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Essay

THE INTELLECTUAL ORDERING OF CONTEMPORARY TORT LAW

MARC FELDMAN*

INTRODUCTION

The past decade has been described as a time of proposed and adopted changes in tort law "unparalleled" in its history.1 These changes, actual and imagined, reflect various institutional perspectives, embody very different values, and range in ambition from precision tuning to wholesale reconception. "In short, tort law is in considerable turmoil and there is no end in sight."

The disquiet that fuels the unsettledness of contemporary tort law is shared by many.3 Newspaper articles and media accounts abound with garish accounts of tort case results and the "windfalls" to the lawyers involved.4 At the last annual meeting of the American Bar Association, Vice President Quayle, perhaps intending to provoke his audience, suggested that the workings of the current tort system are centrally responsible for America's lack of competitive-

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2. Id. at 172.
ness in international economic markets.\textsuperscript{5} Locally, the centerpiece of recent meetings of the Maryland State Bar Association was a "Presidential Forum" designed to promote discussion among insurance, financial, and media executives, business leaders, legislators, lawyers, and others devoted to considerations of the shortcomings and inefficiencies of the tort system.\textsuperscript{6}

The dissonance many of us experience, as we consider our ambitions for and the actual workings of the tort system, is accompanied by widespread desire for explanation, coherence, and direction. In a recent essay in this journal, Professor Kenneth S. Abraham undertook the task of constructing an account that attempts to respond to these desires.\textsuperscript{7} In describing his views, Professor Abraham also crystallizes some of the theories and impulses at the heart of many tort law proposals. In this sense, he is representative, at least in general contour, of the views and sentiments of an array of others writing about and urging change. For this reason, it is worth considering his interpretation with care.

At the core of our traditional conception of a tort claim are two notions: The right to individualized determination of the defendant's liability, and the right to custom-tailored compensation for the actual loss suffered by the claimant. The particular circumstances of the claim play an essential role in such a conception. But the combined effect of a number of the reforms that have surfaced in recent years is the erosion of this conception. In one way or another these measures de-emphasize the particulars of the individual

\textsuperscript{5} J. Danforth Quayle, Prepared Remarks By The Vice President, Address at the Annual Meeting of the American Bar Association (Aug. 3, 1991) (on file with author).

\textsuperscript{6} MEMORANDUM FROM THE PRESIDENTIAL FORUM COMMITTEE OF THE MARYLAND STATE BAR ASSOCIATION, PRESIDENTIAL FORUM ON CHANGE: THE TORT SYSTEM (Nov. 1, 1991) (on file with author). In explaining the tort system forum, the executive summary noted:

The purpose of the November 7th Forum is not to evaluate or reach a consensus on particular reforms but, rather, to identify, discuss and thus understand the problems that give rise to the public's dissatisfaction with the tort system here in Maryland. It is our hope that at the conclusion of the Forum, the participants (and, through them, their constituents) will have a better grasp of the societal, legal and fiscal issues involved. This understanding should, in turn, lead to a better evaluation of the many reforms that are proposed for specific tort law problems.

\textit{Id.} at 1-2.

\textsuperscript{7} See Abraham, \textit{supra} note 1, at 172. Professor Abraham, a former faculty member at the University of Maryland School of Law, is now the Class of 1962 Professor of Law at the University of Virginia School of Law. The 1991 Sobeloff lecture was the genesis of his Maryland Law Review essay.
Thus, Professor Abraham proposes an intellectual device for the ordering of contemporary tort law. This lens offers a way to view and understand recent developments and proposals: the traditional conception of individualization in tort law is giving way to increasingly standardized, increasingly identical treatment for claimants.\(^8\)

In eroding the traditional conception, the reforms seem to me to be significant in two related ways. First, they promote a version of equity among claimants that both accords a priority to the compensation of out-of-pocket loss and reduces the risk of disadvantaging members of particular groups. Second, the reforms import into tort law some of the more appealing (though to some people, unappealing) features of non-tort compensation systems—workers’ compensation, auto no-fault, and private and social insurance. . . . Indeed, the evolving conception of a tort claim reflects the effort to have what some reformers may think is the best of two worlds—the imposition of liability on particular wrongdoers that is at the core of tort liability, and the standardization of recovery that is at the core of health and disability insurance and other non-tort compensation systems.\(^9\)

Professor Abraham evidently believes there are finite and inadequate financial resources available to defendants to satisfy successful plaintiffs’ judgments,\(^10\) resulting in inequity among claimants. Early claimants receive full compensation, while later claimants do not because the defendant has previously exhausted its financial resources paying the earlier judgments. Upon exhaustion of a defendant-debtor’s assets, bankruptcy or some other form of “legal

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8. *Id.* at 173.
9. *Id.*
10. *Id.* at 173-74 (footnote omitted).
11. “As it becomes recognized that for practical purposes a finite amount of money is available to compensate the victims of accidental illness and injury, this kind of distribution [for pain and suffering] is transformed into a target for reform.” *Id.* at 194. Professor Abraham does not quantify or estimate the frequency or extent to which he believes defendants’ resources have become inadequate. I am assuming he thinks this is a significant problem. If it were Professor Abraham’s view that defendants’ resources are only occasionally inadequate, then his claimed benefit of equity would be at best rarely served and not likely to merit the attention he pays the subject. *See infra* note 55 and accompanying text.
protection” is likely to result.12

According to Professor Abraham, the standardization and limitation of damage awards permits the available pool of defendants’ resources to reach further; possibly all plaintiffs will receive some compensation. The consequence, then, is “equity among claimants.”13 This equity is achieved by giving priority to claims for out-of-pocket expenses and by eliminating claims for pain and suffering and other non-economic loss.14 He also believes that members of “particular groups” will be less “disadvantaged” by such developments.15 He discusses three forms of inequity or disadvantage: the unequal capability and performance of lawyers for represented clients; prejudice in the form of racism, sexism, xenophobia, and other bias; and “legal luck.”16

In quick summary, then, this is Professor Abraham’s thesis. His alternative lens and conception offer the promise of understanding both contemporary developments and their value.

Then at least we would not be debating the simplistic question of whether a particular reform does or should benefit plaintiffs or defendants. We could instead address more complicated and difficult questions involving how to handle diversity, which forms of equity among claimants are preferable, and tort law’s proper relationship with the non-tort systems that are its institutional relatives. That is the kind of tort reform debate toward which we ought to be heading.17

My reaction to Professor Abraham’s presentation is layered and was initially contradictory. It struck responsive chords and simultaneously left me uneasy. As a teacher of torts, faced regularly with understandable and insistent student demand for structure and certainty, I have a strong interest in broad-reaching explanations and insights for this area of law. The opposition of individual and collective interests is a familiar dichotomy with seeming intellectual and emotional resonance. Similarly, as one who practices tort law, I am attracted by the prospect of enhancing evenhandedness or equity. I am sympathetic to charges that the tort system is a legal lot-

13. Abraham, supra note 1, at 173.
14. Id. at 173, 186-88.
15. Id. at 173.
16. Id. at 201-02.
17. Id. at 204.
tery to which only a few gain access. For those who do, the results are regularly irrational and indefensible.\textsuperscript{18} Yet, at the same time, I feel resistant to Professor Abraham's intellectual characterizations, to increasing divergence from individualistic notions of tort adjudication, and to his particular notions of collective responsibility and equity. I am unconvinced that his "reforms" will be for the better.

This is not merely an aesthetic dispute between academics. There is a tremendous amount at stake. For example, in the last session of the Maryland General Assembly, a comprehensive bill was prepared and considered that would have fundamentally restructured the way the legal system resolves the thousands of potential claims by lead-poisoned children and their families against the owners of the homes in which they live.\textsuperscript{19} This proposed statute represented a wholesale "de-individualization" of these sorts of disputes. At the choice of the property owner, individual tort actions for the full range of compensatory and punitive damages would be completely eliminated.\textsuperscript{20} In exchange, liability would be replaced by a statutorily created compensation plan for economic injuries only.\textsuperscript{21} My reactions to this initiative, an embodiment of Professor Abraham's thesis, are serious misgivings.

