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WASTE, FRAUD, AND ABUSE IN WORKERS' COMPENSATION: THE RECENT CALIFORNIA EXPERIENCE

GARY T. SCHWARTZ*

Workers' compensation programs came into American law in the 1910s. They entail a combination of features. On the one hand, they are compensation plans, affording compensation to the victims of all job-related injuries. In addition, they are regimes of strict liability, which impose automatic liability on employers for all harms caused by the employment. While liability under workers' compensation is genuinely strict, it is importantly limited as well. The employer is fully liable for medical expenses and for much of lost income; yet the employee, whether or not he is at fault for his accident, bears the loss—the "liability"—for all the intangible harm the accident produces. Given these features, workers' compensation can plausibly be called a regime of divided strict liability.¹

Yet however divided this strict liability might be, the meaningful liability that workers' compensation does place on employers indicates that workers' compensation can be sharply distinguished from programs like automobile no-fault and New Zealand-type social insurance.² These programs relieve injurers from liability for the harms they cause. Since liability ordinarily can serve as an incentive for avoiding harm, these programs raise the prospect of increasing the accident rate. By contrast, workers' compensation, in eliminating one set of liability (which rendered the employer liable for full common-law damages upon proof of negligence), substituted a new set of liability rules (which render the employer liable for moderate damages for all harms caused). It may well be uncertain whether workers' compensation does a better job at deterrence

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1. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800-02 (1982).

2. See Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070 (1993); Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989).

than the tort system.³ (Much depends on which version of the tort system one has in mind.⁴) Yet despite this uncertainty, when workers' compensation is compared to the alternative of no employer liability at all, workers' compensation can be seen as quite effective as a deterrence measure.⁵

I. MODERN PROBLEMS: NATIONALLY AND IN CALIFORNIA

That workers' compensation can perform its compensation function while also producing good results as a deterrence measure makes it uniquely appealing as a social program, at least in the abstract. But how well is workers' compensation working in practice in contemporary America? The chapter on workers' injuries in the American Law Institute's recent *Reporters' Study*, while acknowledging that workers' compensation faces certain problems, suggests that it is free of the kind of crises that were characterizing tort law in the mid-1980s.⁶ Even so, that study, in conjunction with other reports, confirms the rising cost of workers' compensation. Employer expenditures rose from \$2 billion in 1960 to \$5 billion in 1970, \$21 billion in 1980, \$35 billion in 1985, an estimated \$56 billion in 1990, and an estimated \$62 billion in 1992.⁷ The increase between 1970 and 1980 largely can be accounted for by the combination of inflation and improvements in benefit levels, as recommended by a

3. Compare James R. Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUD. 293 (1976) (finding that the move from tort to workers' compensation decreased the fatality rate) with Price V. Fishback, *Liability Rules and Accident Prevention in the Workplace, Empirical Evidence from the Early Twentieth Century*, 16 J. LEGAL STUD. 305 (1987) (finding that the move from tort to workers' compensation increased the accident rate).

4. The limited tort system in effect in the 1910s, when workers' compensation was introduced, differs dramatically from the broad tort system that might be applied to workers' injuries today. On the latter, consider the experience with the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), which continues to govern the claims of injured railroad employees and—by incorporation under the Jones Act, 46 U.S.C. app. § 688 (1988)—sea-going employees. See, e.g., *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

5. See MICHAEL J. MOORE & W. KIP VISCUSI, *COMPENSATION MECHANISMS FOR JOB RISKS* 121-35 (1990) (finding that the repeal of workers' compensation would increase the fatality rate by approximately 40%).

6. See 1 AMERICAN LAW INSTITUTE, *REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 105, 106-07 (1991).

7. *Id.* at 106; John Burton, Jr., *Workers' Compensation 1960-1990: The Increases, the Causes, and the Consequences*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar./Apr. 1993, at 1.

national commission in 1972.⁸ The cost increase since 1980 is more difficult to explain. In any event, the \$62 billion employer expenditure on workers' compensation can be compared to the \$130 billion cost figure now assigned to all of tort law by Professor Paul Weiler.⁹ Specific data on workers' compensation in California are also available. Employer spending for workers' compensation soared from \$3.7 billion in 1981 to a projected \$11 billion in 1991.¹⁰ Relative to payroll, the expense of workers' compensation in California, at 3.112 percent, is now the sixth highest in the nation.¹¹ What makes this figure especially discouraging is that benefit levels in California are in the bottom third of the nation.¹² With less than one-eighth of the nation's population, California has more than one-sixth of the nation's expenditure on workers' compensation.

Correspondingly, California is one of what seems to be a significant number of states in which workers' compensation has recently been creating severe problems that properly can be labeled crises. Certainly, the politicking surrounding workers' compensation in California has been intense. The California legislature was paralyzed during the summer months of 1992 by a pair of issues. One was the budget—as the state's economy continued to flounder.¹³

8. See generally NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972).

9. See Paul Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993).

10. See Stuart Silverstein, *Workers' Comp Blues*, L.A. TIMES, Mar. 25, 1992, at D1.

11. John Burton, Jr. & Timothy P. Schmidle, *Workers' Compensation Insurance Rates: National Averages Up, Interstate Differences Widen*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Jan./Feb. 1992 at 1, 5 (reporting on 1989 data, the latest available in tabulation). Comparable figures for other states ranged from 0.836 for Indiana to 4.402 for Montana, with a national average of 2.225. *Id.*

12. Silverstein, *supra* note 10, at D1. There is one reason why this bottom one-third ranking may be somewhat misleading. In 1975, the California legislature authorized vocational rehabilitation benefits for injured workers. These benefits—which are quite generous—are in addition to the maximum weekly wage-loss benefits. Indeed, the problem is that the program is *too* generous: many of its expenditures have proven to be of trivial value. See PETER S. BARTH & CAROL A. TELLES, WORKERS' COMPENSATION IN CALIFORNIA: ADMINISTRATIVE INVENTORY 129-30 (Workers' Compensation Res. Inst. 1992) [hereinafter WCRI REPORT.] For further information, see CALIFORNIA WORKERS' COMPENSATION INSTITUTE, VOCATIONAL REHABILITATION: THE CALIFORNIA EXPERIENCE 1975-89 (1991). While the California Institute is insurance-industry funded, I have found its reports to be fair-minded.

The vocational rehabilitation program was modified in certain respects by California's 1989 workers' compensation statute. See CAL. LAB. CODE §§ 4600-12 (West Supp. 1993). Additional reforms were included in the 1992 package approved by the legislature but vetoed by the Governor.

13. See Mark Gladstone & Carl Ingram, *Trust Low, Tempers High Among Edgy Lawmakers*, L.A. TIMES, Oct. 10, 1992, at A3.

The other was workers' compensation reform—as a Republican Governor, the Democratic majority in the state legislature, and the legislature's Republican minority battled it out.¹⁴ Partisan politics over the reform measure were complicated by interest-group politics, involving

more than seventy-five lobbyists from a maddening array of interest groups who are working hard to influence a final package. Among the groups are doctors, chiropractors and lawyers. Psychologists are pitted against psychiatrists. Big business fights small business. California insurance companies are in conflict with national insurers.

“This makes a Barnum & Bailey three-ring circus look small,” said [state] Sen. Bill Leonard [who co-authored the principal Republican bill].¹⁵

Eventually, a bill emerged that was supported by most Democrats and by enough Republicans to enable it to clear the legislature.¹⁶ But this bill was vetoed by Governor Pete Wilson, who proceeded to order the legislature back into a one-day special session.¹⁷ That session, however, was also unable to produce a bill that the Governor would sign.¹⁸ It may well be that the Governor's stubbornness was due to his belief that he would be able to use the legislature's failure to approve a workers' compensation package as a campaign issue against Democratic legislators during the fall campaign.¹⁹

Because workers' compensation programs vary considerably among the states, any diagnosis of workers' compensation crises must proceed on a state-by-state basis. In Maine, for example, a primary problem is that the state's regulation of insurance rates has apparently been geared more to what employers deem affordable than to what insurers need in order to cover their expected losses.²⁰

14. See Carl Ingram & Daniel Weintraub, *Legislators Reject Wilson's Demand on Workers' Comp*, L.A. TIMES, Oct. 19, 1992, at A3.

15. Dan Morain & Stuart Silverstein, *Reform of Workers' Comp Falters*, L.A. TIMES, Aug. 29, 1992, at A1.

16. Carl Ingram & Daniel Weintraub, *Workers' Comp Special Session Falls Apart*, L.A. TIMES, Oct. 10, 1992, at A1.

17. *Id.*

18. *Id.*

19. For a discussion of the Governor's general political strategy—and its complete lack of success so far—see Daniel M. Weintraub, *Burned by Scorched Earth Stand*, L.A. TIMES, Dec. 27, 1992, at A1.

20. See Peter Kerr, *A Showdown on Workers' Compensation in Maine*, N.Y. TIMES, Aug. 9, 1992, at 36 (“The insurers insist that the central question raised by Maine's crisis is whether regulators should set premiums not on the basis of what it costs insurers to provide coverage—as used to be the practice—but on what they believe customers can afford Insurance company after insurance company has left the state, refusing to

Oregon has responded to its own workers' compensation problems by recently enacting a reform package.²¹ One item in this package deals with the employee whose on-the-job accident aggravates or activates a pre-existing condition; it requires this employee to show, in order to secure compensation, that the accident was "the major contributing cause" of her new disability.²² While this reform package has apparently been successful in cutting the cost of workers' compensation in Oregon,²³ it involves a massive repudiation of the conventional workers' compensation doctrine that "the employer takes the employee as he finds him."²⁴

II. WASTE, FRAUD, AND ABUSE

The crisis in California is the one I have been best able to study.²⁵ And much of that crisis can justly be characterized as a matter of waste, fraud, and abuse.²⁶ These are, of course, terms that are very familiar in political discourse. They are commonly employed by challenger candidates against incumbent candidates, and by Republican politicians against Democratic politicians. What is interesting in California is that the perception that waste, fraud, and abuse are major problems in workers' compensation is a perception that just about "everyone" shares.²⁷ As Tom Hayden, now a state senator, recently noted, "There is no dispute about the facts. The [Cal-

provide workers' compensation coverage because they say the state, for a decade, has refused to allow them to raise premiums enough to cover skyrocketing health claims and legal costs.").

