and misleading conclusions in the *Newsweek* story, *supra*, and claiming that "tort lawsuits are in fact not on the rise"); Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's "Lawsuit Crisis"*, WASH. MONTHLY, Oct. 2004, at 18, available at <http://www.washingtonmonthly.com/features/2004/0410.mencimer.html> (noting the absence of relevant facts in *Newsweek's* article, *supra*, and explaining that many of the most colorful examples are false Internet and urban legends); Anthony J. Sebok, *Should Doctors Vote Against John Edwards?: Critiques of Senator's Medical Malpractice Litigation Record Are Wrong*, CNN.COM, Jul. 27, 2004, <http://www.cnn.com/2004/LAW/07/27/sebok.edwards/index.html> (suggesting that medical professionals should not direct their frustration with the tort system toward tort lawyers, who are mere "participant[s] in the system").

I. TORTS POLICIES: COMPENSATION AND BEYOND

I emphasize on the first day of a first-semester Torts class that many different, and often competing, policy objectives animate the law. As a predominately common law course that lacks a rules book, uniform code, or statutory supplement, first-year students often struggle to reconcile divergent views and irreconcilable rules in different jurisdictions. They want answers; they want to know what the law is.⁵ Policies, and the degree to which one court or jurisdiction values certain policy objectives more than others in any given case or area of law, explain or offer ways to reconcile the divergent approaches. Thus, policy arguments are central to teaching and understanding torts. Many torts policies advance public health objectives.

Beyond compensation, making the injurer pay for the harm caused creates incentives for safety and deters future, dangerous conduct. A damage award ensures that the injurer “feels,” or internalizes, the whole harm caused. For example, the collateral source rule requires a defendant to pay full damages even when the plaintiff has an alternative, or collateral, source of payment, such as medical or life insurance, or pension or disability coverage to replace lost wages.⁶ Although the collateral source rule seems to provide double-recovery to injured plaintiffs, it is justified in the interest of avoiding a windfall to defendants from the plaintiff’s thrift and good planning.⁷ The rule ensures that defendants get the correct message about acceptable conduct in the future.⁸ In reality, plaintiffs typically do not get double recovery because their tort awards are subrogated to the insurer, which already compensated the loss.⁹

Operating with accurate information, actors can make a rational cost-benefit calculus regarding whether the potential tort damages outweigh the expected

5. “Not having a right answer to write down in your notes can be extremely frustrating. First-year American law students have the same complaint. They, too, want certainty. They learn that they cannot have it. The better the law school, the less certainty, and the more students have to think for themselves.” GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 10 (2005).

6. *E.g.*, *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 63 (Cal. 1970).

7. *E.g.*, *id.* at 66 (“The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim’s providence.” (footnote omitted)); *Arambula v. Wells*, 85 Cal. Rptr. 2d 584, 586 (Cal. Ct. App. 1999) (“The idea [of the collateral source rule] is that tortfeasors should not recover a windfall from the thrift and foresight of persons who have actually or constructively secured insurance, pension or disability benefits to provide for themselves and their families. A contrary rule, it is feared, would misallocate liability for tort-caused losses and discourage people from obtaining benefits from independent collateral sources.”).

8. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 219 (5th ed. Aspen 1998) (explaining the underdeterrence rationale with this example: “The economic cost of the accident, however defrayed, is \$10,000, and if the judgment against him is zero, his incentive to spend up to \$10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced.”).

9. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 380 (2000) (suggesting that “overcompensation is often more theoretical than real” because of insurer’s subrogation rights).

benefits derived from the wrongful conduct.¹⁰ Accordingly, another central objective of tort law is utilitarian—specifically, to avoid creating too much safety. The system does not attempt to achieve perfect safety at the expense of other important social values.¹¹ This utilitarian objective means that some dangerous, even injurious, conduct is tolerated and will not give rise to tort liability because the benefits to society outweigh the harm inflicted on the individual plaintiff.¹²

Tort judgments also operate as a form of loss-spreading or insurance, which serves both efficiency and fairness policies. Rather than leaving the innocent, injured party bearing the whole loss of accidental injuries, the tort system places the loss on the injurer, who may be best able to spread the cost of accidents across all of society. For example, requiring a product manufacturer, rather than an injured consumer, to bear the cost of injury caused by the product allocates the loss to the party in the better position to reduce the risk of injury. Product manufacturers have better information about dangerous products and better means to address the problem than consumers. Product manufacturers or sellers of products can also spread the loss across society through increased purchase prices for products, or pass on the costs to others in the distribution chain. As consumers, we pay slightly higher prices for products, putting in our “two-cents” for the inevitable, occasional injury while still enjoying the benefits of an otherwise desirable product.¹³ Moreover, as a matter of fairness between an innocent consumer and the

10. See Marshall S. Shapo, *Responsibility for Injuries: Some Sketches*, 100 NW. U. L. REV. 481, 481-82 (2006) (discussing the cost-benefit test and other economic conceptions of tort liability).

11. Marshall S. Shapo, *Towards a Jurisprudence of Injury: The Continuing Creation of a Substantive Justice in American Tort Law: Report to the American Bar Association*, 1984 A.B.A. SEC. TORT LIABILITY SYS. 4-13 (noting that under economic views of accidents, “it would be uneconomic if too few accidents occurred” and that a judge-made rule calling for near-perfect safety “would represent a choice by courts that goes beyond the level of safety that consumers prefer”).

12. See, e.g., *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-72 (4th Cir. 1974) (“The purposes and intended use of the article is an even more important factor to be considered [including, among other factors, safety]. After all, it is a commonplace that utility of design and attractiveness of the style of the car are elements which car manufacturers seek after and by which buyers are influenced in their selections.” (footnote omitted)); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (“If the cost of safety measures . . . exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention.”); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 563 (1972) (defining standard of care as “straightforward utilitarian comparison of the benefits and costs of the defendant’s risk-creating activity”); *id.* at 566-67 (discussing foundation of negligence principle as “exempting socially useful risks from tort liability”); *cf.* Shapo, *supra* note 10, at 482-83 (noting that efficiency-oriented models “do not consider the fairness or morality of placing a loss on one party or the other”).

13. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”); Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 TENN. L. REV. 833, 838 (2005) (“[M]any believe that consumers who benefit from products without suffering harm should share, through increases in prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.”).

manufacturer who created the harmful product and benefits from its sale, it seems fair that the product manufacturer should bear the loss.¹⁴

Related to the deterrence function, tort law, in some cases, seeks to punish wrongdoers. Tort plaintiffs may be awarded damages that bear no relation to the value of the loss experienced.¹⁵ Punitive, or exemplary, damages are available in exceptional cases if the defendant's conduct is particularly egregious or reprehensible.¹⁶ Even without punitive damages, tort judgments serve an expressive function, communicating society's disapproval of certain conduct through the verdict and award of damages.¹⁷ The communicative purpose of tort law is particularly salient in professional malpractice and defamation cases, in which litigants' reputations are at stake.

Admittedly, many tort law principles are individualistic.¹⁸ The law protects personal autonomy and dignity, even in the absence of appreciable harm or condemnable wrongdoing. Intentional torts, such as battery, assault, trespass, and false imprisonment, may be committed even when a plaintiff experiences no harm

14. See *Escola*, 150 P.2d at 441 (Traynor, J., concurring) ("If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer."); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 735 (7th ed. 2000) (discussing the "corrective justice" theory of products liability, according to which "loss should be placed upon the party who created the condition, not the party who suffered from it"); Shapo, *supra* note 10, at 483 (describing the basic notion of loss and risk spreading as "where many benefit from an activity that injures a few, the cost of those injuries should be imposed on those advantaged by that activity"); Phillips, *supra* note 13, at 838 ("As between [product wholesalers and retailers] and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses." (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. a, at 13-14 (Tentative Draft No. 2, 1995))).

15. See Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 949 (2001) (noting that "punitive damages routinely violate the allocation principle 'to each, her own,'" and that "an individual plaintiff enjoys no entitlement to punitive damages, in contrast to compensatory relief" (footnote omitted)).

16. *E.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (providing that punitive damages are "quasi-criminal" in nature and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing" (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991))); see also RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."); DOBBS, *supra* note 9, § 381 ("Punitive (or 'exemplary') damages . . . are usually available only when the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice.").

17. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1437-38 (1993) (discussing examples of punitive damages awards as retribution and an expression of societal disapproval); Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WISC. L. REV. 131, 138-39 (discussing various functions of punitive damages, including "expressing moral disapproval"); see also *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible.").

18. See Sebok, *supra* note 4 ("American tort law is more individualistic than any other Western nation But [doctors] should not hate John Edwards for applying to his clients' cases the values which are at the foundation of American tort law.").

or discomfort but merely intentional “invasion” of her interest in bodily integrity. For example, battery requires an intent to touch or bring about an unwanted touching, not an intent to harm or injure.¹⁹ Assault does not require any touching at all, not even fear of touching, but merely apprehension or awareness that an unwanted touching could occur.²⁰ A trespass may be committed even when the defendant honestly but mistakenly believes he has a right to be on the plaintiff’s land,²¹ or when the defendant emits microscopic particles that unavoidably migrate onto the plaintiff’s land.²²

Other torts rules protect freedom of action, allowing a sphere of activity and room for mistakes, even harm-producing mistakes, for which defendants will not be liable. Most significantly, by moving away from certain key elements of our British common law origins, the United States shifted from a strict liability standard for accidental injury to a negligence, or fault-based, standard.²³ Negligence allows defendants to make mistakes and even cause harm; defendants avoid liability as long as their conduct is reasonable in the view of the fact-finder.²⁴

19. *E.g.*, *Vitale v. Henchey*, 24 S.W.3d 651, 657-58 (Ky. 2000) (“The intent necessary for battery ‘is not necessarily a hostile intent, or a desire to do any harm.’ Rather, it is an intent to make contact with the person, not the intent to cause harm.”); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (finding battery when plaintiff, a black mathematician attending a meeting at an all-white country club, had plate snatched from his hand by a white waiter because “[t]he intentional snatching of an object from one’s hand is as clearly an offensive invasion of his person as would be an actual contact with the body”); *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955) (finding a battery would exist if, when a child pulled a lawn chair out from under a woman causing her to have contact with the ground, that child “knew with substantial certainty that the [woman] would attempt to sit down where the chair had been”).

20. *See, e.g.*, *Beach v. Hancock*, 27 N.H. 223, 223-24, 230 (1853) (recognizing assault where defendant threateningly waved a gun, which, unbeknownst to plaintiff, was not loaded); RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (1965) (defining assault as “intending to cause a harmful or offensive contact . . . or an imminent apprehension of such a contact”).

21. *See, e.g.*, *S. Counties Ice Co. v. RKO Radio Pictures, Inc.*, 39 F. Supp. 157, 159 (S.D. Cal. 1941) (finding that studio employees committed trespass and harmed property while mistakenly believing they had a right to enter to erect a set); *Longenecker v. Zimmerman*, 267 P.2d 543, 545 (Kan. 1954) (finding landowner liable in trespass for trimming neighbor’s trees that she mistakenly believed were on her property).

22. *See, e.g.*, *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 797 (Or. 1959) (recognizing trespass as interference with a possessor’s “proprietary or dignitary interest” in land, which may “be violated by a ray of light, by an atomic particle, or by a particulate of fluoride”).