As a way to explore my reservations about Professor Abraham's characterizations and proposals, I shall consider each of his central ideas: (1) that the nature of traditional tort law is highly individualized and the thrust of contemporary tort reform is in the direction of

\begin{itemize}
  \item \textsuperscript{18} Actually, the irrationality is accompanied, at least in equal part, by a much more systematic bias, based most notably upon class but also upon race and gender. See generally Richard L. Abel, \textit{A Critique of American Tort Law}, 8 BRIT. J. L. & Soc. 199 (1981); Richard L. Abel, \textit{A Critique of Torts}, 37 UCLA L. REV. 785 (1990).
  \item \textsuperscript{19} See Md. H.B. 1265, 1992 Sess., introduced by Delegates Rosenberg and Thomas on February 3, 1992. The Act as originally proposed would have established a Lead Paint Poisoning Prevention and Compensation Commission and a Lead Paint Prevention and Compensation Fund. As actually signed into law on May 12, 1992, the legislation represents an abbreviation of original proposals. See Act of May 12, 1992, ch. 406, 1992 Md. Laws 2849. Effective June 1, 1992, a 15-person Commission was created. The governor was directed to appoint members of the Commission based on their representation of designated institutions and constituencies. The Commission, with the aid of staff and consultants, is to undertake various studies on behalf of designing a compensation mechanism for individuals injured by elevated blood lead levels. \textit{Id.} More specifically, the Commission is to develop recommendations, policies, and procedures for: the inspection and remediation of dwellings with lead, the rehabilitation and compensation of injured persons, the limitation of "excessive" claims against property owners, and the implementation of self-funding devices for Commission work. During the 25 months of its initial authorization, the Commission will be funded by the collection of a $2 registration fee imposed upon many of the state's rental units. \textit{Id.}
  \item \textsuperscript{20} Act of May 12, 1992, ch. 406, 1992 Md. Laws 2849.
  \item \textsuperscript{21} \textit{Id.}
\end{itemize}
collective conceptions; (2) that a significant consequence of such developments is increasing equity among claimants; and (3) that "reforms" from the world of non-tort compensation systems import "some of the more appealing" features of those systems into tort law. In so doing, I view this as a provisional response in an ongoing conversation about truly difficult and important societal questions.

I. THE INDIVIDUAL AND THE COLLECTIVE

Central to Professor Abraham's presentation is the characterization of a "traditional conception of a tort claim." The heart of this traditional conception is the individualized determination of liability and compensation. Pitted against this conception are a number of proposals, termed "reforms" by Professor Abraham, which have the combined effect of diluting the individualized focus of the traditional tort claim.

In an earlier article, Professor Abraham developed this idea more fully, and arguably, differently. He suggested that one common link among the phenomena known as "mass torts" is the choice by decisionmakers between individual and collective forms of responsibility. Professor Abraham contended that judges, and

22. Abraham, supra note 1, at 173.
25. Id.
27. Professor Abraham noted:

Under the model of individual responsibility, injuries have identifiable legal causes, and those responsible for these causes are held liable for their legally defined results. An action (or inaction) produces liability only if, absent that action, injury would not have occurred . . . . [T]he model implicitly assumes that those held liable actually bear responsibility by paying damages out of their own pockets. This is a world of people and enterprises with clear identities, of distinct actions that can be ascribed to identifiable parties, of assets that cannot be exhausted by potential or actual liability, and of insurance that can be priced to reflect accurately the probability that the policyholder will suffer a compensable loss.

In contrast, the model of collective responsibility is as yet incoherent and underdeveloped, but has increasing explanatory power. Under this regime, injuries often have multiple legal causes, and parties are held liable not only individually but also as members of a group. As a result, they may be held liable for
others, have increasingly made choices that reflect a preference for collective responsibility. His examples include the choice of strict liability over negligence as the applicable standard of care, and the "relaxing" of traditional burdens of proof for causation and damages.

Professor Abraham offers a historical account of tort law in which the hegemony of individual determination went largely unchallenged. In the last decade, however, less individualized, more standardized, and increasingly collectivized responsibility has emerged. Within that framework the collective is viewed as adversarial to the individual, and it is possible to map, or at least generalize, about tort-wide trends.

My own sense of tort law is somewhat different. At the very least, it seems to me that twentieth-century tort law is better described as simultaneously embodying both individual and collective allegiances. At times these allegiances are complementary and at

damages that another party would pay under the individual model. In addition, in the world of collective responsibility, a party can externalize the risk or cost of liability by declaring bankruptcy or by purchasing insurance that cannot be priced to reflect with accuracy the probability of loss. In all these ways responsibility for the loss in question is shared collectively.

Id. at 848.
28. See id. at 854-59.
29. See id. at 859-68. Many of the developments—many of the "reforms"—that Professor Abraham identifies in his recent essay were earlier identified in relationship to mass tort litigation. In his earlier article, Professor Abraham suggested that "the move toward collective responsibility is not characteristic of only mass torts; it is at the core of much tort liability, though usually it is well-hidden in conventional tort law." Id. at 847. In his more recent essay, Professor Abraham characterizes these developments as having the effect of "de-emphasiz[ing] the particulars of the individual claim," rather than describing such measures as expressions of a move toward collective responsibility. See Abraham, supra note 1, at 173. I do not know if by this he intends to signal a change in his thinking, or has merely resorted to a different stylistic formulation. Similarly, in his earlier article, Professor Abraham was more explicit about his evaluation of the developments he describes. "In my view, the move toward collective responsibility in tort law is not, on the whole, a sensible development." Abraham, supra note 12, at 847. In his Maryland presentation, he was more reticent about providing evaluative conclusions.

30. Here, I invoke broad conceptions of the "individual" and the "collective"—conceptions like those described by Professor Abraham in an earlier article. See supra note 27 and accompanying text. Similarly opposed conceptions underlie the majority and dissenting opinions in Palsgraf v. Long Island Railroad, 162 N.E. 99 (N.Y. 1928), arguably the most famous torts case. Judge Cardozo defined negligence and conditioned liability upon the nature and perception of risk in the specific relationship between the railroad guard and Ms. Palsgraf. See id. at 99-101. This particularistic approach, which focused on identified individuals, sharply contrasted the approach of Judge Andrews, who employed notions of "universal duty" as part of his causation analysis. See id. at 102-05 (Andrews, J., dissenting). According to G. Edward White, the case employed both "relational" and "universal" approaches to negligence. See G. Edward White,
others they are in conflict. Characterization is often difficult; categorization can flatten and oversimplify what should be a richer, regularly ambivalent, and more complicated process of consideration and decision making. This is not the place for detailed doctrinal documentation. The point can be made, however, by reconsidering Professor Abraham’s claims about individual determination of liability and assessment of damages.31

TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 97-101 (1980). The additional point should not be lost that in the earlier (and almost as famous) case of MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), Judge Cardozo rejected Buick Motor Company’s claim that the parties’ obligations were limited by their contract. Id. at 1054. “Cardozo suggested that the negligence principle . . . was not tied to status or vocation or contract but was a reflection of generalized civil obligations . . . , where a broad universal duty of care is substituted for particularized obligations owed only by certain persons.” WHITE, supra, at 125.

31. Professor Abraham attempts to describe and characterize a number of different developments in tort law as eroding the “traditional conception, by rendering the particular circumstances of the plaintiff or defendant less significant to the outcome of the claim than they would have been in the past.” Abraham, supra note 1, at 180. For the moment, even accepting Professor Abraham’s intellectual construct, I find his actual examples only partially persuasive.

Statutory caps on pain and suffering damages, id. at 186-88, and developments in class actions and bankruptcy, id. at 196-97, strike me as the strongest examples in support of his thesis. Yet, for exactly the reasons detailed by Professor Abraham, modifications of the “collateral source rule” exhibit, in Professor Abraham’s terms, both individualistic and collective tendencies.

Admittedly, abolition of the collateral source rule places the precise character of the plaintiff’s collateral sources of coverage at issue in each individual tort claim; but from a broader perspective, such abolition emphasizes what most tort claimants have in common—collateral sources of insurance coverage—rather than isolating the particular circumstances that distinguish one plaintiff from another. . . . [A] plaintiff’s status as an insurance beneficiary is no longer protected and those who do and do not have insurance receive the same net compensation.

Id. at 192-93.

Professor Abraham’s primary examples of the erosion of the “traditional conception” are academic proposals and a handful of decisions that have imposed and measured liability based upon the risk to which a plaintiff has been exposed, rather than the manifestation of injury. See id. at 180-86. Such an approach expands, potentially dramatically, prevailing conceptions of compensable harm. As a quantitative matter, more liability may result. But this is the very perspective Professor Abraham urges us to resist; instead, our focus should be on the degree to which “the unique facts of the plaintiff’s claim” are more or less important. Id. at 181.