21. See Stuart Silverstein, *Oregon's How-To Book on Repairing Workers' Comp*, L.A. TIMES, Nov. 20, 1992, at A1.

22. OR. REV. STAT. § 656.005(7)(1) (1990 Supp.).

23. See Silverstein, *supra* note 21, at A1.

24. See 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 12.21 (1991).

25. I should candidly acknowledge, however, that my understanding of the California situation is far from complete. The legislature's 1992 reform package (vetoed by the Governor) runs on for 90 single-spaced pages of a Westlaw print-out. Parts of this package would have effected changes in the State's system of insurance regulation. A 1989 report by the State Auditor General found that workers' compensation insurance in California is quite profitable. AUDITOR GENERAL OF CALIFORNIA, *A REVIEW OF THE WORKERS' COMPENSATION SYSTEM* (1989). Yet workers' compensation insurers, citing the fraud problem, have recently been withdrawing from southern California. Denise Gellene, *Citing Rampant Fraud, Insurers Quit Southland*, L.A. TIMES, May 30, 1992, at D1. The reduction in competition may result in higher insurance premiums for southern California employers.

26. See Morain & Silverstein, *supra* note 15, at A1. For a discussion of workers' compensation fraud in Georgia, see Scott Bronstein & Peter Mantius, *If You're Hurt, Your Boss Hurts, Too: But Doctors, Lawyers, Insurers, Frauds Cash in on System*, ATLANTA J./CONST., Feb. 9, 1992, at A1.

27. Morain & Silverstein, *supra* note 15, at A1.

for] workers' compensation system is riddled with middleman fraud while perpetuating what are among the highest premiums to firms and the lowest benefits to injured workers in the whole country."²⁸

Fraud may well be a significant problem in workers' compensation nationwide: it was highlighted in a recent segment on the ABC news program *20/20*.²⁹ But the problem has become especially intense in California, where common estimates are that ten percent of all workers' compensation claims are fraudulent³⁰ and that twenty-five percent of all employer payments are a result of either fraudulent claims or the deliberate padding of otherwise valid claims.³¹ Workers' compensation fraud in California was specifically addressed in a recent segment of the CBS news program *60 Minutes*.³² The *60 Minutes* account of California is, in essence, confirmed by recent news coverage in the *Los Angeles Times*³³ and a recent report

28. Tom Hayden, *No One Brings Clean Hands to This Affair*, L.A. TIMES, Oct. 7, 1992, at B7.

29. *20/20* (ABC television broadcast, Jan. 3, 1992) (available through Nexis).

30. Professor John Burton, author of a leading newsletter on workers' compensation, has described as "exaggerated" a suggestion that 20% of all California claims are fraudulent. See Silverstein, *supra* note 10, at D1.

31. Padding of the medical expenses of injured workers happens in many ways. California lawyers advise me that doctors commonly "treat to death" those patients who are known to qualify for workers' compensation; in so doing, doctors run up their own bills. Nationwide, I am told, hospitals "pull out all the stops" when providing services to workers' compensation patients; they "roll out the red carpet." Moreover, these hospitals, facing cost-containment measures on many of their patients, often adopt billing formulae that allocate to workers' compensation patients a disproportionate share of the hospitals' overhead. A recent Minnesota study supervised by Professor Burton found that for several types of injuries, the medical bills for patients covered by workers' compensation were, on average, about twice those of patients insured by Blue Cross. MINNESOTA DEPT. OF LABOR & INDUSTRY, HEALTH CARE COSTS AND COST CONTAINMENT IN MINNESOTA WORKERS' COMPENSATION iii (1990). The study perceived that its Minnesota findings identify what is probably a national phenomenon. *Id.*

Treating physicians often have an ownership interest in facilities that provide services such as physical therapy, psychiatric evaluations, and MRIs. One recent California study explored the consequences of "self-referrals" by physicians to their own facilities. The study found that self-referrals double the rate at which physical therapy is provided, increase the cost-per-patient of psychiatric evaluations, and likewise increase the number of MRIs that in fact are medically inappropriate. Alex Swedlow et al., *Increased Costs and Rates in the California Workers' Compensation System as a Result of Self-Referrals by Physicians*, 21 NEW ENG. J. MED. 1502 (1992).

32. *60 Minutes* (CBS television broadcast, Apr. 12, 1992; transcript: v.24, no.30) [hereinafter *60 Minutes Transcript*].

33. See Stuart Silverstein, *The Big Business of Workers' Comp*, L.A. TIMES, Apr. 25, 1993, at D1; Stuart Silverstein, *Fraud Disables State's Workers' Comp Program*, L.A. TIMES, Aug. 23, 1992, at D1; Stuart Silverstein, *Pitching Workers' Comp*, L.A. TIMES, Apr. 19, 1992, at D1.

by the Workers' Compensation Research Institute.³⁴ Conversations with workers' compensation judges and state lawmakers, including leading Democrats, provide further confirmation.

60 Minutes dramatized California realities by having a reporter stand in line at the state unemployment office, passing herself off as an employee who had recently been laid off.³⁵ She was approached by a "capper"³⁶—a person who works for a workers' compensation mill.³⁷ The capper advised the supposed worker that if she came with him she could receive workers' compensation benefits that would be much greater than her potential benefits in unemployment insurance. During this conversation, the capper had a car waiting; this car then transported the supposed worker to the mill itself. According to *60 Minutes*, cappers receive \$450 for bringing in each client. Having arrived at the mill, the reporter—"client" was then interviewed by a paralegal. The "client" told the paralegal that as an employee she used to drive from place to place to set up com-

34. See WCRI REPORT, *supra* note 12, at 91-93. This Report found fraud to be especially dramatic in Los Angeles County. To be sure, the Report showed caution in dealing with the fraud issue. "The dimensions of the problem are not known, and definitions of fraud are variable." *Id.* at xxii.

It is clear, however, that employers often misunderstand the line between fraud and liberal rules of liability. Consider the person whose back is structurally quite weak, but whose back strain is immediately occasioned by some comparatively minor, on-the-job event. Focusing on the primacy of the nonwork causes, the employer may disparage the worker's resulting claim as fraudulent. Yet that claim is rendered fully appropriate by workers' compensation's adoption of the lenient doctrine that "the employer takes the employee as he finds him." See *supra* note 24 and accompanying text. See also *Emery v. Barnard Nursing Home*, 410 A.2d 224, 225 (Me. 1980) (holding that to justify compensation, the job-related incident, while it must be an "actual" causative factor in the etiology of injury, need not be an "important" causal factor).

35. *60 Minutes* Transcript, *supra* note 32, at 3.

36. These persons are also known as "runners." Several months later, ABC's *PrimeTime Live* replicated the CBS experiment, with about the same results. *PrimeTime Live* (ABC television broadcast, Feb. 11, 1993) (available through Nexis). As an additional experiment, *PrimeTime Live* set up a (phony) medical clinic. The clinic was then approached by "middlemen" who employ cappers—and who offered to "sell" the clinic large numbers of employee-"patients." (By examining these employees, the clinic would be able to bill their employers for the cost of the examinations.) Diane Sawyer referred to a "ecological chain of fraud in which middlemen sell patients to doctors and doctors sell patients to each other." *Id.* at 3.

37. It should be noted that except for a few solo practitioners, almost all applicants' attorneys in southern California work out of law offices that can properly be called "mills." Since both awards and contingent fees are low, high volume and high turnover is essential for the economic viability of these attorneys; personal interviews between clients and lawyers are quite perfunctory. Even so, there are good mills and bad mills—those that are honest, and those that are not.

By adding to the paperwork required of applicants' attorneys, the 1989 California reform statute has decreased the profitability of these attorneys' practice. Some of them are now leaving the field. See WCRI REPORT, *supra* note 12, at 83.

puter programs; the paralegal then advised her that she should claim a lower-back injury, and serious stress as well. The "client" was then referred to seven different doctors, each of whom conducted a medical-legal examination (so-called because it is a diagnostic examination intended to produce medical information that is relevant to legal issues). The seven doctors included chiropractors, orthopedists, and psychiatrists. Even though she essentially told all doctors that she was feeling fine,³⁸ she ended up with a diagnosis of lower-back injury and major depression—all of this caused by her employment.

Let me modify and expand on the *60 Minutes* account in several ways. First, the \$450 per-client fee for cappers seems high: other accounts estimate the fee at \$150.³⁹ Second, while cappers operate at state employment offices, they can also be found outside plants that are laying off workers—and even at homeless shelters.⁴⁰ And third, many people learn of workers' compensation mills not through cappers but rather through a blizzard of advertising that these mills conduct on radio, television, billboards, and newspaper classifieds. (This advertising is said to be especially intense in the Spanish-language media.) News stories in the *Los Angeles Times* report on workers' compensation fraud, and its editorials denounce this fraud; yet its classified pages have been full of advertisements inviting people who are suffering from stress, anxiety, or insomnia to consult one of these mills.⁴¹ It should be added that in many instances, ads of this sort are placed not by lawyer-controlled mills but rather by doctor-controlled clinics, which conduct multiple exams of potential claimants before referring them to affiliated lawyers. Whether initiated by lawyers' mills or doctors' clinics, this process of multiple medical-legal examinations can easily generate doctors' bills of \$10,000 or \$15,000 *before* the employer even learns that a claim might be forthcoming. And under California law, the employer is fully liable for the cost of diagnostic exams that the applicant "actually, reasonably, and necessarily" incurs for "the pur-

38. She truthfully told one doctor that she had recently experienced a single headache. An exam by a doctor employed by CBS found that she was in excellent health. *60 Minutes Transcript*, *supra* note 32, at 7-8.