23. *Compare* *Losee v. Buchanan*, 51 N.Y. 476, 485-87 (1873) (denying liability when non-negligently maintained steam boiler exploded, sending projectile metal shards onto neighbor’s property) with *Rylands v. Fletcher*, 3 L.R.E. & I. App. 330 (H.L. 1868) (finding liability when non-negligently constructed water reservoir broke through and flooded neighbor’s property).

24. *See* *Brown v. Kendall*, 6 Mass. 292, 296 (1850) (defining “ordinary care” as “that kind and degree of care, which prudent and cautious men would use . . . to guard against probable danger”); POSNER, *supra* note 8, at 183 (noting that many accident cases are won by plaintiffs because cases are judged not by individual capacities for accident-avoidance but rather in terms of “the average (in legal parlance ‘reasonable’) person in each party’s situation”).

II. PUBLIC HEALTH POLICIES IN TENSION

Individualistic tort principles seem incompatible with the collective, population-based perspective central to public health.²⁵ As Wendy Mariner's article describes, notions of health focus on individual wellness or freedom from pathology, whereas public health is concerned with promoting optimal health of the population as a whole.²⁶ Public health seeks more than the aggregation of individual satisfaction; it seeks the common good.²⁷ Accordingly, individual rights are constantly in tension with communitarian interests. For example, Garrett Hardin's classic essay, *The Tragedy of the Commons*, describes the challenges of respecting individual interests while promoting societal good.²⁸ In a ranch community with a common pasture, the interest of each cattle owner individually is to add cattle to the commons to increase his or her individual productivity.²⁹ As the commons becomes more crowded, the yield of each animal decreases, requiring the ranchers to add more cattle to produce the same level of individual benefit, and so the cycle continues.³⁰ Eventually the commons is depleted and can be protected only through external controls, such as restricting the rights of each individual owner in favor of the collective good.³¹

25. "Public health is what we, as a society, do collectively to assure the conditions for people to be healthy." COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, INST. OF MED., *THE FUTURE OF PUBLIC HEALTH* 19 (1988); see also LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW & ETHICS: A READER* 2 (Lawrence O. Gostin, ed. 2002) (quoting same); Scott Burris, *The Invisibility of Public Health: Population-Level Measures in a Politics of Market Individualism*, 87 AM. J. PUB. HEALTH 1607, 1608-09 (1997) (arguing that public health addresses the health of people on a collective, rather than individual, basis).

26. Wendy K. Mariner, *Medicine and Public Health: Crossing Legal Boundaries*, 10 J. HEALTH CARE L. & POL'Y 121, 144 n.108 (2007); see also Burris, *supra* note 25, at 1608 (defining "health" as a "personal, medical matter, a state of freedom from pathology achieved by an individual through the mediation of a doctor" and characterizing "[p]ublic health, by contrast . . . as an attribute of communities in social and physical environments" that "ideally, includes not just a high level of well-being for some but its even distribution throughout a society"); Andrew W. Siegel, *The Jurisprudence of Public Health: Reflections on Lawrence O. Gostin's Public Health Law*, 18 J. CONTEMP. HEALTH L. & POL'Y 359, 361-62 (2001) (describing Gostin's distinction between public health law and health care law, and suggesting that "[p]ublic health law is concerned with the state's role in advancing the health of the community, whereas health care law is concerned with the 'microrelationships between health care providers and patients'" (quoting LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 15 (2000))).

27. Lawrence O. Gostin, *Health of the People: The Highest Law?*, 32 J.L. MED. & ETHICS 509, 510 (2004) ("The field of public health would profit from a vibrant conception of 'the common' that sees public interests as more than the aggregation of individual interests.").

28. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968); see also Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 262-63 (Richard A. Goodman et al. eds., 2003) (describing Hardin's essay).

29. Hardin, *supra* note 28, at 1244; see also Malone & Hinman, *supra* note 28, at 263.

30. Hardin, *supra* note 28, at 1244; see also Malone & Hinman, *supra* note 28, at 263.

31. Hardin, *supra* note 28, at 1245; see also Malone & Hinman, *supra* note 28, at 263.

This classic tension between individual interests and the common good operates with public health interventions. For example, an individual may prefer not to be vaccinated based on religious, philosophical, or personal objections—even utterly irrational reasons. Or someone may wish to avoid substantial or even infinitesimally small medical risks associated with the vaccine.³² Tort law's protection of individual autonomy, dignity, and bodily integrity would seem to allow an individual to refuse vaccination even for foolish reasons or slight probabilities. But an individual's failure to be vaccinated depletes the "commons" of a disease-free society by increasing the number of unprotected people in the population.³³

Public health operates from a social contract model according to which individuals leave the state of nature where they had no choice but to fend for themselves to join society.³⁴ In so doing, we give up certain individual rights in the interest of the greater good of society.³⁵ In exchange for giving up those rights, individuals gain the protections of social order and laws, considered superior to the state of nature.³⁶ Classic communitarian public health interventions, such as mandatory vaccination, quarantine, disease surveillance, and partner notification are contrary to interests of personal privacy and autonomy, freedom of movement, and bodily integrity. For example, tort law might recognize a battery for offensive or nonconsensual touching in the form of a vaccination.³⁷ Battery protects individual rights even if the touching might benefit the individual herself or society at large. By contrast, as Wendy Parmet discusses in her article, outside of the torts context, courts have recognized constitutional limits on the same interests in liberty

32. Many parents continue to believe that the thimerosal (mercury) preservative in standard childhood measles, mumps, and rubella vaccines is associated with increased risk of autism, despite comprehensive studies concluding that there is no link. See, e.g., Michelle Meadows, *Institute of Medicine Report: No Link Between Vaccines and Autism*, Sept.-Oct. 2004, http://www.fda.gov/fdac/features/2004/504_iom.html.

33. See Malone & Hinman, *supra* note 28, at 263 ("As more and more individuals choose to do what is in their 'best' individual interest, the common eventually fails as herd immunity disappears and disease outbreaks occur.").

34. THOMAS HOBBS, *MAN AND CITIZEN* 112 (Bernard Gert ed., Charles T. Wood et al. trans., Hackett Publishing Co. 1991) (1651); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 8-9 (J.W. Gough ed., 3d ed. reprint, Basil Blackwell, 1976) (1690).

35. HOBBS, *supra* note 34, at 112; LOCKE, *supra* note 34, at 8-10.

36. HOBBS, *supra* note 34, at 112; LOCKE, *supra* note 34, at 8-10.

37. See *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891) (recognizing potential battery for vaccination without consent but holding that plaintiff objectively manifested consent by holding her arm out to the ship doctor). Various facts in the case, however, raise questions regarding the plaintiff's actual, voluntary consent. *Id.* The plaintiff, Mary O'Brien, was vaccinated onboard, during her passage from Queenstown to Boston. *Id.* At the time, Boston followed strict quarantine regulations for immigrants. *Id.* Only persons possessing a certificate from the ship's medical officer could enter the land without quarantine. *Id.* In addition, there is indication that O'Brien may not have spoken English and may not have understood the consequences of submitting to a vaccination or refusing to be vaccinated. *Id.*

or bodily integrity.³⁸ *Jacobson v. Massachusetts* holds that the state's interest in providing sanitation and other public health measures limits individual rights, consistent with the social contract.³⁹

Other public health interventions—safety regulations such as helmet and seatbelt laws—are classic anti-libertarian laws.⁴⁰ One justification for such laws is paternalism: protecting people from their own bad judgment and requiring them to protect themselves, despite their free will to disregard their own safety.⁴¹ These regulations also purport to benefit society in a utilitarian sense by mitigating the extent of injuries likely to result from inevitable accidents. The lost productivity and medical expenses associated with those injuries would impose costs on the rest of society.⁴² Other anti-libertarian laws, such as criminal prohibitions on prostitution or illicit drugs, paternalistically protect individuals from engaging in unsafe conduct, express moral condemnation of the activities, and aim to reduce

38. Wendy K. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10 J. HEALTH CARE L. & POL'Y 13, 23 (2007) (discussing *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 39 (1905)); see, e.g., *Jacobson*, 197 U.S. at 25-26 (upholding a state law that authorized compulsory vaccinations and criminal sanctions for noncompliance as a valid exercise of state police power and rejecting the plaintiff's Fourteenth Amendment substantive due process claim); see also Malone & Hinman, *supra* note 28, at 271-73 (discussing *Jacobson*, 197 U.S. 11, and the constitutional basis for mandatory vaccination laws).

39. As the Court noted:

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.

Jacobson, 197 U.S. at 26-27 (quoting *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84 (1851)). The Court also recognized "the social compact" in the constitution of Massachusetts. *Id.* at 27.

40. See JOHN STUART MILL, *On Liberty*, FRAZIER'S MAG. (1859), reprinted in ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Oxford University Press 1998) (1991) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized society, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.").

41. See Stephen P. Teret & Tom Christoffel, *Injury Prevention and the Law*, in LAW IN PUBLIC HEALTH PRACTICE, *supra* note 28, at 403 (noting the "bitter debate over the proprietary of [mandatory motorcycle helmet] laws," despite their success, and the condemnation "by some as paternalistic deprivations of highly valued personal freedoms"); Marian Moser Jones & Ronald Bayer, *Paternalism and Its Discontents: Motorcycle Helmet Laws, Libertarian Values, and Public Health*, 97 AM. J. PUB. HEALTH 208 (2007).

42. See John Leland, *The Superstar Athlete Is Paid to Take Risks, Right?*, N.Y. TIMES, June 18, 2006, § 4, at 3 (commenting on the recent motorcycle crash of Pittsburgh Steelers quarterback Ben Roethlisberger, who was riding without a helmet, and noting that "[p]olicy debates over seatbelt laws, cigarettes, gun locks, steroids, environmental safeguards, employee savings plans and storm evacuation orders" arise from the fact that "society -- or a football team -- has an interest in managing risk, trying to maximize individual liberty while minimizing the harm to others when one person's gamble doesn't pay off"); Gostin, *supra* note 27, at 510 ("Laws designed to promote the common good may sometimes constrain individual actions (smoking in public places, riding a motorcycle without a helmet, etc.)."). But see Clive Thompson, *Bicycle Helmets Put You at Risk*, N.Y. TIMES MAGAZINE, Dec. 10, 2006, at 36 (citing a study confirming the myth that cyclists wearing helmets are more likely to get hit because helmet-wearing changes drivers' behavior).

externalities or “neighborhood effects.”⁴³ Those laws restrict individual freedom to engage in certain professions or activities but promote the common good.

Also in the name of consumer safety and welfare, strict product liability judgments against manufacturers of defective products may limit consumer choice by removing products from the market or making them prohibitively expensive for consumers. Likewise, some state legislatures and courts prohibit parties from freely entering certain contracts because the agreements violate public policy.⁴⁴ Although the parties may knowingly and voluntarily agree to give up certain assurances of safety or rights to sue in exchange for cheaper or otherwise unavailable products, services, or employment opportunities, lawmakers may restrict individuals’ freedom to trade personal safety for economic benefit. Justifications for government intervention in economic liberties, such as the inequality of bargaining power and other market imperfections, are not always convincing.⁴⁵ Public health and safety is a more convincing rationale for those paternalistic laws.