Professor Abraham cites Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986), as an example of this development. See Abraham, supra note 1, at 181 n.30. The plaintiffs were a class of persons who owned property or lived within a three-mile radius of a chemical-waste burial site owned and operated by the defendant. Sterling, 647 F. Supp. at 306. They suffered personal injury and property damage when water in their home wells became contaminated by hazardous chemicals that escaped from the 242 acre burial site. They grounded their claims in intentional tort, negligence, and strict liability. See id. at 306-07. The district court awarded damages for the
The most frequently employed theory of liability is that of negligence. Here, by reference to the mythical reasonable person, we compare the defendant's conduct to an imagined and hypothetical standard. As reported appellate decisions sometimes reveal, but every able trial lawyer knows well, an ongoing and crucial contest exists to determine how to frame the hypothetical standard—whether in increasingly particularistic, individualistic, and subjective ways, or in increasingly general, collective, and objective ways. A virtual staple of all first-year torts courses is the presentation of cases in which courts struggle with the inclusion or exclusion of a variety of physical, emotional, and other characteristics of the actors in the particular dispute. This kind of constant jockeying is pres-

harm already experienced by the plaintiffs and also for their "increased susceptibility" or "increased risk" to kidney and liver disease and cancer. See id. at 321.

In recognizing such "increased susceptibility" as an item of compensable damages, the trial court required individualized proof in determining liability and awarding damages. In the sixty-five day trial, it was incumbent upon the plaintiffs to prove their particular proximity to the burial site; defendant's acts or omissions in maintaining the burial site and failing to maintain its boundaries; their actual exposure to the toxic contaminants; their particular medical histories; and their particular abilities to understand the risk involved. In short, they were required to prove their particular susceptibility to developing cancer. See id. at 321-22.

Similarly, a review of the tort law proposals initially anticipated for submission to the 1992 Maryland General Assembly suggests a more equivocal and complicated picture than that offered by Professor Abraham. In addition to the examples already discussed, such as modification of the collateral source rule and limitations on compensatory and punitive damages, proposals were also suggested concerning comparative negligence, health-care arbitration, immunities for special interest groups and governmental units, and modification of the doctrines of joint and several liability and the traditional standard of proof of "preponderance of the evidence." See MARYLAND STATE BAR ASSOCIATION, INC., 1992 STATE LEGISLATIVE PROGRAM (1992).

32. See, e.g., Vaughn v. Menlove, 132 Eng. Rep. 490 (C.P. 1837) (exemplifying the classic struggle between a "collective," objective standard and an "individualistic," subjective standard in determining negligence). In this casebook classic, defendant's counsel argued for a subjective standard: "negligence ought to be estimated by the faculties of the individual, and not by those of other men." Id. at 492. Chief Judge Tindal rejected counsel's proposed defendant-specific inquiry and instead recommended a far more objective rule "which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Id. at 493.

33. Compare Charbonneau v. MacRury, 153 A. 457 (N.H. 1931) with Daniels v. Evans, 224 A.2d 63 (N.H. 1966). In Charbonneau, the minor defendant struck and killed the plaintiff's son, also a minor, while driving his father's vehicle. 153 A. at 458. One of the trial court's jury instructions directed that the minor defendant's conduct be judged against that of "the average conduct of persons of his age and experience." Id. The plaintiff objected to this instruction and instead recommended a far more objective rule "which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Id. at 493. The plaintiff objected to this instruction and appealed. See id. Interestingly, the plaintiff conceded that the infancy of a person is of material importance in determining whether he has been guilty of contributory negligence, but contend[ed] that a minor charged with actionable negligence is to be held to the standard of care of an adult without regard to his non-age and want of experience. Id. In the later case of Daniels v. Evans, however, the court "de-subjectified" its previous
ent throughout the entire body of tort law.  

At first blush, the determination of compensation appears to be highly individualized. When Professor Abraham suggests that there is "[a] right to custom-tailored compensation for the actual loss suffered by the claimant," one's initial reaction is that this is a strong example of traditional conceptions honoring individualized treatment. Yet, when we say that the successful plaintiff has the right to rule; it held "that a minor operating a motor vehicle or a motorcycle, must be judged by the same standard of care as an adult."  


For example, consider a second liability standard, that of "intention." Here, again, there is the possibility of defining intention such that it resembles an inquiry into the particular mental processes of the defendant. It is also possible to conceive of intention in very different, much less defendant-specific ways, and many courts have done so. See, e.g., Garratt v. Daily, 279 P.2d 1091 (Wash. 1955). In Garratt, a five-year-old child moved a chair as the plaintiff was in the act of sitting. Id. at 1092. Despite a jury finding that the defendant did not intend to harm the plaintiff, the court found that the intent element was satisfied by the defendant's "unlawful" invasion of the interests of the plaintiff. See id. at 1093-94; see also Vosburg v. Putney, 50 N.W. 403 (1891) (noting that if the intended act of the defendant is unlawful "the intention to commit it must necessarily be unlawful").  

Preceding the question as to the applicable standard of care or liability is the question of whether a particular interest will receive legal recognition and protection. Again, tort law's history and current response seem more complicated. There are the legendary "no duty to act" cases exemplified by the family physician who refuses without reason to respond to an emergency call, see Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901), or a friend who encourages his helpless acquaintance to dive into a water-filled quarry and then stands by doing nothing while the acquaintance drowns, see Yania v. Bigan, 155 A.2d 343 (Pa. 1959). These cases, which value individual choice and autonomy, enjoy continuing vitality. But there are also decisions in which the connection, interdependence, and collective responsibility of human actors is stressed. A conclusion of "no duty" yields to a characterization that emphasizes relationship, security, and liability. There are the well-known historical examples of innkeepers and common carriers, see Pelot v. Atlantic Coast Line R.R., 53 So. 937 ( Fla. 1911), and also the contemporary relationships of landlords and tenants, see Kline v. 1500 Mass. Ave. Apt. Corp., 459 F.2d 477 (D.C. Cir. 1970), health care providers and patients, see Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), employers and employees, see Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981), and insurers and insureds, see Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967).

Abraham, supra note 1, at 173.
an individualized determination of compensation, we actually mean something less than the literal words imply. Instead, we mean that he or she has the right to collect an individually determined amount of money. We do not mean that the plaintiff has the right to receive an apology or acknowledgement of wrongdoing from the defendant. We do not mean that the defendant might be required to participate in the care of an injured plaintiff. The extent of a defendant’s compensatory responsibility is the payment of money. 36

A truly individualized, “custom-tailored” determination would inquire into the harm suffered and the various ways that the defendant might assist in returning the plaintiff to his or her former position or in moving forward as best as possible in the face of injury. While the payment of money would be an appropriate element of compensation in many situations, countless accidents occur in which truly customized compensation would involve something more than or other than the payment of money. 37 Yet, all injury is regarded as readily convertible into monetary measure and as sufficiently similar that dollars are the near-exclusive remedy. Although largely individualistic determinations as to amount are permitted, the nature of the remedy suggests that a much more standardized approach prevails. 38 Surely, our conception of justice between disputants is richer than monetary compensation.

I have criticized Professor Abraham for offering an oversimplified version of the traditional conception of tort law, which he identifies with the individual. I find the same shortcomings in his description, or evocation, of the “collective.” Even for interpretative purposes, I do not think that tort law historically, contemporarily, or imaginatively can be described with the categorical integrity, oppositional quality, or exclusively legal frame suggested

36. To the extent that the “relief” ordered in torts cases has included items other than the payment of money damages, one might actually argue that such “relief” moves toward the individual rather than the collective.


38. Even for monetary amounts, determinations are often quite routinized. H. Laurence Ross, a sociologist, interviewed claims adjusters and reviewed over 2000 case files of automobile accidents at three insurance companies.

[T]he measurement of pain, suffering, and inconvenience is thoroughly routinized in the ordinary claim. The adjuster generally pays little attention to the claimant’s privately experienced discomforts and agonies . . . . The calculation of general damages is for the most part a matter of multiplying the medical bills by a tacitly but generally accepted arbitrary constant.

by Professor Abraham.  