39. See Silverstein, *supra* note 33, at D1.

40. *Id.*

41. See, for example, a one-column, 13-inch ad that indicates, *inter alia*, "[i]f your job is causing you distressing feelings or disabling illness, you may be eligible for Treatment and other \$\$ MONEY \$\$ Benefits Thru Workers Comp." *L.A. TIMES*, Oct. 1, 1989, at 4 (classified ad).

pose of proving . . . a contested claim.”⁴² The employer’s insurance company may feel that it has done all it can do if, in the name of “reasonable” fees, it can bargain \$10,000 of billed fees down to, say, \$7000. The workers’ compensation claim that these exams produce will often be eventually perceived as a probable loser and settled for a very low figure—perhaps \$1500.⁴³ Yet \$1500 nuisance settlements, agreed to time after time, aggregate into a very large sum. Moreover, on many occasions, errors in the doctors’ reports cannot be adequately detected by employers or their insurers. Hence the claims produced by these reports—though themselves unworthy—are settled or resolved for substantial amounts.

All of this is both discouraging and somewhat surprising. Workers’ compensation was expected to render fraud unlikely. Because workers’ compensation benefits merely restore actual out-of-pocket losses, the employee was thought to have no economic incentive to make fraudulent claims. In a tort action, the plaintiff can recover not only out-of-pocket losses but also a large award that reflects the emotional pain that the plaintiff has reported to the jury. (In many tort cases, the plaintiff sues precisely for the intentional or negligent infliction of emotional distress; in these cases, his personal experience of emotional distress provides the core of his claim.) In workers’ compensation, by contrast, the employee recovers only for medical bills and for about two-thirds of lost wages.

Consider, however, the worker who—like many others—regards his job as an unpleasant experience, one with what economists would call a “negative utility.” If that person can receive wage payments through workers’ compensation without working, he can avoid that unpleasant or negative experience.⁴⁴ For that matter, consider the employee who has been fired or laid off. Since that person is receiving nothing by way of wages from her most recent employer, workers’ compensation benefits for wage loss provide her with an unambiguous gain.

42. CAL. LAB. CODE §§ 4620-21 (West 1989). These exams can consider not only the extent of the employee’s disability but also the extent to which that disability has been caused by the employment.

43. According to a respected workers’ compensation judge, “[I]t is the rule rather than the exception these days to see workers’ compensation cases of doubtful liability settling for \$1500 with jurisdiction reserved over \$10,000 or \$15,000 or even \$20,000 in medical-legal claims.” PAMELA FOUST, *HANDLING MEDICAL-LEGAL ISSUES: AN ANALYSIS AND PROPOSAL 1* (1992).

44. The advantage of being paid for not working was the focus of the recent segment on ABC’s *20/20*. See *supra* note 29.

As far as the medical exams described above are concerned, the employee does not receive any direct benefit from them. Employees are, however, indirectly advantaged by the support these exams provide for their wage-loss claims. Those exams also benefit the doctors who are involved in the process. In other states, a single medical-legal exam costs perhaps \$300; in California, that cost can easily rise to \$1200.⁴⁵ Moreover, California seems to cumulate these exams in ways that other states do not.⁴⁶ Hence, the exams provide important income for the doctors involved in the process. Lawyers also benefit by securing contingent fees on claims that, once submitted, are eventually settled. Formal kickbacks from doctors to lawyers, however, seem to be uncommon; the informal kickback consists of a "good report."

As described above, the barrage of medical-legal exams provides apparent documentation for what in truth is a bogus claim. But it should be made clear that in many cases the worker has suffered a genuine injury and does have a genuine claim. In these cases, as well, the victim will be subjected to a series of exams. Here, too, these exams pose problems. One problem is the wastefully expensive duplication of medical reviews. Not only do many of the multiple exams largely repeat each other, but each doctor spends a significant proportion of her own billable time merely reviewing the results of the previous exams. A second problem is one of abuse, inasmuch as the series of medical-legal exams frequently results in a significant overstatement of the worker's injury.⁴⁷

The standard public account of workers' compensation sees its cost as being passed forward to consumers: "The cost of the product should bear the blood of the worker."⁴⁸ Yet according to economists' accounts, the cost of workers' compensation is largely passed backwards to workers by way of marginally lower wages. An implication of this is that employers need not be so hostile to increases in workers' compensation benefits, since those increases will be offset

45. See WCRI REPORT, *supra* note 12, at 117-18.

46. In California during 1990, there were 3.3 medical-legal reports, on average, for each litigated claim. *Id.*

47. This can happen in one of two ways. The doctors' reports can inflate the seriousness of the actual injury or the reports can claim injury to a separate "body part."

California's 1989 reform legislation provided new procedures for measuring permanent partial disability once payments for total temporary disability have been completed. See CAL. LAB. CODE §§ 4061-4067.5 (West Supp. 1993). There is "widespread skepticism" thus far as to whether these new procedures are making a difference. See WCRI REPORT, *supra* note 12, at 123.

48. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 573 (5th ed. 1984).

in the medium run by adjustments to the wage package.⁴⁹ Consider, however, the workers' compensation program that pays benefits to workers who are laid off,⁵⁰ and that requires employers to pay large sums to doctors who conduct medical-legal exams of essentially unworthy claims.⁵¹ Here, workers' compensation is imposing important costs on employers without providing benefits to their current employees.⁵² Because these costs are an unambiguous loss for employers,⁵³ employer anger about workers' compensation fraud is especially easy to understand. One can also appreciate why small businesses would take these costs into account in deciding whether to leave California altogether.⁵⁴ Moreover, these expenses are employer outlays that provide no obvious benefit to honest workers. Rather, they are likely to entail a cross-subsidy running from honest workers to dishonest workers—a cross-subsidy that is capable of disconcerting good workers and demoralizing the workplace. Indeed, given the interests of deserving workers, one might expect that or-

49. See MOORE & VISCUSI, *supra* note 5, at 53-68. In 1823, Justice Story, strongly affirming the strict liability obligations of admiralty employers, reasoned that those employers "derive an ultimate benefit from what may seem at first an onerous [liability] charge, [since that liability] encourages seamen to engage in perilous voyages with more promptitude, and at lower wages." *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823).

50. That workers' compensation claims often "skyrocket" when companies close plants is a problem "widely reported by employers and [insurers] but little studied so far on a national scale." Peter Kerr, *The High Cost of Job Inquiry Claims*, N.Y. TIMES, Feb. 22, 1993, at C1. The problem is particularly severe in states with "liberal" workers' compensation rules, since those rules make it easier to bring claims. *Id.* Many of the post-plant-closing claims are for stress and cumulative trauma. *Id.* at C7.

51. As Judge Foust reported, "[T]oday we have, in essence, a three party system" in which the employee and his doctors independently submit their own claims against the employer. FOUST, *supra* note 43, at 2.

52. According to Professor Burton, workers' compensation in California produces "real winners"; those winners are not seriously injured workers, but rather "doctors and lawyers who are prospering handsomely off the system." Silverstein, *supra* note 10, at D1.

53. Well, not quite: current employees might have some concern for their welfare after they leave the employment.

54. See Robert Reinhold, *California, Struggling in Slump, Faces High Hurdles to Recovery*, N.Y. TIMES, Dec. 21, 1992, at A1. My own sense is that the relevant interstate workers' compensation cost differentials are not large enough, standing on their own, to induce small businesses to leave California. But when a business proprietor gets hit with a workers' compensation award that she deems wholly unjustified, her anger can help persuade her that the environment for business is unacceptably hostile. "Just as [Proposition 13] represented property owners' anger about taxes, workers' comp has become a symbol [to business] of state government regulatory excess in [a broad range of] areas." Bill Boyarsky, *Lights, Cameras but Slow Action on Workers' Comp*, L.A. TIMES, Jan. 27, 1993, at B2. Moreover, the nationwide image of a California workers' compensation system that is hostile and out of control may well be discouraging businesses from choosing to move into California.

ganized labor would not oppose efforts to crack down on fraud.⁵⁵

III. MODERN DOCTRINE AND ITS IMPLICATIONS

How can workers' compensation programs define eligibility for benefits in ways that minimize opportunities for waste, fraud, and abuse?⁵⁶ "Bad-back" claims often result from cumulative on-the-job experiences. These claims became compensable because of the development of the doctrine of "cumulative trauma,"⁵⁷ which replaced the prior requirement that an employee's injury result from a single traumatic accident or incident. The problem here is that bad-back claims can be notoriously difficult to corroborate or verify.⁵⁸

From one perspective, the doctrine of cumulative trauma is overwhelmingly sound. The injury that happens because of the daily pressures of the job is even more clearly "caused" by that job than the injury that results from a single and quite possibly flukish event. Nevertheless, an accident requirement—insisting that the employee locate the cause of the injury in time and place—reduces the likelihood of two kinds of unworthy claims. First, such a requirement would make it harder for an employee to allege disabling back pain when no such pain exists. Furthermore, back pain occurs for all kinds of reasons—including individual body structure and the inevitable effects of aging. A second benefit of an accident requirement would be to make it more difficult for an employee to allege that her back pain was due to her job when in fact it was instead due to some other cause. Yet despite the possible advantages of a meaningful accident standard, the cumulative-trauma doctrine in back cases and other cases of bodily injury has not been challenged in California during the recent round of reform proposals. Even the person who brings a workers' compensation claim after being laid off may still allege that cumulative experiences before the layoff have resulted in a current disability.

What about employees who are allegedly disabled for reasons of mental or emotional illness? It is important here to note that psychiatric disabilities are becoming increasingly prominent in com-

55. For the position taken by organized labor during the 1992 deliberations of the California legislature, see *infra* text accompanying notes 145-146.

56. I do not regard ordinary lawyers' fees as "waste"; such elements of overhead are the price a system pays in order to achieve its desired results. Still, other things being equal, the lower the overhead the better. Moreover, at some point, lawyers' fees can become so out-of-line as to be "wasteful."