Another theme in tort law that seems to fit poorly with public health objectives is the general lack of a duty to aid, warn, protect, or rescue. In the interest of personal autonomy and freedom of action, the law generally does not impose affirmative obligations on actors.⁴⁶ Instead, liability arises from a plaintiff’s failure to avoid causing harm to others or taking unreasonable risks that expose others to harm. In most cases, actors are liable for accidental harm only if they are negligent, meaning that they failed to exercise reasonable care, or the degree of care expected of a reasonably prudent person acting in the same or similar circumstances.⁴⁷ Accordingly, as a matter of tort liability, there is no duty to undertake even an easy rescue.⁴⁸

43. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 30-34 (40th anniversary ed. 2002) (defining “neighborhood effects” and explaining the rationale for paternalistic laws).

44. *E.g.*, *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444-46 (Cal. 1963) (invalidating a patient’s agreement to release a charitable research hospital from liability for future negligence as adverse to the public interest and listing factors relevant to finding express exculpatory agreements invalid); *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 797-98 (Vt. 1995) (applying a similar analysis to invalidate commercial recreational ski resort’s express exculpatory agreement and noting that “[n]umerous courts have adopted and applied the *Tunkl* factors”) (citing *Tunkl*, 383 P.2d at 445-46).

45. *Compare Tunkl*, 383 P.2d at 447 (analyzing a hospital’s “decisive advantage in bargaining” power against the “inferior bargaining position” of a patient requesting to be admitted) with *Dalury*, 670 A.2d at 799 (noting that the public would be forced to bear “the cost of the resulting injuries” if a ski resort operator could obtain broad waivers of liability).

46. DOBBS, *supra* note 9, § 314 (noting it is “widely accepted” that “[u]nless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, defendants are not liable in tort for a pure failure to act”); RESTATEMENT (SECOND) OF TORTS § 314 (1965) (providing that no duty arises from “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection”).

47. DOBBS, *supra* note 9, § 117 (outlining the objective reasonable person standard, “often described as the standard of ordinary care, due care, or reasonable care”).

48. *See POSNER, supra* note 8, at 207-09 (discussing the no-duty rule and providing additional justifications for not imposing Good Samaritan liability under tort law). *But see generally* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 110-13 (1908) (urging that the law hold individuals liable

Consider the standard hypothetical: If A comes across B, who is lying face down in a puddle, seemingly unconscious and likely to drown if he remains that way, and A can easily flip B over with his foot, thereby saving his life, is A liable if he decides simply to walk past B?⁴⁹ As a matter of morality, the answer may be, “yes,” but as a matter of tort law, the answer is, “no.”⁵⁰ The law imposes no duty to rescue, even though in cost-benefit terms, the benefits of the rescue—a life saved—clearly outweigh the costs—a soiled shoe or few-seconds delay in the course of the rescuer’s day.⁵¹ A real-world example of the no-duty rule, often cited in Psychology textbooks for illustrating the problem of “diffusion of responsibility,” is the tragic case of Kitty Genovese, a woman who was stabbed to death on an urban public street while thirty-eight people watched.⁵² None of the thirty-eight witnesses responded to her cries, each believing that someone else would come to her aid.⁵³ As a matter of tort law, however, none of the witnesses could be held liable.⁵⁴ The no-duty rule protects privacy and freedom of action. Individuals may

for “fail[ing] to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself”).

49. I understand from a Vanderbilt University Law School alumnus that Professor John Goldberg gives the hypothetical of a law student who faces the choice of turning a drowning, face-down classmate over, or proceeding to class, while enjoying a breakfast bagel. From the correct no-duty answer, Professor Goldberg derives the memorable refrain: “Tort law says, ‘eat the bagel!’” See RESTATEMENT (SECOND) OF TORTS § 314 (1965). The *Restatement* hypothetical involves “a blind man, about to step into the street in front of an approaching automobile.” *Id.* The defendant could prevent the accident “by a word or touch without delaying his own progress,” yet the law does not impose a duty upon the defendant to prevent the blind man from walking into the street. *Id.* at § 314, illus. 1; see also *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (holding that the defendant had no duty to rescue a drowning neighbor who jumped into a trench even after the defendant taunted him to do so). It is worth noting that a “cheap” rescue is not necessarily a “free” rescue, as the would-be rescuer forgoes other opportunities, such as arriving to class on-time, avoiding a soiled shoe or wet clothes. In addition, imposing a legal duty to rescue would deprive individuals’ freedom of action and the benefits of public recognition of being a voluntary rescuer. POSNER, *supra* note 8, at 208.

50. See *Union Pac. Ry. Co. v. Cappier*, 72 P. 281, 283 (Kan. 1903) (“The moral law would obligate an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril.” (quoting MORTON BARROWS, *HANDBOOK ON THE LAW OF NEGLIGENCE* 4 (1900))); see also David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006) (conducting empirical research on duty to rescue and concluding that “proven cases of non-rescues are extraordinarily rare, and proven cases of rescues are exceedingly common—often in hazardous circumstances, where a duty to rescue would not apply in the first instance”).

51. See *infra* notes 83-90 and accompanying text for a discussion of Judge Learned Hand’s classic utilitarian formulation which defines negligence in terms of cost-justified precautions. By contrast, the no-duty rule allows defendants to escape liability even for cost-justified rescues.

52. See, e.g., ROGER BROWN, *SOCIAL PSYCHOLOGY* 44 (2d ed. 1986); Martin Gansberg, *Thirty-Seven Who Saw Murder Didn’t Call the Police*, N.Y. TIMES, Mar. 27, 1964, at 1 (“For more than half an hour 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.”).

53. BROWN, *supra* note 52, at 44; Gansberg, *supra* note 52.

54. BROWN, *supra* note 52, at 44; Gansberg, *supra* note 52.

stay out of others' business and need not delay their own business or risk their own safety, privacy, or comfort in attempting to aid others.

As often occurs with a seemingly draconian rule, courts no sooner announce the rule as they begin to identify exceptions. The strict no-duty rule, accordingly, has been substantially eroded.⁵⁵ For example, courts may recognize a duty arising from a special relationship between the plaintiff and the defendant, especially when the defendant has custody or control of the plaintiff, thereby depriving the plaintiff of the ability to protect himself from harm to avail himself of other assistance.⁵⁶ The duty arising from a special relationship may extend to a duty to third parties who may be injured by the conduct of one of the parties.⁵⁷ Some of these exceptions recognize that societal interests outweigh individual privacy or autonomy interests. For example, a therapist whose patient threatens to harm an identified third party may owe an affirmative duty of reasonable care to the third party to rescue, warn, or take other steps to prevent the threatened harm from occurring.⁵⁸ Courts could extend the duty to third parties to advance public health objectives, such as infectious disease control and partner notification.⁵⁹

55. See, e.g., *Mt. Zion State Bank & Trust v. Consol. Commc'ns*, 660 N.E.2d 863, 868-71 (Ill. 1995) (stating that a duty may be imposed upon the landowner or party in control of a premises when there is a latent dangerous condition present and the owner knows or should know of the condition); *Davis v. Virginia*, 335 S.E.2d 375, 378 (Va. 1985) (noting that a legal duty may be imposed by contract); *Wallingford v. Kroger Co.*, 761 S.W.2d 621, 625 (Ky. Ct. App. 1988) (recognizing an exception to the no-duty rule when a landowner or occupier creates an inherent danger); *Clemets v. Heston*, 485 N.E.2d 287, 291 (Ohio Ct. App. 1985) (discussing the affirmative duty imposed upon a law officer to protect those the officer has arrested and has in custody); *People v. Wong*, 588 N.Y.S.2d 119, 124 (N.Y. App. Div. 1992) (recognizing legal duties created by a contractual babysitting agreement and the "voluntary assumption of complete and exclusive care of a helpless child"); *Sandborg v. Blue Earth County*, 601 N.W.2d 192, 196 (Minn. Ct. App. 1999) (noting that a legal duty may be imposed by virtue of a "special relationship" between the parties).

56. See *Consumer Health Found. v. Potomac Hosp.*, No. 97-2550, 1999 U.S. App. LEXIS 537, at *4 (4th Cir. 1999) (recognizing a hospital's duty to treat upon "creation of a hospital-patient relationship" (citing *Lyons v. Grether*, 239 S.E.2d 103, 105 (Va. 1977))); *Lane v. Commonwealth*, 956 S.W.2d 874, 877-79, 881-82 (Ky. 1997) (noting special relationship between a parent and child gives rise to a legal duty to protect the child from harm); *State v. Walden*, 293 S.E.2d 780, 785-86 (N.C. 1982) (recognizing a duty imposed on parents "to care for their small children" because of their standing in a personal relationship with child); *Sanders v. City of Belle Glade*, 510 So. 2d 962, 964 (Fla. Dist. Ct. App. 1987) (holding that facts of case showed a special relationship between custodian and arrestee that was analogous to the special relationship between custodian and inmate, which gives rise to a duty to provide safety); see also RESTATEMENT (SECOND) OF TORTS § 314A (1965) (extending the duty to act in categorical special relationships, including common carrier/passenger and innkeeper/guest); RESTATEMENT (SECOND) OF TORTS §§ 314A cmt. a, 314B (1965) (extending the duty to act in special relationship of employer/employee).

57. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

58. *Id.* at 343-44; see also RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the third person . . .").

59. See *Reisner v. Regents of Univ. of Cal.*, 37 Cal. Rptr. 2d 518, 522-24 (Cal. Ct. App. 1995) (holding that physicians who negligently transfused HIV+ blood to patient owed a duty of care to patient's sexual partner, who was infected three years after the transfusion). *But see Hawkins v. Pizarro*, 713 So. 2d 1036, 1037-38 (Fla. Dist. Ct. App. 1998) (finding that a doctor who negligently advised a

III. BEYOND PERFECT SAFETY AND FULL COMPENSATION

The goal of tort law is not perfect safety and full compensation at all costs. We could not have railroads, firearms, or dynamite because we could never justify the inherent risks to human safety. These examples are extreme, but make the point that as a society, and as a matter of tort law, we clearly do not value safety over all else. Human life is not priceless; we make trade-offs all the time, favoring other interests over the protection of life and safety.⁶⁰

Many torts casebooks introduce the negligence standard for accidental, or unintentional, torts with a survey of old English common law cases and the traditional distinction between writs of trespass for direct harm, and trespass on the case for indirect harm.⁶¹ The point is to show the evolution of accident law from its strict liability origins into the modern fault-based, or negligence, standard of care. When studying those cases—while deflecting students' inevitable "will this be on the exam?" queries—I find it useful to trace the historical origins of strict liability and the historical evolution of the fault-based standard through the machine age and the industrial revolution.

The traditional common law of trespass held landowners strictly liable for things escaping from their land, irrespective of due care. For example, in *The Case of the Thorns*, a landowner was held strictly liable in trespass for shrub cuttings that fell onto his neighbor's property, despite the exercise of due care.⁶² Another example is *Rylands v. Fletcher*, which involved a property owner who constructed a water reservoir to operate a mill.⁶³ The land previously had been used for coal

patient that she had tested negative for Hepatitis C months before the patient met and married her husband owed no duty to the husband because his existence was unknown at the time of the negligence).

60. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 20 (1978) (describing society's attempts to "obscure the fact of tragic scarcity" and suggesting that "we comfort ourselves in the belief that our society does not establish an acceptable number of auto deaths, but that this figure results from thousands of independent, atomistic actions"); see also VICTOR R. FUCHS, *WHO SHALL LIVE? HEALTH, ECONOMICS, AND SOCIAL CHOICE* 4-5 (expanded ed. 2002) ("The oft-heard statement, 'Health is the most important goal,' does not accurately describe human behavior. Everyday in manifold ways (such as overeating and smoking) we make choices that affect our health, and it is clear that we frequently place a higher value on satisfying other wants.").

61. See, e.g., EPSTEIN, *supra* note 14, at 95-105; HARRY SHULMAN ET AL., *CASES AND MATERIALS ON THE LAW OF TORTS* 23-45 (4th ed. 2003); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 28-30, 160-62 (5th ed. 1984).

62. *The Thorns Case*, Y.B. 6 Edw. 4, fol 7a, Mich. pl. 18 (1466), *reprinted in* C. H. S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 195-97 (1949) ("But if one cuts his trees and the boughs fall on a man and hurt him, in this case he shall have an action of Trespass.").

63. *Rylands v. Fletcher*, 3 L.R.E. & I. App. 330 (H.L. 1868). The plaintiff prevailed at trial, was reversed by the intermediate appellate court, the Court of Exchequer, and won a reversal at the House of Lords, the final court of appeal. *Id.* Under current law, maintaining a water reservoir would likely qualify as an "abnormally dangerous activity," exposing defendant to strict liability for the escaping water. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1976) (providing strict liability for "abnormally dangerous activities," as defined by list of factors contained in § 520); see also Shapo, *supra* note 10, at 486 (discussing strict liability for abnormally dangerous activities).

mining, but the sub-surface shafts were depleted.⁶⁴ The plaintiff, the defendant's neighbor, continued to mine.⁶⁵ All agreed that the reservoir was competently constructed with no apparent flaws or defects suggesting lack of reasonable care.⁶⁶ Nevertheless, because of the sub-surface defects, the reservoir eventually broke through, flooding the neighbor's mine-shafts.⁶⁷ The mill owner was held strictly liable for water escaping from a non-natural condition on the land.⁶⁸ The strict liability approach to trespass made sense in feudal society, where harm resulted from wandering animals, flowing water, boughs, and branches. Neighboring landowners created roughly comparable risks and harmful agents were easily traceable to their sources.

But strict liability was incompatible with the rise of the machine age and the industrial revolution, with harm resulting not from animals, water, and naturally occurring agents but from new-fangled machines and complex instruments. Machines carried greater risk of harm but also less readily identifiable causation. Just like escaping animals, the new machines could malfunction or cause injury despite any want of due care.⁶⁹ But often it could not be said what malfunction occurred.⁷⁰ To hold industrial landowners, machine operators, railroads, mining operations, and automobile drivers strictly liable for harm caused by their activities would cause the wheels of progress to grind to a halt.⁷¹ The negligence standard, by contrast, allowed room for industrial progress, despite the inevitable harm and injury. The courts rationally compromised safety in favor of other societal wants and needs. In *Losee v. Buchanan*, the landmark United States opinion rejecting the English common law strict liability rule in favor of a negligence approach, the court noted: "We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the base of all our civilization."⁷² The court's holding derived from the very same social contract themes that animate much of public health law:

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from

64. *Rylands*, 3 L.R.E. & I. App. at 331.

65. *Id.*

66. *Id.* at 332.

67. *Id.*

68. *Id.* at 342.

69. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 71 (1977) ("The earliest efforts to limit the scope of [tort] liability in American law centered not on any grand conception of the nature of legal responsibility but on the need to reduce the burden of damage judgments and to make economic planning more coherent.").

70. *Id.* at 66.

71. *Id.*

72. *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873); see also Shapo, *supra* note 11, at 3-21 (describing the twentieth century as a "society of many fault lines," in which "[j]oggers, cyclists and horse riders compete for the same paths; neighbors quarrel about the use of power lawn mowers and—a problem of enormous magnitude—a bewildering variety of vehicles struggles through hundreds of rush hours every day").

the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me.⁷³

For example, we give up our natural and absolute rights for the enjoyment of land, meaning that we must tolerate certain inevitable, accidental harms—namely, those caused despite due care by our neighbors—without recompense.⁷⁴ At the same time, we gain the right to engage in certain dangerous activities, shielded by the law of negligence from having to make amends to our neighbors, as long as we act with reasonable care.⁷⁵

Strict liability nonetheless persists in United States law for certain types of conduct, including so-called abnormally dangerous activities—activities that cannot be made any safer through the exercise of reasonable care yet are valued by society.⁷⁶ We do not want actors to cease operations altogether but do want the responsible actors to pay for the benefits they receive from the activities.⁷⁷ As a result, we hold defendants strictly liable. Classic examples of abnormally dangerous activities include blasting operations, dynamite storage, atomic energy plants, oil wells, water reservoirs, and insecticide spraying.⁷⁸ We allow, and perhaps even encourage, the operations to continue despite the inherent danger but leave it up to individual actors to decide when the price becomes too high to bear. Liability is imposed for those activities not as a suggestion to cease the activity but rather as a societal tax on the actor. The actor, not the law, makes the cost-benefit determination whether the liability costs of engaging in the activity outweigh the profits derived from engaging in it. The conduct may continue as long as the defendant “pays [his] way.”⁷⁹ Accordingly, the abnormally dangerous activity

73. *Losee*, 51 N.Y. at 484.

74. *Id.* at 484-85.

75. *See id.*

76. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977) (providing that “[o]ne who carries on an abnormally dangerous activity” is liable “although he has exercised the utmost care”); *see also id.* § 520 (listing six factors for determining whether an activity is abnormally dangerous).

77. *See id.* § 520 cmt. b (distinguishing negligence by explaining that “§ 519 is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry on the activity at all”); Shapo, *supra* note 10, at 486 (discussing common law strict liability and RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977), noting “[v]ery simply, strict liability is liability without fault, in the sense that the activity at issue is appraised as one that was permissible, rather than (like speeding on the highway) as conduct that should not have occurred”).

78. *See, e.g.,* *City of Joliet v. Harwood*, 86 Ill. 110 (1877) (blasting); *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (chemical shipping); *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510 (2d Cir. 1931) (dynamite storage); *In re Hanford Nuclear Reservation Litig.*, 350 F. Supp. 2d 871 (E.D. Wash. 2004) (nuclear weapons plant); *Old Island Fumigation, Inc. v. Barbee*, 604 So. 2d 1246 (Fla. Dist. Ct. App. 1992) (pest control); *Rylands v. Fletcher*, 3 L.R.E. & I. App. 330 (H.L. 1868) (water reservoir).

79. *See* RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977) (“The defendant’s enterprise . . . is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.”); DOBBS, *supra* note 9, § 346 (“The idea is not necessarily to deter such activities altogether but to make them ‘pay their way’ by charging them with liability for harms that are more or less inevitably associated with the activity.”).

doctrine serves the dual purpose of compensating injured plaintiffs without depriving the general public of valuable services and products.⁸⁰

Moreover, as a matter of fairness, tort liability should fall on the party conducting or creating the unusual risk. As between two automobile drivers, one who is speeding and one who runs a red light, there is not a strong basis for imposing liability on one versus the other in terms of risk-creation. The risks of speeding and red-light-running are roughly proportional; those are the sorts of risks that people in society generally impose on one another. Accordingly, liability can be allocated according to relative fault for the accident. But the owner of a dynamite blasting, insecticide, or fireworks factory, or airline, wild-animal owner, or oil-drilling operation, is imposing a much greater risk than the rest of us. Thus, it seems fair that the party creating an abnormal, or nonreciprocal, risk be held strictly liable for any resulting accident.⁸¹ Likewise, persons or entities whose activities endanger the public's health should pay accordingly.

IV. SOCIAL WELFARE, UTILITARIANISM, AND TORTS

Public health seeks to promote the good of society as a whole. The welfare of the community transcends and takes precedence over private interests.⁸² Policies central to tort law likewise promote the greater good of the whole, sometimes at the expense of individual interests. An essential first-year doctrine, and one of the few topics in Torts that feels concrete and rule-based to law students eager for certainty in the common law maze, is Judge Learned Hand's famous "Hand Formula." The Hand Formula is a self-conscious, utilitarian expression of negligence in algebraic terms: the defendant is deemed negligent if $B < PL$, where B is the burden, or cost, of a given safety precaution that could have prevented the injury of which the plaintiff complains; L is the magnitude of the plaintiff's loss, or injury, and all other loss that could be avoided with the same precaution; and P is the probability of the harm occurring, used as a discounting factor against L.⁸³ The Hand Formula

80. Strict products liability operates from a similar calculus. *See infra* Section V (discussing mass torts).

81. *See generally* Fletcher, *supra* note 12, at 547 (suggesting that uncommon or dangerous activities, "like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community" and "represent threat of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares").

82. *See* GOSTIN, *supra* note 25, at 77-78 (suggesting that commonwealth themes were central to the Framers: "The central principles underlying the police or regulatory power were the treatment of health and safety as a shared purpose and need of the community and (aside from basic constitutional rights such as due process) the subordination of the market, property, and individual liberty to protect compelling community interests . . . Public health and safety are community or group interests . . . that can transcend and take priority over private interests if the legislature so chooses.").

83. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (announcing rule for determining barge owner's duty to secure his ship as a "function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions," represented by P, L, and B, respectively, where "liability depends upon whether B is less

provides that defendants are liable in negligence for failing to take the cheaper precautions.⁸⁴ But there is no liability if the safety precaution, even if feasible, is too costly relative to the “utils” of safety gained.⁸⁵

The Hand Formula recognizes that we live in a society of scarce resources and must make decisions about how to allocate those resources in the interest of society as a whole, not just the interest of an individual seeking compensation for an injury.⁸⁶ If resources were unlimited, there would be no reason, arguably, not to take every possible safety precaution. But resources are limited; therefore, every safety-related expense takes away from resources that could be spent on other goods or services. If we did not care about fuel-efficiency, comfort, aesthetics, speed, hauling-capacity, and other features of cars, presumably we could build them perfectly safely, with spongy bumpers,⁸⁷ three-point restraints, helmets, and ten-mile-per-hour top speeds.⁸⁸ Even seemingly “costless” precautions carry lost opportunity costs, which must be considered. For example, an easy precaution against car collisions is simply to stay home and not drive. A law student who opts for that safety precaution seems to lose nothing and may even be better off for not having expended fuel, tire-wear, and other out-of-pocket costs associated with driving. But the burden, or B, of that precaution must also include the lost opportunity to attend class, further his education, or enjoy a pre-class bagel.⁸⁹

than L multiplied by P: i.e., whether $B < PL$ ”); POSNER, *supra* note 8, at 180-81 (discussing the operation of the Hand formula); Shapo, *supra* note 11, at 4-15 to -16 (summarizing the same).

