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THE RENAISSANCE OF ACCIDENT LAW PLANS REVISITED

ROBERT L. RABIN*

I. INTRODUCTION

A paucity of reflective thought about the underpinnings of accident law: that is the underlying theme of Guido Calabresi's opening chapter in *The Costs of Accidents (Costs)*.¹ And correspondingly, it can be taken as the linchpin for his pathbreaking volume, as he writes in 1970. Calabresi begins by noting the upsurge of interest in "plans," by which he means legislative efforts and proposals to supplant conventional tort doctrine—the negligence system—with a nonfault-based compensation scheme of one sort or another.² Concurrently, he notes a then-emerging parallel challenge to the fault system in the judicial domain, strict liability for product injuries.³ He laments the absence of an ideological framework, both in the legislative sphere and the courts, that would make sense of the various developments.⁴ And, of course, the remainder of the book is devoted to constructing a theoretical edifice that would illuminate the premises of liability systems addressing the social problem of accidental harm.

Let me unpack the reference to "plans." Viewing accident law from the vantage point of 1970, Calabresi offered a brief account of five categories of plans that seemed both topical and representative of the undertheorized character of accident law reform proposals.⁵ Two of these—the Defense Research Institute approach and the Blum and Kalven Stopgap Plan—have since fallen into the dim recesses of tort-reform history, and can conveniently be subsumed into more general reflections on auto no-fault.⁶ The other three strategies that he

* A. Calder Mackay Professor of Law, Stanford Law School. I would like to thank Suzanne Bratis for her very helpful research assistance.

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 3-16 (1970) [hereinafter *THE COSTS OF ACCIDENTS*].

2. *Id.* at 5.

3. *Id.* at 13-14.

4. *Id.* at 5-16.

5. *Id.* at 6-14.

6. *See id.* at 11-13 (discussing Walter J. Blum & Harry Kalven, Jr., *A Stopgap Plan for Compensating Auto Accident Victims*, 547 *INS. L.J.* 661 (1968)). The Stopgap Plan provided for no-fault compensation for all victims of automobile accidents. The plan proposed to offer the option of collecting up to \$5,000 in medical expenses and up to \$7,500 in disability, loss of services, medical impairment, and survivor's loss payments to all automobile accident victims, including those hurt in accidents involving no driver fault whatsoever, and to use general state tax revenues to fund the additional costs of motor vehicle injuries,

surveys—social insurance/welfare legislation, first-party auto no-fault, and strict liability for defective products⁷—can serve as a port of entry for a broader view of developments in nonfault approaches since the publication of *The Costs of Accidents*.

On that score, I will begin by surveying how the renaissance has fared in the ensuing years. In the next Part of this Article, I will indicate the pathways taken by the resurgence of interest in nonfault approaches since 1970. In particular, I will discuss two systems of reparation that stand in contrast to fault-based liability: no-fault compensation schemes and strict liability in tort (for product injuries)—systems that are consonant with Calabresi's range of concerns, but at the same time reflect a view of nonfault-based compensation substantially broadened beyond the motor vehicle area.

These developments, of course, did not arise in a vacuum. In an immediate sense, the successful legislative efforts to reconceive the domain of tort law reveal the byways of interest group politics. From a scholarly perspective, however, one can ask, as Calabresi did a generation ago, whether latter-day efforts to reconstitute accident law—whether in the legislative arena or in the courts—reveal a greater fidelity to coherently articulated goals than was evident in earlier times. In exploring these questions, in Part III of this Article, I will discuss some related questions as well: Was accident law, in fact, as undertheorized as *The Costs of Accidents* suggests? And does the notion of theorizing about legislative compensation plans resonate in similar fashion to theorizing about judge-made tort law? The principal thrust of this Part will be to determine whether there are identifiable themes underlying nonfault alternatives to traditional tort that illuminate the staying power of the fault system.

on the premise that many nonfault accidents are "no more associated with motoring than . . . with pedestrianism, drinking, or living in our society." Blum & Kalven, *supra*, at 665-68.

The Defense Research Institute plan rejected the auto no-fault concept. THE COSTS OF ACCIDENTS, *supra* note 1, at 10. Instead, it sought to maintain the fault-based system for auto injury claims and to bolster that system with a variety of accident prevention programs, many of which would have necessitated legislative action. *Id.* at 10-11. The programs included: (1) enactment of implied-consent laws allowing police to administer breathalyzer tests without first arresting the suspect; (2) increased monitoring of driver skills; (3) increased drunk driving penalties; (4) increased tracking and punishment of persons repeatedly involved in accidents; (5) increased penalties for drunken pedestrians involved in automobile accidents; (6) heightened training and testing requirements for young drivers; and (7) periodic vehicle safety inspections. Defense Research Institute, *A Program for Highway Accident Prevention*, 9 FOR THE DEFENSE 65, 65, 68 (1968).

7. THE COSTS OF ACCIDENTS, *supra* note 1, at 6-10, 13-14.

In a brief concluding Part, I will offer some summary thoughts on the legacy of *Costs*, drawing on my survey of the observable patterns of legislative and judicial activity over the past thirty-five years.

II. NONFAULT SYSTEMS: AN EXPANDING UNIVERSE?

In hindsight, Calabresi treated auto no-fault as the centerpiece of his nonfault universe just as the movement was about to peak.⁸ By the mid-1970s, sixteen states had adopted auto no-fault plans, and then the movement ran out of steam.⁹ Only the District of Columbia subsequently adopted a scheme, and its plan was repealed within three years of enactment.¹⁰ Indeed, in something of a rollback, two of the earlier-adopting states switched to a “choice” system under which drivers are offered the option of no-fault or tort, and three repealed their plans altogether.¹¹

In 1970, as Calabresi wrote, Massachusetts was about to adopt a first-party plan based on the Keeton-O’Connell proposal that he treats in *Costs* as his principal reference.¹² But its impact on the fault system in motor vehicle cases was minimal: The statute provided compulsory no-fault for medical expenses and seventy-five percent of lost earnings incurred within two years up to the strikingly modest combined sum of \$2,000, excluding this amount from tort recovery along with an even more modest threshold for pain and suffering.¹³ A far more substantial no-fault scheme, which might have served as a model for other

8. See J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427, 435 n.13 (2001) (noting that 1974 was the median year of adoption for states adopting no-fault automobile insurance).

9. DAVID S. LOUGHRAN, *THE EFFECT OF NO-FAULT AUTOMOBILE INSURANCE ON DRIVER BEHAVIOR AND AUTOMOBILE ACCIDENTS IN THE UNITED STATES 1 & n.1*, 7 (RAND Inst. for Civil Justice, Doc. No. MR-1384-ICJ, 2001).

10. *Id.* at 1 n.1.

11. *Id.* at 1 n.1, 7.

12. See 1970 Mass. Acts 670; *THE COSTS OF ACCIDENTS*, *supra* note 1, at 7-10 (discussing the plan developed in ROBERT E. KEETON & JEFFREY O’CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965)).

13. 1970 Mass. Acts 670 §§ 2, 5. The Massachusetts plan may have been modeled on Keeton-O’Connell, but it was not an enactment of their proposal. They had proposed a maximum no-fault benefit payout of \$10,000 and a dollar threshold of \$10,000 (before a victim could opt to bring a tort suit). KEETON & O’CONNELL, *supra* note 12, at 273. The Massachusetts scheme instituted different levels. The original legislation had a \$2,000 benefit payment provision and a dollar threshold for tort option of only \$500. 1970 Mass. Acts 670 §§ 2, 5. Subsequent amendments to the plan raised both levels: \$8,000 for no-fault benefits and \$2,000 for the tort suit threshold, but at no point has Massachusetts enacted the balance between these two factors that Keeton-O’Connell envisioned. 1988 Mass. Acts 273 §§ 15, 55 (codified as amended at MASS. GEN. LAWS ANN. ch. 90, § 34A (West 2001)); MASS. GEN. LAWS ANN. ch. 231, § 6D (West 2000)); see Herbert I. Weisberg & Richard A. Derrig, *Massachusetts Automobile Bodily Injury Tort Reform*, 10 J. INS. REG. 384, 386 (1992);

states, was enacted in New York in 1973, just as auto no-fault was about to fall into precipitous decline.¹⁴ The New York plan replaced tort liability for the first \$50,000 in "basic economic loss," and excluded pain and suffering recovery as well, except for various defined "serious injuries," unless that threshold was met.¹⁵

More generally, the auto no-fault plans adopted by the various states fall into two basic categories: "modified" and "add-on" plans. The specific contours of the schemes vary significantly from state to state. Modified compensation plans restrict access to the tort system for some portion of auto accident victims.¹⁶ For example, states can limit tort claims to those injuries of a given medical or monetary severity, and accordingly limit victims that fall below that threshold to no-fault compensation only.¹⁷ Add-on plans provide limited no-fault benefits as an alternative source of compensation without adopting thresholds on access to tort.¹⁸ The only restriction placed on tort recovery under such schemes is that claimants cannot recover damages under both no-fault and tort for the same item.¹⁹ States also vary on the maximum amount of benefits that can be recovered under the no-fault programs. In the mid-1980s, all of the add-on states had caps on medical benefits of either medium (\$10,000 to \$25,000) or low (\$5,000 or less) levels.²⁰ The modified-plan states were divided almost

Massachusetts Bar Association, *Tort Law: Filing an Auto Insurance Claim* (Apr. 28, 2000), available at http://www.massbar.org/lawhelp/legal_info/index.php?sw=3122&full_id=232.

14. 1973 N.Y. Laws 13.

15. *Id.* §§ 671, 673. The New York dollar limits have remained the same. Comprehensive Motor Vehicle Insurance Reparations Act, N.Y. INS. LAW §§ 5100-5102 (McKinney 2000).

16. See John E. Rolph et al., *Automobile Accident Compensation: Who Pays How Much How Soon?*, 52 J. RISK & INS. 667, 670 (1985).

17. See *id.* As of 1985, the following states had adopted modified compensation schemes: Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. *Id.* at 672 tbl.1.

18. *Id.* at 670. As of 1985, the following states had adopted add-on schemes: Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, Virginia, and Washington. *Id.* at 672 tbl.1.

19. See U.S. DEP'T OF TRANSPORTATION, *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES* 41-49 (1985). This restriction operates in several ways. First, if the insured opts for a tort suit, he may be barred "from pleading or introducing into evidence . . . damages for which [no-fault] benefits are available." *Id.* at 43. Second, if the insured recovers in tort, the insurer may have the right to be reimbursed for any no-fault benefits that it has paid out. *Id.* at 45. Finally, a court may subtract from tort damages any no-fault benefits already received by the insured. *Id.* at 47.