57. See 1B LARSON, *supra* note 24, § 39.40, at 7-423 to -432.

58. See *infra* notes 94-101 and accompanying text.

pensation plans generally. Consider, for example, the Social Security disability program. During the 1970s, of all those persons newly awarded benefits, the proportion alleging psychiatric disability held stable at around eleven percent annually; between 1980 and 1990, however, that proportion more than doubled, reaching twenty-three percent.⁵⁹ Certainly, one interesting question concerns how psychiatric disabilities—and other claims of emotional distress—would be covered by a tort system, were it still in effect in the employment context. As of 1910—just before tort was replaced by workers' compensation—the employee who alleged that his employer had negligently brought about his emotional disability would probably not have stated a valid claim.⁶⁰ Modern tort law, however, has greatly expanded the protection it provides against emotional injuries. The tort system survives in its application to railroad employees, who for historical reasons are covered not by workers' compensation but rather by the Federal Employers Liability Act (FELA)—a liberal tort system.⁶¹ A study mandated by Congress is now underway to determine whether railroad employees should at this late date be converted from FELA to workers' compensation. (I am one member of the committee conducting that study.) But this parallel system of compensation is instructive here because the issue of the compensability of emotional injuries under the FELA has been heavily litigated in recent years.⁶² Currently, there are "open conflicts" among the federal courts of appeal as to the proper scope of railroad liability.⁶³ In considering a possible shift from FELA to workers' compensation, one major issue concerns how the FELA coverage of emotional injuries—uncertain as it now is—compares with what the coverage would be under a workers' compensation alternative. That is, my committee may need to predict where FELA law will end up, and may also need to identify which version of workers' compensation it has in mind as a possible alternative.

59. See Carolyn L. Weaver, *Reassessing Federal Disability Insurance*, PUB. INTEREST, Winter 1992, at 108, 113.

60. There is, for example, no mention of such a cause of action in Labatt's multivolume treatise. See CHARLES B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT (1913).

61. See *supra* note 4.

62. The issue was identified and left open in *Atchinson, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568-70 (1987). The *Buell* opinion urged lower courts to focus on the "precise application of developing legal principles to the particular facts at hand." *Id.* at 570.

63. See *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 365 (3d Cir. 1993) (noting that in the opinions of the courts of appeals "there is no common discernible principle, test, view or attitude"). The *Gottshall* majority itself ruled in favor of liability. *Id.* at 382-83.

In fact, there are considerable variations in the response of workers' compensation programs to claims of psychiatric disability. A threefold classification, derived from the influential Larson treatise,⁶⁴ is useful for analyzing these claims. "Physical-mental" cases, in which a clear physical injury produces a subsequent psychiatric disorder, are the least troublesome. Almost all states agree that disabilities resulting from such disorders are compensable.⁶⁵ This position is certainly understandable; yet the California experience demonstrates how this rule—enabling employees to allege a psychiatric overlay on top of physical injury—can add considerably to an injury's settlement value.⁶⁶

Other cases fit into a classification of "mental-physical." In these cases, a mental stress provokes a physical injury, such as a heart attack or an aneurism. In almost all states, these injuries are regarded as compensable.⁶⁷ Affirming awards in mental-physical cases seems understandable when the injury is as severe and distinctive as a heart attack.⁶⁸ Note, however, what has been happening in California. A clinic or mill suggests that the employee's emotional stress has produced neck pain, back pain, headaches, blurred vision, and gastrointestinal upset. Accordingly, the client is sent for medical-legal exams to a chiropractor, an osteopath, a neurologist, an orthopedic surgeon, an internist, and an ophthalmologist.⁶⁹ These physical symptoms—and also the tests that profess to confirm them—all become compensable under a broad interpretation of the mental-physical category of claims.

Even so, the most difficult cases are "mental-mental," in which a purely mental stimulus produces a purely mental response. Until 1970, there was little judicial authority for recovery in cases of this sort. As the Larson treatise correctly notes, "The most lively development in compensation law in the last fifteen years has been the

64. See 1B LARSON, *supra* note 24, §§ 42.20-42.25 (noting that his classification scheme "is only a rough expedient adopted in order to sort out an almost infinite variety of subtle conditions and relationships").

65. See *id.* § 42.22(a), at 7-832 (finding that the doctrine favoring compensation has been accepted in "[d]ozens of cases, involving almost every conceivable kind of neurotic, psychotic, psychosomatic, depressive, or hysterical symptom, functional overlay, or personality disorder").

66. See WCRI REPORT, *supra* note 12, at 131. In many cases, of course, the claim of additional disability may be genuine; in others, however, the claim is probably insincere.

67. See 1B LARSON, *supra* note 24, § 42.21(a).

68. Of course, heart attacks raise the problem of the employee's prior vulnerability. For the special rules applicable to heart attack claims, see 1A LARSON, *supra* note 24, § 38.83.

69. See FOUST, *supra* note 43, at 47-48.

explosion of 'stress claims.'⁷⁰ Indeed, the treatise's citations show that a majority of states do now affirm compensation in mental-mental cases.⁷¹ Many states have done so, however, only in cases where the mental stimulus has taken the form of a sudden traumatic event, or a series of especially vexing events.⁷² An often-cited case involves a secretary who was unable to work for a period of time after she came into her boss's office and discovered his dead body—the result of his suicide.⁷³

To say that these states condition compensation on the showing of a sudden event is to indicate that they do *not* accept the doctrine of cumulative trauma in psychiatric disability cases; to this extent, state law remains conservative. Even so, a sudden-event test is capable of producing surprising results. Consider the employee who is suddenly fired or laid off. From the perspective of management, discharges are normal, indeed routine, events. Yet, from the employee's perspective, being discharged is a sudden trauma that can easily produce intense and continuing emotional distress.⁷⁴ The recent trend in favor of awarding compensation in these discharge cases⁷⁵ is thus consistent with a sudden-event limitation on recovery. Even so, there is something odd—indeed, perhaps even bizarre—about rendering an employer liable in workers' compensation for the emotional consequences of dismissing a person from its work force.

Other states, while not requiring a single traumatic event, still insist that the job circumstances producing the emotional disability be much more stressful than those experiences that ordinary employees (or ordinary citizens) regularly encounter.⁷⁶ These states hence provide incomplete protection to employees who are unusually vulnerable. That is, they decline to recognize the traditional workers' compensation maxim of "taking the employee as you find him." There are, however, a handful of states, including California,⁷⁷ that have combined (a) full mental-mental coverage, *with* (b)

70. 1B LARSON, *supra* note 24, § 42.25(a), at 7-957. "Stress claim" is a term that is now used as a synonym for "mental-mental." *Id.*

71. *Id.* § 42.25(c) (finding 29 states as of 1991).

72. *Id.* § 42.25(e).

73. *See Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603 (N.Y. 1975).

74. In some cases, the employee has operated under a real threat of termination for a considerable period of time before the decision is finally rendered. In these cases, therefore, emotional distress can occur well before the actual termination.

75. *See* 1B LARSON, *supra* note 24, § 42.23(e).

76. *Id.* § 42.25(f) (terming this "unusual stress").

77. *Id.* § 42.25(g).

the full doctrine of cumulative trauma, *with* (c) the absence of any requirement of "unusual stress," *and* with (d) the basic acceptance of the traditional "take the employee" maxim.

The California position emerged over a period of years through several judicial opinions, mainly by the intermediate courts of appeal. The most dramatic of these was *Albertson's, Inc. v. Workers' Compensation Appeals Board*.⁷⁸ In that case, the employee was disabled because of her belief that she was being harassed on the job. This belief, however, was a misperception on her part. There was in fact no harassment; rather, because of her own unstable emotional condition, she misinterpreted as harassment a number of events at work involving some measure of conflict with her supervisor.⁷⁹ Despite her misperception, the court of appeal reasoned that these events could be said to have played an "active role" in the sequence of circumstances leading up to her disability.⁸⁰ Accordingly, the court found that she was entitled to compensation. The potent combination of doctrines confirmed by *Albertson's* goes a long way toward explaining the increase in the number of emotional disability claims in California. These claims grew by 750 percent between 1981 and 1991⁸¹ and now comprise about eight percent of all workers' compensation claims statewide.⁸² Notably, but unsurprisingly, ninety-eight percent of all stress claims are contested by the employer.⁸³

What sense should we make of all of this? In general, modern society has become increasingly aware of the reality of emotional pain and occupational stress. As described above, an increasing

78. 182 Cal. Rptr. 304 (Cal. Ct. App. 1982).

79. *Id.* at 305-07.

80. *Id.* at 307. Cases that reject the *Albertson's* approach are collected in 1B LARSON, *supra* note 24, § 42.23(d) at 7-931 to -935.

81. The State's data for 1981 through 1990 are set forth in WCRI REPORT, *supra* note 12, at 20, 28. The State's newly released data for 1991 show an increase of 50% in reported claims between 1990 and 1991. See California Workers' Compensation Institute, Bulletin No. 93-1 (1993).

82. The problem here is that many stress claims asserted against employers are not reported to the state. Some calculations suggest that as many as 17% of all claims are for stress. Roger Thompson, *Fighting the High Cost of Workers' Comp*, NATION'S BUS., Mar. 1990, at 20, 28. But eight percent seems like a better estimate. Telephone interview with Tom Perry, Research Director, California Workers' Compensation Institute (Feb. 4, 1993). Still, it should be noted that the calculation of claims for "stress" as such does not include claims alleging psychiatric disability as an overlay to physical injury. See *supra* note 65 and accompanying text. According to data compiled by the State's Workers' Compensation Insurance Rating Bureau, more than 12% of all claims for permanent partial disability allege "physical" injury with a "mental" supplement. See Letter from David M. Bellusci, Chief Actuary, Rating Bureau, to California State Senator Patrick Johnston (Aug. 20, 1990) (copy on file with the *Maryland Law Review*).

83. See WCRI REPORT, *supra* note 12, at 39.

percentage of all claims for Social Security disability payments allege psychiatric disability.⁸⁴ As far as occupational stress is concerned, the recent public health literature has emphasized how real a problem it is for very large numbers of employees.⁸⁵ That literature is unclear as to whether occupational stress is a problem that has only recently become serious, or whether it has always been a serious problem that has only recently been recognized.⁸⁶ In any event, it is a serious problem now; one could therefore conclude that it would be unenlightened for workers' compensation programs to ignore or downplay occupational stress.