84. See, e.g., *Chi. B. & Q. R. Co. v. Kraysenbuhl*, 91 N.W. 880, 881-82 (Neb. 1902) (holding railroad negligent for failing to install lock on turntable when child’s foot was caught and severed and it was known that children played in train yard); *The T.J. Hooper*, 60 F.2d 737, 739-40 (2d Cir. 1932) (holding barge company liable in negligence for failing to have weather radio because precaution was cost-justified, despite the fact that radio sets were not customary in shipping industry); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978) (“If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury.”).

85. See POSNER, *supra* note 8, at 180 (explaining that comparing expected accident costs and accident prevention costs means “stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety”); Uwe E. Reinhardt, *Can Efficiency in Health Care Be Left to the Market?*, 26 J. HEALTH POL. POL’Y & L. 967, 970 (2001) (representing resources as “quantifiable degrees of human happiness measured in units economists call *utils*”).

86. See generally CALABRESI & BOBBITT, *supra* note 60, at 18 (noting that “though scarcity can often be avoided for some goods by making them available without cost to everyone, it cannot be evaded for all goods. In the distribution of scarce goods society has to decide which methods of allotment to use”).

87. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 136-37 (1977). Credit for my awareness of the memorable “spongy bumpers” reference must go to my own Torts professor, Michael L. Wells, Professor and Marion and W. Colquitt Carter Chair in Tort and Insurance Law, University of Georgia School of Law.

88. See *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-72 (4th Cir. 1974) (providing that standards of safety will be balanced against the utility of design and purpose of the specific type of vehicle).

89. See *supra* note 49 (referencing Professor Goldberg’s hypothetical); see also *Kimbar v. Estis*, 135 N.E.2d 708, 710-11 (N.Y. 1956) (rejecting claim that summer camp operator was negligent for failing to light path in woods when child who stepped off path broke his nose by bumping into a tree, noting that holding camp liable would deny “youth . . . the adventure, of living closer to nature . . .”).

The Hand Formula implicitly rebuts the notion that any resources, including human lives, are priceless. If human life were priceless, there would be no limit to the amount that could be spent on safety precautions because the L of the Formula would always exceed any potential B. But no individual human life is priceless under the Hand Formula. Social welfare is advanced not by taking every possible safety precaution but only those that are cost-justified, even at the expense of human life.⁹⁰ In short, the Hand Formula, like communitarian values underlying public health law, recognizes that individual interests and rights, even the most fundamental, must yield to the greater good of the commonwealth.

A good example of the Hand Formula's operation in promoting public health is *Helling v. Carey*.⁹¹ A 32-year-old woman sued her ophthalmologist, alleging his negligent failure to diagnose primary open-angle glaucoma, which resulted in severe and permanent vision loss.⁹² The parties agreed that the professional standard of care for ophthalmologists did not require routine glaucoma testing for patients under the age of forty.⁹³ Glaucoma could be detected by a simple puff of air to test eye pressure.⁹⁴ The incidence of glaucoma in persons younger than forty was one in 25,000.⁹⁵ Applying a Hand Formula analysis, a jury could find that the B of a relatively cheap, painless eye-pressure test, balanced against the serious, high-magnitude L of permanent vision loss, even discounted by the relatively low P of one in 25,000 for patients in the plaintiff's age-group, suggested that the doctor was negligent for failing to administer the test, contrary to the professional standard of practice for ophthalmologists.

Helling is a poor case for teaching the standard of care for medical malpractice inasmuch as the court independently determined the standard of due

[and] would frequently compel camps to keep boys confined after dark and thereby effectively spell the end of some of the most desirable activities of real camping life").

90. Indeed, the fact that human life and all other elements of compensatory damages are included in the Formula leads to philosophical, practical, and scientific objections to the Formula. It may be morally objectionable, for example, to suggest that a defendant is negligent in failing to prevent fire to a high-rise executive office building but not to a coal mine, where the B and P of each accident is the same but the L includes lost earnings, which are much higher for the office building than the coal mine. See POSNER, *supra* note 8, at 209-14 (discussing damages and earnings disparities). Practical objections relate to the difficulty estimating the monetary value of life and damages generally as well as risks, probabilities, and precautions. See, e.g., *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949) (describing how Hand himself recognized the difficulties in applying the Formula). The Formula is psychologically questionable in that it assumes that people operate at all times as rational cost-benefit analysts, calculating the relative worth of each step they take. See POSNER, *supra* note 8, at 179-83; CALABRESI & BOBBITT, *supra* note 60, at 198-225; see also Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW & ECONOMICS 1* (Cass R. Sunstein ed. 2000) (describing social scientists' insights into rational choice models, noting that "models are often wrong in the simple sense that they yield inaccurate predictions. People are not always 'rational' in the sense that economists suppose").

91. 519 P.2d 981 (Wash. 1974).

92. *Id.* at 981-82.

93. *Id.* at 982.

94. *Id.* at 983.

95. *Id.*

care, contrary to professional standards.⁹⁶ The standard of care for professional negligence is not the reasonably prudent person, but a customary, or professional, standard. Parties generally must present expert evidence establishing both the standard of care and the manner in which the defendant's conduct fell short.⁹⁷ The court and fact-finder may decide between opposing experts' views but are not free to ignore the expert testimony and apply a different standard. In other words, professional custom is conclusive of the standard of care; it is not merely "some evidence" that the jury may consider or ignore.⁹⁸

The court in *Helling* nevertheless rejected the prevailing professional standard of care, citing Justice Holmes's rationale in *The T.J. Hooper* for rejecting the custom of the shipping industry as the standard of care because an "entire calling may be lagging."⁹⁹ In the court's view, the physician's decision whether to administer the glaucoma test did not require the exercise of professional judgment. Therefore, the court's negligence analysis was not constrained by the professional standard of care.¹⁰⁰ Moreover, the court suggested that, as a matter of fairness, people under the age of forty are entitled to the same safety protection as people over the age of forty.¹⁰¹

In Hand Formula terms, the court's decision makes sense. From a public health perspective, the decision may be laudable because it embodies a net positive for society in terms of resource expenditures. Collectively, we garner a substantial net gain in terms of health outcomes—preventing the permanent disability of blindness—for minimal cost in real dollars (a puff of air) and inconvenience (a few seconds). Holding a physician liable for failing to take a cost-justified precaution that could improve health outcomes seems rational and consistent with communitarian and utilitarian principles. By refusing to apply the professional

96. *Id.*; see POSNER, *supra* note 8, at 185 (suggesting that medical malpractice cases are one area of negligence in which courts "have traditionally allowed a defense of custom"); RAND ROSENBLATT ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 862-63 (1997) (describing *Helling* as "[t]he most famous (and largely unique) recent health law case purporting to overrule a professional standard" by relying on *The T.J. Hooper*, 60 F.2d 737, (2d Cir. 1932)).

97. See *Robbins v. Footer*, 553 F.2d 123, 126-27 (D.C. Cir. 1977) (noting that medical malpractice plaintiff "must present expert witnesses since the technical complexity of the facts and issues usually prevents the jury itself from determining both the appropriate standard of care and whether the defendant's conduct conformed to that standard" (citations omitted)); ROSENBLATT ET AL., *supra* note 96, at 843 (noting that plaintiffs, "in most instances," must "find an expert medical witness willing to testify that the defendant doctor violated the professional standard of care").

98. *Robbins*, 553 F.2d at 126-27; Shapo, *supra* note 10, at 489 (noting that courts require expert testimony to establish that defendant fell below the standard of care); ROSENBLATT ET AL., *supra* note 96, at 843 ("[B]y the later nineteenth century American judicial doctrine accorded the customary practices of doctors virtually conclusive weight as to what constituted 'reasonable care'").

99. *Helling*, 519 P.2d at 983 (citing *The T.J. Hooper*, 60 F.2d 737, discussed *supra* note 84, and accompanying text); cf. Shapo, *supra* note 10, at 484 (noting that industry standards generally are evidence of due care but not conclusive).

100. *Helling*, 519 P.2d at 983 (concluding that "reasonable prudence required the timely giving of the pressure test . . . irrespective of its disregard by the standards of the ophthalmology profession").

101. *Id.*

standard, the court prevented the temptation for physicians and other professionals to “low-ball” society on public health and safety. From a medical perspective, however, the case is troubling.¹⁰² Do we want courts and lay-jurors defining standards of care for medical professionals? Will the uncertainty regarding what is required of physicians undermine predictability and consistency in tort law, leading to unfairness to defendants? Will tort decisions lead to increased practice of “defensive medicine” and waste of societal resources in unnecessary precautions, tests, and medical procedures?¹⁰³

V. THE “OBVIOUS” EXAMPLE: PRODUCTS, POLLUTION, AND PUBLIC HEALTH

Perhaps the closest alignment of tort law and public health law is in cases involving products or activities that resulted in serious, detrimental health effects on a population. I say “obvious” because mass torts seek to remedy broad societal harm from dangerous or defective consumer products, environmental pollution, toxic substances, and other agents. So viewed, mass tort litigation promotes collective responsibility and population-based health. By bringing these hazards to light and imposing liability on the risk-creators, tort lawyers and class representatives act collectively to assure the conditions for people to be healthy, consistent with public health goals.¹⁰⁴ Examples include: asbestos, lead paint, silicone breast implants, Dalkon Shield, DES, tobacco, and firearms.¹⁰⁵ Litigation has also challenged various vehicle defects, including gas tanks, rollovers, tires, and airbags.¹⁰⁶ Other recent cases involved pharmaceutical products such as Phen-

102. See Peter D. Jacobson & Matthew L. Kanna, *Cost-Effectiveness Analysis in the Courts: Recent Trends and Future Prospects*, 26 J. HEALTH POL. POL'Y & L. 291, 303 (2001) (discussing *Helling* as an example of cost-effectiveness analysis in medical liability cases).

103. *Id.* (summarizing criticisms of *Helling*).

104. See *supra* note 25 and accompanying text (citing the IOM definition of public health and discussing the population-based perspective).

105. See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001) (overturning a jury verdict against multiple firearms manufacturers on negligent marketing theory); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y. 1989) (holding manufacturers of diethylstilbestrol (“DES”) liable for harm to daughters of women who took the drug while pregnant); *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005) (discussing lead paint); Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719 (2006) (describing Agent Orange, asbestos, and other examples); Kenneth R. Feinberg, *Reporting From the Front Line—One Mediator's Experience With Mass Torts*, 31 LOY. L.A. L. REV. 359 (1998) (describing Dalkon Shield, silicone breast implants, tobacco, and other examples); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993) (discussing the same).

106. See GOSTIN, *supra* note 25, at 265-67 (introducing chapter on “Tort Litigation for the Public's Health” and describing examples); Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REVIEWS: INJURY PREVENTION AND CONTROL 90, 92-96 (Stephen B. Thacker & Ellen J. MacKenzie eds. 2003) (describing examples, including: Firestone tires, swine flu vaccine, seatbelts, pacemakers, and handguns); see generally DAVID G. OWEN, PRODUCTS LIABILITY LAW 1072-94 (2005).