To construct a more meaningful account of our sensibilities and values—which drive us and explain us both in tort disputes and as human beings more generally—there is more to be considered. Notably missing from Professor Abraham’s description is any sense of context and particularity. As we move from the abstract to a particular dispute about injury, we reintroduce a sensitivity to feelings and physical needs essential to any explanation. Inseparable and intrinsic to our definitions of who we are as individuals are our connections to and involvement with others. If we must engage in offering up a prototypical persona, it should be an identity that recognizes and responds (warmly and hostilely) to the others both near and far who people our lives. Virtually every harm to an individual is a harm to a larger collection of individuals, whether they be family, friends, neighbors, co-workers, or strangers. Virtually every harm has consequences, not only for the individual, but for others who constitute that individual’s intentional and unintentional world.

Dominated by the familiar dichotomies of the individual and collective, the public and private, the intellectual and emotional, and the past and future, highly general landscapes of our motivations are often misleading. In the critical parlance, these are false distinctions. I believe we are interested in wealth, production, and material well-being and I believe we are interested in human welfare. We wish to protect our property and possessions and our safety and health. We wish to settle past wrongs and move toward

39. Professor Abraham has written: “Two models of responsibility facilitate an understanding of this less visible world; they represent polar examples of phenomena that in practice combine both individual and collective responsibility themes.” Abraham, supra note 12, at 847-48. I appreciate the difficulty—even the necessity—of creating heuristic accounts and the understandable tendency to create starker, simpler models than one would wish. For a cautionary discussion about the limits of abstraction and visions of reality, see Peter A. Bell, Analyzing Tort Law: The Flawed Promise of Neocontract, 74 MINN. L. REV. 1177, 1210-15, 1221-25 (1990). Notwithstanding his rhetoric (which suggests combined qualities), however, Professor Abraham’s actual descriptions and categorizations so lack nuance and complexity as to importantly detract from his interpretation. I say this despite the fact that versions of his account have been offered by others. See, e.g., GASKINS, supra note 3, at 83-87. In all fairness, it must be noted that Professor Abraham did not offer his interpretative account as a complete one. He wrote that “the model of collective responsibility is as yet inchoate and underdeveloped.” Abraham, supra note 12, at 848.

40. See Bender, supra note 37, at 870-71. Accidents and injuries are constant reminders about social connectedness and interdependence. See also Bell, supra note 39, at 1205-10.

the future. We want to ensure our options and our autonomy. We yearn for involvement with others—from the casual to the intimate. We do not always choose well or consciously, but tort law, in particular, is one bridge by which we pursue these simultaneous and inseparable interests.\(^\text{42}\)

II. EQUITY

Professor Abraham suggests that as the particulars of individual claims become less important—manifested in the "erosion" of the traditional conception—the promotion of equity among claimants has developed as a significant consequence.\(^\text{43}\) Based on my reading of Professor Abraham's essay, I am not confident that I know what he thinks about this development.\(^\text{44}\) Regardless, it is important to be clear about the kind of equity that Professor Abraham describes.

The rhetoric of equity is powerful. Though it is an argumentative strategy and a rhetorical style employable on behalf of virtually any position,\(^\text{45}\) it is a style of discourse with particular power for plaintiffs in support of increased liability. The service for which Professor Abraham employs "equity" is somewhat different. His notion of "equity," or at least his use of the word, is specific; it is standardization and uniformity.\(^\text{46}\) His is an equity of "evenhandedness,\(^\text{47}\)

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\(^\text{42}\) Jacques Derrida wrote persuasively that familiar paired concepts, such as the "individual and collective" or "autonomy and security," which are typically cast as oppositional, separate, or independent, are rather mutually dependent or interdependent. See Jacques Derrida, Positions (Alan Bass trans., 1981) (outlining conceptual dualism in a series of three interviews with Derrida); see also Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 1-2 (1988) (describing the paired notions of "plurality" and "unity" that underlie modern jurisprudence); Bender, supra note 37, at 888 n.104.

\(^\text{43}\) See Abraham, supra note 1, at 173. Actually, Professor Abraham goes further. He suggests that an interest in enhancing equity or, alternatively, a growing intolerance of inequity may even, in some sense, be motivating reforms. See id. at 194-95, 201-02. This is but the first of two significant consequences that Professor Abraham claims flow from the "erosion" of traditional, individualized claims. The second consequence is the importation of compensation system features into the torts system. See infra Part III.

\(^\text{44}\) A reading of the essay, taken as a whole, suggests that Professor Abraham approves of the general developments he describes. His very choice of terminology—"reforms"—leads to this conclusion. However, throughout the essay he is most circumspect. On one occasion in his text, he criticizes placing "dollar caps" on pain and suffering damages as burdening "precisely the wrong people—those who have suffered serious injuries early in their lives." Id. at 204. Previously, Abraham has questioned the wisdom of such "reforms" more generally—at least in the mass tort context. See Abraham, supra note 12, at 847 ("The move toward collective responsibility in tort law is not, on the whole, a sensible development.").

\(^\text{45}\) See generally Duncan Kennedy, A Semiotics of Legal Argument (Aug. 22, 1989) (unpublished manuscript, on file with author) (using language theory as a source of analogies for a set of inquiries into traditional legal argument).

\(^\text{46}\) Abraham, supra note 1, at 173, 186, 197, 199.
“overlook[ing] differences between individual parties,” and using "categorical rules of various sorts to ignore idiosyncrasies and differences among individuals." This is comparative fairness. Unfortunately, it is a comparison exclusively between claimants rather than between claimants and their injurers.

To understand Professor Abraham's perspective, several digressions are necessary. The first has to do with "front-end" and "back-end" questions. "Front-end" questions concern liability and general causation. "Back-end" questions relate to the allocation of awards. In his survey of contemporary tort reforms, Professor Abraham noted recent developments on both the front and back ends.

Professor Abraham limits his discussion of front-end concerns to proposals and judicial decisions that approach liability "according to the degree of risk imposed on the plaintiff rather than by the amount of harm the plaintiff suffered." The dearth of front-end reforms has real anti-plaintiff consequences. Plaintiffs continue to bear the burden of proving liability, as defined by the requirements of individual judicial determination. Unlike the allocation of awards, which has been subject to increasing limitation, there has been no reciprocal lessening of plaintiffs' liability burdens to qualify for compensation.

Instead, back-end questions receive the bulk of Professor Abraham's attention. These are questions of damages: "caps," scheduling, and collateral sources. To understand his particular notion

48. Abraham, supra note 12, at 847.
49. Abraham, supra note 1, at 195.
50. The notion of achieving similar, even identical, treatment between similarly situated claimants is not necessarily at odds with achieving equity or fairness between claimants and those who have caused their injuries. This second aspect of equity—for me the more important focus—is barely addressed by Professor Abraham. Also, there is the idea of equity or fairness to injured parties that is not the expression of comparison between them and others. Rather, such inquiry would be directed to each individual’s needs and desires.
51. See Abraham & Robinson, supra note 47, at 139.
52. Abraham, supra note 1, at 181. As I have discussed previously, I do not believe this example of "tortious creation of risk" supports Professor Abraham’s thesis that tort law is becoming increasingly de-individualized. See supra note 31.
53. This treatment is consistent with the thrust of Professor Abraham’s work in recent years. See, e.g., Abraham & Robinson, supra note 47 (focusing on back-end damage valuation).
54. Id.
of equity one must also understand that he focuses most strongly upon questions of claim adjudication and administration.

Once within the realm of back-end questions, the next important step in understanding Professor Abraham's ideas is to appreciate an essential claim about the limitation of defendants' resources: There are often inadequate defendant resources to fully reimburse successful plaintiffs whose awards have been determined on an individual, case-by-case basis. Professor Abraham's familiarity with mass torts presumably supports this conclusion.

In previous works, he has usefully suggested that two classes of cases are encompassed within the phrase "mass tort." There have actually been three "mega-tort" actions: (1) the asbestos litigation involving approximately 340,000 claimants; (2) the Dalkon Shield litigation involving some 210,000 claimants; and (3) the Agent Orange cases involving approximately 125,000 plaintiffs. The second class of cases includes claimants ranging from a few hundred to several thousand. "In the past decade, there have been roughly a dozen such cases, including the MGM Grand Hotel fire litigation, DES suits, toxic shock syndrome cases, the Bendectin litigation, and the Hyatt Regency Hotel skywalk litigation."

