Should Tort Law Protect Property against Accidental Loss

Richard Abel
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RICHARD L. ABEL*

Tort damages for accidental harm to property violate the fundamental values of autonomy, equality, and community. Tort law itself recognizes that property is less important than personal integrity. State action, including judicial decisionmaking, that seeks to protect property against inadvertent damage either is unprincipled and hence arbitrary or reflects and reinforces the existing distribution of wealth and power, or both. Tort liability for accidental injury to property cannot be defended as a means of reducing secondary accident costs, it entails very high transaction costs, and it has little or no proven value as a deterrent of careless behavior. Consequently, courts should cease to recognize a cause of action in tort for accidental damage to property.

† An earlier version of this Article was presented to the Symposium of the Colston Research Society at the University of Bristol, April 3-6, 1984. It will appear in THE LAW OF TORT (M.P. Furmston ed. 1986). I am grateful to the participants in that symposium, my colleagues at UCLA, at William Whitford, for their comments on that draft. Virtually all the tort law I know, and therefore all the case citations in this Article, come from the casebook with which I teach, M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES (3d ed. 1983), and the two earlier editions. I am grateful to the editors for their thoughtful and comprehensive compilation, although they bear no responsibility for the conclusions I draw and would, I am sure, be horrified by many of them.

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INTRODUCTION

Tort law protects two distinct kinds of interest: personal integrity (which includes both physical and emotional well-being) and property. When these interests are invaded, damages are awarded: for pain and suffering, medical expenses, and past and future property losses (that is, reduction in the value of property by reason of physical damage or other cause, lost wages, and lost profits). Recent developments have extended the protection of tort law in the areas of nuisance and damages for economic loss. This Article questions whether tort law should protect any property interests against unintentional interference. My argument will proceed as follows. Previously I have insisted that our primary goal in confronting risks to personal integrity should be to control them rather than to compensate the victims or punish the tortfeasors after the fact. Any encounter with the risks that remain ought to be as autonomous and equal as possible. Now I will explore how best we may realize the values of autonomy, equality, and community in confronting the risk of damage to property. I also have argued previously that violations of personal integrity we cannot or will not eliminate demand a social welfare scheme ensuring adequate medical care and some minimum level of income maintenance, regardless of how those needs arise. Now I will examine both the distributional and the symbolic consequences of extending such protection to property damage. I will try to show that the present regime of tort law recognizes the fundamental difference between personal integrity and property damage, and is far more solicitous of the former. I will also argue that state action protecting property against unintentional loss, whether through tort law or other mechanisms, inevitably has unequal and arbitrary effects. Therefore, I conclude, the values of autonomy, equality and community, together with the principled exercise of state power which is the minimum condition of justice, can be advanced only if tort law ceases to protect property against accidental injury.

Let me begin by sketching the legal and empirical dimensions of the phenomenon I am examining. Property loss includes physical damage to property or impairment of its value (car crashes, house fires, the siting of a cement factory next to a residential community, a truck that will not run smoothly); past and future wage losses,

2. Abel, A Critique of American Tort Law, 8 Brit. J. L. & Soc'y 199, 210-11 (1981). In the present Article, I assume the existence of a welfare scheme extending to certain other minimum entitlements, such as housing and transportation, and, under some circumstances, entailing the ownership of a home and an automobile. Until society guarantees these minimum entitlements, I strongly favor the preservation, and indeed the expansion, of tort liability and damages, and I readily grant that any reduction would be regressive.
whether suffered as a result of physical disability or through some
other impediment (a salesperson’s car that will not function, an in-
ability to get to work because a bridge collapsed, the closure of an
employer’s factory); past and future lost profits (because capital or
labor has been damaged physically, natural resources have been im-
paired, or transportation has been interrupted); and disappointment
of more speculative expectations (such as the appreciation of an in-
vestment or an expectation of inheritance). Although it is impossible
to estimate the value of most of these losses, we do have some data
concerning the physical destruction of property and the amount of
wages lost through injury or illness. A variety of sources suggest
that these two items represent at least half of all accidental loss and
cost tens of billions of dollars a year in the United States. The an-
nual estimates by the National Safety Council consistently show that
wage loss and property damage account for the bulk of all accident
costs. In comparison, medical expenses typically represent only thir-
ten to twenty-five percent of total losses. Although medical expen-
ses are twice the value of lost wages in small cases (economic loss
less than $5000 in 1971 dollars), this relationship is reversed in seri-
ous cases (economic loss greater than $25,000), where wage and
property losses constituted fifty-seven percent and medical expenses

3. Crimes of violence as well as property crimes inflict property losses on their
victims. See A. Linden, The Report of the Osgoode Hall Study on Compensation


<table>
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<tr>
<th>Year</th>
<th>Loss</th>
<th>Wage</th>
<th>Medical Expenses</th>
<th>Insurance Administrative Costs</th>
<th>Automobile Property Damage</th>
<th>Fire Loss</th>
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<td>1980</td>
<td>22.7</td>
<td>33</td>
<td>10.3 15</td>
<td>16.6 24</td>
<td>13.4 19</td>
<td>6.2 9</td>
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<td>1979</td>
<td>20.9</td>
<td>33</td>
<td>9.2 15</td>
<td>15.1 24</td>
<td>12.1 19</td>
<td>5.8 9</td>
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<td>19.3</td>
<td>33</td>
<td>8.4 14</td>
<td>14.1 24</td>
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<td>1977</td>
<td>18.3</td>
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<td>7.5 14</td>
<td>12.3 23</td>
<td>10.1 19</td>
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<td>16.1</td>
<td>36</td>
<td>6.9 15</td>
<td>8.7 19</td>
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<td>2.9 13</td>
<td>5.9 26</td>
<td>4.7 20</td>
<td>2.3 10</td>
</tr>
</tbody>
</table>

Note: Percentage calculated on the basis of total of these rows, which omits indirect loss
from work accidents.

In a 1958 Michigan study, the following were the proportions of loss for serious auto-
mobile accidents (three weeks of hospitalization or more than $500 in medical expenses
or death or permanent impairment) and for all accidents.
thirty-eight percent of total costs. Examining the same issue from the perspective of the insurers, seventy-five percent of their premiums pertain to property loss and only twenty-five percent to personal injury. Likewise, under no-fault systems, wage losses exceed medical costs in both workers' compensation and automobile accident schemes. Pain and suffering is a trivial proportion of all but the largest tort judgments: only sixteen percent of the net recovery by victims in that half of all automobile accidents in New York City involving only slight shock and contusions. Although comparable data from the United Kingdom are unavailable, a Royal Commission study confirmed that wage losses are substantial. The Pearson report found that ninety-two percent of all those injured between June 1972

<table>
<thead>
<tr>
<th>Type of Damages</th>
<th>All Accidents</th>
<th>Serious Accidents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income Loss (past and future)</td>
<td>51%</td>
<td>67%</td>
</tr>
<tr>
<td>Expenses incurred</td>
<td>45</td>
<td>28</td>
</tr>
<tr>
<td>Property Damage</td>
<td>21</td>
<td>5</td>
</tr>
<tr>
<td>Medical and burial</td>
<td>16</td>
<td>14</td>
</tr>
<tr>
<td>Cost of seeking compensation</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Expected future expenses</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Medical</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

(N=$178.2 million) (N=$111.4 million)


Wages are about three-quarters and medical expenses about a quarter of all losses in automobile accidents, products liability cases, and medical malpractice claims. O'Connell, Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendant’s Prompt Tender of Claimant’s Net Economic Losses, 77 NW. U.L. REV. 589, 597 n.46 (1982).

In the Netherlands, two-thirds of a sample of 1000 traffic accident cases in 1967-68 dealt with damage to the car alone. A. BLOEMBERGEN, J. HERS VAN OVERN, P. VINKE & P. VAN WERSCH, DUIZEND BOTSINGEN: EEN KWANTITATIE ANALYZE VAN CIVIELFACHTEN IN VERKEERSZAKEN (1972) [hereinafter cited as A. BLOEMBERGEN].

5. U.S. DEP’T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE U.S.: A REPORT TO THE CONGRESS AND THE PRESIDENT 31-52 (1971). Jeffrey O’Connell reaches somewhat different conclusions from the same source, although the relative magnitudes of the various categories are roughly similar. In one book he states that wage and property losses account for 79% of all damage while medical expenses account for only 18%. J. O’CONNELL, ENDING INSULT TO INJURY 75 (1975). In another book O’Connell states that 46% of compensable damage is injury to property, 40% is wage loss, and 12% is medical expenses. J. O’CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 143 n.8 (1971).


and June 1975 were absent from work for more than a week, fifty-four percent for more than two weeks, twenty-six percent for more than four, and ten percent for more than nine.\textsuperscript{10} Injured workers lost an average of £189 (in 1973 pounds), but twenty-seven percent lost more than £200 and 7.7% more than £500.\textsuperscript{11} Despite the inadequacy, inaccuracy, and incomparability of these figures, they amply demonstrate that property damage, broadly conceived, accounts for the bulk of all accidental losses, greatly overshadowing medical expenses and pain and suffering. Property damage, therefore, is of sufficient economic importance to justify serious examination.

\section*{Promoting Autonomy, Equality, and Community in the Confrontation with Risk}

\subsection*{Autonomy}

In a previous article I argued that the right to personal integrity is so fundamental that we are entitled to confront the risk of its violation as autonomously and equally as possible.\textsuperscript{12} Here I want to consider what respect for those values implies in the confrontation with threat of accidental loss to property. Physical and emotional integrity clearly are essential attributes of being; their violation threatens the very core of selfhood. Therefore it is paramount that the individual should enjoy the greatest possible autonomy in confronting the possibility of such loss. In order to achieve that autonomy with respect to risks encountered in the workplace, I argued that workers had to acquire full ownership and control.