20. Rolph et al., *supra* note 16, at 672 tbl.1.

equally among high (\$50,000 or more), medium, and low medical benefit provisions.²¹

Why did auto no-fault rapidly lose its nationwide impetus? In my view, a principal reason can be traced to the broader cross-currents of major tort reform.²² Both auto no-fault and workers' compensation, the earlier forerunner of broad-based replacement of the tort system, can be located in the context of major social welfare reform movements: in the case of workers' compensation, Progressive-era initiatives (and in particular, labor legislation); in the case of auto no-fault, the consumer/environmental movement of the late 1960s-early 1970s, which had as one principal focal point health and safety concerns related to motor vehicles.²³ By the mid-1970s, the latter reform impulse was almost entirely spent—aided, perhaps, in the case of auto no-fault, by internal reforms of the tort system such as the adoption of comparative fault as a replacement for the harsh contributory negligence bar.

Whatever the explanation, nonfault legislative reform of traditional tort took on a new character after the mid-1970s. It became narrower in focus and more the product of classic interest group politics (which had been notably absent in the case of much of the consumer/environmental legislation enacted in the immediately preceding years, as well as the auto no-fault movement).²⁴

A. *Legislative Nonfault Systems: Post-1970*

1. *Black Lung Disease Compensation.*—Indeed, just as *Costs* was published a no-fault scheme that foretold future developments—focused in character and the product of interest group bargaining—was enacted. The Black Lung Benefits Act provides benefit payments and medical treatment for coal miners totally disabled from black lung disease (pneumoconiosis).²⁵ A series of events led to the creation of the program. The 1960s witnessed a decline in coal production and coal prices throughout the nation.²⁶ Unemployment rates among coal mine workers rose significantly.²⁷ Traditionally in the industry, a welfare and retirement benefits fund had been maintained by the

21. *Id.*

22. See generally Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988).

23. *Id.* at 21.

24. *Id.* at 22.

25. 30 U.S.C. §§ 901-945 (2000). This compensation scheme began with the passage of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742.

26. PETER S. BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* 4 (1987).

27. *Id.*

large coal miners' union, United Mine Workers of America (UMWA), and funded through a price-per-coal-tonnage tax paid by mine owners.²⁸ The fall in revenues and rise in unemployment rendered the fund an inadequate source of benefits.²⁹ At the same time, a grassroots movement began among miners that pushed black lung disease to the forefront of union issues.³⁰ The workers' compensation programs of most states did not provide benefits for occupational disease, and despite pressure by these grassroots groups, UMWA failed to get an occupational benefits provision added to the mine workers' contract during labor negotiations.³¹ Finally, in 1968, a mine explosion occurred at a large mine site in Farmington, West Virginia, killing 78 miners and bringing national attention to the issue of coal mine safety.³²

By the end of the 1960s, Congress faced political pressure from a variety of sources to take action on mine safety generally, and more specifically on the provision of black lung benefits.³³ The UMWA, which was itself under strong attack by smaller miners' unions, lobbied for a federal black lung benefits program.³⁴ At the same time, mine owners fought against any federal action that would put more economic pressure on the already declining coal industry.³⁵ Additionally, state legal and health professional groups opposed any move to shift workers' compensation away from state control.³⁶ In the end, the union interest prevailed on the federalism issue, and the Coal Mine Health and Safety Act of 1969 in essence plugged the occupational-disease hole in the state workers' compensation programs, at least for coal miners afflicted with black lung disease.³⁷

28. *Id.* at 6.

29. *Id.*

30. *Id.* at 9.

31. *Id.* at 8-9.

32. *Id.* at 12.

33. *Id.* at 10-16.

34. *Id.* at 9-12.

35. *Id.* at 15-16, 23.

36. *Id.* at 22-23.

37. *Id.* at 27-30. The contours of the federal black lung program have changed over time, influenced by lobbying efforts on behalf of the coal miners, and then responsive to concerns about steeply rising costs. *See id.* at 38-50. Title IV of the 1969 Act created a benefits program for underground coal miners who were totally disabled from black lung disease and for the dependents of coal miners who had died from the disease. Federal Coal Mine Health and Safety Act of 1969, tit. IV, 83 Stat. at 792-93. The 1972 amendments expanded the definition of "total disability" to include those miners unable to obtain gainful employment because of black lung disease. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4(a), 86 Stat. 150, 153-54. These amendments extended benefits to surface miners and to survivors of miners with black lung disease even if the miner had died of another cause. §§ 3(a), 4(b)(2), 86 Stat. at 153-54. The amendments also provided that a

To receive benefits, a miner (or the miner's dependent survivors) must prove that he suffers from black lung disease, that he is totally disabled from the disease, and that he contracted the disease from coal mining-related employment.³⁸ Under most circumstances, it is the last employer of the claimant who is responsible for benefits.³⁹ Compensation under the scheme is scheduled at a percentage of the pay rate for federal employees (GS-2, step 1);⁴⁰ for FY 2003, benefits came to \$535 per month with graduated increases for dependents.⁴¹ Medical benefits are recoverable in full.⁴² Surviving spouses receive benefits on the same monthly schedules as do the miners themselves, though there is a provision that allows beneficiaries to request lump-sum payment.⁴³

If *Costs* notes a "renaissance," it is presumably a rebirth harking back to workers' compensation as a progenitor of nonfault plans. In this regard, the black lung scheme can be regarded as the apple that did not fall far from the tree. The design features just sketched out are strikingly similar to the workers' compensation model: scheduled

negative chest x-ray could not be the sole basis for a denial of benefits and it created a rebuttable presumption of the presence of black lung where the claimant could prove 15 years of underground coal mine employment and total disability due to respiratory or pulmonary impairment. § 4(c), (f), 86 Stat. at 154.

The criteria for benefits were expanded even more by the 1977 amendments. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978). The definition of "miner" was rewritten to include individuals who work in or around coal mine or coal preparation facilities and who were exposed to coal dust. *Id.* § 2(b), 92 Stat. at 95. The most recent amendments, the Black Lung Benefits Amendments of 1981, have made eligibility for benefits more difficult. Pub. L. No. 97-119, tit. II, 95 Stat. 1643 (1981). The 1981 amendments overturned some of the provisions passed in 1972, including the rebuttable presumption of eligibility for 15-year coal mine employees. *Id.* § 202(b)(1), 95 Stat. at 1643. The 1981 law also reinstated the requirement that survivor claimants prove that their spouse's death was caused by black lung disease. § 203(a)(4), 95 Stat. at 1644.

38. 30 U.S.C. § 932(c).

39. 20 C.F.R. §§ 725.494, 725.495 (2004). The operator responsible for benefit payments is the "potentially liable operator" that most recently employed the miner. § 725.495(a)(1). The principal limitation is that the miner must have been employed by the operator for a cumulative period of not less than a year. § 725.494(c).

In addition to direct benefit payments, coal mine operators are required to pay an excise tax to support the Black Lung Disability Trust Fund. 26 U.S.C. § 9501(b) (2000). The Fund is used to pay administrative costs and claimant benefits in cases where the liable operator has defaulted on payments or cannot be identified. § 9501(d).

40. 30 U.S.C. § 922(a)(1).

41. HOUSE COMM. ON WAYS AND MEANS, 108TH CONG., *Worker's Compensation, in 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 15-WC-8* (Comm. Print 2004), available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/workerscomp.pdf>.

42. 20 C.F.R. § 725.701. For background on the Act's provisions on medical benefits, see *Glen Coal Co. v. Seals*, 147 F.3d 502, 505-06 (6th Cir. 1998).

43. 30 U.S.C. § 922(a)(2); 20 C.F.R. § 725.521.

income replacement benefits for a specified, permanently disabling condition; medical expenses recoverable in full; no recovery for intangible loss; periodic payments; and funding by employer contribution.⁴⁴ In a perhaps fitting turn, then, the compensation gap created by the coverage limitations of existing state workers' compensation programs—limitations precluding recovery for occupational disease—came to be filled by federal legislation referenced to the workers' compensation model.

2. *Childhood Vaccine-Related Injury Compensation.*—The National Childhood Vaccine Injury Act of 1986⁴⁵ was created in response to an upsurge in tort claims.⁴⁶ In the early 1980s, several reports were issued estimating the number of children seriously or fatally injured by adverse reactions to vaccines.⁴⁷ The number of lawsuits filed against vaccine manufacturers and health care providers increased during this time and a handful of large verdicts were entered.⁴⁸ These events led a number of companies to leave the industry.⁴⁹ In response to a perceived crisis of vaccine shortages, Congress created a no-fault alternative to tort liability.⁵⁰ The goal of the program was to provide compensation for victims of vaccine-related injuries while giving protections to private vaccine manufacturers so they could continue making products deemed essential to the public welfare without a looming threat of massive tort awards.⁵¹

The Act established a compensation fund that is financed through an excise tax on each dose of vaccine distributed.⁵² Under

44. See generally ORIN KRAMER & RICHARD BRIFFAULT, *WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* (1991).

45. Pub. L. No. 99-660, tit. III, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-34(2000)).

46. H.R. REP. NO. 99-908, pt. 1, at 6-7 (1986) [hereinafter 1986 House Report].

47. E.g., OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., *COMPENSATION FOR VACCINE-RELATED INJURIES: A TECHNICAL MEMORANDUM* (1980); Am. Med. Ass'n Bd. of Trustees, *Report of the Ad Hoc Commission on Vaccine Injury Compensation*, 49 CONN. MED. 172 (1985).

48. See, e.g., *Toner v. Lederle Labs.*, 828 F.2d 510, 511 (9th Cir. 1987) (affirming a jury award of \$1,131,200 in a negligence claim against a vaccine manufacturer); *Johnson v. Am. Cyanamid Co.*, 718 P.2d 1318, 1320, 1327 (Kan. 1986) (reversing a \$10,000,000 jury verdict against a vaccine manufacturer).

49. Daniel A. Cantor, *Striking a Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853, 1858 (1995) (noting that six manufacturers ceased production of vaccines in the mid-1980s out of fear of financial exposure to tort liability).

50. 42 U.S.C. §§ 300aa-10 to 300aa-17.

51. See 1986 House Report, *supra* note 46, at 7. For a more detailed treatment of the politics of the enactment of the Act, see THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 142-70 (2002).