While defendants' threats of insolvency have been near universal in mass tort cases, defendants' actual inability to pay has been far more equivocal. Two high-profile cases in which defendants sought anticipatory bankruptcy protection are the Dalkon Shield litigation and the asbestos litigation, involving A.H. Robins and Johns-

55. "For example, under the traditional rules governing pain and suffering, enormous sums may be paid for pain and suffering to a few claimants. At the same time, other individuals' economic losses may go undercompensated . . . [F]or practical purposes a finite amount of money is available to compensate the victims of accidental illness and injury . . . ." Abraham, supra note 1, at 193-94. In my correspondence with Professor Abraham, he clarified that in the passage above he meant that "there is a finite amount of money that society will want to devote to compensating the victims of torts. I meant to say nothing in this passage about how much money individual defendants have at their disposal before they become insolvent." Letter from Kenneth S. Abraham to author (Mar. 17, 1992) (on file with author).


58. Id. (footnotes omitted). "[T]here have been approximately 2,000 DES claimants, 1,000 claimants associated with the fire at the MGM Grand Hotel, and 2,000 Bendectin claimants." Id. at n.8.
Manville, respectively. Even here, the availability of defendant resources was hotly contested.

Defendants' ability to take advantage of bankruptcy protections and the courts' willingness to assess the continuing economic viability of defendants in limiting available compensation resources are not addressed in this Essay. Considering the relative influence of various constituencies, bankruptcy may be regularly employed in the future to limit defendant compensation resources and the resulting plaintiff settlements and verdicts. But, that is not the necessary conclusion. Given a different array of forces, actors, and political sensibilities, other conclusions with very different allocational consequences might be reached.

Understanding and deciding the availability of defendant resources—their finiteness and inadequacy, their relative elasticity and sufficiency—is even more problematic if we move the discussion from Professor Abraham's class of mass torts to the field of torts more generally. Here, the telling would become more anecdotal. An account about several badly injured persons denied compensation for even their out-of-pocket medical expenses because the first plaintiff has exhausted all the defendant's insurance coverage would be matched by a similar story, but with different results. In the competing story, plaintiff's counsel aggressively pursues the assets and property of the defendant and successfully collects the plaintiff's judgment.

The point is, we simply do not know enough. Professor Abraham's assumption about inadequate resources requires more elaboration. What is the frequency and extent of inadequate defendant resources? Are there particular kinds of cases or arrays of parties that intensify or minimize the unfairness to successive claimants? When are defendants able to "pass through" settlement or judgment costs to consumers or externalized insurance? Are there particular claimants who are more or less disadvantaged? What is the role of counsel? Are there detectable patterns of conflict between attorney self-interest and full compensation to plaintiffs? Is the interplay of these forces distinguishable in cases that are actually litigated, versus those that settle, versus those that are not even formally initiated?

I am skeptical about the likelihood of meaningfully developing such information. I doubt the interest of the legal profession and

legal academia in such matters, the willingness to commit the necessary resources, and the inclination to value such empirical descriptions as part of policy making in tort law. Rather, I think we have relied and will continue to rely on largely imaginative, highly ideological accounts. At this level, my experience, imagination, and preference does not match that of Professor Abraham.

Absent a more definitive showing of the limitation and inadequacy of defendants' resources, the focus of the inquiry about equity should be directed elsewhere. In arguing for "damage scheduling," Professor Abraham appropriately has noted the "silent inequities that can be camouflaged by what Holmes calls the 'featureless generality' of jury verdicts." Building upon this insight about bias, I assume that Professor Abraham would view the poor and working classes as disproportionately victimized by injury, affected by where they live, where they work, and the products they use. Compensation levels, in turn based upon such factors as purchasable medical care and legal representation, income lost, and valuables destroyed, reflect the very same biases and thus are regressive. Any reduction in current compensation levels, whether by caps or compensation schemes, will have the effect of being all the more regressive.

Regressive compensation, based upon race, gender, and class, is a serious shortcoming of the current system. It is not, however, the most serious. Rather, it is exceeded by the inequities among people in their power to control the risks to which they are exposed.

The current response to the control of risk is threefold. First, risk may be controlled by the possibility of civil liability, described by Guido Calabresi as market or general deterrence. Some have been critical of Calabresi's claim: "[M]arket deterrence internalizes only a fraction of all accident costs; it does so in a way that exposes people to different levels of risk on the basis of their class, race, and gender; and it motivates efforts to minimize liability not risk." On the deterrence front, workers' compensation and other compensation plans are even less effective.

Regulation may be employed as a second means to control risk.

60. Abraham, supra note 1, at 195.
61. The intensifying regressiveness of lowering compensation levels was pointed out in Richard Abel, A Socialist Approach To Risk, 41 MD. L. REV. 695, 696 n.3 (1982).
63. Abel, supra note 61, at 698 (footnotes omitted).
64. See generally RONALD CONLEY & JOHN NOBLE, WORKERS' COMPENSATION REFORM: CHALLENGE FOR THE 80'S, in RESEARCH REPORT OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE (1980).
The shortcomings of state regulation have, by academic standards, generated a vast literature.\textsuperscript{65} This is particularly true in a politically hostile environment like the Reagan and Bush administrations.\textsuperscript{66} Regulation provides, at best, a minimum floor below which one's behavior may not fall. Even if such minimum regulation were one hundred percent effective, an immense area of risk, actual exposure, injury, and compensatory need would remain.

The third approach to the control of risk is operation of the market. Based upon their access to education, wealth, and status, individuals may buy safer homes, jobs, and products. Participation in the civil liability system often serves to reinforce such status. And, regardless, they may also buy private compensation in the form of insurance. Wealth, and all that accompanies it, permits some to live and work in safer settings; should they be injured, they may buy, at least to the extent that there is a market, increasingly unequal and superior services and replacement goods.

True equity, and thus a conception of equity worth aspiring to, should permit each of us to control meaningfully our exposure to risk. True equity would also mean that each of us would be exposed to that remaining risk, that risk which escaped control, in equal fashion regardless of our market status.\textsuperscript{67} I understand that, by definition, such a state of affairs would reflect fundamental reconceptions of the ways we currently approach work, wealth, consumption, care, and governance. While I do not imagine that such a political transformation is about to take place, its unlikelihood should not rationalize highly diluted normative conceptions of fairness.

\textsuperscript{65} See, e.g., Gabriel Kolko, Railroads and Regulation 1887-1916 (1965); see also Abel, supra note 61, at 695, 699 n.15.

\textsuperscript{66} Immediately after taking office, President Reagan established the Task Force on Regulatory Relief, chaired by then Vice President Bush, which suspended some 200 regulations within its first week of operation. See Robert V. Percival, Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency, 54 Law & Contemp. Probs. 127, 148 (1991). (Chaired by Vice President Quayle, the Council on Competitiveness functions as the Task Force successor. \textit{Id.} at 155.) Bush then sent a letter to corporate executives seeking to identify unduly burdensome existing regulations that were later developed into a "hit list" of regulations for reconsideration. \textit{Id.} at 148.

In February 1981, Reagan issued Executive Order 12291, which required "executive agencies to submit all proposed rules and final regulations to OMB [Office of Management and Budget] for prepublication review." \textit{Id.} (citation omitted). For a general discussion of the Reagan Administration's deregulatory scheme, see Percival, supra, at 147-54.

\textsuperscript{67} George Fletcher's notion of "nonreciprocal risks" reflects some of these ideas. George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 542 (1972). This focus is in opposition to a central rhetorical tenet of liberalism, which commends equal opportunity, but not equal consequences or results.
In the nearer term my guiding standard or definition of equity consists of levels and types of compensation appropriate and adequate to each injured individual. Compensation must be sufficiently comprehensive and complete to create incentives, to the greatest extent possible within the actual operation of a system of market deterrence, for would-be defendants to avoid causing future injuries. Only with the accomplishment of these two propositions does a conception of equity based upon standardized and comparable treatment between injured persons become desirable. The current tort system fails badly in its lottery-like effect, but identical, standardized treatment to injured persons, at low levels and with limited conceptions of compensation, is worse.

III. Compensation Systems

Professor Abraham has identified a second significant consequence of the erosion of the traditional individualized conception: the importation of compensation system features into the torts system.\(^{68}\) The features of such compensation systems enjoy currency among some scholars, politicians, business leaders, and even community activists. While there is much to be said about current proposals, I will address the tendency to romanticize compensation systems in operation and result. This tendency is present in Professor Abraham's work in his treatment of discretion and compensation levels.