Is dominion over property integral to selfhood in the same way? I believe it is not. We view concern about personal safety as a healthy expression of indispensable egoism, although we know that this concern can become cowardice, hypochondria, and phobia when exaggerated. We have a more critical attitude toward attachment to property. These attachments often are associated with antisocial

\begin{itemize}
  \item \textsuperscript{10} Royal Commission on Civil Liability and Compensation for Personal Injury, II Report 12 (1978) (Cmd. 7054-I) [hereinafter cited as Royal Commission]. Road accidents causing only property damage are six times as common as those that also cause some physical injury, however slight. P. Atiyah, Accidents, Compensation and the Law 220 (1970). In a recent survey of the clients of a program intended to reach personal injury victims who ordinarily do not seek compensation, 55% were affected by their injuries for more than two months and three-quarters for more than a month. H. Genn, Meeting Legal Needs? 17 (1982).
  \item \textsuperscript{11} Royal Commission, supra note 10, at 112.
  \item \textsuperscript{12} Abel, supra note 1.
\end{itemize}
greed, miserliness, and neurotic obsession. Every society accords respect to individuals who are unencumbered and unconcerned with property—Christian saints, Indian holy men, Bohemian artists. Many societies regard asceticism as an important ideal, if not one that every person can attain. No society extols similar disregard for personal integrity, although it may idealize a particular individual who sacrifices his or her own life to save another. Consistent indifference to personal safety is associated with immaturity, alcoholism, drug addiction, and insanity. We can understand the deliberate destruction of property in pursuit of profit—such as arson committed on an overinsured building of diminishing value—though we may punish it as fraud. After all, how different is such an act from the continual destruction of both the natural and the constructed environment in the name of progress? But we find it hard to comprehend self-mutilation except as a means of avoiding even greater threats to autonomy—service in the Czarist army, for instance.

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13. We may make an exception for property that represents an extension of self through the exercise of personal labor and creativity, works of art, the creation of home or garden—or perhaps a customized car. We feel differently about the accumulation of wealth or the consumer goods that wealth can buy, whether these are fungible mass products or unique "collectibles."

One of the very few American cases granting damages for emotional loss caused by accidental injury to property concerned a home the owners had built themselves. See Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970). Certainly we recognize that intentional destruction of property can be perceived as a personal assault by both aggressor and victim. In the film Shoot the Moon (Metro Goldwyn Meyer Productions 1981), the estranged husband returns to the family home to find himself supplanted by a young contractor his wife has hired to build a tennis court. He responds by destroying the tennis court with his automobile, which in turn drives the contractor to physical violence.

Margaret Radin has offered a subtly nuanced distinction between property she associates with personhood and merely fungible property, by arguing that the former deserves greater protection. Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982). Radin is almost exclusively concerned with intentional invasions of property rights, where I agree such a distinction is helpful. With respect to unintentional invasions, however, I believe we best can protect what she calls "personal" property by guaranteeing individuals the resources necessary to purchase what society judges to be the minimum entitlement to necessities.

14. In this respect American capitalism may have achieved a debasement of human autonomy comparable to that found in pre-revolutionary Russia (or among paupers in medieval Europe or third-world countries today), for Americans also mutilate themselves, not to evade the grasp of autocratic power but in a cruel parody of capitalist greed. A Californian recently had two of his companions hack off his leg with an axe in order to simulate a motorcycle accident and collect insurance. See also J. O'CONNELL, supra note 6, at 16-17. More comprehensible was the suicide of a 42-year-old man who had squandered some $600,000 his father had sent from Iran to invest in preparation for the day when the father emigrated. Learning that his father finally was planning to move to the United States, the son took out a one million dollar double indemnity life insurance policy, left a set of elaborate hints that his life was threatened by terrorists, and then blew himself up with an explosive in his car. L.A. Times, Jan. 5, 1984, § II, at 1, col. 1.

It is, perhaps, quintessentially American to simulate injuries. In a nice example of the exploiters exploited, three Los Angeles men have been charged with securing advances of thousands of dollars for living and medical expenses from personal injury plaintiff's attor-
slapstick comedy is the destruction of property, such as chairs, violins, cars, houses. But the dismemberment or destruction of a person never is comic, except in cartoons where the victim always is miraculously made whole again. We cannot imagine a society that deprives individuals of all control over the personal risks to which they are exposed, although we do tolerate some restrictions. But would we view holding property at one's own risk as an equal affront to human autonomy? This seems much more a distributional question—whether to make property owners richer or poorer—than a matter of ultimate values. Indeed, we can take this argument fur-

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ther and consider whether it might violate the autonomy of those who do not own property to compel them to take care of and pay for damage to property owned by others. In an earlier article, I argued that the values of autonomy and equality could be reconciled despite the apparent tension between them. Here I suggest that extending negligence law to unequally distributed property is unacceptable because it infringes the autonomy of those who own little or no property.

Exposing property to the risk of accidental injury may not violate autonomy because owners may wish to express that autonomy by placing their property at risk. A similar argument often is advanced with respect to personal integrity. Economists insist that the world is made up of risk-averse and risk-preferential individuals and that the latter enjoy subjecting themselves to the risk of bodily harm (or at least mind it less than the former). Certainly there are realms of behavior in which many of us take pleasure from activities involving some degree of risk. Recreational pursuits offer many examples, although I would argue that our enjoyment would be enhanced, not diminished, by reducing or even eliminating the risk. Furthermore, there may be a few individuals, such as Houdini or Evel Knievel, who like to court danger in everything they do. I tend to be skeptical, however, about the economist’s “risk preferrer,” especially in environments where choice clearly is constrained, such as the workplace and the marketplace for many consumer goods. Workers expose themselves to carcinogens not because carcinogens add spice to their work but because the workers have no other way to earn a living (or at least as good a living) and a superior has ordered the workers to submit to the exposure. I drive my car to the shopping center not because I like to dodge the crazies on the freeway but because Los Angeles has woefully inadequate public transportation. When we turn from personal integrity to property, however, I find the construct of a “homo aleator” a good deal more plausible.

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that the injury in the second case was death rather than property damage, although other cases do protect property against ultrahazardous activities.

16. See Abel, supra note 1, at 718-19.


18. The United States Parachute Association has a membership of 17,000, which it estimates represents about half of all active divers in the country. Last year there were three million jumps and 29 recorded fatalities. Interviews with sky divers suggest that they would jump more often, and others would join them, if the sport could be rendered safer, L.A. Times, Dec. 6, 1983, § I, at 3, col. 4.

Many people enjoy the speculative pursuit of wealth, whether this means buying a lottery ticket, collecting supermarket stamps in the hope of winning a prize, feeding quarters into a slot machine, or buying and selling stocks. Here there is none of the compulsion that constrains the worker, or the consumer dependent on necessities in an economy characterized by extreme division of labor.

Earlier I argued that autonomy in the confrontation with risks threatening personal integrity required fundamental social change—worker ownership and control of the means of production and collectivization of consumption. But I do not see that value as mandating or even justifying collective intervention in the confrontation with risks to property. First, accidental damage to property does not violate the core of being. Hence the value of autonomy does not require that tort law protect property against accidental loss. Second, there are situations in which people actually choose to place their property at risk, and respect for their autonomy may require that we allow them to bear their losses. Furthermore, as I shall argue later, it is difficult to identify these situations. The most that can be deduced from autonomy, therefore, is that it fails to provide arguments for tort liability. Arguments against liability turn on other values.

Equality

The second value by which I believe the encounter with risk should be judged is equality. When personal integrity is threatened, equality is simply a recognition of our common humanity. We readily acknowledge the imperative of equality when the risk is extreme, public, and widely shared—as in compulsory military service during wartime. Few would argue that exemptions from military service should be sold or substitutes purchased, as occurred in nineteenth-century Europe and America. Indeed, we remain quite uncomfortable about the extent to which class, ethnicity, and gender

20. For an account of professional poker players, see A. Alvarez, The Biggest Game in Town (1983); for traders on the futures market, see N.Y. Times, Dec. 4, 1983, § 6 (Magazine) at 8, 71; N. Kleinfield, The Traders (1984). The authors clearly admire their subjects.
21. Abel, supra note 1, at 719-51.
23. For a fuller development of this argument, see Abel, supra note 1, at 710-17.
correlate with the incidence of military service and casualty rates. There is widespread revulsion when wealth and poverty determine entitlement to health and safety, for example when the poor are denied medical care or when the market allocates human organs for transplantation, as occurs in Brazil and has been proposed by an American physician.\textsuperscript{24} Our tort law is solicitous of those who are unusually susceptible to physical injury because their disabilities make it difficult for them to exercise the average degree of care for themselves (for example, infants, the blind). Additionally, an injury that would be trivial for the ordinary person has much more serious repercussions for hemophiliacs or those prone to schizophrenia. We individualize the standard of care which the former must display\textsuperscript{25} and compensate the latter in full for their aggravated injuries.\textsuperscript{26} In other words, we respect the fundamental human equality that underlies superficial physical or psychological differences by treating unequals unequally rather than by responding with a mechanical uniformity that would compound the inequality.

If our common humanity mandates that personal risk should be distributed equally (and redistributed if necessary to achieve such equality), enormous disparities in the enjoyment of property argue \textit{against} protecting it "equally." The distinction between the essential equality of people, which demands an equal response, and the inequality of property, which warrants different responses, is nicely illustrated in \textit{The Merchant of Venice}. Shylock commands the sympathy of all listeners when he denounces Antonio for treating him (unequally) as a Jew:

\begin{quote}
Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? if you tickle us, do we not laugh? if you poison us, do we not die?
\end{quote}

But he forfeits that sympathy by what follows: "if you wrong us, shall we not revenge?"\textsuperscript{27} The injustice of his position becomes obvious the more he presses his legal rights ("I crave the law, /The pen-

\textsuperscript{24} \textit{Id.} at 715 nn.88-89; see also supra note 13.
\textsuperscript{25} See, e.g., Peterson v. Taylor, 316 N.W.2d 869 (Iowa 1982) (age); Mochen v. State, 43 A.D.2d 484, 352 N.Y.S.2d 290 (1974) (insanity). We do not, however, adjust the standard of care to the wealth or poverty of the actor. In Denver & Rio Grande R.R. v. Peterson, 30 Colo. 77, 88, 69 P. 578, 581 (1902), the court acknowledged that "[t]he care required of a warehouseman is the same, whether he be rich or poor."
\textsuperscript{26} See e.g., Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) (schizophrenia). The law is not equally solicitous of property damage. See infra note 106 and accompanying text.
\textsuperscript{27} W. Shakespere, \textit{The Merchant of Venice}, *act III, scene 1, lines 54-61.
\textsuperscript{28} \textit{Id.} at *act III, scene 1, lines 61-62.
alty and forfeit of my bond")\(^{29}\) with the apparent, but actually treacherous, support of Portia: “there is no power in Venice/Can alter a decree established;/Twill be recorded for a precedent,/And many an error by the same example/Will rush into the state.”\(^{30}\) It is clear Shylock has no moral claim to the legal penalty for Antonio’s failure to pay his debt, and even his legal right is fatally compromised. He cannot justify violating Antonio’s bodily integrity by invoking his own mere property loss.