52. 26 U.S.C. §§ 4131, 9510 (2000).

the Act, a person claiming a vaccine-related injury must file a petition for compensation in the United States Court of Federal Claims.⁵³ A special master evaluates the claim to determine whether it meets the criteria for benefits from the compensation fund.⁵⁴ To qualify for compensation the claimant must show: (1) that she has suffered an injury listed on the Vaccine Injury Table; (2) that the vaccine significantly aggravated a pre-existing condition; or (3) that the vaccine *caused* an injury not listed on the Table.⁵⁵ For eligible claimants, the statute covers all actual medical expenses, rehabilitation costs, and lost earning power, based on the average earnings of workers in the non-farm sector of the economy.⁵⁶ Compensation for pain and suffering may also be awarded up to a limit of \$250,000.⁵⁷ Eligible claimants have the option of rejecting the compensation offer and pursuing a tort claim, but it is a seriously constrained tort option.⁵⁸ Likewise, those claimants deemed ineligible for compensation are free to seek tort relief.⁵⁹

The Childhood Vaccine Act, and the next-to-be discussed birth-related compensation schemes, introduced a new plot element into the narrative of nonfault compensation: legislative responsiveness to the perception of a public health crisis. On that score, a similar view can be taken of the ill-fated Swine Flu Vaccine Act.⁶⁰ How was cer-

53. 42 U.S.C. § 300aa-11(a)(1).

54. § 300aa-12(a).

55. § 300aa-11(c)(1). The Injury Table lists certain vaccines with corresponding adverse events and time intervals between the administration of the vaccine and the occurrence of the event. § 300aa-14. Where a claimant is asserting an injury not listed on the Vaccine Injury Table, she bears the burden of proving that the vaccine did in fact cause the injury. § 300aa-11(c)(1)(C)(ii)(I). For injuries listed on the Table, causation is presumed and need not be proved by the claimant. § 300aa-13(a)(1)(A).

56. § 300aa-15.

57. § 300aa-15(a)(4).

58. § 300aa-21. The Act puts three main constraints on claimants who choose to pursue the tort option. First, in accordance with the *Restatement (Second) of Torts*, it permits manufacturers to use the provision of an adequate warning as a defense against liability. § 300aa-22(b); RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). Second, the Act adopts the "learned intermediary" doctrine, which requires an adequate warning only to the person who administers the vaccine. § 300aa-22(c). Finally, the Act allows a manufacturer's compliance with Federal Food, Drug and Cosmetic Act regulations to shield it against punitive damages. § 300aa-23(d)(2).

59. § 300aa-21(a)(2).

60. National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (originally codified at 42 U.S.C. § 247b(j)-(l) (repealed 1978)). It should be noted that this was a governmental liability replacement scheme, rather than a privately funded no-fault plan. In February of 1976, military servicemen in New Jersey were diagnosed with a strain of flu virus related to swine flu. *In re Swine Flu Immunization Prods. Liab. Litig.*, 533 F. Supp. 567, 571-72 (D. Colo. 1980). Congress enacted the Swine Flu Act with the goal of preventing an epidemic within the U.S. similar to that of 1918-19, which took more

tainty of financial exposure—the sine qua non of continuing market presence by the key suppliers—to be achieved? In the Childhood Vaccine Act, as earlier, the quest for certainty culminated in an insurance scheme that for all practical purposes banished tort from the playing field and replaced it with responsibility primarily limited to economic loss, tight ceilings on high-end recovery, and funding by flat contributions.

In context, the vaccine plan can be viewed as narrowly focused. Just as neurological birth defect litigation, next discussed, was a relatively small island in the sea of medical malpractice litigation, so too were childhood vaccine cases but a minor contributor to the volume of drug defect litigation. Nonetheless, in what came to be perceived as a crisis atmosphere, the individual rights perspective of tort yielded to a collective, insurance-based model of compensation.

3. *Birth-Related Neurological Injury Compensation.*—Beginning in the 1970s, the nation experienced a rise in medical malpractice lawsuits.⁶¹ The upsurge of tort litigation triggered increases in medical malpractice insurance premiums and decreases in insurance availability for practicing physicians.⁶² Malpractice claims for birth-related injuries are brought at a relatively high rate, and they often result in large monetary awards.⁶³ The high risk of financial exposure led malpractice insurance companies in many states to raise premiums and severely limit their coverage for obstetricians.⁶⁴ In two states, Florida

than 500,000 American lives. *Id.* The Act sought to have the entire adult population of the U.S. inoculated by November of 1976. *Id.* at 571. During the same time period, the country was experiencing a collapse of the commercial liability insurance market for vaccine manufacturers. *Id.* at 572. Thus, as part of the Act, Congress implemented a vicarious liability provision that replaced tort liability of the manufacturers. The provision created a cause of action against the government for any claims of negligence or wrongful death, but made all damage awards final and left claimants with no alternate cause of action in tort. National Swine Flu Immunization Program, sec. 2, § 247b(k), 90 Stat. at 1114-16; *see also Swine Flu*, 533 F. Supp. at 571.

61. *See* PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 26-27 (1991).

62. *Id.*

63. *See* Frank A. Sloan et al., *The Road from Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, 60 *LAW & CONTEMP. PROBS.* 35, 37 (1997); *see also* FRANK SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 191-93 (1993).

64. *See, e.g.,* David J. Nye et al., *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 *GEO. L.J.* 1495, 1495-98 (1988) (discussing the malpractice insurance “crisis” that obstetricians faced in the mid-1980s); Peter H. White, Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 *VA. L. REV.* 1487, 1488 (1988) (noting that in 1986, Virginia’s two largest malpractice insurance carriers refused to write any new policies for obstetricians, and a third carrier adopted a national policy under which it would terminate coverage for all obstetric practices with less than ten doctors).

and Virginia, legislatures responded to this move by the insurance companies, by enacting no-fault birth-related neurological injury compensation plans.⁶⁵ In both states, a compensation fund was created through contributions from participating physicians and hospitals.⁶⁶

The programs provide full compensation for the child's necessary and reasonable medical expenses, including hospital, rehabilitative, residential, special equipment, and custodial care, as well as the costs of filing a claim, including attorney's fees.⁶⁷ Under the Virginia plan, families are compensated for the child's lost earnings—assessed from ages eighteen to sixty-five and calculated at fifty percent of the average weekly wage of nonfarm, private sector workers.⁶⁸ There is no comparable provision for recovery of unrealized earnings in Florida. In Florida, families may receive a lump-sum pain and suffering award capped at \$100,000;⁶⁹ Virginia has no provision for recovery of intangible loss.

A 1997 study of the Florida and Virginia schemes found that families have continued to file malpractice lawsuits, even for injuries that could be eligible for no-fault compensation.⁷⁰ Although both schemes aspired to make no-fault an exclusive remedy against participating physicians apart from exceptional situations, the Florida statute has been judicially interpreted to leave the tort option open under many circumstances.⁷¹ Indeed, in Florida, roughly half of the claimants studied filed their initial claim in the tort system.⁷² The study also found that twenty-seven percent of the families who filed a no-fault claim but were deemed ineligible for compensation then chose to pursue a tort remedy.⁷³ By contrast, in Virginia, where the option restriction is considerably more stringent, the study found that approximately only fourteen percent of the families initially filed a tort claim.⁷⁴ Currently, Florida and Virginia remain the only two states that have such no-fault systems in place, but a bill proposing a similar

65. Florida Birth-Related Neurological Injury Compensation Plan, FLA. STAT. ANN. §§ 766.301-.316 (West 1997 & Supp. 2004); Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000 to -5021 (Michie 2002).

66. These contributions are annual flat fees with no provision for experience rating. FLA. STAT. ANN. § 766.314(4)-(5); VA. CODE ANN. § 38.2-5020.

67. FLA. STAT. ANN. § 766.31; VA. CODE ANN. § 38.2-5009. Both states reduce state payments by the amount paid by private insurance policies or other government programs. FLA. STAT. ANN. § 766.31(1)(a); VA. CODE ANN. § 38.2-5009(A)(1).

68. VA. CODE ANN. § 38.2-5009(A)(3).

69. FLA. STAT. ANN. § 766.31(1)(b).

70. Sloan et al., *supra* note 63, at 46.

71. *Id.* at 38.

72. *Id.* at 48.

73. *Id.* at 46.

74. *Id.* at 48.

plan was introduced in the New Jersey legislature in 2003 and is still under consideration.⁷⁵

Like the black lung and vaccine programs, these schemes are designed to remove the key discretionary elements of intangible loss, future wage replacement, and unlimited ceilings on recovery that characterize tort. The birth defect compensation plans also abandon—even more than black lung—any effort to tie financing obligations to risk-creating conduct, relying instead on flat-levy funding. The tradeoffs on the dimensions of risk prevention, spreading, and administrative cost considerations—theoretical considerations to be discussed in greater detail in the next Part—are quite explicitly encoded in the statutory framework.

4. *September 11 Victim Compensation.*—Perhaps the most dramatic nonfault scheme enacted since Calabresi surveyed the scene in 1970 was a consequence of the greatest trauma to American society in the same period, the events of September 11, 2001. Within two weeks of the terrorist acts, Congress established the September 11th Victim Compensation Fund (the Fund), adopting a no-fault compensation scheme for the personal injury victims and survivors of those who perished.⁷⁶ The Fund is unprecedented in a variety of ways that I have spelled out in detail elsewhere.⁷⁷ For present purposes, I would simply contrast it to a model that can be gleaned, in rough outline, from the legislative compensation schemes discussed above—noting, at the outset, the most obvious difference: that the Fund was an ex post response to a discrete event rather than an ex ante model for a category of continuing injury victims.⁷⁸

In sharp contrast to the traditional model, the Fund rejects the tradeoff central to the conception of workers' compensation: that in return for benefits available without reference to fault, those eligible under the scheme are limited to recovery of economic loss—with the

75. Assemb. 3148, 210th Leg., 1st Ann. Sess. (N.J. 2003).

76. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, tit. IV, § 405(b)(2), 115 Stat. 230, 237 (2001) (reprinted at 49 U.S.C. § 40101 note (Supp. I 2001)).

77. See Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 574-81 (2001) [hereinafter *Quest for Fairness*].

78. *Id.* at 577. In this regard, a "mixed" model would be an asbestos victims' no-fault fund, presently languishing in Congress, that would offer compensation to tens of thousands of present claimants, as well as enormous numbers of future, still-to-be-identified claimants. See Asbestos Compensation Act of 2003, H.R. 1114, 108th Cong.