Fen,¹⁰⁷ Oxy-Contin,¹⁰⁸ and Vioxx.¹⁰⁹ Litigants have even attempted to address the obesity epidemic through litigation, suing fast food vendors for misrepresenting their products as part of a healthy lifestyle.¹¹⁰

From the perspective of mainstream tort theories, however, mass torts and class action litigation are anything but obvious. In the main, tort law seeks to allocate responsibility and loss-bearing as between individual victims and injurers.¹¹¹ Products liability and mass torts play fast-and-loose with traditional tort principles of fault, causation, and damages.¹¹² Strict application of tort rules could bar recovery in many cases and thereby compromise public health objectives.¹¹³ To facilitate the process of public interest oriented lawsuits, judges have devised an entire set of judicial procedures to facilitate class litigation.¹¹⁴

As noted above, the popular perception is that trial lawyers are motivated not by public health but by profit, enlisting litigants and bringing these actions, often on a contingency fee basis, to garner the hefty awards and fees.¹¹⁵ Although plaintiffs' attorneys may enjoy substantial proceeds in some product liability or mass torts cases, they may also perform a valuable public service, exposing dangerous products and pushing manufacturers to improve safety.¹¹⁶ Tort litigation can operate as informal regulation when the government has refused, failed, or

107. *E.g.*, HPF, L.L.C. v. Gen. Star Indem. Co., 788 N.E.2d 753 (Ill. App. Ct. 2003); *In re* Diet Drug Litig., 895 A.2d 493 (N.J. Super. Ct. Law Div. 2005).

108. *E.g.*, Howland v. Purdue Pharma L.P., 821 N.E.2d 141 (Ohio 2004); Price v. Purdue Pharma Co., 920 So. 2d 479 (Miss. 2006).

109. *E.g.*, Int'l Union of Operating Engr's Local #68 Welfare Fund v. Merck & Co., Inc., 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006); Rutherford v. Merck & Co., Inc., 428 F. Supp. 2d 842 (S.D. Ill. 2006).

110. *E.g.*, Pelman *ex rel.* Pelman v. McDonald's Corp., 396 F. Supp. 2d 439 (S.D.N.Y. 2005).

111. *See also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356-57 (1995) (describing judicial skepticism to mass tort class actions because of the presence of individual issues of causation, harm, and defenses).

112. *See* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 6 (1980) (tracing development of products liability law, as "surg[ing] toward ever greater public control," in the context of which "courts have radically defined the relative obligations of manufacturers and consumers").

113. *See id.* at 5-6 (noting that "rigorous requirements of proof everywhere blocked the plaintiff" in earlier products liability law and that "many of the barriers to recovery could not be justified either as a matter of substantive principle or administrative necessity").

114. *See* Coffee, *supra* note 111, at 1358-67 (discussing judicial procedure evolution of mass tort litigation).

115. *See* Crawford, *supra* note 4 (quoting Senator Orrin Hatch's description of Vioxx as a lawyers' "feeding frenzy" and a spokesperson for the American Tort Reform Association's comment that in class actions, "the bigger the award, the bigger the cut that the lawyers get," adding, "[y]ou can't tell me that some of these lawyers aren't motivated purely by greed").

116. *See id.* (noting that Vioxx lawyers assert that advertising on the Internet "helps them offer a necessary public service" and the Internet enables them to "reach out to victims who otherwise would not know that they have a claim"); Taylor & Thomas, *supra* note 4 (suggesting that trial lawyers "have positioned themselves as the guardian of the little man against the corporations").

lacks resources to adequately protect consumers' safety.¹¹⁷ In rare cases, punitive damages may be awarded, punishing manufacturers for consciously or recklessly ignoring consumer safety.¹¹⁸ Ralph Nader's exposé of the Chevrolet Corvair and General Motors' attempts to silence him are almost synonymous with public interest litigation challenging manufacturers' reluctance to invest in product safety.¹¹⁹ In those cases, tort law policies, including compensating injured individuals, deterring dangerous activities, creating incentives for safety, and efficiently allocating scarce resources, are consistent with public health objectives to reduce injury and disease.¹²⁰

A. *Strict Liability and Fault Revisited*

Many cases addressing public health hazards are brought as products liability actions. Products liability law purports to impose liability without fault on anyone who is engaged in the business of manufacturing or selling unsafe products.¹²¹ The cases seem to revive the old English common law of strict liability or borrow heavily from the doctrine of abnormally dangerous activities.¹²² But the standards for determining liability in the largest category of products cases—design defects—come very close to a negligence, or fault-based, approach.¹²³ The intrusion of fault-based principles into purportedly strict products liability again suggests that the law

117. See Vernick et al., *supra* note 106, at 91 (noting that when there has been a failure of government regulation, litigation becomes an important prevention tool); Lawrence O. Gostin, *Public Health Law: A Renaissance*, 30 J.L. MED. & ETHICS 136, 137 (2002) ("Tort litigation can provide strong incentives for businesses to engage in less risky activities. Litigation has been used as a tool of public health to influence manufacturers of automobiles, cigarettes, and firearms.").

118. See Galanter, *supra* note 3, at 1130 (providing data on low frequency of punitive awards in product liability cases); Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889 (2001).

119. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE 32, 34 (updated 1972) (describing Corvair suspension design defect that required drivers to maintain tire pressure within narrow ranges); see Jones & Bayer, *supra* note 41, at 209 (noting that Nader's book led to the 1966 National Highway Safety Act).

120. See GOSTIN, *supra* note 25, at 265 (suggesting that "[t]he goals of tort law, although imperfectly achieved, are frequently consistent with public health objectives" and describing tort policies).

121. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (Cal. 1963) (holding the manufacturer of a defective lathe strictly liable without a showing of warranty or negligence); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."); OWEN, *supra* note 106, at 32-34 (describing the strict products liability theory of liability).

122. See *supra* notes 61-79 and accompanying text.

123. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998) (defining design defect as "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design"); see MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 92-98 (2006) (describing both the risk-utility test and the consumer expectations test, and discussing the "negligence-based evolutionary path"); Phillips, *supra* note 13, at 833-34 (suggesting that the Reporters of the RESTATEMENT (THIRD) OF TORTS would "place the standard of liability [for design defects] squarely in negligence").

is animated by concerns other than perfect safety and full compensation. To achieve those ends, courts have softened the strictness of products liability law. A product may be found defective either because it falls below the ordinary consumer's expectations of product safety or because the risks of the challenged design outweigh the benefits.¹²⁴ The risk-benefit calculus in products liability applies in hindsight, rather than as a foreseeability test in negligence. Manufacturers are strictly liable if the risks of the final product outweigh the benefits, even if they exercised all due care when initially designing the product. The consumer expectations test, however, applies only when products are "used in an intended or reasonably foreseeable manner,"¹²⁵ which seems to tie liability to foreseeability, or risks perceived in advance.

Products liability, like negligence and abnormally dangerous activities, operates from a utilitarian calculus. Even the most stringent, no-fault formulations of strict products liability are not aimed at perfect safety.¹²⁶ Indeed, if that were so, consumers would be denied a whole range of useful yet dangerous products, including everything from children's toys to automobiles to medical devices to firearms. Just as American courts in the industrial age recognized the inevitability, and non-compensability, of some level of accidental injury, products liability law allows some hazardous products to stay on the market and product-related injuries to go uncompensated.

Through tort judgments, product manufacturers and sellers are encouraged to independently evaluate the costs and benefits of continuing to make and sell the product in question. The fact that a product is deemed "defective" does not necessarily mean that the manufacturer should cease production. Like those engaged in abnormally dangerous activities, manufacturers should "pay their way." A tort judgment against the manufacturer may operate as an incentive to make the product safer or to adopt an alternative design in order to reduce liability exposure.¹²⁷ Despite the imposition of liability, however, the ultimate cost-benefit

124. See, e.g., *Barker v. Lull Eng'g Co., Inc.*, 573 P.2d 443, 457-58 (Cal. 1978) (defining design defect alternatively as "product failed to perform as safely as an ordinary consumer would expect" or the "risk of danger inherent in [the challenged] design" outweighs the benefits); see Shapo, *supra* note 10, at 492 (describing both tests and the dispute over the Restatement's adoption of exclusive risk-utility test).

125. *Barker*, 573 P.2d at 457.

126. See, e.g., *Shetterly v. Crown Controls Corp.*, 719 F. Supp. 385, 403 (W.D. Pa. 1989), *aff'd* 898 F.2d 139 (3d Cir. 1990) (holding no liability on manufacturer of pallet truck, despite the absence of a reasonable alternative design, because the benefits of the product in terms of increased productivity and decreased costs outweighed risks, even when eight workers suffered sprained, twisted, and broken ankles).

127. Considerable controversy exists over the "reasonable alternative design," or "RAD," feature of design defect claims. Some advocate that plaintiffs must prove existence of a RAD as an element of the claim and others urge that products may be deemed defective even without proof of a RAD. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998) (suggesting that plaintiff must prove RAD); Phillips, *supra* note 13, at 852-56 (describing dispute); Shapo, *supra* note 10, at 492 (noting same); see, e.g., *Banks v. ICI Americas, Inc.* 450 S.E.2d 671, 674 (Ga. 1994) ("[T]he

calculus is left to the manufacturer. If a manufacturer determines that the profit or other benefit derived from selling the “defective” product outweighs the risk of future tort liability, manufacturing of that product may continue. A tort judgment does not operate as an injunction or “cease-and-desist order.”¹²⁸ Therefore, product liability law serves both individual compensation and community benefit goals. The injured consumer is compensated for injury, but the rest of society is not deprived access to an otherwise useful product.

Products liability was initially conceived as “strict,” in the sense that a manufacturer would be absolutely liable for placing a dangerous product in the stream of commerce, without regard to privity, warranty, or want of due care.¹²⁹ That view comports with the compensation goal of torts by easing plaintiffs’ burdens of proving fault. Moreover, the cost of injury was placed on manufacturers, who are in a better position than individual victims to bear the loss and spread it among other members of society.¹³⁰ But over time, products liability law has incorporated elements of negligence and relative risk-bearing responsibilities among members of society for much the same reason that negligence replaced strict liability as the standard of care. As a society, we have wants other than safety that would not be served by imposing liability too readily on dangerous but desirable products.

B. Causation and Probabilities

In addition to less-than-strict liability standards, products law has allowed less rigorous proof of causation than traditional tort claims. Tort law generally requires a plaintiff to show a causal link between the defendant’s wrongful conduct and the plaintiff’s injury. A punch thrown that misses its victim is not a battery, and the puncher is not liable.¹³¹ As Judge Cardozo announced: “Proof of negligence in the air, so to speak, will not do.”¹³² In many products liability and environmental

reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is considered the ‘heart’ of design defect cases . . .”).

128. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (“Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.”); see Phillips, *supra* note 13, at 838 (discussing policies and trade-offs underlying the Restatement’s approach to design defects).

129. See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963); see EPSTEIN, MODERN PRODUCTS LIABILITY, *supra* note 112, at 36-39 (describing cases and origins of strict products liability).

130. See EPSTEIN, *supra* note 112, at 46-48 (discussing the hardship effects and the ease of insurance rationales for strict products liability).

131. A punch thrown that hits *another*, unintended victim, however, is a battery on the theory of transferred intent. See *Carnes v. Thompson*, 48 S.W.2d 903, 904 (Mo. 1932) (“Defendant’s intention, in such a case, is to strike an unlawful blow, to injure some person by his act, and it is not essential that the injury be to the one intended.”); *Talmage v. Smith*, 59 N.W. 656 (Mich. 1894).

132. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (1928) (citing POLLOCK, TORTS 455 (11th Ed.)); *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920)).

harm cases, it may be difficult or impossible for plaintiffs to establish the necessary causal links. Insistence on strict cause-in-fact proof could defeat many cases in which there is acknowledged wrongdoing and obvious harm. In many products cases, the injured plaintiff may be unable to prove not only the cause of the harm but the party causing the harm. Without an identified defendant, the products liability claim could not get even a foot inside the courthouse door.

The problem of identifying the responsible party is not unique to products liability law. Take the classic case of *Summers v. Tice*, involving a quail-hunting party.¹³³ Two members of the party fired negligently into the air. Another person was injured by a single bullet and could not establish which of the two defendants' wild shots caused his harm. On the theory that either bullet could have caused the injury and that each hunter was acting carelessly, the court relied on a fiction of joint-and-several liability, allowing the plaintiff to recover his full damages from either hunter.¹³⁴ The case is a fiction because the plaintiff's claim should have failed for failing to prove by a preponderance of the evidence the cause-in-fact of the injury. Instead of denying recovery, the court shifted the burden to the defendants to sort out who caused the harm; either defendant could avoid liability for the full harm by demonstrating that he was not the cause.¹³⁵

An even more contorted application of the burden-shifting approach to causation is seen in *Ybarra v. Spangard*,¹³⁶ cited in *Summers*, in which a plaintiff who was injured while unconscious on an operating table could not prove which of several persons present during the surgery caused his harm. The court shifted the burden to all the persons present in the operating room to prove that he or she was not the cause, on pain of being held jointly and severally liable for the full harm if unable to carry that burden.¹³⁷ The cases are dramatic because they relieve the plaintiff of proving an essential element of the negligence claim—causation—and

133. 199 P.2d 1 (Cal. 1948).

134. *Id.* at 2–3; see EPSTEIN, *supra* note 112, at 155 (suggesting that “*Summers* was incorrect in its insistence that each hunter could be liable for the full damages”). Joint and several liability is the wrong theory in this case, however, because the two actors were not acting in concert, nor did their conduct combine to produce one, indivisible injury. More correctly, *Summers* represents the theory of “alternative liability.” See DOBBS, *supra* note 9, §§ 385, 386 (discussing joint and several liability); *id.* § 175 (discussing *Summers*); MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 277–79 (2003) (discussing theories of joint and multiple liability, including acting in concert and alternative liability).

135. *Summers*, 199 P.2d at 4.

136. 154 P.2d 687 (Cal. 1944). The case is often covered as an illustration of *res ipsa loquitur*, but it contorts that theory of negligence as well by allowing recovery based on the suggestion that the injury ordinarily would not happen without negligence, despite lack of proof of the identity of the defendant, the injury causing instrumentality, or the defendant's exclusive control of the instrumentality. See SHAPO, *supra* note 134, at 249 (listing elements of the *res ipsa loquitur* doctrine); *Byrne v. Boadle*, (1863) 2 Hurlstone & Coltman 722, 159 Eng. Rep. 299 (applying the theory to hold property owner liable for barrel of flour falling out of second-story window); see also RESTATEMENT (SECOND) OF TORTS § 328D (1965).

137. *Ybarra*, 154 P.2d at 691.

of even identifying the proper defendant. All possible defendants, in turn, face liability unless *they* absolve themselves by proving *lack* of causation.

The results in *Summers* and *Ybarra* serve the goal of compensating the injured party, without insisting on strict proof of causation. But only *Summers* can be justified on the basis of sending the appropriate message about safety to the careless defendants. Strict insistence on “but for” causation in *Summers* would have defeated the claim, leaving an admitted wrong, a serious injury, and no remedy for the injured party. The *Summers* fiction might be tolerated when we know that both parties failed to exercise due care but cannot tell which caused the injury. By imposing liability on the hunter who got lucky because his shot went into the woods, he still got the proper message for safety. But the fairness and deterrence rationales are harder to see in *Ybarra*. Why should an innocent nurse who was present at the time of the negligence face liability when he did nothing wrong? Liability in that case may undermine public health by making actors reticent or overly cautious in the future.

Cases like *Summers* and *Ybarra* that relax the causation requirement are significant for products liability and public health litigation. Suppose two factories, A and B, operate on either side of a river. Each factory dumps sludge into the river. A downstream landowner is injured when the sludge piles up on his lawn. But he cannot prove which polluter was the source of the particular waste. Using the *Summers* alternative liability theory, the landowner should be allowed to sue either Factory A or Factory B for the full harm. The landowner would be compensated for the wrong, the factory owners would get a message about the costs of pollution, and the public would benefit to the extent that liability or potential for liability encouraged both factories to adopt improved waste-disposal practices.

Perhaps the case is even easier than *Summers* if we assume that both factories contributed to a single, indivisible injury of the downstream sludge pile, for which either defendant could be held jointly and severally liable. But joint and several liability has largely been displaced in favor of proportional liability.¹³⁸ If the landowner sues both factories, how would a court apportion fault? There is nothing characteristic or distinguishable about Factory A’s sludge compared to Factory B’s sludge; therefore, there would be no way to say which portion of the landowner’s harm is attributable to which defendant. One solution would be to require each defendant to pay a portion of the damages based on the portion of sludge it dumped into the river, irrespective of how much of its sludge, in fact, ended up on the plaintiff-landowner’s lawn.

This market share approach to liability, like *Summers*, does not insist on proof of a one-to-one correlation between injurer and injured. But, like *Summers*, it seems fair as long as all of the defendants were bad actors, producing potential harm. Courts relied on the market share approach to allocate liability for claims made by

138. DOBBS, *supra* note 9, § 390 (noting that joint and several liability may no longer be applied to indivisible injuries).

hundreds of women and their daughters harmed by some three hundred manufacturers of a drug, diethylstilbestrol (“DES”), that was marketed as a prenatal vitamin.¹³⁹ The plaintiffs could not establish which manufacturer produced their particular prescription, but the court allowed recovery, proportional to market share, against all pharmaceutical companies manufacturing the drug.

Using the market share approach, the landowner might recover from both Factory A and Factory B even though one factory may have had no part in causing that plaintiff’s injury. As long as there is proof that both committed a wrong—released the sludge—and the plaintiff was injured by sludge, the plaintiff can recover from either or both factories, despite the distinct possibility that all of the sludge that ended up on the plaintiff’s lawn was from Factory A and not an ounce was from Factory B. As long as both Factory A and Factory B produced noxious waste that caused harm, if not to this landowner in particular, perhaps to another landowner who chose not to sue, placing liability on both factories properly assigns the equities and incentives for safety. From a public health perspective, there would be much to gain by telling both factories that pollution leads to liability, and much to lose if the landowner had to bear the cost of a pile of sludge on his lawn when faced with the impossible task of proving whose sludge it was.

How far should we extend traditional tort principles and reliance on probabilities in the name of public health? Consider a variation on the classic “blue bus” hypothetical: While walking at night on a dark road, the plaintiff is struck by an oncoming bus in a hit-and-run accident.¹⁴⁰ In the darkness and glare of the headlights, the plaintiff cannot identify or describe the vehicle, other than to say that it was a bus. The plaintiff sues the Blue Bus Company and offers proof that the Blue Bus Company operates eighty percent of the buses along the road where the accident occurred, while the Red Bus Company operates twenty percent of the buses along the road. Surely, the plaintiff should be allowed to recover, having shown more likely than not, based on probabilities, that a Blue Bus, rather than a Red Bus, struck him. But courts generally say, “no.” Indeed, most courts refuse to even send the case to a jury based on statistical probabilities.¹⁴¹ Proof that more SUVs than passenger cars were produced in a given year does not establish that an undescribed vehicle made during the current year is an SUV rather than a passenger car, nor does proof that most women die of causes other than breast cancer establish that a particular woman did not die of cancer.¹⁴²

139. See *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (adopting market share theory to apportion liability among pharmaceutical manufacturers of DES where plaintiffs could not conclusively identify which manufacturer produced the drugs that harmed their fetuses); *Sindell v. Abbott Labs.*, 607 P.2d 924, 936-37 (Cal. 1980) (rejecting the alternative liability and concerted action theories).

140. See *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 754-55 (Mass. 1945); see Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985).

141. See *Smith*, 58 N.E.2d at 755.

142. See *id.*

The significant distinction between *Summers* and the market share approach, on the one hand, and *Ybarra* and the “blue bus” hypothetical, on the other, is that in *Summers* and *Hymowitz*, everyone agreed that both hunters and all drug companies were wrongdoers. By contrast, the Blue Bus Company might operate its entire fleet with a near-perfect safety record, fully within the standard of care. Like most of the operating room attendants in *Ybarra*, the Blue Bus Company might not have caused the accident, much less any other accidents. Imposing liability on the Blue Bus Company, based on the available facts, distorts the incentives for safety and seems grossly unfair. If there is no negligence in the air, surely there is no liability in the air, based solely on statistics. Like the *Summers* defendants, it might be good for bus companies to get a message regarding safety, even if wrongdoing and injury do not directly align. The public good seems well served by ensuring recovery to injured plaintiffs as well as encouraging safer driving by all bus companies. Assigning liability to the Blue Bus Company, based on statistical evidence alone, however, would disproportionately burden larger companies and force them to subsidize smaller companies like the Red Bus Company. Red Bus Company drivers would not have an incentive to drive carefully, and accidents would increase. Social utility, as a result, would decrease.¹⁴³

Another possible solution to the polluting factories or the blue bus hypothetical would be to assign fault based not on market share, but in proportion to fault. Suppose, for example, that the landowner could demonstrate that Factory A produced forty percent of the sludge and that Factory B produced sixty percent. Allowing the landowner to recover forty percent of his harm from Factory A and sixty percent of his harm from Factory B would be entirely consistent with modern comparative fault principles. Each factory would have the proper incentive for safety, relative to the amount of harm caused, and the plaintiff would be made whole. But suppose Factory B went out of business or was otherwise judgment-proof. The landowner could sue Factory A for forty percent of his damages but would be left bearing the remaining sixty percent of his losses. Accordingly, from the perspective of potential defendants, the proportional fault approach seems consistent with utilitarian tort policies and the concern for “too much safety,”¹⁴⁴ but at the expense of the plaintiff’s make-whole recovery.

Take another example: Suppose the plaintiff suffers from typhoid fever, one possible cause of which is the city’s contaminated drinking water. Myriad other causes are also possible. The plaintiff can prove by a preponderance of the evidence that there is a forty percent chance that the city’s contaminated drinking water caused his illness. Rather than allowing the plaintiff to recover one hundred percent of his harm from the city based on weak statistical evidence, or denying recovery

143. See POSNER, *supra* note 8, at 604 (discussing the bus hypothetical); Nesson, *supra* note 140, at 1381-82 (describing Posner’s arguments in support of the *Smith v. Rapid Transit* outcome on economic efficiency grounds and suggesting alternative approach, requiring statistical plus additional evidence of liability).