For a regime to respond equally to legal subjects who are grossly unequal is to reproduce that inequality, both materially and symbolically. This is one of the classic dilemmas of liberal thought, which condemns state sanctioned inequality while condoning inequality in civil society. Just as both rich and poor are forbidden to sleep under the bridges of the Seine, so the law extends to both its protection of their Rolls Royces against automobile crashes, their mansions against accidental fires, their hunting meets against any behavior that might reduce the population of foxes, and their speculations in the market for old masters against the negligence of an art consultant who fails to spot a forgery. In doing so, it translates inequality in one realm (property ownership) into inequality in another (the exercise of state power).\(^{31}\) Nor can the victim base a claim to protection on the fact that the risk to which he is exposed is not reciprocal,\(^{32}\) for the asymmetry is attributable not to the behavior of the causal agent but rather to privileges enjoyed by the person who suffers property loss. Earlier I argued that equality in confronting risks which threaten personal integrity required a breakdown in the division of labor through job sharing and job rotation in the workplace and equalization of income and wealth in the marketplace.\(^{33}\) For the same reasons I conclude that we best can promote equality in the confrontation with risks threatening property simply by refusing to protect property against accidental damage.\(^{34}\) Or, to put the same

\(^{29}\) Id. at *act IV, scene I, lines 203-04.

\(^{30}\) Id. at *act IV, scene I, lines 216-19.


\(^{32}\) Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).

\(^{33}\) See Abel, supra note 1.

\(^{34}\) Property losses suffered by the poor will affect them more severely than those suffered by the rich, thereby aggravating inequality if left uncompensated. Poor people are likely to invest higher proportions of both net worth and income in material property, which can be destroyed physically, whereas the wealthy may have a higher proportion in savings, stocks and bonds, etc. My response would be social insurance guaranteeing a minimum income and other necessities (housing, car), which would protect the poor but
point differently, the value of equality can justify protecting property only when that property is distributed equally.

Community

In my earlier article, I did not explicitly identify community as a value by which to assess the confrontation with risk. I did, however, endorse collective forms of production and consumption (worker and consumer cooperatives), which clearly embody that value. The three values are interdependent: individuals must feel autonomous and equal before they can begin to create a community, while only through collective action can autonomy and equality be preserved. Like the other two values, community also has different implications for threats to personal integrity and to property. It is only with respect to our shared humanity that “no man is an Island, intire of it selfe”35 or “a wrong to one is a wrong to all.”36 Risks to which all are exposed equally evoke a powerful sense of community, which is expressed in the collective response to such injuries after they occur. Consider the virtually unlimited resources society devotes to rescuing an identifiable individual trapped in a mine or cave, at sea or on a mountain,37 or the generosity a community shows when its members have suffered in a flood, an explosion, or a fire.38 A further example would be the spontaneous outpouring of gifts, both preventative—when a child needs an expensive operation in order to live—and consolatory—after a family has experienced a tragedy, such as the death of a member.

Risk or damage to mere property does not elicit this powerful sense of community.39 One reason may be that property is not viewed as an extension of self. Thus, observers do not experience the threat empathetically as endangering the shared humanity that is the bedrock of community. Indeed, insofar as property ownership expresses the self, it accentuates individuality and thus undermines community. Individuals who have isolated themselves from others by conspicuously enjoying the privileges of property hardly can make a

35. J. Donne, Devotions Upon Emergent Occasions (1625), quoted in E. Hemingway, For Whom the Bell Tolls (epigraph) (1940).
39. But see infra the important qualification in note 42 and accompanying text.
convincing claim that those others should protect or restore the damaged property in order to preserve those privileges. Because the unequal distribution of property also subverts community, a collectivity would be engaging in self-destructive activity if it sought to perpetuate that inequality. Indeed, when a privileged person suffers property loss, thereby reducing previous inequalities, the response often is indifference, or even ill-disguised satisfaction, rather than sympathy.\footnote{It is revealing that cartoons of tophatted stockbrokers jumping to their deaths from Wall Street skyscrapers following the crash of 1929 are intended to be, and are read as being, humorous, though nobody otherwise would laugh at the plight of physical injury. Acts of personal or group sacrifice to save another are viewed as expressions of altruism. In these situations, asking for compensation, even accepting it, would be unseemly, though social recognition certainly is appropriate. People are much less willing to risk their lives or even their property to protect the property of another. If they do so and suffer loss in the process, they feel perfectly justified in claiming compensation.\footnote{Threats to property or loss of property elicit a collective response only where the values of autonomy and equality also are respected: for instance, where the property is an extension of self (a home, a family farm, a kibbutz), and the circumstances of the victim are similar to those of the people who come to the victim's rescue or relief.\footnote{Conversely, it is noteworthy that even the most advanced welfare states do not offer collective protection to inequalities of property. Furthermore, when disaster aid for property damage is dispensed, there always is a ceiling on what can be claimed.\footnote{A recurrent theme in literature is a privileged character, estranged from a loved one or community by reason of that privilege, who loses everything and is reunited with the other or the community. M. Drabble, The Needle's Eye (1972), with its biblical title, is an example (though there the heroine gives away her wealth). C. Dickens, A Christmas Carol (1843) reflects a similar theme.\footnote{See, e.g., Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910). What is deemed property may depend upon cultural elements. Recently, American newspapers reported a tragedy in which a dog was washed into a heavy sea at an English resort, and several people drowned in efforts to save it. The American press viewed the behavior of the rescuers as bizarre, whereas it was clear that English sentiment found such heroism admirable.\footnote{The history of the American frontier is full of such incidents. The children's books of Laura Ingalls Wilder, for instance, offer many such examples. On another frontier, Amos Oz's story, A Hollow Stone, describes the response of other kibbutzim and the kibbutz movement when one of them is devastated by an unusual windstorm. See Oz, A Hollow Stone, in Where the Jackals Howl and Other Stories (1981).\footnote{Butler & Doessel, Natural Disaster Relief and Horizontal Equalization in Australia, 13 Publics 55 (1983). Many no-fault schemes for compensating automobile accidents or injuries at work impose a ceiling on the amount of income loss they will}}}}}}
Thus I conclude that communities feel no responsibility to protect inequalities of property from accidental loss or to restore them after the fact. Any effort to do so only undermines the sense of community.

**COMPENSATING THE VICTIMS OF ACCIDENTAL PROPERTY DAMAGE**

The previous discussion assumed tacitly that preventing loss is more important than compensating the victim, because it is impossible to restore to the status quo ante someone who has suffered physical or emotional injury. In these situations, money damages are a very inadequate substitute. The same is not true of property loss. Money is a perfectly acceptable replacement unless the damaged property is unique (a dwindling category in our mass consumer society). Therefore it makes sense to be more concerned with compensating the victims of accidental property loss and less concerned with reducing property damage to some optimum level or with redistributing the irreducible residual risk so that those exposed to it are autonomous, equal, and communal. In any case, this question has to be asked with respect to losses that continue to occur after risk has been reduced to an optimum level and reallocated in some principled fashion. For present purposes I will concentrate on the two polar answers, strict liability and strict non-liability, ignoring the compromise of negligence. The former response can be found (or hinted at) in cases concerning ultrahazardous activity and products liability, the latter in doctrines that antedate the emergence of liability insurance.

**The Expansion of Tort Liability for Personal Injury**

Injuries may be compensated through either social insurance or tort liability. The first might be dismissed as a lost cause. Movements for comprehensive social insurance, though successful in New Zealand, have failed in the United Kingdom and Australia. In

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44. See infra notes 185-92 and accompanying text.
47. Ogus, Corfield & Harris, Pearson: Principled Reform or Political Compromise?, 7 Indus. L. J. 143 (1978).
North America, social insurance has been limited to a few Canadian provinces⁴⁹ and never got off the ground in the United States.⁵⁰ On the other hand, there has been an extraordinary expansion of tort liability, which might be turned to the advantage of victims of property loss. The cumulative effect of recent American decisions has gone far to make the liability insurer of the defendant (or the self-insured defendant) a no-fault or loss insurer for personal injuries of the victim. Categories of victims who previously would have been barred have been allowed to recover. They include social guests and trespassers injured by a negligent condition on the land of another,⁵¹ victims who are guilty of contributory fault or who assumed the risk or who have signed exculpatory clauses,⁵⁴ a fetus in utero,⁵⁵ and bystanders injured by a defective product.⁵⁶ The standard of care to which defendants are held has become more stringent due to the extension of res ipsa loquitur,⁵⁷ the application of negligence standards to the exercise of professional judgment,⁵⁸ and the expan-
sion of strict liability for ultrahazardous activity and defective products. The number of potentially liable defendants has increased with the abolition of charitable and intrafamilial immunity, the contraction of sovereign immunity, and the liberalization of the concept of proximate cause. The doctrine of joint and several liability allows the victim to recover in full from any solvent tortfeasor. Compensable damages have proliferated to include recovery for emotional distress incurred without physical impact and without any physical consequences. Courts have awarded compensation for fear for one's own safety or the safety of others, damage to an intimate relationship (whether the loved one dies or survives impaired), and even wrongful life.

Perhaps more relevant to the present topic is the increasingly explicit judicial invocation of insurance as the best solution to the problem of injury. A number of recent decisions have justified the imposition of liability on the ground that the defendant is likely to be insured.

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60. Recent California decisions have reintroduced fault principles while shifting to the defendants the burden to disprove negligence. Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (reintroducing comparative fault of plaintiff as a defense). They also have extended the regime to new fact situations. See, e.g., Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972) (furnished apartment).

61. For example, holding a remote (but solvent) tortfeasor responsible for the conduct of a proximate (but insolvent) defendant. See Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980) (building site contractor liable for failure to protect worker against driver who suffered epileptic seizure). Thus, the doctrine of joint and several liability allows the victim to recover in full from any solvent tortfeasor. A broad construction of respondeat superior also achieves the same end, see, e.g., Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (1975) (employer liable for assault by employee).


64. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).


66. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (parents recover for medical expenses and emotional distress of bearing and raising deaf child who would not have been conceived but for defendant’s negligence; child recovers for additional medical costs after majority).

67. See, e.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (“the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business”); Rowland v.
average of both parties before deciding whether to set off the injuries of one against those of the other. Where insurance is present, it is treated more like a status relationship (that is like social insurance) than a creature of private contract law. In one case, a settlement was reopened where the victim discovered injuries he could not have known about at the time of the agreement. Insurance contracts have been liberally construed to cover a victim’s accident: one court held that a stepson was not a “family member,” another that a claim based on the negligent entrustment of a motorbike by a father to his child did not pertain to the father’s "ownership, maintenance, operation [or] use" of the motorbike. A liability insurer was not allowed to repudiate an insurance contract after an accident, on the ground that the insured had made a material misrepresentation in applying for the policy. Courts have ruled that the insurer will be denied any right of subrogation unless it is clearly specified in the

Christian, 69 Cal. 2d 108, 111, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968) (“availability, cost, and prevalence of insurance” are factors to be considered); Petition of Kineman Transit Co., 338 F.2d 708, 725 (2d Cir. 1964), cert. denied, 380 U.S. 944 (1965) (“Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago”); Bing v. Thunig, 2 N.Y.2d 656, 664, 143 N.E.2d 3, 7, 163 N.Y.S.2d 3, 9 (1957) (“the availability of insurance to protect against possible claims and lawsuits”); Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173 n.4 (2d Cir. 1970) (“[t]he seeming severity of this doctrine is mitigated by the prevalence of liability insurance which spreads the risks”). In Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971) the court quoted W. PROSSER, HANDBOOK OF THE LAW OF TORTS 889 (3d ed. 1964), “[T]he suit is in reality aimed not at the defendant family member but at his insurance carrier. In such case, the tort action poses no threat whatever to family tranquility; in fact, ‘domestic harmony will not be disrupted so much by allowing the action as by denying it.’”

68. Jess v. Herrmann, 26 Cal. 3d 131, 604 P.2d 208, 161 Cal. Rptr. 87 (1979). See also Ard v. Ard, 414 So. 2d 1066, 1067 (Fla. 1982) (parental immunity to suit by child waived only “to the extent of the parent’s available liability insurance coverage”). Many judges, however, still refuse to allow the jury even to hear the word insurance mentioned. See, e.g., Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980) (trial judge correctly prevented plaintiff’s attorney from asking prospective jurors whether they held stock in or were employed by insurance company).


70. Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982) (holding that a stepson who lived with the insured and was treated as a natural child was not a family member where a policy excluded damages for a bodily injury to the insured or to any member of the family of the insured residing in the same household as the insured).


Limited social insurance schemes like workers' compensation have been construed broadly to include the intentional killing of one employee by another and the suicide of an employee following a work-related injury. The refusal of an insurer to perform (to make good the losses of an insured or those of a victim to whom the insured is liable) has become one of the very few breaches of contract for which tort damages will be awarded. As a result, the liability insurer may be held responsible for the full damages of the victim even if these greatly exceed the policy limits.

The Distributional Consequences of Tort Liability for Accidental Property Loss

Even if it would be politically naive to contemplate a scheme of comprehensive social insurance, there appears to be considerable momentum for expanding tort liability so that some insured, or self-insured, defendant will bear the loss. Should we endorse and encourage this development where the damage is to property rather than personal integrity? I believe we should not because tort liability for property loss reinforces the unequal distribution of property and the values that support and are supported by this distribution.

Tort damages for property loss have several distributional effects. First, consider a two-car collision in which each driver is fifty percent at fault and the jurisdiction follows comparative fault principles. A is driving a Rolls Royce worth $100,000 and enjoys a salary of $200,000 a year. B is driving a wreck worth fifty dollars and lives on a pension of $2000 a year. Both cars are demolished and both drivers totally disabled. Each has compulsory liability insurance. Assuming that their driving records are equivalent and no other factor justifies attributing a greater risk potential to one than the other, they will have paid the same liability insurance premiums. This means, however, that B will be paying a premium much higher than would be necessary to protect the property and income he enjoys while A will be paying a premium much lower than would be necessary to protect the property and income he enjoys. Compulsory liability insurance makes sense when it protects personal integrity (because people are equally vulnerable). When protecting property,
however, it functions as a form of regressive quasi-public taxation to
generate the reserves necessary to preserve the existing, unequal dis-
tribution of property (both wealth and income).

The same point can be made by analyzing the well-known case of
H.R. Moch v. Rensselaer Water Co. In Moch, the defendant water
company was charged with negligent failure to provide water pres-
sure sufficient to allow a fire department to extinguish a fire that
consumed the property of the plaintiff. Judge Cardozo denied liabil-
ity on two grounds: the plaintiff was not an intended third-party ben-
eficiary of the defendant's contract to provide the city with water;
and the defendant was guilty of nonfeasance, not misfeasance. Had
liability been imposed, the property damage caused by (some) fires
would have become the cost of water (since the water company held
a natural monopoly). Consequently, liability would have been borne
in proportion to the water consumed (most heavily by farmers, for
instance, or the municipal swimming pool, or paper manufacturers)
rather than in proportion to the risk of property loss (in which case it
might fall most heavily on the owners of large estates or of paint
warehouses). Let me adapt the facts of Moch slightly to my own
environment—Los Angeles. Let us suppose the following situation:
(1) the fire department is liable for negligent failure to extinguish
fires (this is not California law); (2) fires are less common and less
destructive on the flatlands where more people live than on the hills
populated by movie moguls and entertainment stars (this certainly is
true of brushfires in the hot, dry fall); and (3) the fire department
obtains its revenues (from which it discharges its liabilities) through
an ad valorem property tax (this is at least partly the case). As a
result, the masses who suffer the smog, crime, and congestion of ur-
ban Los Angeles will be paying part of the cost of protecting and
compensating the few who enjoy the clear air and ocean views of the
hills.

courts often use a crude rule of thumb that "generals" (intangible injury or pain and
suffering) are between one and two times "specials" (medical expenses and lost earn-
ings). Thus B's liability insurance premium also is inflated in order to compensate A's
pain at a higher level than B's own pain will be valued.

79. This, of course, is what Calabresi calls the problem of "what is a cost of
what?" G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS
Part III (1970). Calabresi engages in an economic analysis by asking who is the cheapest
primary accident cost avoider. I am more concerned with the distributational issue of who
should be made richer or poorer, which is inescapably a political question.
80. An example of the distributional consequences is a one billion dollar claim
made against Los Angeles County by some 200 property owners in Malibu alleging that
An analogous situation can arise with respect to services offered by the private sector. Suppose a lawyer drafts two wills, virtually identical in form and taking the same amount of time and effort; one for C, who is worth $1000, and the other for D, who is worth one million dollars. Because the lawyer (correctly) fears he may be held liable to potential heirs if his negligence invalidates the will or causes undesirable tax consequences, he takes out malpractice insurance. If the lawyer charges C and D comparable fees for comparable work and incorporates an equivalent proportion of his malpractice insurance premium in each bill, C will be paying to protect D's heirs, who stand to gain or lose a benefit vastly greater than that of C's own heirs. Or take another example that lies beyond the frontiers of present tort law but in which liability could be imposed through a straightforward extension of decided cases. A newspaper columnist negligently offers erroneous financial advice in a weekly column. Two readers invest in reliance on this advice, E losing $1000 and F losing $100,000. Liability for the loss (paid from self-insurance reserves or by a liability insurance policy, which results in higher premiums) will cause an increase in the price of the paper borne equally by investors E and F as well as by non-investor readers, together with an increase in advertising rates, ultimately borne by the consumers of advertised products.

a hillside belonging to the county slid, thus damaging or endangering their land. The property owners sought compensation for both property damage and emotional distress. Individual claims ranged from $3-500 million. L.A. Times, Dec. 22, 1983, § 4, at 1, col. 3.

81. See supra note 58.

82. One objection to this argument is that the market will compel lawyers to allocate insurance premium costs to each transaction in proportion to the risks generated because otherwise competitors will undercut the price of low-risk transactions. This seems implausible for several reasons. First, it is difficult if not impossible for a lawyer to know how much risk any given transaction generates. Second, the apportioned risk premium almost certainly is too small in comparison with the total legal fee significantly to affect the overall price of the services. Third, most testators are not repeat players. Fourth, and most important, lawyers do not engage in meaningful price competition. Even after Bates v. State Bar of Ariz., 433 U.S. 350 (1977), price competition continues to be discouraged by the legal profession. As a result, little competition actually occurs, and there are enormous disparities in fees for equivalent services within the same locality. Furthermore, lawyers generally do not inform their clients what the fee will be until after the transaction is completed. For a look at compliance with the Bates decision by state bar associations and supreme courts, see Andrews, Lawyer Advertising and the First Amendment, 1981 AM. B. FOUND. RESEARCH J. 967. On lawyer behavior and the extent of price competition, see S. Cox, W. Canby, & A. DeSerpa, LEGAL SERVICE PRICING AND ADVERTISING (1978); S. Cox, THE PRICE EFFECTS OF ATTORNEY ADVERTISING REGULATIONS (1982-83); Cox, Canby & DeSerpa, Consumer Information and the Pricing of Legal Services, 30 J. IND. ECON. 305 (1982).

To offer an illustration from another profession, the fee dentists charge for coating the surface of a tooth with plastic sealant varies from $4 to $100 a tooth. L.A. Times, Dec. 8, 1983, § 1, at 3, col. 3.