A second critical difference is that the Fund is government financed, rather than enterprise or activity financed, as in the earlier-discussed no-fault schemes. The implications of this key distinction are discussed at the outset of Part III.

wage loss component of any such recovery further subject to scheduled limitations based on type of harm and ceilings reflecting notions of horizontal equity. As I have indicated, other no-fault compensation schemes enacted since *Costs* was published adopt the workers' compensation premise—although, in some instances, allowing for relatively modest, fixed-sum pain and suffering.⁷⁹ Instead, the Fund was designed to allow recovery of economic loss, defined to include not just medical expenses and loss of present earnings, but “loss of business or employment opportunities”—presumably future lost income—“to the extent recovery for such loss is allowed under applicable State law.”⁸⁰ Along with this strikingly open-ended, individualized approach to future economic loss, the Fund provided for non-economic loss recovery, not in the fixed-sum, limited terms found in some no-fault schemes (assuming any non-economic loss is recognized), but with allowance of “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.”⁸¹

This sweeping provision for non-economic loss—exceeding even the bounds of traditional tort recovery for pain and suffering—was subsequently redefined in fixed-sum terms in the regulations adopted by the Special Master appointed to administer the Fund.⁸² The Special Master also established a schedule of “presumed economic loss” that gave sharper definition to recovery for lost income, as well as establishing a presumptive ceiling on recovery—albeit an extraordinarily high one—the ninety-eighth percentile of individual income in the United States in 2000.⁸³

The question remains whether the Fund, with its distinctly tortcentric perspective on recovery, as contrasted against the workers' compensation model grounded in social welfare notions of horizontal equity, represents the direction for the future. In my view, there is

79. See *supra* notes 57, 69 and accompanying text.

80. § 402(5), 115 Stat. at 237.

81. § 402(7), 115 Stat. at 237. In contrast to these tort-type provisions, the Act does have a strong preclusive provision regarding collateral sources. § 405(b)(6), 115 Stat. at 239. On the scheme's embrace of certain tort principles and rejection of others, see Rabin, *Quest for Fairness*, *supra* note 77, at 576-81.

82. September 11th Victim Compensation Fund of 2001, 28 C.F.R. §§ 104.1-104.71 (2003). The regulations presume non-economic losses of \$250,000 for decedents, plus \$100,000 for the spouse and each dependent of the deceased. § 104.44.

83. § 104.43.

good reason to think that the Fund model will have a very limited shelf life, and that any future resort to no-fault replacement of tort is likely to reflect the principles first established nearly a century ago in the workers' compensation model.⁸⁴ On this score, the Special Master's regulations are particularly revealing. As indicated above, the statutory language adopting an individualized, case-by-case approach to lost income and non-economic loss in claims of survivors—tantamount to the most liberal version of wrongful death recovery schemes in tort—was simply overridden by the Special Master in an effort to reshape the structure of benefits under the Fund in more traditional, categorical terms, through reliance on presumptions, scheduling and capping of damage awards.⁸⁵

Moreover, the hybrid tort/compensation model adopted by Congress for September 11 redress can well be regarded as *sui generis*. In its rush to judgment, Congress was particularly concerned about the solvency of the airlines—and, in fact, capped the aggregate liability in tort for those who chose to opt out of the Fund at the insurance limits of the airlines and other potential defendants.⁸⁶ Because there was a general sense that these aggregate claims—including property damage tort claims outside the Fund—might far exceed insurance limits, the tort option could well have been viewed as creating a limited fund for victims that would fall far short of traditional tort recovery. Hence the impulse to build tort-type compensation into the Fund option. In addition, in the immediate aftermath of the tragedy, there clearly was a sense that the victims were stand-ins for all Americans—that they should be viewed as heroes, martyrs, or both—and afforded whatever special recognition could be attached to the extinguishment of their lives.⁸⁷

Note, too, that this special sense of generosity was very quickly exhausted. Efforts to extend Fund-type recoveries retroactively to the surviving families of earlier acts of terrorism that might well have been regarded as similar in character—the Oklahoma City bombing and the earlier bombing at the World Trade Center—were to no avail.⁸⁸ A related no-fault fund for smallpox vaccination victims, established

84. See generally Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003) [hereinafter *September 11th Victim Compensation Fund*].

85. The Special Master's regulations were upheld against a challenge that he had exceeded the authority conferred upon him by the enabling statute. *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003).

86. § 408(a), 115 Stat. at 240.

87. Rabin, *Quest for Fairness*, *supra* note 77, at 576.

88. *Id.* at 588.

with little fanfare after September 11, was designed along traditional lines.⁸⁹ And more generally, the state crime victim compensation statutes, which might be regarded as broadly analogous in purpose to any future provision for victims of terrorist-related activity, are far more modestly designed to meet the immediate out-of-pocket needs of eligible claimants.⁹⁰

B. *Judicial Nonfault: Products Liability*

In *Costs*, Calabresi devotes only a paragraph to noting the unsettled character of products liability law in 1970, remarking that: "It is said that products liability law has become or is becoming an area of strict liability, that is, that users now often recover for defects regardless of the manufacturer's or seller's fault."⁹¹ Much of the theoretical framework that is then developed in *Costs* bears directly on the case for strict products liability, and Calabresi would address the topic of the unsettled character of products liability law with far greater particularity in subsequent papers.⁹² But as time passed, judicial refinements would greatly undermine the notion that a conceptual revolution in the world of tort had in fact occurred.⁹³

89. Smallpox Emergency Personnel Protection Act of 2003, Pub. L. No. 108-20, 117 Stat. 638 (codified at 42 U.S.C.A. § 239 (Supp. 2004)). The Act provides no-fault benefits to health care workers and other emergency personnel who suffer injury or death after receiving the vaccine. *Id.* § 261(a)(2)-(3), 117 Stat. at 638-39. Claimants are eligible for lost-income reimbursement at a rate of 66-2/3% of their income at the time of the injury (75% when there are dependents). § 265(b)(1)-(2), 117 Stat. at 642. Lost-income payments are capped at \$50,000 annually, and the lifetime lost-income benefit is not to exceed the death-benefit received by police officers and firefighters under the Public Safety Officers' Benefits (PSOB) Program, currently \$275,658. § 265(c)(3)(A), 117 Stat. at 643; U.S. Dep't of Justice, Public Safety Officers' Benefits Program, at http://www.ojp.usdoj.gov/BJA/grant/psob/psob_main.html (last visited Nov. 21, 2004). The lifetime-benefit cap does not apply to claimants who suffer "permanent and total disability." § 265(c)(3)(B), 117 Stat. at 643. The scheme provides a death benefit for survivors of the decedent in the amount of the PSOB death benefit, less any benefits paid for lost income. § 266(a), 117 Stat. at 643-44. Reasonable medical expenses are also covered. § 264(a), 117 Stat. at 641. All benefits are secondary to other public-benefit programs. §§ 264(b), 265(c)(1), 266(b)(3)(B), 117 Stat. at 641-44. There is no provision for non-economic loss.

90. See Rabin, *September 11th Victim Compensation Fund*, *supra* note 84, at 796-98.

91. THE COSTS OF ACCIDENTS, *supra* note 1, at 13.

92. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

93. See, e.g., James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480-81 (1990) (arguing that judicial decisions beginning in the 1980s demonstrated a significant turn from expanding the boundaries of products liability law to placing substantial limitations on plaintiffs' ability to recover).

By 1998, when the *Restatement (Third) of Torts: Products Liability*, was published, strict liability for product injuries, as it had been envisioned in the landmark section 402A of the *Restatement (Second) of Torts*, was in serious retreat.⁹⁴ In the years between the early California landmark opinions boldly enunciating a doctrine of strict liability—for example, *Cronin v. J.B.E. Olson Corp.*,⁹⁵ expressing “no difficulty in applying the *Greenman* formulation [of strict liability] to the full range of products liability situations, including those involving ‘design defects’”⁹⁶—and the *Restatement (Third)*, it had come to be generally accepted that products cases fell into three discrete categories: manufacturing defects, design defects, and warning defects.⁹⁷ It also became generally accepted that with respect to design defects, risk-utility analysis—tantamount to a fault determination—was the dominant approach.⁹⁸ So, too, in the case of warning defects, reasonableness analysis governed; indeed, it had almost certainly always supplied the applicable standard in claims of failure to warn adequately.⁹⁹

What this left in the way of nonfault liability was manufacturing defects—many of which had been similarly resolved through the medium of *res ipsa loquitur* even before the apparent rise of nonfault liability¹⁰⁰—and a limited subset of design defect cases in a handful of jurisdictions that adhered to a consumer expectations approach.¹⁰¹

94. Strikingly, strict liability is not even mentioned in the *Restatement (Third) of Torts: Products Liability*.

95. 501 P.2d 1153 (Cal. 1972).

96. *Id.* at 1162.

97. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (providing tripartite treatment for product defect cases).

98. *Id.* § 2(b), cmt. g. But there is considerable critical commentary on limiting the test for design defect to risk/utility. See, e.g., Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1704 (2003) (arguing for a “reinvigorated understanding of the [consumer expectations test] that fulfills its purpose of providing a normatively desirable alternative to the risk-utility test”).

99. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c), cmt. i, Reporters’ Note cmt. i.

100. *Id.* § 3 cmt. a.

101. *Id.* § 2, Reporters’ Note cmt. d(II)(D). I would emphasize “limited subset.” Most cases that in fact are best characterized as “consumer expectations” claims involve manufacturing defects, not design defects. See, e.g., *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 n.3 (Cal. 1994) (providing examples of “design defect” cases where consumer expectations analysis would be appropriate: “For example, the ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions.”). Clearly, in the real world, each of these examples involves a manufacturing defect. Moreover, as *Soule* itself held, the consumer expectations test is inapplicable in cases involving technically complex products, where the consumer has no *ex ante* basis for having expectations about risks associated with the product. *Id.* at 308-09.

Nonfault liability might also have achieved some degree of prominence if courts had followed *Beshada v. Johns-Manville Products Corp.*¹⁰² In that case, involving a claim for asbestos-related disease, the New Jersey Supreme Court proceeded on the assumption that the manufacturer had no knowledge of the health risks associated with asbestos at the time plaintiff was injured.¹⁰³ Nonetheless, the court rejected the defendant's effort to rely on a state-of-the-art defense, asserting that "[s]trict liability focuses on the product, not the fault of the manufacturer."¹⁰⁴ This ex post view of liability for after-acquired information about risk was soon rejected by the same court in *Feldman v. Lederle Laboratories*,¹⁰⁵ however, in which the court limited *Beshada* to its facts (asbestos cases), and adopted an ex ante, negligence-type approach for other cases involving risk information that only arises after product distribution.¹⁰⁶ The ex ante approach is widely followed elsewhere, although not without occasional confused efforts to maintain the consistency of such an approach with the conception of strict liability.¹⁰⁷

C. End of an Era?

As far back as 1914, a distinguished legal scholar, Jeremiah Smith, mused over the question of whether the advent of no-fault compensation for industrial injuries heralded the demise of fault-based liability: "[I]f this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason . . . for refusing to make this statutory rule the test of the right of recovery on the part of persons other than

102. 447 A.2d 539 (N.J. 1982).

103. *Id.* at 542-43.

104. *Id.* at 546.

105. 479 A.2d 374 (N.J. 1984).

106. *Id.* at 385-88.