A. Discretion

Professor Abraham notes the "enormous discretion accorded the jury under the traditional conception," and "the potential that circumstances that ought to be legally irrelevant to the outcome of the claim may be taken into account."\(^ {69}\) Race, gender, and wealth, as well as other status-based characteristics such as organizational

\(^{68}\) See Abraham, supra note 1, at 173-74. While Professor Abraham appears to approve of these developments, I am not confident of my conclusion. Professor Abraham's language and presentation suggest approval: "[R]eforms import into tort law some of the more appealing (though to some people, unappealing) features of non-tort compensation systems—workers' compensation, auto no-fault, and private and social insurance." \(Id.\) at 173. "[T]he importing [of] some of the more attractive features of non-tort compensation systems into tort law . . . has begun to occur and will continue, I think, both because the alternatives are attractive in their own right, and because they would remedy some of the weaknesses of tort law that we once were willing to tolerate, but which have become increasingly objectionable." \(Id.\) at 179.

\(^{69}\) \(Id.\) at 194.
form or proximity to the locality, are examples. While the existence of pervasive and pernicious discrimination in our legal system, as in our society generally, seems irrefutable, I question Professor Abraham's unexamined linkage of discretion and bias with jurors, but not with judges, lawyers, law professors, and others who conceive and administer compensation schemes. Although long neglected as a subject of serious and significant study, the last several years have witnessed a growing literature and body of studies addressing bias, most notably by judges, lawyers, and court personnel.

Professor Abraham responds to the problem of jury discretion by suggesting the "scheduling" of damage awards. "The various forms of damage scheduling that recently have been proposed would tend to mitigate different outcomes because of prejudice or favoritism based on the . . . factors [of race, gender, and wealth]." He acknowledges that prejudice or favoritism might play a part in the original construction of such schedules, but he maintains that the aggregation of case results would at least moderate the effect of

70. Id.

71. Central to Professor Abraham's essay is an effort to describe contemporary developments in tort law separate from a consideration of whether such developments result in more or less liability. Generally, in responding to Professor Abraham, I have tried to respect his alternative lens. Nevertheless, this is an instance in which I feel compelled at least to note the liability consequences. To the extent that lawyers' conventional wisdom is correct about the generally pro-plaintiff sentiments of juries, then a focus or limitation upon jury discretion only has anti-plaintiff consequences. This is analogous to my earlier comment about the anti-plaintiff consequences of "back-end" limitations without a lessening of "front-end" liability burdens. See supra notes 51-55 and accompanying text.


73. See Abraham & Robinson, supra note 47, at 139-52. Scheduling of damage awards is a feature present "in any number of non-tort compensation systems that use categorical rules of various sorts to ignore idiosyncrasies and differences among individuals." Abraham, supra note 1, at 195.

74. Abraham, supra note 1, at 194.

75. See id.
such bias.\textsuperscript{76} I suspect that this is true, but only marginally so.

Even within the bounds of scheduling proposals, discretion, and thus the possibility of bias, would be present not only in the awards used to compile schedules or to aggregate claim profiles, but also at every important step of the conceptualization and execution of such an approach. If a scheduling proposal like the one forwarded by Professors Abraham and Robinson were to be adopted, generating schedules based upon previous actual awards, a number of structural questions would have to be addressed. How many previous awards would constitute the sample upon which the resulting schedules would be based? Would there be separate schedules or profiles for each political subdivision or for the entire jurisdiction? Would the actual awards that constitute the database be selected on a first-come basis, randomly, or pursuant to some predetermined pattern? What approach would be taken to the inevitable differences between the characteristics and capability of counsel, the characteristics and credibility of parties and witnesses, and the legally appropriate and inappropriate reactions of factfinders and decision makers?\textsuperscript{77}

It is not just the tort system that is subject to the play of discretion. Non-tort compensation systems are as replete with discretion as the traditional system that they are "imported" to replace. Within the American experience, the compensation system paradigm is workers' compensation. Dating from the early 1900s in most states, this "specialized administrative scheme" has proven no more successful than the judicial system itself in "operationalizing sharply defined standards of eligibility, accountability, causation, and damages."\textsuperscript{78} An injured party's eligibility to participate (or the requirement of participation, if the remedy is exclusive) remains a regular subject of contention. Was the injured party an employee of the defendant-employer? Was the injury-causing activity "work-related"? The increase of occupational disease and stress present a contemporary eligibility variation that is exerting increasing pres-

\textsuperscript{76} See id. at 194-95.

\textsuperscript{77} I suspect Professor Abraham would respond that these are examples of the very factors that currently produce such different results in individual cases and that his damages scheduling proposal is intended to eliminate, or at least moderate. This poses an empirical question in response to which Professor Abraham offers no data.

\textsuperscript{78} GASKINS, \textit{supra} note 3, at 155. Instead, there is a tremendous amount of conflict about every aspect of plan operation. One source estimates that "[i]n California, for example, litigation costs accounted for more than $1 billion out of $6 billion in total workers' compensation costs in 1988." Dennis Pillsbury, \textit{Workers' Compensation on the Critical List: Saving a System in Crisis}, Forbes Special Advertising Supp. (Sept. 30, 1991).
sure upon compensation plans, by exposing the inherent imprecision of statutory language delineating eligibility.\textsuperscript{79}

Driven at least in part by inadequate compensation levels,\textsuperscript{80} eligibility questions have been intensified by accountability questions. Who will be held responsible? Will the employer be liable, either directly or vicariously? Can third-party liability be pursued via tort law?\textsuperscript{81} If third-party actions are permitted, can third-party defendants seek reimbursement against employers for successful claims by their workers? May workers bring actions against co-employees, others present at the work site, and insurance carriers?\textsuperscript{82}

Causation, a vexing and often unsettled question within tort law, is theoretically easily managed as part of a compensation plan inquiry. Yet, in practice, causation questions sometimes figure prominently. Claims for occupational disease vividly illustrate this point. For many cancers, respiratory and cardiovascular diseases, there are often multiple, even compound, causes and sources.

Despite the existence of injury schedules and grids, the assessment of damages is no less problematic, no less discretionary. Determinations as to the type, severity, and duration of injury and disability are sometimes straightforward, but often not. A "traditional" workplace injury like the loss of a limb may be mechanical in assessment and placement on the applicable schedule, but a calculation of the resulting disability is a far more difficult and uncertain proposition. With increasing medical sophistication and the ability to recognize soft tissue injury, emotional trauma, and latent disease, heightened by an appreciation of the endless variations in individual response to injury, the determination of injury and disability is highly speculative.\textsuperscript{83}

Accompanying these regular questions of eligibility, accounta-


\textsuperscript{80} See infra Subpart III.B.

\textsuperscript{81} See \textit{Gaskins}, supra note 3, at 257.

\textsuperscript{82} A common form of third-party action is product liability claims. It has been estimated that "a high percentage of product liability claims are based on workplace accidents." \textit{Id.}; see, e.g., Merton E. Marks, \textit{Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Co-Employees, Employers and Carriers}, 22 \textit{Tort & Ins. L.J.} 612 (1987).

\textsuperscript{83} The assessment of damages is further complicated to the extent that a jurisdiction (1) permits the award of discretionary benefits for such things as "special maintenance"; (2) requires the offset of workers' compensation benefits, in part or whole, because of the receipt of benefits or compensation from other sources; and (3) determines counsel fees, provides for attorney reimbursement for case-related expenses, or otherwise intervenes in attorney-client matters and disputes.
bility, causation, and damages are potential disputes about numerous other issues. A suggestive list includes the timeliness of any required worker “notice” and compliance with applicable statutes of limitation, the identification and satisfaction of appropriate evidentiary burdens, the practical requirement of experts and the approach taken to deciding between conflicting expert testimony, and appellate issues such as the contours of the record and standards of review.

Workers’ compensation claims are fundamentally open-textured; from beginning to end, decisions are made that require the exercise of discretion. Some of these discretionary decisions are interstitial; others are dispositive of the eventual outcome. In describing the highly discretionary quality of the operation of workers’ compensation, I mean to suggest that other compensation systems are similarly discretionary in their operation. These include the Social Security Disability Insurance Program (SSDI) and the “diagnostic review group” (DRG) limitations on Medicare noted as examples by Professor Abraham. In no instance are these jury decisions. Yet, employing Professor Abraham’s formulation, the exercise of discretion brings with it the possibility of bias and the expression of prejudice.