83. A California court of appeal recently held an estate agent liable to a purchaser for the loss of value of a house caused by land slippage that the agent reasonably
The tendency of tort law to translate inequalities of property into inequalities of power in other spheres can be illustrated by two disparate examples involving the law of nuisance and damages for lost earnings following personal injury. When owners of adjacent parcels seek to put them to incompatible uses the landowner whose use is more "productive" (that is, capable of producing a higher rate of profit) can compel his neighbor to surrender an incompatible use (although the former may have to pay compensation if use by the latter was prior in time).84 Thus a question of competing values is transferred from the realm of politics, where democratic theory accords each party an equal voice, to that of economics, where unequal property entitlements can determine outcomes. The fact that damages for personal injury are a function of income has a similar effect: it makes the safety of those who enjoy high incomes more valuable than the safety of those who earn low wages and, a fortiori, of those without any earned income or prospect of it. When cost-benefit analysis adopts a similar concept of human worth, the resulting regulatory decisions often reproduce inequalities of income in allocating safety.85

The Symbolic Message of Damages for Property Loss

At the same time that tort law affects the allocation of resources (safety in confronting risk, compensation following injury), it also reinforces the system of symbols and values by which this allocation is justified. Tort damages for property loss affirm the justice of the existing distribution of property. The award of damages signifies that property interests are as important as physical and emotional integ-

84. See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972); Calabresi & Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). In balancing competing interests, the market weighs only those that have been or can be commodified. In politics, by contrast, other values may be given weight. It is the crudest kind of economic reductionism to assume that, because our society uses the market for some purposes, it does or should use it for all. See G. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976); R. BRENNER, HISTORY—THE HUMAN GAMBLE (1983).

rity and (by extension) that property can and should be loved in the same way we love other people. Indeed, to the extent that property losses are more easily quantified than so-called "intangible" injuries and thus more readily translated into money (the only remedy our legal system offers), tort damages declare that values expressed in market terms are superior to those that cannot be. Tort damages for property loss declare that the importance of a victim or potential victim depends on how much the victim owns and earns, now and in the future. Tort law makes it appropriate, indeed inevitable, that inequalities of property will be translated into the political sphere, where they will influence decisions about property use, safety regulations, and the allocation of public services.

Proponents of tort damages for accidental property loss might argue that even if such damages contribute to the existing distribution of property and reinforce its legitimacy, the contribution is minor. If we were to withdraw the protection of tort law (as I propose at the end of this Article), the distribution of property would not change significantly. Those who enjoy property could protect their privileges through contract (including insurance contracts), although they would have to incur the cost. Property owners still would be able to exert disproportionate influence over the political process and the allocation of public services. The distribution of wealth and power would continue to draw symbolic support from other bodies of substantive law (such as contract and property). Furthermore, it is both arbitrary and inefficient to redistribute wealth and power through the chance occurrence of accidental loss.

Each of these arguments assumes that the burden of persuasion is on those, like myself, who advocate change. On the contrary, I believe it is the apologists for the present system who must justify it. The imposition of tort liability for accidental injury to property represents an exercise of state power, both coercive and symbolic. It signifies that the victim is entitled to the lost property and that the defendant is responsible for restoring it because he has committed a wrong. Property is taken away from the defendant and given to the victim. Unless strong arguments can be presented for using state coercion or for allying the state with this particular set of values, tort damages for accidental property loss lack legitimacy. It would be false naivete, if not hypocrisy, to criticize my proposal for doing too little to redistribute property unless the critic can propose another strategy that will be more effective and has a greater chance of implementation.86

86. One merit of my proposal is avoidance of certain obvious political obstacles. First, it calls for the withdrawal, not the expansion, of state power. Second, it addresses the judiciary, which is somewhat disposed to hear principled arguments, rather than the legislature, which is far more responsive to pressure groups, especially those that wield

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"The Safety of the Person Is More Sacred Than the Safety of Property"87

In the preceding section, in order to heighten the tension between our present legal regime and my misgivings about the distribution and centrality of private property in our society (an uneasiness I believe is widely shared), I portrayed tort law as though it extends its protection to property enthusiastically and without reservations. In fact, the law displays considerable ambivalence toward property loss. In many diverse areas tort law withholds from property the degree of protection it grants to personal integrity. When defendant liability is predicated on the manufacture or sale of a defective product, a victim who suffers only economic loss may not be able to recover in tort, particularly if there is no risk of physical injury. In comparison, a victim who suffers or is threatened with physical injury may be able to recover economic loss as well.88 Courts that compensate for physical damage to property are unwilling to allow the owner of a capital good to recover for anticipated profits lost during the period it was rendered inoperable.89

Courts have been more cautious in finding that an economic loss was foreseeable than in making that finding about a physical injury.90 The worker who suffers physical injury and lost income can recover for both, but employers cannot recover lost profits as a result.91 A spouse, parent, or child who experiences emotional distress because the other spouse, child, or parent is injured or killed can recover in tort.92 There is no equivalent protection for negligent damage to a partner in a commercial relationship, even if the other partner suffers equivalent emotional distress.

In recent years, courts have emphasized that they are recognizing and protecting personal relationships, not purely pecuniary interests. Although the death of a child may confer a net economic benefit on

92. See cases cited supra note 65.
the family, parents still can recover for loss of society, companionship, and affection. A victim can recover damages for fear of injury to self or for emotional distress caused by witnessing an injury to a loved one, but not for fear of injury to property or for witnessing the destruction of property, even a possession so invested with emotion as a household pet. The sole exception to this rule reaffirms the underlying principle: a bereaved person can recover for injury to the corpse of the deceased, not because property has been damaged (there is no property interest in a corpse) but because the injury aggravates the rupture of the interpersonal relationship.

A psychiatrist has a duty to warn a potential victim who is physically threatened by a patient the psychiatrist has treated but not those threatened only with loss of property. The state assumes that the value of self-preservation is so strong and so widely held that it criminalizes suicide and devotes substantial resources to restraining and caring for potential suicides.

93. Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); Ahrenholz v. Hennepin County, 295 N.W.2d 645 (Minn. 1980) ($100,000 award for death of month-old child to compensate parents for loss of potential guidance in their old age). It costs a middle-class family more than $300,000 to raise a child from conception to financial independence. For an historical analysis of the transformation of the child from an economic to an emotional asset, see V. ZELIZER, PRICING THE PRICELESS CHILD (1986).


95. See Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

96. Van Patten v. Buyce, 37 A.D.2d 448, 326 N.Y. S.2d 197 (1971) (plaintiff was awakened when truck crashed into her house; she saw all her china and crystal wedding gifts destroyed). But see Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (emotional distress damages awarded when owners built their home themselves), and Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976) (car crashes into house damaging it and contents, threatening plaintiff's husband, and causing plaintiff to injure self).


98. See, e.g., Corrigal v. Bail & Dodd Funeral Home, Inc., 89 Wash. 2d 959, 577 P.2d 580 (1978) (son's cremated remains placed in plastic sack through which mother rummaged, looking for non-existent burial urn). The notion that personal injury can be suffered through an affront to the body of a deceased relative is as old as classical Greece, as illustrated in Sophocles's Antigone. That the law is concerned with emotional distress is clear from the cases allowing recovery for negligently misinforming next-of-kin of a death. See, e.g., Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).


101. In the fall of 1983 the State of California was involved in the trial of a cere-
prison wardens and even hotelkeepers) responsible for exercising reasonable care to prevent suicide.\textsuperscript{102} The state makes doctors liable for failing to report child abuse.\textsuperscript{102} It also assumes that an unconscious patient would consent to the emergency treatment necessary to save his or her life.\textsuperscript{104} The state overrides the refusal of parents to consent to the treatment of a child whose life is imperilled, even when their refusal is based on religious grounds.\textsuperscript{106}

We outlaw such extreme invasions of personal integrity as prostitution, sadomasochism, and slavery (even if we continue to tolerate them). But there are no comparable restraints on the right of an owner to destroy property.\textsuperscript{106} A parent who withholds nourishment or nurturance or otherwise endangers a child will be deprived of custody and eventually of parental rights; but a parent freely can waste or destroy an estate or disinherit a child. The respect we feel for personal integrity is evident in the constitutional limitations on state actions that threaten such fundamental expressions of autonomy as freedom of speech and religion, political association, and privacy. By contrast, the state has broad discretion to act in the name of economic regulation, although it may have to compensate property owners.\textsuperscript{107}

Tort law continues to expand its protection of personal integrity while declining to treat property interests in the same manner. Thus the "thin-skull" rule protects a victim against any physical or emotional injury, no matter how idiosyncratic the victim's reaction.\textsuperscript{108}


\textsuperscript{103} Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).


\textsuperscript{105} In re Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978); In re Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979).

\textsuperscript{106} This is less true today, not because we are paternalistic toward the property owner but because we are beginning to socialize private property, recognizing that others have an interest in historical landmarks, works of art, environmental amenities, etc.

\textsuperscript{107} The increasing scope of constitutional protection for commercial speech runs counter to this distinction. For a critique, see Tushnet, Corporations and Free Speech, in The Politics of Law 253 (D. Kairys ed. 1982).

\textsuperscript{108} See, e.g., Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) (schizophrenia).
But tort law appears to require that the specific property damage be reasonably foreseeable by the tortfeasor before imposing liability.\(^\text{109}\) A tortfeasor who causes physical injury is responsible for its aggravation by a third party, even if the third party is negligent or commits medical malpractice. But a tortfeasor who inflicts mere property damage is not responsible when the condition deteriorates further during an attempted repair, even if the repairer is not negligent.\(^\text{110}\) A tortfeasor who exposes one person to physical risk is liable to another who is injured in attempting a rescue,\(^\text{111}\) but I do not know, nor can I imagine, a case where the rescuer of property is compensated for physical injury. Similarly a tortfeasor who causes physical injury may be liable if the victim commits suicide,\(^\text{112}\) but I do not think any court would hold that a tortfeasor who damages property should reasonably foresee that the property owner might commit suicide.

Other bodies of law also express greater concern for personal integrity than for property rights. The interaction between tort and contract is instructive in this regard. Breach of contract typically incurs contract damages, not tort; an exception is made only when the contract protects personal integrity. Thus the failure of a medical procedure (like plastic surgery) to produce the promised results justifies not only restitution of the consideration paid but also compensation for the emotional distress suffered, though not for the economic gain anticipated had the operation been successful.\(^\text{113}\) Willful breach of a contract of insurance (both loss and liability) renders the insurer liable to the insured for emotional distress because the purpose of the contract is to protect against the risk of personal injury.\(^\text{114}\) A similar distinction can be seen in the capacity of contract to narrow tort recovery rather than expand it. For instance, an exculpatory clause or disclaimer is effective when the injury is to property but not when it is to physical integrity, when the victim is a commercial entity but not when it is the ultimate consumer.\(^\text{115}\) The law of intentional torts.