Nevertheless, there are many reasons to be concerned about this extension of workers' compensation. For one thing, it is not clear what employers can do to reduce the infliction of disabling stress. To be sure, companies can set up stress management programs.⁸⁷ But it seems doubtful that employers should be actively seeking to redesign jobs and job assignments in order to lessen the degree of stress.⁸⁸ The public health literature discusses screening techniques that employers might rely on in order to assign stress-resistant workers to potentially high-stress jobs.⁸⁹ This strategy, however, would reduce the employment prospects of apparently stress-vulnerable employees. The strategy is hence doubtful as a

84. See *supra* note 59 and accompanying text.

85. See, e.g., ROBERT KARASEK & TÖRES THEORELL, *HEALTHY WORK: STRESS, PRODUCTIVITY, AND THE RECONSTRUCTION OF WORKING LIFE* (1990); Annetta Miller et al., *Stress on the Job*, NEWSWEEK, Apr. 25, 1988, at 40.

86. Mergers and company-downsizing are often cited as sources of modern stress; also cited is the rapid pace of modern work assignments, especially in the growing "service" sector. Additionally, as one article notes, "common job demands and role characteristics that cause stress include crowding, lack of privacy, poor spatial arrangements, noise, excessive heat or cold, inadequate lighting, air pollution, repetitive work, time pressures, competition, and conflict within or between groups." Christy L. DeVader & Andrea Giampetro-Meyer, *Reducing Managerial Distress about Stress: An Analysis and Evaluation of Alternatives for Reducing Stress-Based Workers' Compensation Claims*, 31 SANTA CLARA L. REV. 1, 5-6 (1990). These job conditions were all present in early nineteenth-century textile mills.

87. See Miller, *supra* note 85, at 42, 44-45.

88. Those job conditions that induce disabling stress in a few employees tend more generally to bring about worker productivity and creativity. See *id.* at 42. "Because individuals respond [so] differently to stress, the stress reduction strategies that emphasize people over jobs or positions should be most effective." DeVader & Giampetro-Meyer, *supra* note 86, at 23. However, for a recommendation that corporate hierarchies be radically decentralized in order to reduce worker stress, see KARASEK & THEORELL, *supra* note 85.

89. See DeVader & Giampetro-Meyer, *supra* note 86, at 17.

matter of both social policy and existing federal law.⁹⁰

Moreover, for reasons that extend beyond the difficulty of controlling occupational stress, one can find unsatisfactory the willingness of workers' compensation law to compensate for psychiatric disability.⁹¹ Return now to those states that allow "mental-mental" recoveries when there is a single traumatic incident. *Wolfe v. Sibley, Lindsay & Curr Co.*,⁹² the case involving the secretary who discovered her boss's suicide, is considered by many to be an attractive case for recovery on its facts. Yet compare this secretary to the person who suffers the most devastating of all emotional experiences—the sudden, unexpected death of a spouse. This experience ranks at the very top of psychologists' lists of emotional traumas;⁹³ the surviving spouse can incur an experience of mourning that can easily last for a period of two years or more. Granting all of this, one can still note that a worker of ordinary emotional durability would be able to return to work after a relatively brief period. Indeed, the return to work will often be good therapy—a process that reduces, rather than enhances, emotional distress.

Of course, in a case like *Wolfe*, the particular location of the secretary's job could serve as a reminder of the earlier episode in a way that would make her return to work especially distressing. If so, the appropriate response would be to have her come back to work, but arrange for a re-assignment to a different office. Even, then, in superficially attractive cases like *Wolfe*, any long-term—let alone permanent—disability seems primarily due to the employee's own situation of prior vulnerability. It is one thing to accept the "take the employee as you find him" maxim in ordinary cases of personal injury. It is another matter to approve of compensation in a particular category of cases where nontrivial disability can *only* result from the employee's position of prior susceptibility.

Consider the applicant who claims that he has been incapacitated for work by severe depression. In such a case, one may well be

90. *Id.* at 26. For a more general treatment of the problems with employers' screening practices, see Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379 (1983).

91. Some workers will find particular jobs so stressful that they may feel the need to quit. If so, this should raise an issue of unemployment insurance, not workers' compensation.

92. 330 N.E.2d 603 (N.Y. 1975).

93. A list prepared by Drs. Thomas Holmes and Richard Rate ranked "death of a spouse" at 100 on a scale of 100. Being fired from work received a rating of 47; "trouble with boss," a rating of 23. This list has been reproduced in many places. See, e.g., MAX L. FEINMAN & JOSLEEN WILSON, *LIVE LONGER: CONTROL YOUR BLOOD PRESSURE* 97-98 (1977).

able to credit the applicant's claim that he is experiencing serious depression. Even so, his ability to work remains to a large extent dependent on his desire and his will. A person who claims to be unable to work because of depression often cannot be distinguished from the person who could work—despite his depression—if he were adequately willing to work. Call this a problem of moral hazard, self-deception, or actual fraud. Whatever the label, providing continuing wage-placement payments to former employees will be in many instances an unaffordable social mistake.

As it happens, a somewhat similar evaluation can be made in the case of soft-tissue back injuries. As I and many of my acquaintances can testify, back pain can be very real and very disabling. Nevertheless, there seems to be a large measure of psychological and social construction⁹⁴ at work in the diagnosis of back pain and lower-back injuries. According to a recent article in the *New York Times*,⁹⁵ “the majority [of chronic-pain patients] have no specific problem that can be found on tests or exams.”⁹⁶ The director of a prominent pain clinic was quoted as saying that “[a]ll the evidence suggests that for most people chronic pain is a stress-related disorder, just like ulcers.”⁹⁷ And a number of leading pain specialists believe that “medical and legal practices actually help set the chronic-pain cycle in motion. The barrage of scans and exotic ther-

94. The social construction of the concept of disability within the Social Security disability program is emphasized in DEBORAH A. STONE, *THE DISABLED STATE* (1984). According to Professor Stone, society operates under two “conflicting” principles of distribution—the principle of “work” and the principle of “need.” In her view, “disability” is the concept that “mediates the boundary” between these conflicting principles. *Id.* at 188. I find Stone's account quite puzzling. A society that places a high priority on people earning their income through work could still, without any real “conflict,” favor public support for those who are unable to work because of actual disability.

Much of the time, Professor Stone seems sympathetic to programs based on a broad definition of “need.” *See, e.g., id.* at 177. Yet, at other times, she seems to appreciate the real, social disadvantages of an excessively broad definition of compensable “disability.” *See, e.g., id.* at 190 (“[O]nce people are categorized as disabled, they become socialized to the role. . . . Dependence creates dependence.”); *id.* at 191 (seemingly recommending a move away from “compensation” plans towards systems of “liability” that aim at “prevention”).

95. Elisabeth Rosenthal, *Chronic Pain Fells Many Yet Lacks Clear Cause*, N.Y. TIMES, Dec. 29, 1992, at C1. The general accuracy of the *Times* article was confirmed for me by Professor John Liebeskind of the UCLA Medical School. For an earlier review of the medical evidence, see Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1356-60 (1974). For further discussion, see generally DAVID MORRIS, *THE CULTURE OF PAIN* (1991).

96. Rosenthal, *supra* note 95, at C1 (quoting Dr. John Loeser, director of the pain clinic at the University of Washington in Seattle).

97. *Id.*

apies that doctors prescribe for pain convinces healthy people that they have a serious condition.”⁹⁸ As it happens, prior to World War II lower-back pain was a rare diagnosis; currently, more people are disabled by lower-back pain in the United States than in any other country.⁹⁹ Much of the time, this pain cannot be linked to physical injury or X-ray findings. Rather, studies have found that pain “correlates with such factors as job satisfaction, depression and the resolution of lawsuits.”¹⁰⁰ Since a claim of pain cannot be confirmed by the doctor’s exams, doctors are placed in a “‘terrible dilemma. . . . Pain is what people say it is. And if you start with the concept that you should believe the patient, then how can you say it is real or unreal, and how do you prove it?’”¹⁰¹

This dilemma has been confronted in recent years by the Federal Social Security Program. Of all disability cases considered by federal administrative law judges (ALJs), the majority involve allegations of chronic pain; the next largest category involves claims of neuroses, which are at least as difficult to measure objectively.¹⁰² In 1968, Congress, appreciating the uncertainty of many disability claims, introduced a note of caution into the Social Security program: to secure benefits, an applicant cannot rely solely on his own “statement as to pain or other symptoms”; rather, he must introduce “medical signs and findings, established by medically acceptable clinical and laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities.”¹⁰³ During the 1970s and 1980s, federal administrators, acknowledging the difficult choices faced by ALJs, responded with various procedural innovations aimed at improving the accuracy and consistency of ALJ

98. *Id.*

99. *Id.*

100. *Id.* One of these studies is Stanley J. Bigos et al., *Methodology for Evaluating Predictive Factors for the Report of Back Injury*, 16 SPINE 669 (1991).

101. Rosenthal, *supra* note 95, at C1 (quoting Dr. Kathleen Foley, director of the pain service at Memorial Sloan-Kettering Cancer Center, New York).

102. See Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decision-making: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 502 n.85 (1990).