While it is impossible to map, with any precision, the relationship between the exercise of discretion and the expression of bias, I agree with Professor Abraham that such a relationship exists. Unlike Professor Abraham, however, jury discretion and bias do not strike me as the most pressing targets for reform. We would do well to extend our concern about bias to judges (both administrative and judicial), lawyers, and others. The elimination of discretion, however, is a largely illusory and highly undesirable route to combat bias. In any event, I strongly suspect that non-tort compensation schemes minimize neither discretion nor bias.

B. Compensation

Professor Abraham canvasses “reforms of damages law” imported into tort law from non-tort compensation systems. He believes that devices such as categorical rules or schedules for damages, reimbursements for out-of-pocket loss only, and the elimination of duplicate benefits have been used “successfully” by non-

84. See Abraham, supra note 1, at 195. I believe there has been widespread discretion in the administration of various mass tort cases, also discussed by Professor Abraham.

85. Professor Abraham’s “reforms” include statutory caps, scheduling, and reversal of the collateral source rule. See id. at 186-96.
tort systems in providing compensation.\textsuperscript{86} For Professor Abraham, one attribute of "success" is "equity among claimants."\textsuperscript{87} Surely, a second attribute of "successful" compensation is its sufficiency in meeting the needs of injured persons.\textsuperscript{88} My second concern about the contemporary allure of compensation systems is a failure to take seriously the inadequacy of compensation levels. Once again, for illustrative purposes I refer to workers' compensation.

Recently, workers' compensation has been a regular topic in the news. In a number of states, as part of highly partisan and contentious budget disputes about looming deficits, the forced curtailment of services, and the possibility of new taxes, workers' compensation has been held hostage to the legislative process. Generally workers' compensation is not a direct recipient of significant state funds, and thus has little or no budgetary impact; nevertheless, decreases in compensation levels and other "reforms" have been required by one of the contending sides to these budget disputes as a condition of their support for any compromise regarding the larger state budget.

In Maine, for example, Republican Governor John R. McKerenan and Democratic lawmakers, despite agreement about virtually every detail of the state budget, stalemated about the Governor's proposed thirty-five percent reduction in workers' compensation benefits, resulting in a partial shutdown of state government and the idling of over ten thousand state workers. Agreement was ultimately reached in the form of a twenty-six percent cutback, phased in over the course of several years, and thus the budget impasse was finally overcome.\textsuperscript{89}

California faced a similar scenario. State appropriations directly supporting the system were not at issue. Nevertheless, Governor Pete Wilson, at the behest of various employer groups including the California Manufacturers Association, proposed changes to the existing workers' compensation law. The major changes related to disability resulting from psychiatric and emotional injuries. The Governor proposed adjustment to prevailing causation and standard of proof requirements. In each instance, the Governor's pro-

\textsuperscript{86} See id. at 193, 195-96.
\textsuperscript{87} See id. at 195; see also supra notes 43-67 and accompanying text.
\textsuperscript{88} Professor Abraham does not explicitly address this subject. I assume from his omission of this topic and his commendation of proposals that limit damages awards that he does not view inadequate compensation as a pressing problem.
posals would have made it more difficult for injured workers to qualify for benefits.90 Once again, budget deadlock ensued, vetoes were threatened, and considerable political acrimony was generated.91

The rhetorical strategy employed by cutback supporters included a variety of claims about the antibusiness atmosphere created by workers' compensation schemes. The argument was made that in the face of "excessive" costs to employers and insurance carriers, a state cannot compete in retaining and luring business enterprises.92 Underlying this contention is the assumption that workers' compensation benefit levels and provisions for care are adequate and appropriate, even unnecessarily generous. Claims about the adequacy or extravagance of compensation levels are not surprising coming from employers who wish to lower compensation levels, restrict medical care, and increase eligibility criteria.

What is surprising is the general unfamiliarity with compensation plans in operation—particularly compensation levels and benefit details—by would-be proponents. In my conversations with proponent community activists, academics, and politicians, during their development of lead paint poisoning proposals for submission to the Maryland General Assembly,93 workers' compensation was regularly referred to as a model for their efforts. They believed workers' compensation was attractive not only because of its ease of use by greater numbers of injured claimants and the increased equity between claimants, but also because of heightened incentives for work-

90. More specifically, under Governor Wilson's proposal, to collect disability for a "stress-related" injury, a worker would have to prove that at least 50% of the injury was job-related, instead of the current 10% requirement. Additionally, Governor Wilson proposed that the current standard of proof of "clear and convincing" evidence be replaced with the traditional criminal "beyond a reasonable doubt" standard. In addition, as part of the worker's evidentiary burden, he or she would have to show that the stress was caused by "sudden and extraordinary events," rather than routine stress that built up over a period of time. See Robert Reinhold, California Tax Plan Loses, Returning State to Turmoil, N.Y. TIMES, July 5, 1992, at A8; Daniel M. Weintraub, Plan To Revise Workers Benefits Opposed, L.A. TIMES, June 13, 1991, at A3 [hereinafter Weintraub, Plan Opposed]; Daniel M. Weintraub, Worker's Comp. Becomes Key to State Budget, L.A. TIMES, July 6, 1991, at A1 [hereinafter Weintraub, Worker's Comp. Becomes Key].
91. See Reinhold, supra note 90; Weintraub, Plan Opposed, supra note 90; Weintraub, Worker's Comp. Becomes Key, supra note 90.
92. The similarity of this argument to that used by Vice President Quayle in attacking the tort system is obvious. See supra note 5 and accompanying text. For an example of the sort of rhetoric employed by insurance representatives, see Pillsbury, supra note 78.
93. For a summary of the legislation that actually passed, see supra note 19.
place safety and the adequacy of its compensation and care. This is another example of the highly romanticized mythology of workers' compensation, and of compensation systems more generally.

Applicable workers' compensation statutes reveal, for the large majority of states, an intention that lost-income benefit levels equal two-thirds of a worker's weekly wage. Yet, these are benefit levels in name only. In actuality, the level of compensation ranges from one-fourth to one-third of a worker's wage because state provisions also provide for a maximum benefit payment. Regardless of pre-injury wages, a Maryland worker who is killed or totally and permanently disabled may not be paid more than four hundred and fifty-two dollars per week.

With a maximum weekly benefit of four hundred and fifty-two dollars, Maryland's benefit levels are among the highest in the nation. In New York, the maximum weekly payment is three hundred and forty dollars, in California three hundred and thirty-six dollars per week, and in Georgia two hundred and twenty-five dollars. Assuming no other limitations or deductions, on an annual basis, maximum compensation levels total from twelve thousand dollars to twenty-four thousand dollars, depending upon the state. These compensation levels are intended as a complete substitute for lost-wage income.

At first, these figures "do not seem so bad." But it must be remembered that these are maximum amounts for workers whose pre-injury incomes were two to three times greater than the benefit levels they will receive. For lower-income workers, benefit levels will be much less. For a seriously injured, totally disabled worker, this is the standard of living available. For the some 90 million workers covered by such schemes, reimbursement of medical ex-

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94. In this Essay, I do not discuss the incentives or disincentives for safety created by compensation systems. In practice, I believe that workers' compensation gives up, even more completely than does the tort system, on creating meaningful incentives to minimize risk.


96. Id.

97. Of the neighboring states, Pennsylvania has a maximum weekly level of $436; Virginia a maximum payment of $404; West Virginia $376; and Delaware $297. States of this region represent the high end of benefit levels nationally. Id.

98. Id.

99. "Approximately 93.7 million wage and salary workers were covered under the state and federal workers' compensation programs in 1989." William J. Nelson, Jr.,
expenses, a fraction of lost income, and occasionally a limited lump sum award is the horizon of compensation.

Criticism about the inadequacy of workers' compensation for workplace injuries is nothing new. As part of the Occupational Safety and Health Act of 1970, Congress established a National Commission on Workman's Compensation. This panel, appointed by President Nixon and comprised of representatives from business, labor, government, and academia, made a number of recommendations. Nineteen of the Commission's recommendations were said to be "essential" to the future of the various states' workers' compensation systems. A central target of these recommendations was what the Commission regarded as inadequate benefit levels. The Commission recommended, for example, that state maximum weekly benefits be at least one hundred percent of the state's average weekly wage by July 1, 1975 and at least two hundred percent by July 1, 1981.