144. See *supra* notes 86-89 and accompanying text.

because the plaintiff failed to prove that the contaminated drinking water was the “but for” cause of his illness, why not allow him to recover forty percent of his loss from the city?¹⁴⁵ In a probabilistic sense, that result seems fair. The plaintiff would not be left without a remedy, but would recover some portion of the harm commensurate with the degree of probability that the defendant caused the harm. On the other hand, the defendant, which caused some, but not all, of the harm, would not get off scot-free, but instead would pay damages proportional to the probability that the defendant may have caused the plaintiff’s injury.

In “but for” terms, however, this result would allow the plaintiff to recover despite failing to carry his burden of proof on an essential element of the claim: “but for” causation. If, in fact, the city’s contaminated drinking water did not cause the disease, the plaintiff would recover a forty percent windfall, and the city unfairly would be forced to pay forty percent of harm that it did not cause. But if the city’s contaminated drinking water was, in fact, responsible for the plaintiff’s illness, the plaintiff would be left bearing sixty percent of the loss while the city would be allowed to impose sixty percent of the harm it caused on an innocent victim. The city would receive only forty percent of the proper incentive for improving the city’s water quality and might calculate the cost-benefits of continuing to inflict disease on its residents much longer than it would had it been required to bear the full cost of the harm caused. Accordingly, using a probabilistic approach to causation and proportional recovery in toxic torts and products liability actions seems inconsistent with not only traditional tort policies but also public health objectives.

C. *Informal Regulation and Vioxx*

Tort litigation offers an effective alternative to and several advantages over government regulation of products and activities that endanger public health.¹⁴⁶ Private litigation is decentralized, stemming from individual complaints rather than a broad policy agenda. Therefore, the process may identify risks and seek corrective action more quickly than entrenched political or administrative structures. Private litigants are not beholden to constituents, do not require congressionally approved budget appropriations, and are not constrained by various procedural strictures that can hamper lawmakers and regulators. The public enjoys a largely “free” benefit, with attorneys and their clients fronting the costs of bringing the actions and effecting policy change. In addition, to the extent that an

145. See *Stubbs v. City of Rochester*, 124 N.E. 137, 140 (N.Y. 1919) (noting that, based on similar facts, the spirit of the ‘but for’ causation rule may be satisfied by evidence “from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable”).

146. See GOSTIN, *supra* note 25, at 265-66 (describing advantages and disadvantages of litigation as informal regulation of public health).

industry may have captured the agency charged with its regulation, tort litigation may be more effective because it is decentralized and unaccountable.¹⁴⁷

On the other hand, regulating product safety, pollution standards, and other public health objectives through private lawsuits is anti-democratic, in that it allows individuals and their attorneys, rather than accountable political representatives, to set the health policy agenda. In product liability cases, society may suffer by losing a useful, beneficial product because the manufacturer faces staggering liability from a few injured consumers. Also, the benefits may not disperse through society but rather concentrate on a few litigants who garner a windfall. Critics also suggest that civil litigation is enormously expensive, with high administrative and transaction costs, thereby depleting any benefits that society might derive from the damages awarded.¹⁴⁸ Tort litigation, particularly over products such as junk food, firearms, shallow swimming pools, and tobacco, may undermine some of the most effective public health interventions, which call for consumers to avoid injury by taking personal responsibility for improving health, including diet and exercise, safety precautions, and due care.¹⁴⁹

The recent Vioxx litigation provides a good example of tort law and public health goals in operation. Merck & Co. developed a popular prescription pain medication that was especially effective for arthritis and other chronic conditions. The drug had undergone the full Food and Drug Administration (“FDA”) new drug approval (“NDA”) process, which requires a product to be proven “safe and effective” for its intended use and ensures that identified side effects and adverse reactions are listed on the product’s label before it is marketed and sold.¹⁵⁰ After several years on the market, some Vioxx patients experienced heart attacks and

147. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

148. See Taylor & Thomas, *supra* note 4 (suggesting that costs to society are “enormous, an estimated \$200 billion a year, more than half of it for legal fees and costs that could be used to hire more police or firefighters or teachers”). *But see* deMause, *supra* note 4 (suggesting that Taylor & Thomas’s figure “ignores the credit side of the ledger: the consumer savings brought by, for example, suits that prompt improvements in product safety, or the reduced need to have the government cover care for patients injured by medical misdeeds”); Mencimer, *supra* note 4 (noting that the \$200 billion figure includes administrative, overhead, and salary costs of insurance companies’ CEOs). See also Galanter, *supra* note 3, at 1096-97, 1140-41 (discrediting Vice President Dan Quayle’s oft-quoted estimate that the tort system costs the nation \$300 billion annually).

149. See Geoffrey Rose, *Sick Individuals and Sick Populations*, in *PUBLIC HEALTH LAW & ETHICS*, *supra* note 25, at 58, 64 (describing the “prevention paradox,” whereby preventative measures, such as seatbelt-wearing and immunization, offer “enormous potential importance to the population as a whole” yet “very little—particularly in the short term—to each individual” whereas “heroic” measures to save individual lives, such as heart transplants, do little to improve the population’s health); Shapo, *supra* note 10, at 494-96 (describing defenses to products liability cases, including contributory negligence, “open and obvious” dangers, and misuse).

150. 21 C.F.R. § 310.501 (2006). See also Elizabeth A. Weeks, *Is It Worth the Trouble? The New Policy on Dissemination of Information on Off-Label Use Under the Food and Drug Administration Modernization Act of 1997*, 54 *FOOD & DRUG L.J.* 645, 652-58 (1999) (describing NDA process).

strokes. Plaintiffs alleged that Merck was aware of the increased risk and was therefore liable for failure to warn. Merck continued to sell the blockbuster drug for several months, even as more lawsuits were filed, but eventually voluntarily pulled the product from the market in September 2004.¹⁵¹

As lawsuits mounted, Merck approached each claim separately, tailoring its strategy to the facts of each case and particular characteristics of each plaintiff. With over 27,000 cases pending,¹⁵² there is ample opportunity for case-by-case developments. For example, in August 2005, Merck lost the first case brought to trial in Texas, involving a fifty-nine-year-old triathlete who took the medication for several months.¹⁵³ The jury awarded \$253.4 million in compensatory and punitive damages.¹⁵⁴ Merck won the second case that made it to trial in Idaho in November 2005, involving an Idaho postal worker with a twenty-year history of health problems, including high blood pressure, obesity, and known job-related stress, who had taken Vioxx for only a few months.¹⁵⁵ In the Idaho case, the jury refused to find that Merck had not adequately warned the plaintiff and others about the drug's risks.¹⁵⁶ With the score one-to-one, Merck was under no pressure to settle other pending cases until a trend emerged, suggesting that the risks of liability were greater than the expected benefits of continuing to fight "frivolous" lawsuits.¹⁵⁷ Many open questions remain, including the causal connection between the plaintiffs' adverse health events and Vioxx, especially given the aforementioned two plaintiffs' different underlying clinical conditions and periods of exposure to the drug.

Several of the torts and public health themes described in this article played out in the Vioxx litigation. Perhaps agency safety controls failed to identify the serious health risk. Maybe the FDA turned a blind eye because of the pharmaceutical industry's control of its regulators. Private litigation may effect change more quickly than agency action, pressuring Merck to remove an unreasonably dangerous product from the market. As the individual cases proceed against Merck, the link, if any, between Vioxx and increased risk of heart attack and strokes may become clear. The epidemiological evidence may be better developed through private litigation than by the FDA's NDA process because

151. *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co., Inc.*, 894 A.2d 1136, 1140 (2006).

152. See Marc Kaufman, *Texas Jury Finds Merck Responsible in Vioxx Death*, WASH. POST, Aug. 20, 2005, at A1.

153. *Id.*

154. *Id.* The punitive damages and pain and suffering awards were reduced according to Texas's cap. *Id.* ("Texas state law caps punitive damages at twice the amount of economic damages").

155. See Marc Kaufman, *Merck Wins Vioxx Lawsuit: Firm Not Held Responsible for Heart Attack*, WASH. POST, Nov. 4, 2005, at D1.

156. *Id.*

157. See *Merck Scores Win in Alabama Court Over Vioxx Drug*, WALL ST. J., Dec. 16, 2006, at A5 (announcing latest verdict and current "scorecard" of eight Merck wins to four Merck losses); see also *Merck Wins Suit in Alabama Over the Painkiller Vioxx*, N.Y. TIMES, Dec. 16, 2006, at C2.

plaintiffs are more motivated and better funded than the agency to reveal the underlying factual evidence. On the other hand, epidemiological evidence developed for trial may reveal that plaintiffs' heart attack and stroke risk could be better reduced by other health interventions, rather than by depriving the public of a beneficial, popular pain medication.¹⁵⁸ In addition, the high profile litigation may capture the public's attention. Public attention can pressure the pharmaceutical industry to improve safety, the FDA to implement more stringent controls,¹⁵⁹ individuals to improve health habits, and health care providers to improve communications with patients.

As numerous Vioxx cases proceed to trial and settlement, it may become clear whether the litigation is merely a "feeding frenzy" by greedy, ambulance-chasing lawyers¹⁶⁰ or an effective approach to promoting public health and safety. The early chapters of the story support the theme of this article, that tort law and public health are not inherently dichotomous. Individuals may be awarded damages for harm caused by a dangerous product, while the public at large, not just plaintiffs and their lawyers, enjoys a public health windfall by means of an efficient and responsive system of regulation by litigation.

CONCLUSION

Traditional tort law courses emphasize the goal of compensating individuals for harms inflicted on them by other members of society. As between an injured victim and an injurer, the task of tort law is to determine who should bear the loss. Tort law protects individual autonomy by compensating victims for intrusions of their bodily and personal integrity. The law also enforces standards of conduct. Members of society who engage in activities that unreasonably endanger others' safety are made to pay for the harms that they inflict. But the goal of tort law extends beyond compensation. Optimal safety does not mean perfect safety but, instead seeks to balance society's interests as a whole against the individual victim's interest. The utilitarian calculus and communitarian tradition that underlies much of tort law is central to public health law. Public health laws recognize that individual interests sometimes must yield to the greater societal good.

Recent international incidents, epidemics, and natural disasters have brought about a renaissance of public health law and policy. Law students preparing for a range of practice settings, from public interest law to government work to corporate

158. See Vernick et al., *supra* note 106, at 93-94 (discussing increasing importance of epidemiology in litigation and reciprocal relationship between law and epidemiology).

159. Increasingly vigorous FDA standards may limit the number of potentially useful pharmaceutical products reaching the consumer market. In 2006, the FDA approved only seventeen new drugs, the lowest number of approvals in the last fifty years. See Kaiser Daily Health Policy Report, *Prescription Drugs: FDA Approved 17 New Prescription Drugs in 2006, Lowest Approval Rate Since New Drug Approvals Peaked at 53 a Decade Ago*, Jan. 4, 2007, http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=41936.

160. See Crawford, *supra* note 4.

representation, will benefit from gaining some basic introduction to public health law themes. Although many law schools do not offer dedicated public health law courses, those themes can be readily included in traditional law school courses, including Administrative Law, Constitutional Law, Health Law, Contracts, and Torts. In this article, I have offered a non-exhaustive collection of examples from traditional tort law cases, principles, and policies that highlight the perhaps surprising but substantial overlap between torts and public health.