103. Social Security Act, 42 U.S.C. § 423(d)(5)(A) (1988). Over the years, Congress has insisted on adopting rules that render findings of disability dependent on the objective judgments of doctors—even though doctors themselves have repeatedly told Congress that their own judgment calls are necessarily subjective. See Stone, *supra* note 94, at 80-89. Evidently, there is a “lay perception” that medical science is “objective,” a perception that overrides the statements of medical associations. *Id.* at 87. See *id.* at 87-88 (offering other explanations for congressional policy).

decisions.¹⁰⁴

Yet, these are elements of caution and reform that have been absent, at least until recently, in the California version of workers' compensation. In California, claims of chronic pain are routinely confirmed by a series of medical-legal reports. So confirmed, an applicant's claim probably will be approved if the applicant testifies as to back pain and if her job was one that seems conducive to back strain. The California system seems eager to avoid false negatives—the improper denial of compensation. In so doing, however, California has apparently been willing to pay a high price by way of accepting large numbers of false positives—that is, by granting awards (and encouraging settlements) when compensation probably should be withheld. Conceivably, these practices could be justified by the notion that workers' compensation should be “liberally” construed.¹⁰⁵ But the primary function of this maxim was to make sure that early workers' compensation judges—interpreting broad new statutory concepts—rid themselves of their prior common-law mindset. It is hard to see how the maxim could authorize deliberate biases in fact-finding in late twentieth-century cases.¹⁰⁶ At the very least, the barrage of one-sided, employer-subsidized medical-legal reports gives claims momentum as they enter the process of settlement and adjudication—a momentum that cannot be justified as a matter of policy or principle.

IV. CALIFORNIA REFORMS

To recap, then, at least in the California version of workers' compensation, there has been some combination of waste, fraud, and abuse in both the presentation of claims and the conducting of medical-legal exams; moreover, those exams have placed inappropriate pressures on the processes of settlement and adjudication. How, then, have California policymakers responded to this range of problems? In the last several years, the California legislature has

104. For a description, see Pierce, *supra* note 102, at 503-15. These innovations have in turn prompted the consideration of the best of American legal scholars. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Pierce, *supra* note 102. For the work of a political scientist, see MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* (1990).

105. See CAL. LAB. CODE § 3202 (West 1989) (providing that the workers' compensation statute be liberally construed).

106. It is elementary in workers' compensation that the worker bears the burden of proving all the factual elements of a claim by a preponderance of the evidence. See 3 LARSON, *supra* note 24, § 80.33(a).

thrown a variety of statutes at the problem of outright fraud by cappers, lawyers, and doctors.¹⁰⁷ It will take a considerable period of time to fully measure and assess the aggregate effectiveness of these new statutes.

For lawyers, it is notoriously hard to draw the line between legally prohibited solicitation and constitutionally protected advertising. Similarly, it is difficult to separate out the lawyers' presentation of fraudulent claims from the kind of partisan advocacy that is routinely expected. With respect to doctors, it is difficult to draft a statute that distinguishes between diagnoses that are fraudulent and diagnoses that are no more than inaccurate and superficial. Cappers themselves are only foot soldiers in a tawdry operation; if taken off the streets, they can easily be replaced. And a statute violated when cappers bring clients to lawyers with "reckless disregard" of the lawyers' "intent" to practice illegal fraud¹⁰⁸ creates a crime whose elements are obviously difficult to prove.

Still, there have been recent instances of significant enforcement activity. California's Insurance Commissioner orchestrated a raid of one leading clinic, resulting in nine arrests for fraud;¹⁰⁹ I am told that the clinic had a few rooms for medical examinations but a large number of rooms filled with word-processors (apparently set up to mass-produce exam reports). One California insurer has creatively relied on the federal RICO statute¹¹⁰ in suing a workers' compensation clinic.¹¹¹ This suit was settled when the clinic agreed

107. An extensive "Reform Act" was enacted in 1989; additional, more limited measures were approved in 1990 and 1991. In 1992, even though the legislature's major workers' compensation package was defeated by gubernatorial veto, a number of other workers' compensation bills were adopted. The relevant reforms are scattered through the Labor Code, the Insurance Code, the Business & Professions Code, and the Penal Code.

108. CAL. PENAL CODE § 549 (West Supp. 1993).

109. See Stuart Silverstein, *Nine Arrested in Workers' Comp Fraud*, L.A. TIMES, Apr. 23, 1992, at D1. In an even more recent enforcement effort, the state has searched various offices of a workers' compensation referral service. As of yet, there have been no arrests. Stuart Silverstein, *Workers' Comp Probe Hits 40 Medical Offices*, L.A. TIMES, Dec. 3, 1992, at D2.

Oddly, while Governor Wilson has been vigorous in condemning workers' compensation fraud, last September he vetoed \$11.5 million authorized by the legislature for investigating and prosecuting fraud in workers' compensation and auto insurance. See Carl Ingram, *Wilson Vetoes Funds to Fight Insurance Fraud*, L.A. TIMES, Sept. 3, 1992, at A28. The veto evidently resulted from animosity between the Republican governor and the Democratic insurance commissioner, who is independently elected.

110. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988).

111. See Stuart Silverstein, *Deal Reached in Workers' Comp Suit*, L.A. TIMES, Aug. 18, 1992, at D1.

to pay the insurance company an undisclosed sum, abandon a million dollars of claims it had been asserting against the company, and abide by certain "protocols" in its submission of future claims.¹¹² (One of these protocols requires the clinic to submit no more than one medical-legal report in support of any claim.¹¹³) A 1992 statute requires that all media advertisements soliciting clients for workers' compensation provide notice of the criminal penalties for filing fraudulent claims.¹¹⁴ From what I can observe, this requirement has diminished the flow of lavish media solicitations. Moreover, in the last quarter of 1992, the number of new workers' compensation claims declined significantly.¹¹⁵ While this decline probably has several causes, it can still be said that "[a]ll the anti-fraud stuff is beginning to work."¹¹⁶ Furthermore, claims continued to decline during the first quarter of 1993.¹¹⁷ Apparently, many of the medical mills are either "closing down" or "trying to go legit."¹¹⁸

Legislation has also been enacted to combat waste and abuse in the conduct of medical-legal exams. In an effort to reduce the incidence of both fraud and superficiality, new requirements have been imposed upon the content of medical-legal reports.¹¹⁹ With regard to the cost of these exams, a series of statutory maneuvers has endeavored to provide content to the notion of the "reasonable" fee to which the diagnosing doctor is entitled.¹²⁰ But in this context, for whatever reason, the new statutory provisions may well be perpetuating a bad situation. A reform measure passed in 1984 called for the annual compilation of the range of fees for diagnostic exams within several specialties—and then indicated that during any one year a particular fee is presumptively reasonable if it does not exceed the fee at the eightieth percentile of the list for the previous year.¹²¹ This statutory "reform" set in motion a process that essen-

112. *Id.*

113. *Id.*

114. See Workers' Compensation Truth in Advertising Act of 1992, CAL. LAB. CODE §§ 5430-34 (West Supp. 1993).

115. See Stuart Silverstein, *Workers' Comp Claims Indicate Sudden Drop*, L.A. TIMES, Feb. 26, 1993, at A1.

116. See *id.* at A25 (quoting a lawyer for the California Manufacturers' Association).

117. Stuart Silverstein, *Job-Injury Payments Decline*, L.A. TIMES, May 22, 1993, at D1.

118. *Id.* at D2 (quoting a statement of a representative of a company that processes claims for self-insured employers).

119. See CAL. LAB. CODE § 4628 (West Supp. 1993). The statute requires, *inter alia*, that the doctor who signs the report be the person who actually conducted the exam.

120. See *id.* § 4624(a) (providing a list of charges that "shall be rebuttably presumed reasonable").

121. 1984 Cal. Stat. 596 (adding a new § 4624(c) to the Labor Code).

tially guaranteed a significant annual increase in compensable fees.¹²² In 1990, the legislature reviewed its 1984 enactment—and lowered the percentile figure trivially, from eighty to seventy-three.¹²³ Not surprisingly, in mid-1992 the fees that were deemed presumptively reasonable went up by an average of more than ten percent.¹²⁴

Apart from statutory reform, workers' compensation judges—at least in Santa Monica—have begun the process of conferring a somewhat more rigorous interpretation on the existing statute rendering employers liable for the basic cost of medical-legal exams. As one judge pointed out, duplicative exams are hardly "reasonable and necessary;"¹²⁵ and neither are reports that are so conclusory or incomplete as to be essentially lacking in evidentiary value.¹²⁶ Furthermore, because the purpose of a compensable exam supposedly is to prove a "contested claim," some judges find it difficult to see how a claim can be regarded as "contested" if the employer has not yet seen and denied the claim, or at least had a reasonable time in which to deny it.¹²⁷ As of now, it is unclear how receptive appellate courts—and other workers' compensation judges—will be to these proposed re-interpretations, and how successful the interpretations themselves will be in restraining wasteful costs.

The more fundamental question concerns the basic logic of the California statute, which holds employers liable for these diagnostic exams.¹²⁸ Such exams can be plausibly analogized to the medical treatment that the injured employee receives.¹²⁹ In light of this analogy, the employer *should* bear the cost of these exams—but *only* if the employee turns out to have a winning claim. (A number of states do in fact utilize such an arrangement.¹³⁰) Yet in California, the employer bears liability even when, as is often the case, the claim

122. It has been suggested to me that the Legislature confused the concept of "eightieth percentile" of physicians' fees with the concept of "eighty percent" of the average of physician's fee.

123. CAL. LAB. CODE § 4624(d) (West Supp. 1993).

124. Indeed, in mid-1992 the fees that are presumptively acceptable went up by an average of more than 10%. See California Workers Compensation Institute, Bulletin No. 92-9 (1992) (describing the new fee schedule promulgated by the State's Division of Workers' Compensation).

125. FOSTER, *supra* note 43, at 16.

126. *Id.* at 30.

127. *Id.* at 26-27.

128. See *supra* note 42 and accompanying text; *infra* note 132 and accompanying text.

129. On the difficulty of drawing the line between medical-legal diagnosis and ordinary medical treatment, see 3 LARSON, *supra* note 24, § 83.20 at 15-1372.

130. States that formally allow the prevailing claimant to recover for the cost of medical-legal exams are discussed *id.* at 15-1368 n.46.

is a loser.¹³¹ Alternatively, these diagnostic exams, conducted “for the purpose of proving . . . a contested claim,”¹³² can be analogized to the legal fees incurred in the employee’s effort to prove a contested claim. Given this analogy—and given the general acceptance in workers’ compensation law of the so-called American Rule¹³³—the costs of these exams should remain with the employee, regardless of whether the claim wins or loses. Most American jurisdictions do in fact adhere to such an arrangement.¹³⁴ Indeed, even if a workers’ compensation system were dramatically to embrace fee-shifting on a one-way basis, that would justify imposing the cost of the exams on the employer only in the event of a successful claim. Yet, to repeat, under the California practice the employer bears liability for these exams regardless of the outcome of the claim.