107. For example, in *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. Dist. Ct. App. 1998), the court adopted what it understood to be the California position spelled out in *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991), and *Carlin v. Superior Court*, 920 P.2d 1347 (Cal. 1996):

While we recognize that a required showing of knowledge or constructive knowledge makes strict liability "to some extent a hybrid of traditional strict liability and negligence doctrine," we find that this result best serves to promote the counter-vailing policies underlying strict liability articulated in [an earlier Florida case]. As we construe *Anderson*, manufacturers are to be held to a higher standard than that imposed under negligence jurisprudence, but are not reduced to insurers; manufacturers are not required to warn of every risk which might be remotely suggested by any obscure tidbit of available knowledge, but only of those risks which are discoverable in light of the "generally recognized and prevailing best" knowledge available.

Ferayorni, 711 So. 2d at 1172 (citations omitted). The latter standard could as easily be described as the requisite test for manufacturer negligence.

workmen when they suffer hurt without the fault of either party?"¹⁰⁸ For a generation and more, there was no direct answer to this question, as nonfault extensions beyond workers' compensation were largely absent from the radar screen of legislatures and courts.¹⁰⁹ In this sense, it seems apt for Calabresi to have referred to the recent developments, as he wrote in 1970, as a "renaissance" in the making.

But a survey of the nonfault landscape thirty-five years later reveals a renaissance that in fact never really came to fruition. In the principal areas of accidental harm other than work-related injuries—in particular, motor vehicle accidents, premises injuries, product mishaps, medical malpractice, and toxic exposures—fault-based principles remain the dominant liability standard. Although there have been creative proposals offered for extending broad-based nonfault liability to medical and product injuries, they have not been endorsed in the legislative arena.¹¹⁰ Rather, as I have indicated, the principal

108. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 251 (1914).

109. *But see* REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932) [hereinafter COLUMBIA PLAN] (proposing an auto no-fault plan modeled on workers' compensation). On the common-law side, the *Restatement of Torts* included a provision—little utilized—for strict liability for ultrahazardous activities. RESTATEMENT OF TORTS §§ 519-520 (1938).

110. In the medical malpractice area, Professors Havighurst and Tancredi proposed a no-fault insurance model entitled "Medical Adversity Insurance" (MAI) in 1973. *See generally* Clark C. Havighurst & Laurence R. Tancredi, "Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 MILBANK MEM. FUND Q.: HEALTH & SOC'Y 125 (1973), reprinted in 613 INS. L.J. 69 (1974) [citations below to the reprint]; *see also* Clark C. Havighurst, "Medical Adversity Insurance"—Has Its Time Come?, 1975 DUKE L.J. 1233. The MAI system was designed as an alternative to medical malpractice litigation, not as a full replacement. Under the proposal, MAI policies would create a list of "compensable events," specifically designated injuries eligible for compensation. Havighurst & Tancredi, *supra*, at 71. A claimant who could show he or she suffered from a compensable event could recover medical expenses and limited wage losses without having to prove fault. *Id.* Malpractice victims who did not suffer from a compensable event would still be free to pursue a claim in tort. *Id.* at 74-75. For a comprehensive analysis of medical no-fault, proposing experimentation with a scheme along with a review of other reform options, see WEILER, *supra* note 61, at 44-69.

Professor Jeffrey O'Connell has proposed a variety of comprehensive and focused no-fault schemes, including proposals that would extend to the products field. *See generally* JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE AND INJUSTICE (1987). His "early offer" plan provided tort defendants with a 120-day window in which they could offer the claimant a settlement in the form of periodic payments. Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 149-50 (1999). The settlement offer had to be an amount that would cover the claimant's wage loss and medical expenses, but required no allowance for pain and suffering. *Id.* at 150. If the defendant chose not to offer the settlement, the claimant's tort action would be litigated under normal common-law rules. *Id.* However, if the defendant did choose to

no-fault extensions after 1970 have been limited to narrowly-focused pockets of accidental harm—vaccine and neurological birth defects (the latter in just two states)—and a horrific event, September 11, that triggered an ex post compensation scheme limited to victims of the terrorist acts.

So too, in the courts, the early landmark decisions of the California Supreme Court and the bold initiative in section 402A of the *Restatement (Second) of Torts*, which many observers took as signaling a radical departure from the common law in assigning responsibility for product-related harms, appear a generation later to be grounded in an expansive conception of the fault principle.

Instead of bold and sweeping replacement of fault-based liability, the hallmark of the past thirty-five years has been incremental tort reform. Beginning in the mid-1970s, with the perception that rising costs of malpractice insurance were wreaking havoc in the medical profession, state legislatures have responded with alacrity, establishing a variety of limitations on tort remedies (although largely leaving the substantive law principles untouched).¹¹¹ The early prominent initiative was the Medical Injury Compensation Reform Act (MICRA), adopted in 1975 by California,¹¹² establishing a model that would be influential nationwide: limiting recovery for pain and suffering to a maximum of \$250,000;¹¹³ establishing limits on contingency fees;¹¹⁴ altering the collateral source rule;¹¹⁵ and requiring periodic payments

make an offer, the claimant would face disincentives (e.g., a higher burden of proof) to reject that offer and pursue the tort action. *Id.*

On an even broader scale was Professor Stephen Sugarman's social insurance proposal. See STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 127-48, 167-91 (1989). Sugarman advocated the compensation of all disability, regardless of whether the source of that disability was accident-related or not. *Id.* at 127-48. As with O'Connell's "early offer," Sugarman's plan would not provide compensation for pain and suffering (except perhaps in more serious cases). *Id.* at 134. However, unlike the no-fault schemes addressed above, Sugarman's social insurance proposal was designed to be a replacement for, not an alternative to, the tort system. *Id.* at 127. For short-term needs, compensation under the social insurance plan would be provided by an extension of employment-based income replacement and health benefit plans. *Id.* at 135-36, 141-43. For longer-term needs, and the needs of unemployed persons, compensation would come from an expanded social security system. *Id.* at 136-43.

111. See MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 787-92 (7th ed. 2001).

112. 1975 Cal. Stat. 2d. Ex. Sess. 3949 [hereinafter MICRA]; see also FRANKLIN & RABIN, *supra* note 111, at 787-88 (discussing MICRA).

113. MICRA, ch. 1, sec. 24.6, at 3969.

114. Ch. 1, sec. 24.2, art. 8.5, at 3967.

115. Ch. 2, sec. 1.19, at 3990.

under certain circumstances.¹¹⁶ Almost thirty years later, when Texas passed a package of similar limitations on medical malpractice claims, it avowedly followed the California model.¹¹⁷ In the interim, three identifiable waves of tort reform occurred—in the mid-1980s, mid-1990s, and at present.¹¹⁸ The central features build on the California experience but extend further in many cases to across-the-board measures, rather than focusing exclusively on medical malpractice, and also frequently include limitations on joint and several liability and punitive damages, as well as following the MICRA model by addressing non-economic damages, the collateral source rule, and the contingency fee.¹¹⁹

III. NONFAULT SYSTEMS: A SATISFYING THEORETICAL FOUNDATION?

A. *The Legislative Forum*

A convenient point of entry for thinking about the role of theory in grounding nonfault systems is to revisit the most highly publicized of the recent plans, the September 11th Victim Compensation Fund. I refer here not to the mix of compensation, deterrence, and administrative cost considerations that establish a framework for assessing how this plan measures up against more traditional nonfault models or the tort system, but to a more fundamental question. Like all focused nonfault schemes, the Fund carves out a category of accidental harm victims for special treatment, raising a threshold question of horizontal equity.

In particular, the Fund makes a claim for special treatment on behalf of victims of terrorist incidents. But what precisely is the premise on which this claim rests?¹²⁰ The Fund itself can be narrowly

116. Ch. 2, sec. 26, at 3971.

117. See, e.g., Tex. Med. Ass'n, Talking Points for CSHB 4, at http://www.texmed.org/liability/cshb4_talkpoints_051203.asp (last modified May 12, 2003); Tex. Med. Ass'n, Why Texas Needs a Flat, \$250,000 Cap on Noneconomic Damages, at http://www.texmed.org/liability/cap_ned.asp (last modified Mar. 26, 2003).

118. See FRANKLIN & RABIN, *supra* note 111, at 787-91.

119. In the latest round, beginning in 2001, many states began to experience a resurgence in medical malpractice costs. More than a dozen states have considered or passed malpractice reform legislation. The malpractice reform measures currently being passed by the states cover the same gamut of issues advanced in the 1970s, namely limitations on attorney's fees, damage awards, collateral source recovery, and statutes of limitations. See NAT'L CONFERENCE OF STATE LEGISLATURES HEALTH POLICY TRACKING SERV., MEDICAL MALPRACTICE: TORT REFORM (NETSCAN iPublishing, Apr. 1, 2004) (citing measures taken by Arizona, Florida, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, and Wisconsin).

120. The discussion here draws on Rabin, *September 11th Victim Compensation Fund*, *supra* note 84, at 799-803.

construed as a special case: terrorism as manifested in a singularly horrific sequence of events was tantamount to an act of war. So characterized, however, it appears, upon initial consideration, to be of limited interest; it was simply the occasion for an ad hoc political response. On further reflection, however, a conception of September 11 victims as tantamount to soldiers fallen in battle is not unprecedented—a similar conception of victims as martyrs of attacks on the nation can be found in the Israeli no-fault scheme for compensating victims of terrorism.¹²¹ Israel provides benefits to all victims of terrorist activities and their families. In the case of death from a terrorist act, survival benefits are identical to those of the families of soldiers killed in the line of duty.¹²²

Whatever one makes of the rhetoric of a “war on terrorism” in the context of our current national state of affairs, linking a compensation scheme to alien enemy attacks establishes an uneasy justificatory principle. Is there good reason to opt for a no-fault scheme that would distinguish between events with the strong commonalities of September 11 and Oklahoma City, on the grounds that Timothy McVeigh was an American citizen rather than a foreign operative? At the same time, the war rhetoric is placed under considerable strain if victims of McVeigh are afforded similar treatment to September 11 victims. The logical consequence would be that the nation has been at war with various benighted predecessors to McVeigh, from white Aryan survivalists to Ted Kaczynski, the Unabomber—all of whom have claimed multiple innocent victims out of a sense of rage against the social order, as they viewed it.

In fact, the more closely one focuses on terrorism as the linchpin for a no-fault plan, the more unstable the foundation becomes. Cut loose from the war rhetoric, there remains the possibility of grounding the establishment of a scheme in some special sense of indebtedness to the unfortunate victims of terrorist activity; some basis for expressing a special sense of national gratitude or bereavement. Of course, there is nothing illegitimate about these sentiments. But they seem to miss the mark in the context of the Unabomber’s victims, or those who fell before the brief reign of terror of the Washington-area snipers, John Muhammad and Lee Malvo, in October 2002.