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\(^\text{110}\) Exner Sand & Gravel Corp. v. Petterson Lighterage & Towing Corp., 258 F.2d 1 (2d Cir. 1958).


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and criminal law both make analogous distinctions. The unlawful touching of property is not an assault, though any nonconsensual touching of the person is. An individual is entitled to use deadly force to protect his personal integrity and that of his loved ones but not to defend the inviolability of his property. The criminal law typically penalizes invasions of personal integrity more severely than property crimes, and public opinion supports this ranking.

Finally, it is significant that the fragmentary forms of social insurance various countries have enacted exclude or limit protection for property. Thus broad no-fault schemes like that of New Zealand\textsuperscript{116} or the workers' compensation systems in many jurisdictions\textsuperscript{117} deal with injury to the person but provide only limited compensation for lost wages and none for property damage. The partial no-fault automobile accident schemes enacted by many American states\textsuperscript{118} allow recourse to tort liability for the victim of a serious personal injury but not for someone who has suffered unusual property damage. The state offers relief to those who experience losses in natural disasters but not to those who invest in a fraudulent scam. State compensation plans respond to the victims of violent crime but not to those who have suffered only property loss.\textsuperscript{119} All western nations (except the United States) accepted responsibility for health services long before accepting similar responsibility for legal services, and the former are still much more comprehensive and generous than the latter. These allocational decisions are indicative of the priority of health over wealth. The evolution of legal services also illustrates this principle: they are provided for threats to personal integrity (that is criminal charges leading to incarceration)\textsuperscript{120} but remain unavailable where

\textsuperscript{116} See sources discussing the New Zealand system cited supra note 46.

\textsuperscript{117} See generally Widiss, Boujerg & Cavers, supra note 8.


\textsuperscript{119} This was the justification for extending constitutional protection to the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). For an account of the extension of legal aid in the United Kingdom and the United States along this dimension, see Abel, Toward a Political Economy of Lawyers, 1981 Wis. L. Rev. 1117, 1168.
the client stands to gain some economic advantage.\footnote{121}

\textbf{State Action Protecting Property Against Accidental Loss Is Unprincipled}

In the previous section I argued that the law displays ambivalence in protecting property against accidental damage while showing greater concern for personal integrity. Now I want to demonstrate that the way in which the state protects property is fundamentally and irretrievably flawed. First I will look at state action in the broadest sense; in the next section I will examine the tort regime itself.

The decision to protect property necessarily begins with the definition of what is property and thus worthy of protection. But the content of the concept cannot be derived solely from legal norms.\footnote{122} It represents a political choice, even when this choice is made by an institution, such as a court, that purports to apply the law. We can see this most clearly in nuisance law. The decision to protect one of two incompatible adjacent land uses is inherently political: should a court favor fishermen or offshore oil exploitation, for instance?\footnote{123} The question cannot be answered by asserting that one party has a property right (or even that the party gave "value" for the entitlement) because that is precisely what must be decided. Nor is it sufficient to refer to priority in time because that, too, reflects a choice of values. How serious the invasion must be to justify state action also is a political decision (a ten percent reduction in the catch? fifty percent?). And the selection of a remedy, whether damages, an injunction, or criminal penalties, cannot be resolved by reference to the efficient allocation of resources\footnote{124} because what counts as a cost or benefit and how to value those for which no market exists are political decisions as well.

The problem with nuisance law is that legal institutions are required to make political decisions for which they can offer no legal justification. Even when political institutions are given responsibility, they often do not explain why some property interests are protected against accidental loss and others are not. The political branches of government—legislative and executive—constantly take actions that

\footnotetext{121}{The personal injury plaintiff can obtain legal aid in the United Kingdom but not in the United States, where the contingent fee system purportedly makes counsel available; legal aid is not granted for property or business matters in either country.}

\footnotetext{122}{F. Parkin, \textit{Marxism and Class Theory: A Bourgeois Critique} 50 (1979). For an historical account of changes in the concept of the property interest in contract, and thus in its protection from the tort of intentional interference, see Note, \textit{Tortious Interference With Contracted Relations In The Nineteenth Century: The Transformation of Property, Contract and Tort}, 93 \textit{Harv. L. Rev.} 1510 (1980).}

\footnotetext{123}{See Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).}

\footnotetext{124}{As suggested by Calabresi & Melamed, \textit{supra} note 84.}
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profoundly affect property interests, enriching some people and impoverishing others. Yet there are few controls on such action and little or no attempt to offer principled justifications. Examples of this include government decisions to award or deny, renew or cancel a contract; to extend or withdraw price controls or supports; to build or close, improve or neglect some essential part of the infrastructure such as a bridge or tunnel, public housing project or prison, army base, road,\textsuperscript{125} transit system, or school; or to rescue or abandon a financially troubled industry.\textsuperscript{126} All of these decisions typically are exempt from judicial review precisely because there are no criteria by which courts can evaluate them. Nor is government any more accountable in its role as benefactor. Courts will not review the failure of state schools to educate,\textsuperscript{127} and they offer scant protection to the recipients of welfare, social security, disability, unemployment or veteran’s benefits.\textsuperscript{128} It is instructive to contrast the lack of protection for those whose very survival depends on government benefits with the extensive procedural protections enjoyed by high status beneficiaries of state largesse—such as radio and television stations, common carriers, and the professions, all of which owe their monopolies to government fiat.\textsuperscript{129} These differences parallel those between

\textsuperscript{125} The completion of 12 miles of freeway, which will bypass a stretch of U.S. 101 near San Jose, California, a road filled with fruit stands and other stores catering to the tourist trade, will wipe out a dozen small businesses, some of which date back to the 1930’s. Farhi, L.A. Times, Nov. 28, 1983, § V, at 1, col. 1.

\textsuperscript{126} On the difficulty of offering a justification for the 1971 Lockheed loan guarantee, see Turkel, \textit{Rational Law and Boundary Maintenance: Legitimating the 1971 Lockheed Loan Guarantee}, 15 LAW & Soc’y REV. 41 (1980-81). For a proposal to handle both the enrichment and the impoverishment of landowners as a consequence of government action, see \textit{Windfalls for Wipeouts: Land Value Capture and Compensation} (D. Hagman & D. Misczynski eds. 1978). Consider, for instance, the decision to locate one of the stops of the proposed Metro Rail underground system in Los Angeles at the site of a large department store, May Co., and to connect four of the six entrances at that stop directly to the store. Clifford, L.A. Times, Jan. 5, 1984, § IX, at 3, col. 1.


\textsuperscript{128} Richard de Friend has argued that legal “rights” cannot protect welfare benefits. de Friend, \textit{Welfare Law, Legal Theory and Legal Education}, in \textit{Welfare Law and Policy} 43 (M. Partington & J. Jowell eds. 1979). Although the recipient of state benefits enjoys certain procedural rights (e.g., to a hearing before benefits are changed) and can insist that administrators adhere to both statutes and the constitution, there is nothing to prevent the legislature from reducing or terminating benefits at will—even “vested” benefits such as social security—and certainly nothing to compel the government to adjust them for inflation.

\textsuperscript{129} I am thinking, for instance, of the extreme rarity with which a lawyer is disbarred or a physician loses his license and the fact that the professional who is being disciplined enjoys elaborate safeguards including appeal to the highest court. For an ac-
the inadequate protection and insufficient compensation provided by
the state to the urban poor and ethnic minorities, both of whom are
the principal victims of crime,130 and the extraordinary resources the
United States government expends in protecting American busi-
nesses abroad against expropriation and in compensating them for
assets seized.

Sometimes the law discriminates among protected property inter-
est interests in ways that explicitly recognize major social cleavages. When a
capital good (a machine, for instance) is damaged physically, the
factory owner will be compensated for both the loss of value and the
profits that would have been earned during the period when the in-
vestment was unproductive, as long as the owner demonstrates that
these profits cannot be recouped later.131 Workers, however, cannot
claim any compensation for their losses during the period the factory
was shut down. Since they do not own the means of production, they
have no claim to the lost profits. Workers can only sell their labor;
but since no labor was expended during this period, they are not
entitled to wages. After all, the capitalist could curtail production,
lay off employees, or even close the plant, and the workers would
have no redress. Neither would suppliers, local businesses, their em-
ployees, or other residents—all of whom might be affected pro-
foundly. These individuals and entities have no right to participate in
decisions about continuing production or even to be heard. Further-
more, none has a right to compensation if production ceases—even
those who have “invested” in the factory through governmental con-
struction of essential infrastructure, loans, rezoning, regulatory re-
lied, or tax rebates—all of which are financed by their taxes. Once
again it is instructive to contrast the precariousness of the “prop-
erty” interests of workers (and others who provide labor, raw materi-
als, component parts, and infrastructure, or contribute to the repro-
duction of labor) when capital decides to flee132 with the protection

count of the bias of British judges who review administrative decisions concerning tax
planning and licensing authorities more stringently than those concerning welfare recipi-

130. Cohen, Klugel, & Land, Social Inequality and Predatory Criminal Victimi-
zation: An Exposition and Test of a Formal Theory, 46 AM. Soc. Rev. 505 (1981). This
insecurity can extend to minority businesses as well as to personal integrity. The family
of a black businessman, who owns and operates a grocery store in Watts (a black ghetto
in Los Angeles), has been terrorized by a local gang ever since the son shot one of the
1, col. 2. More recently, the mortuary business of the family has been destroyed by fire,
suspected to be arson. L.A. Times, Jan. 5, 1984, § II, at 1, col. 5.

131. See cases cited supra note 89.

132. As a nineteenth-century political economist wrote of capital: “[i]ts workings
must be free as air, for at sight of human ties, it will spread the light wings of capital
and fly away from bondage.” A. URE, PHILOSOPHY OF MANUFACTURES 453 (1835),
quoted in Carson, The Other Price of Britain’s Oil: Regulating Safety On Offshore Oil
Installations In The British Sector Of The North Sea, 4 CONTEMP. CRISSES 239, 247
offered to capital invested overseas when those same workers and other residents seek to gain control over the means of production.