The California practice is thus quite unjustified in terms of basic doctrine—and the incentive it creates for wasteful and abusive exams is clearly offensive. Still, the seemingly unique California practice can be seen as solving a distinctive problem—the inability of low-income workers to ascertain whether they have valid claims. I know of nothing in the professional or scholarly literature on workers’ compensation that discusses how serious a problem this is in the remaining forty-nine jurisdictions. Nor does that literature deal with how the problem itself can best be solved. A contingent fee for claimants’ lawyers is of course a common practice. A contingent fee for diagnosing doctors, however, would be a distressing innovation—in part because of the way it would induce highly partisan diagnoses.

In any event, the problem of medical-legal exams is a quite important matter of system design that has largely escaped scholarly attention. By contrast, the extent to which psychiatric disabilities

131. In fact, until 1959, the predecessor of CAL. LAB. CODE § 4620 required the employer to pay for medical-legal exams only when these exams were “required to successfully prove a contested claim.” In 1959, the legislature, without explanation, amended the statute by deleting the word “successfully.” In *Subsequent Injuries Fund v. Industrial Accident Comm’n*, 382 P.2d 597 (Cal. 1963), the California Supreme Court ruled that this deletion meant what it seemed to mean. In the court’s view, the requirement that expenses be “reasonably” and “necessarily” incurred provided a sufficient “safeguard against . . . abuse.” *Id.* at 598.

132. CAL. LAB. CODE § 4620 (West 1989).

133. The limited circumstances in which the California employer can be required to pay for the applicant’s attorney’s fee are described in WCRI REPORT, *supra* note 12, at 81.

134. See 3 LARSON, *supra* note 24, § 83.20 (“Like attorneys’ fees, other fees and expenses must be borne by the parties themselves, in the absence of a statute shifting the incidence of such expenses.” (footnote omitted)).

are compensable depends on formal rules of liability that are much attended to in treatises and coursebooks. Indeed, the Larson treatise, as indicated above, calls the trend towards coverage of pure stress claims "the most lively development" in workers' compensation doctrine during the last fifteen years.¹³⁵ And in California this trend has been extended considerably. How has the California legislature responded to the psychiatric-disability problem that has developed in that state? A 1989 reform measure, approved by the legislature and signed by Governor Deukmejian, was designed to tighten up eligibility by requiring that the employee who complains of emotional disability show that at least ten percent of the cause of her disability was due to "actual events" on the job.¹³⁶ As a reform measure, this was a fiasco. If anything, it provided the legislature's acceptance and endorsement of the idea that, absent the statute, the employee could recover for psychiatric disability by showing job causation of less than ten percent. (Recall, this is an idea that had been accepted by intermediate courts, but not by the California Supreme Court itself.¹³⁷) Further, it modified the idea by requiring nothing more than a ten percent job contribution. Lawyers practicing in California regard the ten percent threshold as largely meaningless;¹³⁸ doctors typically encounter no difficulty in assigning more than ten percent responsibility to the employee's job experiences. Indeed, the California ten-percent rule is now often cited—for example, in *60 Minutes*—as proof of how permissive California workers' compensation is in psychiatric disability cases.¹³⁹

When I have spoken to legislators, they have acknowledged that the 1989 reform measure was a mistake, both analytically and strategically. Accordingly, they have been quite willing to consider additional restrictions. By 1991, evidence had been collected seemingly indicating that fifteen percent of all stress claims were filed by employees who had been on the job for less than six months.¹⁴⁰ In that year, the legislature passed a statute specifying that such employees, in proving their stress, can no longer rely on the "cumulative trauma" doctrine; rather, they must show that their stress was due

135. See *supra* note 64 and accompanying text.

136. See CAL. LAB. CODE § 3208.3(b) (West Supp. 1993).

137. See *supra* text accompanying note 78.

138. See WCRI REPORT, *supra* note 12, at 123.

139. 60 Minutes Transcript, *supra* note 32, at 5.

140. Telephone interview with Tom Perry, *supra* note 82. For a 20% estimate, see Carl Ingram & Douglas P. Shuit, *Accord Near on Workers' Comp Deal*, L.A. TIMES, July 16, 1991, at A3. For an estimate of 12-15%, see Daniel M. Weintraub & Douglas P. Shuit, *Deal on Stress Claims May End Budget Impasse*, L.A. TIMES, July 17, 1991, at A1.

to a "sudden and extraordinary" employment event.¹⁴¹ A year later, the reform package that the legislature adopted would have extended this "sudden and extraordinary" event test to stress claims brought by persons who had already been terminated or laid off. Secondly, that reform package would have required all employees claiming psychiatric disability to show that "actual events of employment were predominant as to all causes combined of the psychiatric injury."¹⁴² That is, the percentage of job causation would have risen from ten percent to fifty-one percent. Thirdly, it would have barred claims by persons who alleged that their psychiatric disability was due "solely" to their layoff or discharge, as long as that dismissal was "lawful, nondiscriminatory, [and in] good faith."¹⁴³

These reform measures were part of a larger package that also provided for a significant increase in workers' compensation benefit levels.¹⁴⁴ This was the reform package that was finally able to navigate its way through the legislature. Yet it was opposed by many business interests, who perceived that the benefit increases were too soon and too steep.¹⁴⁵ The package was also opposed in the end by organized labor, which assessed the benefit increases as inadequate, and which also was evidently offended by the recognition of a "51 percent causation" requirement for *any* category of workers' compensation cases. And it was finally vetoed by the Governor, for reasons that might well have included narrow political calculation.¹⁴⁶

V. BEYOND WORKERS' COMPENSATION

Having described the problems that California workers' compensation has faced, I should make clear that several of the problems relate to other compensation-oriented programs. As noted above,¹⁴⁷ workers' compensation claims that run up as much as \$10,000 of compensable medical-legal costs are often settled before the workers' compensation hearing for a quite small amount, such as \$1500. But California's state-run disability program may be institutionally even less able to weed out weak claims than its workers' compensation system is. I am advised that many of the claims

141. See CAL. LAB. CODE § 3208.3(d) (West Supp. 1993).

142. A.B. 69 § 14, Cal. Leg. (1992).

143. *Id.*

144. See Carl Ingram, *Wilson Vetoes Workers' Comp Reform Plan*, L.A. TIMES, Sept. 24, 1992, at A1.

145. See *id.* ("The California Chamber of Commerce deplored the bills as piling up costs that would exceed 'reputed savings' to employers.").

146. See *id.*

147. See *supra* text accompanying notes 41-43.

that essentially fail in workers' compensation are resubmitted to the disability program. These are claims against the state that are, in essence, subsidized by workers' compensation insofar as they are supported by the medical reports paid for by the employer on account of the original workers' compensation proceeding. The California disability program has been much praised by scholars such as Professor Steve Sugarman.¹⁴⁸ Yet this program, in part because of an excess of claims, was recently required to cut benefit levels by an average of twenty percent to avoid insolvency.¹⁴⁹

The disability program run by Social Security experienced a huge increase in costs during the 1970s. Between 1970 and 1977, program expenditures soared from \$3 billion to \$12 billion—a real-dollar increase of 150 percent.¹⁵⁰ As a result, first the Carter Administration and then the Reagan Administration attempted to tighten the standards for eligibility. These efforts proved largely unsuccessful, however, in part because of judicial resistance.¹⁵¹ In 1990, the number of Americans added to the disability rolls was reaching its all-time high, while the proportion of beneficiaries leaving the rolls had fallen sharply.¹⁵² Indeed, this combination of trends has raised the prospect of program insolvency during the 1990s.

A large portion of the increase in program cost is due to claims of chronic pain and psychiatric disability.¹⁵³ Here it can be noted that certain problems encountered by workers' compensation in dealing with psychiatric disability claims can be avoided by Social Security. The schizophrenia of a claimant may clearly have a basic organic cause, even though it is allegedly precipitated by certain recent events. Even if these recent events are job-related, the likeli-

148. See STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 130 (1989).

149. Another reason for this program's budgetary troubles is that California's high unemployment rate has held down the program's revenues. See Dan Morain, *GOP Blocks Bill to Hike Payroll Tax*, L.A. TIMES, Feb. 9, 1993, at A3. The cuts apply only to new applicants for disability benefits. For such applicants, the minimum benefit will stay at \$50 per week; but the maximum benefit will go down from \$366 per week to \$266—a reduction of almost 28%. *Id.* The program is supported by a tax on employees' wages, paid nominally by employees. The current tax is 1.3% of the first \$34,000 in wages. The alternative to a benefit cut would have been an increase in the tax rate to 1.4%. *Id.*

150. See Weaver, *supra* note 59, at 112 (explaining that the seven-year period represented a time "when poor economic conditions coincide[d] with lax administration").

151. See Pierce, *supra* note 102, at 501-15.

152. See Weaver, *supra* note 59, at 109. According to Weaver, "[i]n 1990, almost a half million people were added to the disability rolls, more than were added in any year since 1977. The proportion of beneficiaries leaving the rolls due to medical recovery or return to work stood at half the rate of the late 1970s." *Id.*

153. *Id.* at 113.

hood of an underlying organic cause makes a workers' compensation award problematic. But this is no problem for the Social Security disability programs, which attach no significance to the cause or origin of the disability. Indeed, a finding of organic causation would make it easier for Social Security ALJs to confirm the reality of the psychiatric disorder itself. Still, for many other claims, Social Security faces the same problem that workers' compensation encounters—distinguishing psychiatric disorders that are genuinely disabling from those emotional problems that are consistent with (and perhaps even rendered more manageable by) a return to some form of work.