Another justificatory principle would be the failure of the state to meet an implicit obligation to provide public security in each of these

121. See *Victims of Hostile Action (Pensions) Law, 1970*, 24 L.S.I. 131 (1969-70) (referencing *Fallen Soldier’s Families (Pensions and Rehabilitation) Law, 1950*, 4 L.S.I. 115 (1949-50)).

122. *Id.*

instances. But there is a striking disjuncture between this rationale and the judicial resistance in tort to recognizing a general obligation on the part of the police to prevent criminal acts that result in personal injury.¹²³ More generally, a justification based on governmental failure to provide adequate security offers no satisfactory stopping point from a no-fault perspective short of a blanket assurance that anyone injured by a random act of violence in a public place will receive state compensation.¹²⁴

To discriminate among this multitude of victims, all of whom were, in the common vernacular, victims of terrorism, seems at odds with a basic sense of fairness—that is, treating like cases in like fashion. Yet none of the justifications offered above seems to satisfy a claim for wholesale recognition of these disparate incidents of terrorism.

There would be no call for these refined distinctions among terrorist activities in defining the parameters of eligibility if instead one substituted a broader conception, focusing on victims of criminal violence—as in the state victim compensation programs.¹²⁵ Still, however, the search for a satisfying justificatory principle would remain problematic. The highly respected English scholar, Patrick Atiyah, has been one of the most outspoken critics of the English Criminal Injuries Compensation Scheme, adopted in 1964,¹²⁶ which played a formative role in triggering California's pioneering adoption of a similar program one year later in this country.¹²⁷ Atiyah levels a general attack on the Scheme:

123. See, e.g., *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987) (holding that a municipality is not liable for simple failure to provide police protection and enumerating a four-factor test for establishing the limited circumstances in which a "special relationship," and hence a duty, would exist).

124. Interestingly, however, this argument may have special force in the context of September 11, in view of the allegations of security lapses prior to the events of that day. In particular, the statements of Richard Clarke raised the level of awareness both on the part of the public and Congress. See generally NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <http://www.gpoaccess.gov/911/>.

125. See LISA NEWMARK ET AL., URBAN INSTITUTE, THE NATIONAL EVALUATION OF STATE VICTIMS OF CRIME ACT COMPENSATION AND ASSISTANCE PROGRAMS: FINDINGS AND RECOMMENDATIONS FROM A NATIONAL SURVEY OF STATE ADMINISTRATORS (2001). Every state has a crime victim compensation scheme in place. *Id.* at 4. While these programs vary significantly between states, in general they provide monetary compensation for victims of violent crime who have suffered physical injury and for the survivors of homicide victims. *Id.* Funds may be used for crime-related expenses including medical, dental, mental health, funeral and burial, lost wages or lost support, and even crime scene clean-up costs. *Id.*

126. For background on the English scheme, see Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333 (1994).

127. See 1965 Cal. Stat. 1549.

The [Home Office working party] committee never really came to grips with the crucial issue, which is not whether victims of criminal violence ought to be compensated by the State, but whether there are any grounds for giving such victims financial support over and above social security benefits available to others. The committee did point out that the welfare state did nothing for the victims of crimes of violence “as such.” But why should this matter, provided it does something for them? The working party perhaps thought that social security benefits were too low. If this is so, the right solution is to increase benefits across the board, not to provide extra benefits for particular groups of needy people at the expense of the generality.¹²⁸

To highlight the concern, consider the Rhode Island nightclub fire in February 2003. A rock band, Great White, staged a concert in an overcrowded nightclub, The Station, in West Warwick, Rhode Island, using pyrotechnics as part of their act.¹²⁹ The pyrotechnics ignited foam insulation on the walls of the club, and the ensuing fire turned the club into a raging inferno that led to one hundred deaths and almost two hundred injuries,¹³⁰ many of which were very serious burn cases.¹³¹ The West Warwick case can serve as a stand-in for the kinds of catastrophic events—put aside natural disasters—that occur, seemingly at random, in the course of everyday life. Indeed, a not entirely dissimilar nightclub disaster had occurred in Chicago, with a substantial number of fatalities, less than a month earlier.¹³² The West Warwick victims were innocent parties, who, like the victim class in terrorist-related incidents or instances of violent crime, are highly unlikely to realize anywhere near full recovery in the tort system.¹³³

128. PETER CANE, *ATYIAH'S ACCIDENTS, COMPENSATION AND THE LAW* 253 (6th ed. 1999).

129. Thomas Farragher, *Behind the Rhode Island Nightclub Fire: Deception, Missteps Sparked a Tragedy*, *BOSTON GLOBE*, June 8, 2003, at A1.

130. *Id.*

131. Stephen Smith, *10 Weeks After R.I. Fire, 100th Victim Dies*, *BOSTON GLOBE*, May 6, 2003, at B1.

132. *Stampede at E2: Fiction and Fact*, *CHI. TRIB.*, Mar. 5, 2003, at C26.

133. Early estimates of the total prospective claims in tort for the West Warwick victims ranged in the area of \$1 billion. Christopher Rowland & Jonathan Saltzman, *Tragedy in Rhode Island: Suit Filed in Fire as R.I. Mulls Aid Fund; Liability Claims Seen Topping \$1B*, *BOSTON GLOBE*, Mar. 5, 2003, at A1. Tort defendants were not hard to identify. The foam insulation appeared to be highly flammable, which suggested the possibility of suits against the owners of the nightclub, as well as the company that supplied the foam, and its manufacturer. *Id.* The foam had been in place for nearly three years, and yet the municipal fire inspector had certified the club as recently as two months before the fire—strongly suggesting viable claims against the municipality. Farragher, *supra* note 129, at A1. The band itself, of course, and its manager, were certain defendants. And in the search for deep pockets, Clear Channel, the largest operator of radio stations in the country, which had

But they are not victims of criminal violence, let alone terrorist activities. Should it matter? Should it matter if they were the innocent victims of a runaway car plowing through an outdoor street market?¹³⁴

Bereavement will not serve as an adequate discriminating principle. Presumably, communal sympathy extends to the West Warwick fire victims in full measure, as to victims of violent crimes. Nor will bereavement provide an inclusive principle that stops at the victims of human error, once one considers the innocent and destitute victims of personal injury from a natural disaster. Ultimately, one is driven to the question of whether there is any stopping point short of universal social insurance coverage of (at least) basic out-of-pocket loss that satisfies the dictates of horizontal equity.

Treating like victims in like fashion is, of course, one dimension—but only one—on which the case for nonfault liability might have been regarded as undertheorized. A comprehensive exploration of the foundations of nonfault liability required, as Calabresi suggested, sensitivity to considerations of justice (one of which would be horizontal equity), risk prevention, risk spreading, and administrative costs.¹³⁵ In fact, although these intersecting perspectives were never explored with the conceptual rigor found in *Costs*, nonfault legislative schemes did not rest on barren foundations.

Clearly, if one goes back to the origins of workers' compensation legislation, the Progressive-era advocates were sensitive to what John Witt refers to in his survey of the intellectual history of the movement as "managerial control," by which he means the risk-prevention poten-

promoted the concert on its local affiliate and whose disc jockey introduced the band, was named in early filings. Jonathan Saltzman, *Fire Suit Targets Two Large Businesses: Brewer, Broadcaster Named in Fatal Blaze*, BOSTON GLOBE, Mar. 11, 2003, at B1.

As in the case of September 11, however, it is one thing to identify defendants and another to recover compensatory damages in tort. In the West Warwick case, too, the prospect of insolvency cast a pall on tort litigation: the owners, band members, and those in the supply chain of the foam insulation materials all appeared to be marginally solvent defendants with limited insurance coverage that might, in fact, be unavailable in any event if criminal charges were filed. Rowland & Saltzman, *supra*. The town's liability, even if established, was limited by state statute to \$100,000 per plaintiff. *Id.* It seemed unlikely that, even by recourse to joinder of defendants, anywhere near the out-of-pocket loss would be recoverable, let alone claims for intangible loss—consider, once again, the serious burn cases, along with the prospect of 100 wrongful death claims. And in the absence of settlement, a protracted litigation process would almost certainly ensue, during which the plaintiffs would be left to their own resources, with serious liability issues in doubt against some defendants, particularly the radio station and foam manufacturer. For an account of the early stages of the litigation process, see Tracy Breton, *Judge Refuses to Delay Civil Case Against Derderians*, PROVIDENCE J., Nov. 9, 2004, at A1.

134. See Joel Rubin et al., *Car Plows Through Crowd in Santa Monica, Killing 9*, L.A. TIMES, July 17, 2003, at 1.

135. THE COSTS OF ACCIDENTS, *supra* note 1, at 24-33.

tial of assigning no-fault liability to employers.¹³⁶ Similarly, seminal figures like John Commons, the influential labor economist at the University of Wisconsin, were attuned to a risk-distribution rationale for workers' compensation, grounding it in a broader socioeconomic conception of the theoretical premises for social welfare legislation.¹³⁷ And the relevance of administrative cost considerations to the adoption of industrial injury schemes was a principal concern articulated by the many state industrial injury investigative commissions established after 1900.¹³⁸

By contrast, in the earliest serious effort to build a bridge from workers' compensation to a motor vehicle nonfault system, the 1932 *Report by the Committee to Study Compensation for Automobile Accidents*,¹³⁹ the tone is distinctly more grounded in immediate real-world concerns. Although accident prevention is an acknowledged consideration, it is discussed by the Report in the context of complementary regulatory measures, such as rules of the road and driver's license requirements, rather than as a principal goal of the proposed no-fault system.¹⁴⁰ More generally, in surveying the concerns with the existing system of tort liability, the Report focused almost exclusively on the compensation shortfalls to victims of auto injuries in an era when liability insurance coverage was spotty at best, and contributory negligence served as an absolute bar to recovery.¹⁴¹

But a generation later, in 1965, when Keeton and O'Connell unveiled their influential Basic Protection Plan, they addressed in quite explicit terms, in a chapter primarily addressed to the "fair allocation of the costs of motoring accidents," issues of resource allocation (as well as fairness)—citing two then-recently published papers by none other than Guido Calabresi that would shortly make their way into *The Costs of Accidents*.¹⁴² Nonetheless, their pragmatic streak was evident in the Plan itself, which offered a mixed approach: retaining tort liability

136. John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467, 1484-96 (1998).

137. See JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 224-28 (4th rev. ed. 1936).

138. See Lawrence M. Friedman & Jack Landinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69-70 (1967). See generally ROY LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935, at 45-65 (1968).

139. See COLUMBIA PLAN, *supra* note 109.

140. See *id.* at 17-19.

141. *Id.* at 199-217.