There has been widespread failure to reach even the modest compensation minimums proposed by the National Commission. As of 1989, twenty-two states had maximum benefits for temporary and permanent total disability that reimbursed workers at less than one hundred percent of the state's average weekly wage. Seventeen states limited the payment of disability benefits by dollar


There is a tendency to assume that workers' compensation is coverage intended primarily for industrial workers. While such notions are accurate in describing the historical origins of such coverage, the contemporary reality is that most workers, except generally domestic and farm workers and workers of small employers (i.e., less than three to five employees), are covered. Coverage extends to workers of all income levels, and to those who work with their hands as well as "pink" and "white collar" workers. Coverage also extends to minimum wage workers as well as those of "middle" and "high income." In the face of the relatively low incidence of subscription to private disability income plans and the relatively low ceilings of the Social Security Disability Insurance system, workers' compensation is the disability income source for most American workers. "For example, in 1983 only 24 million people—slightly more than 20% of the labor force—were protected by private, long-term disability insurance, and only about 36 million people were protected by short-term disability insurance." Abraham, supra note 12, at 900 n.121 (citing Health Insurance Ass'n of Am., Source Book of Insurance Data 1984-85, at 87-88 (1985)).

102. See id. at 19.
amount or time, so that seriously injured or diseased workers did not receive benefits for the duration of their disability.\textsuperscript{104} Thirty-seven states did not offer death benefits to surviving spouses for the remainder of their lives or until remarriage; twenty-eight states failed to make death benefits available to dependent children until age eighteen or for the duration of their actual dependence.\textsuperscript{105} These limitations, and the resulting inadequacy of compensation, have been intensified by waiting periods, infrequent cost of living adjustments, and increasing numbers and amounts of offsets and deductibles.

In the face of low levels of compensation, one might understandably ask why workers' compensation has become a political target. One explanation centers on the increasing costs of workers' compensation.\textsuperscript{106} Administrative costs are escalating,\textsuperscript{107} as are the costs of health care for injured workers.\textsuperscript{108} An allied explanation is the lessening economic mobility and generally unexercised political muscle of covered workers within compensation plans. Simultaneously, employers have successfully exerted their influence in achieving eligibility restrictions and benefit "take backs" in recent state budget disputes. These developments are motivated by economic and political self-interest; these actions are motivated by the goal of limiting and decreasing liability. Despite Professor Abraham's pref-

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} Traditionally, employer costs associated with workers' compensation were estimated to be no more than one percent of total payroll expenses. In recent years, these costs are estimated to have approached two percent. In 1972, total workers' compensation costs were approximately $4 billion, while in 1987 expenditures approached $27 billion. By 1990, estimates reached $50 billion or higher. James N. Ellenberger, Medical Cost Containment in Workers' Compensation, Paper Delivered at the National Conference of State Legislatures, Preconference Workshop on Workers' Compensation, Nashville, Tennessee, at 1 (Aug. 4, 1990) (on file with author).

\textsuperscript{107} "Processing costs under workers' compensation are variously estimated at 40 to 52 percent of each dollar awarded in compensation, which is not far below the 60 percent rate for tort law, and well above the 5 percent rate for Social Security disability." GASKINS, supra note 3, at 427 n.48 (citation omitted).

\textsuperscript{108} One source estimates that in 1980 the average medical cost per worker's compensation case was $1741, and that by 1989 the average cost per case had risen to $5370. See Pillsbury, supra note 92, at 9. Some of the most hotly contested issues in workers' compensation are really issues about health care. Four such issues are physician choice, reimbursement schedules, deductibles and co-payments, and discontinuing insurance coverage. Id. Each is an example of attempted "cost containment" by employers in a delivery system largely driven by private gain; each is potentially an example of diminishing care for injured workers. It seems possible, then, to say that the dramatically increasing cost of workers' compensation, accompanied by a potentially dramatic lessening in the availability and quality of care, partakes of the more general crisis in health care with which we are faced in the United States.
ference for a different lens with which to understand these developments, they cannot be meaningfully understood as expressions of concern about equity among claimants or as an attraction to the features of non-tort compensation systems unattached from a concern about greater or lesser liability.

CONCLUSION

Professor Abraham has offered a historical account in which tort law is anchored by a commitment to individualized conceptions and processes. Opposing the traditional conception is a contemporary account that focuses on collective notions of responsibility. While the ideology of this contemporary conception is not fully developed, Professor Abraham believes it has sufficient power to have motivated a number of proposals to reform tort law. Some of these proposals have been adopted; others remain mere proposals, although Professor Abraham predicts their adoption. He characterizes many of these “reforms” as importing attractive features from compensation systems into tort.

My sense of tort law is that there is much more thickness and nuance to its doctrine, rhetoric, and social vision. Instead of viewing individual and collective notions as categorical opposites or even as poles of a continuum, critical theory offers a more sophisticated and satisfying account. This is an account that views ideas and values about the individual and the collective as joined, inseparable, interconnected, and interdependent. This is an instance in which theory speaks knowingly and helpfully about practice.

Emerging intellectual traditions in legal scholarship teach us that even highly general accounts about the nature of law can also include descriptions of how law works in practice. To the extent that legal explanation includes the dimension of context, it commends itself all the more for our consideration. For this reason I find Professor Abraham’s exclusion of a consideration about liability a serious shortcoming. By failing to take account of the context in which the developments he describes arise, by failing to include the consequences of the ideas he discusses, he obscures something essential to an understanding of contemporary tort law. The quality of our understanding of any body of law, both historically and contemporarily, matters whether we represent clients or discuss future directions. In either instance, the interests of thousands of real parties are at stake, as are our expectations about the public forum of
litigation and the social mechanism of tort law.¹⁰⁹

Equity among claimants is the first of two consequences that flow from the de-individualization of tort. For Professor Abraham, the inadequacy of defendant resources remains a regular and problematic occurrence. He thinks that the amounts plaintiffs receive should be standardized by the use of schedules, grids, and guidelines.¹¹⁰ Fairness is identical, or at least similar, treatment. The similarity of treatment, within relevant categories, takes precedence even if some plaintiffs receive less.

In contrast, I question the finiteness of defendant resources. Proponents of this claim have yet to come forward with the sort of detailed presentation that is necessary to make the claim persuasive. Instead, I choose to focus on risk. Genuine equity would mean that each of us has control over the risk in our lives. To the extent that risk cannot be eliminated, the remaining risk should be shared equally by all.

As for compensation, I similarly invert Professor Abraham’s hierarchy. The first priority should be compensation that is appropriate and adequate for each injured person. The accompanying priority is deterrence. Despite limitations, general market deterrence in the form of high levels of compensatory damages does have some salutary effect. Only after the needs of injured persons have been satisfied and after the deterrent effect of tort has been fully exploited would I favor proposals that treat injured persons in increasingly standardized and similar fashion.

Disagreements with Professor Abraham about the nature of tort and our differing conceptions of fairness rehearse in many ways our differences in evaluating what is attractive about non-tort compensation systems. Importantly, Professor Abraham identifies the potential within discretionary action for the operation of bias. The conclusions we draw about the tort system in practice, however, are quite different. Professor Abraham targets the discretion of juries and the expression of prejudice by them as worthy targets of reform. I would target, instead, the exercise of discretion by judges and lawyers. Specialized administrative schemes—whether workers’ compensation, SSDI, DRGs, or the claims administration of mass tort cases—are as filled with discretion as tort actions. Non-tort repre-

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¹⁰⁹ See generally Geoffrey C. Hazard, Jr., Authority in the Dock, 69 B.U. L. Rev. 469 (1989); Bender, supra note 37, at 860-63, 868, 877-84.

¹¹⁰ See Abraham, supra note 1, at 188-90.
sents neither a gain in the elimination of discretion nor a lessening in the potential expression of bias.

Unaddressed by Professor Abraham is the topic of the adequacy of compensation levels as part of non-tort alternatives. As I survey specialized administrative schemes that have been adopted and proposed, the general inadequacy of compensation levels remains their most striking feature. The absence of clear prospects for gain in other respects and the seemingly endemic characteristic of limited compensation and care, at least in the American experience, explains my hesitance, even resistance, to these so-called tort reforms.