CONCLUSION

Let me now offer certain concluding observations. "Waste, fraud, and abuse" is certainly a political cliché; unfortunately, it is also an administrative reality. Leading opinions in modern tort law have tended to downplay the significance of fraud as a criterion for liability rules.¹⁵⁴ At times, courts seem to say that as a matter of *principle* it is wrong to deny valid claims because of the possibility of fraud. At other times, courts suggest that as a matter of *reality* trial judges can do a good job of distinguishing valid claims from fraudulent ones. Yet the principle, so stated, is by no means self-evidently correct; and the statement regarding the capacity of courts is an empirical claim lacking in verification. Because the judicial reasoning is so thin, the underlying issues certainly invite scholarly consideration. But that consideration has not been forthcoming. I know of no major law review articles in the modern era that have dealt with the problems of waste, fraud, and abuse in their application to tort law itself.¹⁵⁵ Modern torts scholars, it seems, either do not regard

154. See *Brown v. Merlo*, 506 P.2d 212, 224-28 (Cal. 1972); *Dillon v. Legg*, 441 P.2d 912, 917-19 (Cal. 1968). Both of these involved auto claims. As it happens, I am not troubled by the abolition of guest statutes, as accomplished in cases like *Brown*. Still, as a general matter, auto insurance fraud is a major problem in California and nationwide. For an account of the arrest of a ring of attorneys and doctors responsible for millions of dollars of fraudulent claims, see Rene Lynch & Gebe Martinez, *35 Arrested in Auto Fraud Scheme*, L.A. TIMES, Jan. 14, 1993, at A26. For multi-billion-dollar estimates of the cost of auto insurance fraud, see Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 913-16 nn. 24, 28 (1992). A recent fictional account of auto insurance fraud in California reached the national best-seller list. See SUE GRAFTON, "H" IS FOR HOMICIDE (1991).

155. To be sure, those "anti-tort scholars" who recommend the abandonment of the tort system generally emphasize its wastefulness. See, e.g., JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY* (1977). Also, the more recent phases of asbestos litigation have attracted some quite critical scholarly attention. E.g., Lester Brickman, *The Asbestos Litiga-*

the problems as real ones—or do not regard them as congenial for purposes of their own research efforts. Somewhat similarly, law professors who recommend the replacement of tort systems with compensation programs generally emphasize the supposed efficiency—or at least the comparative efficiency—of those programs. The real problems that *those* programs face by way of waste, fraud, and abuse tend to escape attention.¹⁵⁶ Yet if the writings of tort scholars and law-school-based compensation scholars are ultimately to be taken seriously—if they are to comply with William James's demand for tough-minded analysis—they need to reckon with those problems of administration that can easily become quite severe. Indeed, at the theoretical level, our writings need to identify those variables in the structure of programs that are productive of—or at least conducive to—a range of problems in practice. Moreover, the point made here in the context of scholarship can be deployed at the level of policymaking as well. As any new program is developed, every effort should be made to get its basic features designed properly in the first place. For as the California experience with workers' compensation shows, once that program is in operation, its design features can acquire constituencies that can make the process of reform extraordinarily difficult.

AFTERWORD

This Article was essentially prepared in December 1992 and January 1993. At that time, most informed observers were predicting that the legislature, exhausted after its reform effort in 1992, would ignore workers' compensation during 1993. For whatever combination of reasons, this prediction turned out to be inaccurate. By March, more than 100 bills dealing with workers' compensation had been introduced, and many were under serious consideration.

On April 3, the Republican Governor, Pete Wilson, signed a bill

tion Crisis: Is There a Need for an Administrative Alternative?, 13 *CARDOZO L. REV.* 1819 (1992).

156. The federal Medicare program has been hit by serious and recurring problems of fraud. For a recent \$111 million guilty plea by "one of the nation's largest providers of clinical diagnostic testing," see Calvin Sims, *Company to Pay \$111 Million in Health-Claims Fraud Suit*, *N.Y. TIMES*, Dec. 19, 1992, at 1. For consideration of Medicare fraud nationwide, see Medicare Waste, Fraud, and Abuse, Hearings, Subcommittee on Health, Committee on Ways & Means, U.S. House of Rep., 100th Cong., 2d Sess., Serial 102-106 (1992). See also PAUL JESILOW ET AL., *PRESCRIPTION FOR PROFIT: HOW DOCTORS DEFRAUD MEDICAID* (1993); John J. Farley, *The Medicare Antifraud Statute and Safe Harbor Regulations: Suggestions for Change*, 81 *GEO. L.J.* 167 (1992).

that had been sponsored by a Democratic senator, Pat Johnston.¹⁵⁷ This bill deals with the cost and the required elements of medical-legal exams. As for cost, the bill repeals the “seventy-third percentile” presumption that my Article has already described (and critiqued).¹⁵⁸ As a substitute for that presumption, the bill calls on a state agency to “adopt and revise a fee schedule for medical-legal expenses . . . , which shall be prima facie evidence of the reasonableness of [particular] fees.”¹⁵⁹ As for content, the bill accepts some of the interpretations that had recently been recommended by a Santa Monica workers’ compensation judge.¹⁶⁰ From now on, to be compensable a report must have enough substance to be “capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employee’s claim.”¹⁶¹ And a medical-legal exam is not compensable unless it is performed *after* the employer has in fact rejected the claim, or has failed to accept liability during a reasonable period of time after the claim’s submission.

In late April, the senate approved a comprehensive reform bill, while a quite different bill was approved in the assembly. By late May, the work of a conference committee had begun. Recall that in 1992 the Governor had vetoed a conference committee bill for what may have been narrow political reasons; moreover, the assembly Speaker, Willie Brown, had seemed mildly hostile to reform, possibly because of his ties to the claimants’ bar. But this year, the reform effort was “imbued with political symbolism.”¹⁶² Last year’s unsuccessful effort at reform—despite an apparent consensus that basic reform was needed—“conveyed so clearly to the public the message of legislative gridlock,”¹⁶³ and highlighted the inability “of the Legislature and the governor to deal effectively with many of the state’s most pressing problems.”¹⁶⁴ In this sense, workers’ compensation had become “a very public challenge to political leadership in the Capitol.”¹⁶⁵

157. S.B. 31, Cal. Leg. (1993).

158. See *supra* notes 122-123 and accompanying text.

159. S.B. 31 § 8.

160. See *supra* notes 125-127 and accompanying text.

161. S.B. 31 § 2.

162. Carl Ingram, *Hopes Rise for Workers’ Comp Reform*, L.A. TIMES, May 24, 1993, at A3.

163. *Id.*

164. *Id.* at A20.

165. *Id.*

On July 15, the conference committee reported out a package of bills; a day later this package was approved by the senate and the assembly, and immediately signed by the Governor. The package is vast, and deals with a large variety of issues;¹⁶⁶ the lead bill alone runs on for ninety pages of single space in Lexis. Speaker Brown was himself the sponsor of one bill that strengthens the enforcement mechanism for a 1939 statute that professes to render "void" any contract between a lawyer and a capper for the latter's services.¹⁶⁷ Another bill imposes rigorous limits on *all* claims brought by workers after they have received notification that they are being terminated.¹⁶⁸ For claims of psychiatric disability, that same bill sets forth restrictions that are somewhat broader than those that had been included in the bill vetoed last year.¹⁶⁹ Claimants must show that their job was "predominant as to all causes" of their psychiatric disability,¹⁷⁰ and they cannot recover if that disability was "substantially caused" by a "lawful, nondiscriminatory, and good faith personnel action."¹⁷¹ As for medical-legal exams, the package aims to reduce both their number and their partisanship. In ordinary cases, workers are expected to submit no more than one comprehensive medical-legal examination, and these exams are to be conducted primarily by the worker's "treating physician" or by a so-called "qualified medical evaluator."¹⁷² In any event, given all the reforms that the legislative package effectuates, the package is able to raise workers' compensation maximum benefits by about forty percent,¹⁷³ while also guaranteeing employers an immediate reduction in insurance premiums of seven percent.¹⁷⁴

Meanwhile, on the law enforcement front, in late June state (and federal) investigators conducted a massive raid at 150 locations of a network of workers' compensation clinics.¹⁷⁵ On June 29 alone,

166. One bill (A.B. 110 § 22(c)) places limits on expenditures for vocational rehabilitation. *See supra* note 12. That bill (A.B. 110 § 20) also prohibits physicians from referring workers' compensation claimants to facilities in which the physicians have a significant financial interest. *See supra* note 31.

167. A.B. 1300 § 2, amending CAL. BUS. & PROF. CODE § 6154 (West 1989).

168. A.B. 119 § 2(a)(10).

169. *See supra* text accompanying notes 142-143. *Cf.* A.B. 119.

170. A.B. 119 § 1(b)(1).

171. A.B. 119 § 1(n).

172. A.B. 110 § 29.

173. *See* A.B. 110 §§ 37, 53.5 (setting out formulae for computing average annual earnings for purposes of disability indemnity, and increasing death benefits).

174. A.B. 110 § 4.

175. *See* Stuart Silverstein & Eric Young, *Firms Raided in Massive Workers' Comp Fraud Probe*, L.A. TIMES, July 1, 1993, at D1.

these investigators carted off three truckloads of documents taken from the offices of lawyers, doctors, psychologists, and other health care professionals.¹⁷⁶ According to the Los Angeles District Attorney, “[W]e’re going after major players here, among the biggest.”¹⁷⁷ Yet the complexity of the investigation will evidently delay the actual filing of criminal charges. Even so, as a result of an apparently separate investigation, on July 20 nine persons were arrested and charged with running a large workers’ compensation fraud ring, one that had bilked insurers of about \$40 million over a four-year period.¹⁷⁸ One doctor was arrested at his “estate in Beverly Hills;”¹⁷⁹ prosecutors are now attempting to freeze his assets, allegedly kept in almost eighty bank accounts.¹⁸⁰

176. *Id.* at D2.

177. *Id.*

178. See Andrea Ford, *Nine Held in \$50-Million Workers’ Comp Fraud Case*, L.A. TIMES, July 21, 1993, at A1.

179. *Id.*

180. *Id.* at A16.