142. KEETON & O'CONNELL, *supra* note 12, at 256-72 (citing Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965)).

for "serious" injuries at the same time that it offered basic no-fault protection for motor injury victims.¹⁴³ And this left them vulnerable to Blum and Kalven's assertion that nonfault liability, at least in the legislative forum, was characterized by theoretical incoherence.¹⁴⁴

But Blum and Kalven's criticisms, most fully articulated three years after the publication of *Costs, in Ceilings, Costs and Compulsion in Auto Compensation Legislation*¹⁴⁵—an apologia, of sorts, for the common-law tort system—seem distinctly myopic. Blum and Kalven challenged the architecture of auto no-fault along the three dimensions indicated in the title of their critique: ceilings, costs, and compulsion. In each instance, however, their indictment could as easily be turned on the tort/fault system itself. Thus, with respect to compulsion, they raised the question of whether, as a matter of principle, it is just to compel participation in the auto no-fault scheme—noting only in passing that the common-law tort system similarly functions as a system of compulsory insurance. Medical malpractice liability, products liability, and the like impose a "tax" on consumers that would only be obviated if potential plaintiffs were allowed to waive tort through contractual exculpatory provisions, which had already fallen into disrepute at the time that Blum and Kalven wrote.¹⁴⁶

On the cost dimension, the authors noted that "intramural allocation" (risk premium categorization) functioned incoherently in failing to take full account of the risk profile implications of shifting from third-party to first-party financing.¹⁴⁷ In fact, auto no-fault plans, including New York's, are typically silent on the intramural allocation of costs, leaving it to the insurers to determine risk categories and attendant premiums.¹⁴⁸ And more saliently, it is virtually impossible to experience-rate with any degree of precision in auto cases where, un-

143. *See id.* at 273-95.

144. *See* WALTER J. BLUM & HARRY KALVEN, JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965).

145. Walter J. Blum & Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341 [hereinafter *Ceilings*].

146. *Id.* at 368-70, 376-77; *see, e.g.*, *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (holding as invalid and contrary to public policy a release from future liability imposed as a condition of admission to a charitable research hospital, and establishing criteria for the limited circumstances under which an exculpatory clause would withstand public policy concerns); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (holding that an automobile manufacturer's disclaimer of an implied warranty of merchantability was invalid because it was contrary to public policy). It can be added, of course, that on the compulsion axis, auto no-fault is no different from virtually all of the major social insurance schemes that compensate for disability and death, such as social security old-age insurance, SSDI, and workers' compensation.

147. Blum & Kalven, *Ceilings*, *supra* note 145, at 363-64.

148. *Id.* at 364.

like the workplace, price discrimination as an accident prevention measure is probably meaningful only for the more egregious recidivist types, who are largely immune from influence by civil liability provisions in any event.

Finally, with respect to ceilings, Blum and Kalven viewed the existing landscape of plans and offered two points of principle. On the one hand, in the case of a high-ceiling plan, as in New York, why have any ceiling and discriminate among the most seriously injured?¹⁴⁹ On the other hand, in the case of the prevailing low-ceiling approach, why have any plan, when most of the supposedly irrational tort system is left in place?¹⁵⁰ Certainly, workers' compensation, which by contrast entirely replaces tort, rests on a clearer theoretical premise: that victim compensation ought to be based on a social welfare rationale rather than a corrective justice foundation. But Blum and Kalven conflate normative and descriptive analysis at this point. There is no reason in principle that an auto no-fault plan need be a two-tier scheme. Rather, as the authors themselves stress throughout their critique, auto no-fault on the books, by contrast to an idealized scheme, reflects political considerations ranging from a desire to keep aggregate system costs within acceptable bounds to a need to keep organizational players within the tort system from feeling excessively threatened by the magnitude of proposed reform.¹⁵¹

These latter realpolitik considerations lead into my principal reason for resurrecting Blum and Kalven in this retrospective look at theorizing about nonfault systems of compensation. As I discussed earlier, auto no-fault became largely a dead letter shortly after Blum and Kalven's wide-ranging critique appeared. It is revealing, I think, that very little in the way of sustained theoretical analysis appears in the succeeding years as a new, if modest, era of focused no-fault initiatives emerges.¹⁵² There are no successors to Blum and Kalven in teasing out the jurisprudential implications of the more recently enacted plans that I have discussed.

With the exception of the September 11 plan, as I have indicated, these later efforts almost invariably constitute variations on a more-or-less standardized model, harking back to workers' compensation. Medical expenses are afforded full coverage; out-of-pocket wage loss is compensable within specified limits reflecting considerations of hori-

149. *Id.* at 353.

150. *Id.*

151. *See, e.g., id.* at 342-43.

152. Even the academic proposals tend to be functional rather than philosophical in tone. *See supra* note 110 (discussing medical malpractice and products no-fault proposals).

zontal equity, as is future wage loss to a ceiling generally pegged to the average wage in the state; injury benefits are paid as loss is incurred rather than as a lump sum; there is recovery of death benefits—and, under some schemes, pain and suffering, as well—in relatively modest scheduled amounts.

This somewhat standardized model reflects a patchwork set of influences, more pragmatic than ideological in character. The value that society places on rehabilitation and physical restoration is reflected in the impulse to compensate medical expenses in full. Fairness considerations associated with allocating responsibility for harm directly to risk-imposers are reflected in linking funding responsibility to the source of the risk.¹⁵³ And the desire to keep administrative costs (as well as aggregate costs) under relatively tight control is embodied in the resort to fixed-amount ceilings on non-economic loss recovery—when it is allowed at all—rather than allowing discretionary determinations of intangible loss linked to individual claims of victimization. Surveying the universe of legislative no-fault, these considerations play out in incremental variations in plan design, and do not reflect a systematic effort to address new issues of principle.

By contrast, on the threshold issue of whether a no-fault system should be established for a given category of injury victims, matters of principle loom large—and the search for a satisfying theoretical justification for carving out a particular class of injury victims for special treatment is constantly renewed. That is why I engaged in a somewhat extended treatment of the September 11 Victim Compensation Fund at the outset of this Part. And, in fact, I would argue that the inability to come up with satisfying reasons for affording any given subclass of injury or disease victims special treatment—even in a mass tort context as overwhelming as asbestos—has played a major role (along with stalemates in interest group bargaining, of course) in dooming most such proposals to failure.

B. The Tort System

From a theoretical vantage point, nonfault liability in the judicial forum is another matter. Since tort has been traditionally grounded in a two-party perspective, injured and injurer, normative thinking—that is, inquiring when losses ought to be shifted—comes with the territory. Oliver Wendell Holmes took this as a challenge to articulate a

153. A subgoal here is to realize at least a measure of deterrence as well as to promote fairness. But the constraints on recovery of full economic loss, as well as pain and suffering, relegate risk prevention as an objective of these plans to distinctly second-class status.

theoretical foundation for fault liability in *The Common Law*.¹⁵⁴ Was the nonfault terrain in 1970 as barren as Calabresi suggests, particularly with respect to the developing concept of strict liability for product-related harms?¹⁵⁵

In a provocative paper published in 1985, George Priest argued that the rise of strict liability for product injuries could be traced directly to the theoretical work of two influential legal scholars in the generation preceding *Costs*, Fleming James and Fritz Kessler, and the rise of the law and economics movement.¹⁵⁶ Indeed, Priest asserted, this body of theoretical work overshadowed socioeconomic factors that were often identified as the primary influences on developments in products liability law.¹⁵⁷ Priest describes in detail the development of James's view that broad risk distribution should be the governing principle in personal injury cases, and Kessler's view on the undermining of contract law by the rise of inequality due to the dominant economic power of corporate enterprise.¹⁵⁸ According to Priest, these twin themes converge in the modern notion of enterprise liability (read "strict liability") found in Justice Traynor's landmark concurrence in *Escola v. Coca Cola Bottling Co.*¹⁵⁹

A qualifier is necessary here, however. In *Costs*, Calabresi does not assert that nonfault liability rests on no theoretical base; rather, his claim is that the case for nonfault liability was inadequately theorized.¹⁶⁰ And certainly, the work of James and Kessler, as promoted by Priest, can be targeted for this indictment. The notable deficiency in this earlier work is the striking inattentiveness to the risk-prevention potential of strict liability so thoroughly developed in the work of Calabresi.¹⁶¹

154. O.W. HOLMES, JR., *THE COMMON LAW* 77-129 (1881).

155. See *THE COSTS OF ACCIDENTS*, *supra* note 1, at 3-16.

156. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

157. *Id.* at 464.

158. *Id.* at 470-96.

159. See *id.* at 498-99 (discussing *Escola*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring)).

160. *THE COSTS OF ACCIDENTS*, *supra* note 1, at 5. In his opening footnote, Calabresi cites a number of earlier scholars whose work illustrated a "rebirth of interest in accident law." *Id.* at 3-5 n.1.

161. For further elaboration, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 637-38 n.177 (1992). This inattentiveness is especially interesting in view of the prominence of risk prevention in the strict liability rationale for product injuries in Traynor's *Escola* concurrence. See *Escola*, 150 P.2d at 440 (Traynor, J., concurring) (stating that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products"). There is similar inattentiveness to what Calabresi labels as tertiary

Interestingly, a full generation before James and Kessler, William O. Douglas, then a law professor at Yale, authored a highly original paper on vicarious liability, which offered a policy analysis of respondeat superior from what he referred to as an “administration of risk” perspective.¹⁶² Douglas questioned the conceptual coherence of the “frolic and detour” test and the independent contractor rule—central defining characteristics of the limits of respondeat superior liability—by examining the doctrinal refinements, in good legal realist fashion, through the lens of three key components of administration of risk: risk avoidance, risk shifting, and risk distribution.¹⁶³ While the analysis falls short of explicitly recognizing the goal of optimal deterrence, the theoretical framework is nonetheless a close cousin to the theorizing about accident law that would come to characterize law and economics thinking in the 1970s.¹⁶⁴

Since the 1970s—that is, in the period after *Costs*—there is surely no shortage of theorizing about judicial strict liability, much of which has addressed the products liability area that was a particular concern of Calabresi’s. It would take me far beyond the confines of this paper to do justice to a survey of that theoretical literature.¹⁶⁵ Yet in the face

costs; that is, administrative costs associated with competing liability systems. See, e.g., THE COSTS OF ACCIDENTS, *supra* note 1, at 228.

162. William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929).

163. *Id.* at 585-604.

164. Respondeat superior is, of course, still one step removed from nonfault liability, since it rests on the premise of negligent conduct by the agent. In the half-century preceding *Costs*, traces of a theoretical sensitivity to risk-prevention considerations in the work of other legal scholars are identified in John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 41-44 (2003).