Thus capitalist tort law does not protect some abstract apolitical concept of property but rather a historically specific form, namely capitalist property. We can see this more clearly by examining two instances where the law has discarded feudal residues. Under feudalism a master could sue for interference with his right to his servant's labor, just as the state could punish criminally a servant who left a position without the consent of his master. Capitalism, however, demands the greatest possible mobility of labor (as of capital). Therefore, a master no longer can maintain an action for negligent injury to a servant, nor can he enforce an employment contract by specific performance. And it no longer is a crime to break a contract of employment. (A parallel can be drawn with the contemporary attack on patriarchy and the gradual disappearance of the cause of action for alienation of affections, as well as its converse, breach of promise of marriage.)

Tort law also appears uncomfortable with another relic of feudalism. A decision at the beginning of this century refused to recognize that tenants and bailees might have a property interest in realty or personalty meritig protection against negligent interference in situations where those with a freehold interest (the counterpart of the feudal lord) could recover. But this distinction has been criticized, and I would expect it to be repudiated as judges acknowledge that a capital good may just as appropriately be leased as owned outright.

**Tort Rules Protecting Property Against Accidental Loss Are Ambiguous and Arbitrary**

In the previous section I advanced four arguments: (1) legislative and executive decisions have affected property interests far more per-
vasively and profoundly than do the private acts that tort law claims
to regulate; (2) the state necessarily operates in an unprincipled
manner, reflecting political and economic power; (3) state action is
more restrained when it impinges on the "new property" of the rich
and powerful than when it violates that of the poor and powerless;
and (4) capitalist tort law protects only capitalist property.

It is no revelation that political institutions mirror the distribution
of power. Legal institutions, however, purport to administer equal
justice, respect neutral principles, and follow rules expressing values
that command a broad consensus. The ultimate justification for
granting coercive power to the undemocratic authority of a court is
that the judge obeys clear rules furthering some agreed social pur-
pose. Does tort law satisfy these criteria? Do the decisions about who
recovers for accidental property loss under what circumstances fol-
low a coherent body of rules? Furthermore, do those rules articulate
accepted social values? I think the answer clearly is no. We cannot
offer a persuasive account for why one victim recovers and another
does not by reference to either rules or values. Decisions therefore
must be, and must appear to be, arbitrary and hence unjust, because
the arbitrary exercise of power is the essence of injustice.

One way of framing the first problem—the indeterminacy of these
rules—is to note that the criteria advanced to guide judicial decision-
making vary continuously, but the decision itself—liability/nonli-
bility—is dichotomous. No reason is given for choosing any particu-
lar point along the continuum and none could be given.\textsuperscript{140} I can
illustrate this difficulty by means of examples drawn from another
area of tort law where the logic of the problem is identical. Ameri-
can (as well as English) tort law long has awarded damages for pain
and suffering. But the pain inflicted by physical injury and property
loss ramifies endlessly. Courts therefore must explain why they com-
panse victims for some pain but not for all. They began by award-
ing damages for emotional distress only if the victim was
\textsuperscript{141} touched. Then they extended liability to situations where the victim was
\textsuperscript{142} threatened physically, where a close relative was injured in the
presence of the victim and the victim suffered physical consequences
as a result of the emotional distress,\textsuperscript{143} and ultimately where there
was emotional distress but no physical injury.\textsuperscript{144} Each of these rul-

\begin{enumerate}
\item\textsuperscript{140} Katz, \textit{Studies in Boundary Theory: Three Essays in Adjudication and Polit-
\item\textsuperscript{141} Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).
\item\textsuperscript{142} Battalla v. State of New York, 190 N.Y.2d 237, 176 N.E.2d 729, 219
\item\textsuperscript{143} \textit{Compare} Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72
\item\textsuperscript{144} Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal.
\end{enumerate}
ings, proclaimed as principled and necessary at the time, was repudiated by the later cases. The present boundaries are no less contingent and arbitrary and therefore are subject to distortion depending upon the facts of a particular case. For example, why should a parent recover if present when a child is injured but not if the parent arrives moments later, or if the child deteriorates rapidly but not if the decline is more gradual? Why allow recovery if the parent independently perceives the threat but not if the vital signs have to be interpreted by a physician? Furthermore, if a parent recovers, why not allow other relatives or close friends to do so? Why allow one spouse to recover loss of consortium when the other is injured but disallow parents and children to recover when their relationship is disrupted by a similar injury? Each time a court refuses to take the next step, a strong dissent notes that every argument marshalled by the majority has been considered and rejected in the earlier cases. This problem—the impossibility of rationalizing any boundary—has surfaced most recently in the so-called “wrongful life” cases. In these cases, the parents of a child (unwanted because the parents had chosen to limit their family, or the child had a severe genetic defect, or the mother was unmarried), and sometimes the child as well, seek damages for medical and other expenses and also for emotional suffering. Courts often invoke the standard of “fore-


148. In Mobaldi, a foster parent was allowed to recover even though her application to adopt the child had been denied.


150. “The majority opinion effectively demolishes every legalism and every policy argument which would deny recovery . . . yet, having shown all this, inexplicably, recovery is denied.” Tobin, 24 N.Y.2d at 619, 249 N.E.2d at 424-25 (Keating, J., dissenting).

seeability” to justify their conclusions, but its inadequacy was acknowledged clearly in a decision refusing to extend liability:

On foreseeability, it is hardly cogent to assert that the negligent actor, if he could foresee injury to the child . . ., should not also foresee at the same time harm to the mother who, especially in the case of children of tender years, is likely to be present or about . . . . But foreseeability, once recognized, is not so easily limited . . . [It] would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.152

The same dilemma arises in deciding when to allow recovery for accidental injury to property.163 The courts have no uncertainty about taking the first steps along this path: a person should be able to recover lost income when physically disabled from working as well as the lost value of property that is damaged physically. But logic cannot tell us how far to extend the “foreseeability” standard. A capitalist may recover profits lost during the period when a capital good was rendered inoperable,164 but workers may not claim wages nor may local businesses or suppliers claim lost profits165 even though their injuries are just as “foreseeable.” In rejecting liability, one court noted that if “foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined” and “arbitrary distinctions” would be necessary.166 In so doing, however, the court avoided one arbitrary distinction only by embracing another. Someone who owns outright a chattel (such as a ship) may recover damages for the period it cannot be used because of the negligence of another, but one who charters the ship has no claim, though certainly it is foreseeable that ships will be chartered.167 Property owners injured when negligence caused the damming of the Buffalo River and the flooding of their premises were allowed to recover.168 The same court, however, denied recovery

152. Tobin, 24 N.Y.2d at 615, 249 N.E.2d at 422. Another problem with the criterion of foreseeability is its redundancy. It appears to consist of two principal ingredients: the likelihood of the damage and the information cost of assessing this likelihood. But both already have been considered in determining whether the conduct of the defendant was negligent: the first under the heading of the probability of injury and the second under that of the cost of avoiding the accident (P and B in the familiar formula of Learned Hand). I see no reason why these same factors ought to be weighed twice.153

153. One commentator has argued that the task of drawing boundaries is more difficult with respect to personal integrity than with respect to economic loss because “the task of defining liability limits is eased, but not eliminated, by the operation of the laws of physics.” Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 71 (1982). But it seems pointless to compare degrees of impossibility.

154. See cases cited supra note 89.


158. Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), cert. denied,
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to two shipowners who were prevented from unloading their cargo, resulting in damages caused by their inability to perform contracts calling for delivery of the cargo. Even in denying recovery, the court conceded that:

it was a foreseeable consequence of the negligence . . . that the river would be dammed. It would seem to follow from this that it was foreseeable that transportation on the river would be disrupted and that some would incur expenses because of the need to find alternative routes of transportation or substitutes for goods delayed by the disaster.160

A purchaser who relies on the certificate of a weigher hired by the seller can recover against the weigher if the latter negligently overstates the weight.160 A creditor who relies on a balance sheet in lending money to a company that subsequently goes bankrupt cannot recover against the public accountants who negligently prepared the balance sheet,161 although damage surely is as foreseeable in one case as it is in the other. An attorney is liable if he negligently gives his client a written opinion intended for a third party, who relies on it to his detriment.162 The same attorney is not liable if he negligently advises his client about the value of stock the client sells to a third party, who relies on the erroneous advice,163 though once again reliance and injury seem equally foreseeable in each situation. As Judge Cardozo ruefully admitted: "[t]he line of separation between these diverse liabilities is difficult to draw."164 A health insurer cannot recover damages from a tortfeasor who negligently injures an insured, compelling the insurer to provide medical services, for "although it was reasonably foreseeable that defendant's negligence might cause injury to [the insured], it was less foreseeable that it would injure [the insurer's] economic interest."165 A recent exercise

159. Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968).
161. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). Bishop, Negligent Misrepresentation Through Economists' Eyes, 96 L.Q. Rev. 360 (1980), has sought to refine the criterion of foreseeability by asking about the value of the information, the ease with which the producer can recapture its benefits in his prices, and whether such a price increase would discourage information production. But these remain continuous variables, devoid of any logical stopping place.
in demarcation by the California Supreme Court does nothing to clarify the boundary: "recovery for negligent interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk."\textsuperscript{166} But how "closely" must the risk be connected, when are damages "wholly" speculative, and what is an "ordinary business risk?"