165. A good starting point is Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993). The authors provide summary views of an array of products liability scholars, through 1993, locating them on a “products liability matrix.” *Id.* at 695-712. To simplify somewhat, they regard the then-current generation’s scholars as falling into two camps. In one camp are “the contractarians [who] believe that there are no significant impediments to optimal contracting between consumers and manufacturers in product markets.” *Id.* at 714. In the other camp are “the regulators, [who] are skeptical of the market’s ability to satisfy the deterrence and insurance goals of products liability law.” *Id.*

Curiously, Calabresi is missing from the roster of “current” scholars surveyed by Croley & Hanson. Instead, he is relegated to the “first generation” of products liability scholars, along with Fleming James, Fritz Kessler (both of whom I have discussed, see *supra* notes 156-159 and accompanying text), and others “whose influence peaked in the decade surrounding the promulgation of § 402A of the *Restatement (Second) of Torts*—that is, from 1960 to 1970.” Croley & Hanson, *supra*, at 691 n.29. The authors themselves clearly fall into “the regulators” camp, and draw on three themes in providing a revived argument for enterprise liability: “imperfect consumer information . . . , exploitative manufacturer market power . . . , and risk distribution.” *Id.* at 769. While Calabresi does not offer an expansive treatment of manufacturer market power, these themes are precisely those that constitute

of a wide array of normative arguments for nonfault liability, the fault principle retains its dominant position as the cornerstone of common-law tort liability for accidental harm.¹⁶⁶ How can this be explained?

Whatever the limitations in the “strictness” of strict liability in the products field, discussed earlier, why has the conceptual apparatus of nonfault liability seemed uninviting in related areas of accidental harm? Two representative cases—one an effort to expand strict liability from products to motor vehicle injuries and the other an effort to rely on the products paradigm to reshape medical malpractice liability—are revealing.

In *Hammontree v. Jenner*,¹⁶⁷ defendant suffered an epileptic seizure when driving his car, lost control, and the vehicle crashed into a bicycle repair shop, causing the plaintiff, who was working in the shop, serious injuries.¹⁶⁸ When defendant established at trial that he had faithfully taken his anti-seizure medication for many years without any untoward incident occurring, plaintiff’s negligence claim appeared to be destined for dismissal.¹⁶⁹ In a desperate gamble, her attorney sought to pursue her case, both in the trial court and on appeal, on a theory of strict liability, relying on the California Supreme Court’s then-recent receptiveness in products cases to such a change in the law.¹⁷⁰

The appellate court rejected the analogue, relying in the first instance on the fact that motor vehicle accidents, in contrast to product injuries, are not within the ambit of enterprise liability.¹⁷¹ But it would not strain credulity to project the principal goals of enterprise liability/strict liability—promoting risk-spreading and accident prevention—into the world of auto injuries, particularly if one posits

the framework for his extended theoretical discussion—although concededly not empirically based in any rigorous way—of primary and secondary accident costs. See THE COSTS OF ACCIDENTS, *supra* note 1, at 35-129. If the post-Calabresi theoretical literature has a dominant theme that is in sharp contrast to his own approach, it is the contractarians, who argue for a revived role for contractual exculpation based on assumptions about consumer access to information that diverge from the regulators’ perspective.

In a later article, Hanson and a co-author provide an extended treatment of the case for imperfect consumer information and exploitative market power in the context of arguing for an enterprise liability approach to tobacco-related harms. See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998).

166. See, e.g., James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377 (2002).

167. 97 Cal. Rptr. 739 (Ct. App. 1971).

168. *Id.* at 740.

169. *Id.*

170. *Id.* at 741.

171. *Id.* at 742.

near-universal auto liability insurance. Rather, the court's underlying concern is evident in its extensive quotation from an earlier California Supreme Court case:

To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence.¹⁷²

What these fundamentally practical considerations suggest, perhaps, is that the *Hammontree* court, writing in 1971, surmised that auto no-fault was waiting in the wings.¹⁷³ The last sentence in the quotation suggests as much. But one would be hard-pressed to argue that *Hammontree* would be less likely to be decided as it was today, when auto no-fault is a dead letter; the deference to legislative prerogative seems to run deeper.

A second case, *Hoven v. Kelble*,¹⁷⁴ offers an interesting example of an effort to extend the strict liability concept into the area of responsibility for medical mishaps. Plaintiff suffered cardiac arrest while undergoing a lung biopsy.¹⁷⁵ Apparently shaky about the proposition of establishing negligence, the plaintiff sued in strict liability as well, framing his argument, as the court restated it, as "if a plaintiff could show that a hypothetical virtually perfectly informed doctor, working in a perfectly equipped hospital, could have avoided the untoward result, the plaintiff could recover, notwithstanding that the defendants exercised reasonable care in all respects."¹⁷⁶

The court took the claim seriously, pointing out that many of the justifications for nonfault liability that had been persuasive in the products sphere had resonance in the area of medical mishap liability as well:

172. *Id.* (quoting *Maloney v. Rath*, 445 P.2d 513, 515 (Cal. 1968)). The California Supreme Court refused to grant an appeal on December 16, 1971. *Id.* at 739.

173. On the history of unsuccessful efforts to adopt no-fault in California, see BURKE, *supra* note 51, at 103-41.

174. 256 N.W.2d 379 (Wis. 1977).

175. *Id.* at 380.

176. *Id.* at 387.

The provider of medical services appears to stand in substantially the same position with respect to the patient as the seller of goods does with the consumer. The typical purchaser of medical services cannot evaluate the quality of care offered because medical services are complex and infrequently bought. The medical care market gives the purchaser little assistance in enabling the purchaser to evaluate what he or she is buying. It is generally the physician—not the patient—who determines the kind of services to be rendered and how often. It is the physician not the patient who prescribes other goods and services, *e.g.*, drugs, therapy, and hospitalization, that should supplement the physician's services. The physician is in a better position than the patient to determine and improve the quality of the services, and the patient's reliance on the doctor's skill, care and reputation is perhaps greater than the reliance of the consumer of goods. The difficulties faced by plaintiffs in carrying the burden of proving negligence on the part of a doctor are well known. The hospital and doctor are in a better position than the patient to bear and distribute the risk of loss.¹⁷⁷

Nonetheless, in the end, the court dismissed the claim, expressing concern that the consequences of such a move "cannot be predicted with sufficient clarity" to warrant regime change.¹⁷⁸ Presumably, this failure of judicial nerve points in the same direction as in *Hammontree*: let the legislature do the job.

Do these expressions of judicial deference reflect legitimate concerns over institutional competence? The short and straightforward answer to this question is that the courts, in the end, remain wedded to a vision of tort law that entails great reluctance to assume the mantle of architects of social policy—and imposing a regime of nonfault liability bespeaks that character. These prudential considerations inexorably counterpose strict liability through judicial edict against its legislative counterpart. Clearly, the array of legislative no-fault models discussed in the preceding Part of this Article converge on a set of characteristics that are simply foreign to the common-law tradition: scheduled compensation for economic loss, fixed-sum awards (if any) for non-economic loss, payment as loss arises, and perhaps most critically, hybrid systems featuring threshold nonfault and residual tort-type recovery. Not surprisingly in this context, judicially administered accident law has eschewed venturing very far beyond the familiar domain of fault-based liability, where a patchwork of fairness, corrective

177. *Id.* at 391 (footnote and citation omitted).

178. *Id.* at 393.

justice, and resource allocation principles can be adjusted to the strictures of an individualized interpersonal model of claims resolution.

Coming full circle, this reluctance is evident in the domain of products liability itself. At a relatively early stage in the reconstruction of products liability, the New Jersey Supreme Court, at the forefront of this movement, decided *O'Brien v. Muskin Corp.*¹⁷⁹ The case involved a serious injury from a diving incident in a backyard, above-ground swimming pool featuring a vinyl liner at the bottom.¹⁸⁰ The court, in reversing a judgment for the defendant, showed no reluctance to adopt a broad social policy perspective:

The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others.¹⁸¹

O'Brien evoked a firestorm of criticism aimed at the notion of "generic" risk-utility analysis by courts; that is, judicially imposed nonfault liability based on sweeping assessments of the social utility of particular products.¹⁸² In 1998, when the *Restatement (Third) of Torts: Products Liability* was adopted, generic products liability was relegated to extremely marginal situations, reflecting virtual unanimity of disapproval of *O'Brien*.¹⁸³ Instead, as indicated earlier, in design defect cases the courts have resorted to incremental cost-benefit analysis embodied in the requirement that plaintiff demonstrate a reasonable alternative design.¹⁸⁴ For the most part, true nonfault liability has been limited to the uncontroversial failure to measure up to consumer expectations in manufacturing defect cases.¹⁸⁵ The benchmark here, as in the case of judicial nonfault liability more generally, has been a

179. 463 A.2d 298 (N.J. 1983).

180. *Id.* at 301-02.

181. *Id.* at 306.

182. See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

183. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (excepting the requirement of proof of a reasonable alternative design only in cases of "manifestly unreasonable" designs, and giving as its sole illustration novelty exploding cigars). The New Jersey legislature subsequently limited the *O'Brien* approach to "egregiously unsafe or ultra-hazardous" products. N.J. STAT. ANN. § 2A:58C-3 (West 2000).

184. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b).

185. *Supra* note 101 and accompanying text.

constrained view of institutional role rather than the guidance of theoretical perspectives.

IV. CONCLUDING THOUGHTS

Is the renaissance of nonfault activity that Calabresi noted a generation ago now a historical artifact? That would be too strong a conclusion to draw from my survey of the ensuing years. But surely it has failed to ripen into a new era of transformed responsibility for accidental harm. I have suggested that political cross-currents have played the dominant role in stunting the growth of nonfault systems in the legislative arena. Absent the sense of urgency that is triggered by a perceived crisis in the delivery of public health services, for example, or the human devastation of an unprecedented terrorist attack, legislative embrace of a tort replacement system has been hard to come by. Instead of a bold move to nonfault approaches, the legislative proclivity has been to whittle away at the borders of the traditional fault system through incremental reform, predominantly limitations on recoverable damages.

Within the domain of tort, the courts have shown a similar reluctance to expand nonfault principles of liability. One might view the situation as a reciprocal institutional failure of nerve: the judicial tendency has been to rebuff the claims for nonfault liability by reference to the superior institutional competence of the legislative forum. Here, it is not so much political cross-currents in play as a pragmatic sense that nonfault responsibility entails recourse to tradeoffs between rights and remedies that courts are ill-suited to design and implement.

Tort theory has not played a major role in influencing these developments. But that does not diminish the importance of thinking analytically about the consequences of remaining substantially wedded to a fault-based liability system that leaves much to be desired when measured against the three perspectives that Calabresi so clearly articulated thirty-five years ago: risk prevention, risk spreading, and administrative cost (as well as the more elusive notion of justice). In my view, if there is a critical intellectual vacuum that emerges in examining *Costs* thirty-five years later, it is in the empirical realm. We still know far too little about the real-world consequences of liability rules to take full advantage of the intellectual legacy of *The Costs of Accidents*.