Efforts to specify and explain the limits of liability for property loss in other situations are no more satisfactory. In products liability cases courts have had considerable difficulty deciding when manufacturers and sellers of defective products will be liable for property losses. All agree that a victim can recover both income lost through physical injury caused by the defective product and physical damage to other property.\textsuperscript{167} But suppose only the defective product loses value? If it also threatens some person or other property, then the owner can recover: for example, a defective truck is involved in an accident that endangers life or other property but damages only the truck.\textsuperscript{168} If, however, the product threatens no other person or property but simply fails to perform (with consequential economic loss) or gradually deteriorates and loses value, there can be no recovery.\textsuperscript{169} Such a rule fails to satisfy either criterion of principled decisionmaking. First, it cannot assign fact situations unambiguously to one side of the liability boundary or the other. Suppose a purchaser of defective chicken feed suffers loss in the value of the feed purchased, in the eggs produced (which taste bad), and in the chickens themselves (which cease to lay). Has the defective product caused, or even threatened, damage to something other than itself?\textsuperscript{170} Or suppose

\begin{itemize}
  \item expenses in 1950, 80% in 1968, while a third had coverage for office visits in 1962. M. Franklin, Injuries and Remedies: Cases and Materials on Tort Law and Alternatives 478 (1971).
  \item J'Aire, 24 Cal. 3d at 808, 598 P.2d at 66, 157 Cal. Rptr. at 413.
  \item Wulff v. Sprouse-Reitz Co., 262 Or. 293, 498 P.2d 766 (1972) (electric blanket starts fire destroying house).
  \item See, e.g., Seely, 63 Cal. 2d at 9, 403 P.2d at 145, 45 Cal. Rptr. at 17; Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965) (failure of tractor to perform); State ex rel. Western Seed v. Campbell, 250 Or. 262, 442 P.2d 215 (1968), cert. denied, 393 U.S. 1093 (1969) (failure of sugar beets to germinate); cf. Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955) (negligent manufacture requiring purchaser to repair creates no liability without accident); but see Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Although the Oregon cases had experimented with another criterion—whether the damage was the result of an "accident"—they soon dropped it as unworkable.
  \item The court in Brown v. Western Farmers Ass'n, 268 Or. 470, 521 P.2d 537 (1974), ruled no. But the majority implicitly may have overruled earlier decisions (Brownell and Wulff) by suggesting that personal integrity must be endangered. Yet this
\end{itemize}
that a homeowner covers a house with paint that fails to protect it from rot: has the defective product caused damage to other property? 171 Second, the distinction between allowing recovery for damage to other persons or property (actual or threatened), but not for the failure of the product to perform is not justified in terms of a larger social value. It cannot be maintained, as one court argued, that personal injuries always are more catastrophic to victims than property losses. 172 Furthermore, the rule makes liability depend on threatened danger, whereas tort law deals only with actual injuries and does not impose liability for mere risks. 173 "Negligence is not a tort unless it results in the commission of a wrong . . . . [To argue otherwise] is to ignore the fundamental difference between tort and crime." 174 The rule fails to explain why identical injuries should produce different legal results depending on how the harm occurs. A defective car overturns, injuring the salesman driving it. The salesman loses income as a result and is allowed to recover for the loss. If the salesman emerges unscathed but the accident renders the car inoperable, depriving the salesman of the identical income, he does not recover. If the car overturns, endangering but not injuring the salesman and rendering the car inoperable, the salesman can recover. If a defective burglar alarm in the car short-circuits the electrical system, rendering the car inoperable, it is uncertain whether the sales-

171. That interpretation was rejected, at least in dictum, by the later case of Russell. The dissent in Brown argued that it would be logical to limit strict liability to damage for personal injuries, [footnote omitted] but it is incomprehensible to me to say that a product must constitute a risk of injury to human life before recovery will be allowed for property damage, even though in the particular instance in which the property damage occurred no person suffered any harm. Brown, 268 Or. at 484, 521 P.2d at 543 (O'Connell, C.J., dissenting).

172. See Seely, 63 Cal. 2d at 25, 403 P.2d at 155-56, 45 Cal. Rptr. at 27-28 (Peters, J., dissenting).

173. "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured . . . . " Seely, 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23 (quoting Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944)). But some personal injuries are not overwhelming misfortunes, while some property losses are. Id. at 25, 403 P.2d at 155, 45 Cal. Rptr. at 27 (Peters, J., dissenting). The majority in Seely did not explain why recovery is allowed where only property damage occurs.

174. This sounds suspiciously like the discredited rule in In re an Arbitration between Polemis and Another and Furness, Withy & Co., Ltd., [1921] 3 K.B. 560: "[I]f the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 345-46 162 N.E. 99, 101 (1928).
man recovers.  

The difficulties that tort law encounters in drawing and rationalizing boundaries cannot be resolved by means of contract analogies. Recovery in cases in which the tortfeasor contracts with someone other than the victim to render services that injure the victim often depends upon whether the victim is a third-party beneficiary of the contract. But since the application of that doctrine turns on whether the court imputes to the tortfeasor a fictitious intent to benefit the victim, it simply substitutes one arbitrary and unjustified distinction for another. Nor can the law of implied warranties alleviate the uncertainty of products liability because it offers no principled basis for deciding what warranties should be implied or what kind of privity, if any, should be required between the party sought to be held liable and the ultimate victim.

I see no way to avoid the conclusion that the boundary between liability and nonliability in cases involving economic loss is "all a question of expediency." Even Holmes, the greatest American common law judge, could do no better than the ipse dixit: "the law does not spread its protection so far"—a confession of analytic despair that lesser judges continue to cite as adequate authority in cases where they are unable to offer persuasive reasons for their actions. But this abdication of responsibility is intolerable. The legitimacy of liberal legalism rests ultimately on the ability of judges to justify their exercise of power by reference to rules. The only way tort law can regain its pretensions to principled decisionmaking is by ceasing to protect property against accidental damage.


176. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of a community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds, where the means do not exist for determinations that shall be good, for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.

Holmes, The Path of the Law, 10 HARV. L. REV. 457, 466 (1897).

177. Kinsman, 388 F.2d at 825 (quoting Palsgraf, 248 N.Y. at 354-55, 162 N.E. at 104 (Andrews, J., dissenting)).


179. See, e.g., Kinsman, 388 F.2d at 823 (Kaufman, J.); Ultramares, 255 N.Y. at 181, 174 N.E. at 448 (Cardozo, C.J.).
CONCLUSION

Let me summarize my analysis thus far. I began by exploring the implications of the values of autonomy, equality, and community. Property is not fundamental to human autonomy in the same way that physical and emotional integrity are. But to the extent that ownership is an expression of selfhood, it can be argued that respect for the autonomy of property owners requires that they bear the risk of accidental loss as part of the broad dominion over their property they enjoy under capitalism. Protecting the unequal distribution of property against accidental loss obscures our essential human equality and extends the contingent and illegitimate inequality of property from the realm of economy to that of polity. It also undermines community, which is built on the consciousness of what unites people and which only can be mobilized to protect against and redress harm to the collectivity, not to the individual. Anticipatory prevention, paramount when personal integrity is at stake, is not so clearly superior to retroactive compensation for property losses because property owners can be restored to the status quo ante in a way that personal injury victims cannot. But when tort law does compensate property loss it preserves an unequal distribution of property by regressive means. It translates superior wealth and income into entitlements to political power and public services and reproduces a symbolic universe that affirms the rightness of the existing distribution of wealth and power. Tort law, itself, rejects the analogy between personal integrity and property loss by according the latter significantly less protection. State action has enormous potential to affect property interests inadvertently, both to enhance values and to depress them. But such action often is unprincipled and more solicitous of those who enjoy wealth and power, sometimes explicitly reflecting fundamental social cleavages. When judges extend tort protection to property, the rules they purport to follow cannot be applied consistently and are not grounded in accepted social values.

What, then, can be said on behalf of tort damages for property loss? The weakest argument for liability rests on a concern for what Calabresi calls secondary accident costs—the dislocation experienced by whomever has to bear the loss. The problem with this variable is its indeterminacy; rarely can we assert with confidence that either victims or tortfeasors, as a category, are able to spread the loss bet-

ter by insuring or self-insuring and by passing the costs on to the customers of a product or service.181 If the analysis of secondary costs is inconclusive, the lesson of tertiary costs is clear. Because of the high transaction costs of transferring losses from victims to tortfeasors,182 strong arguments must be advanced against leaving losses where they fall. The victim is in a better position to insure because he is better able to estimate the value of the property at risk.183 Leaving the loss on the victim will avoid the waste and inefficiency of multiple insurance by the property owner and each of a large number of potentially liable tortfeasors. Unlike the victim of personal injury (who may be indigent), the owner of property at risk always has the means to insure it.184 Consequently, it seems appropriate that those who enjoy property should bear the cost of protecting it against loss.185 Perhaps we can clarify our attitude toward compensating the victims of property loss by asking whether we would endorse a regime of true strict or enterprise liability or a system of social insurance directed toward this purpose.

But what of the other goals of tort law: the reduction of primary accident costs and the promotion of justice? I do not think the case for either is sufficiently strong to overcome the arguments advanced

181. The law of products liability is predicated on a belief that we can make this generalization about consumers as contrasted with manufacturers and sellers:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Escola, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J. concurring). For instance, when two cars are involved in a collision or a fire spreads from one house to another, it is not possible to predict which car or house owner is better able to bear the loss or more likely to be insured.

182. The costs of operating a liability insurance system are about 120% of the benefits ultimately received by victims; the comparable costs for a private loss insurance system are about 20%. Conard, The Economic Treatment of Automobile Injuries, 63 Mich. L. Rev. 279, 290-91 (1964); cf. T. Ison, The Forensic Lottery 205-210 (1979).


184. I believe this statement requires only minor qualification. Most people own no more than two major assets: their homes and their cars. With respect to both, the cost of property loss insurance (not liability insurance) is a tiny fraction of the total cost of ownership. Similarly, the cost of insuring a future income stream is a tiny fraction of that income. Any hardship to the poorest would be alleviated by guaranteeing minimum entitlements to essential property and minimum income.

185. Torts scholars, especially advocates of economic analysis, frequently argue that it is necessary to deny the victim compensation in order to motivate him to worry about his own safety. This belief justifies doctrines of contributory negligence, assumption of risk, and comparative fault. "If the damages fully compensated the victim he would be indifferent between being injured and not being injured . . . ." R. Posner, Economic Analysis of Law 85-86 (1972). This is a false and dangerous proposition with respect to personal injury, which never can be "fully compensated." But it is more plausible with respect to property loss, especially since the owner may be the cheaper primary accident cost avoider.
above. Even without tort liability for property damage, many powerful safety incentives remain: fear of suffering personal injury (which never can be compensated adequately), fear of incurring property loss oneself (which now will not be compensated at all), fear of liability for causing personal injury, altruistic concern for the personal integrity and property of others, and the pervasive influence of reciprocity (fear that the person threatened or injured will be less solicitous of one’s own safety or may withdraw from an ongoing, mutually beneficial, relationship). With respect to retributive justice, many of these same mechanisms also impose significant punishments on the tortfeasor. It is not clear that accidents causing property loss warrant greater punishment. Finally, regulatory and criminal laws will continue to promote safety and punish the infliction of both risk (which tort liability ignores) and injury.

Although the goals of optimum safety and moral judgment must command universal respect, a stronger retort to their invocation is the overwhelming evidence that the present system of tort liability cannot be taken seriously as a mechanism of either control or punishment. Whether evaluated sociologically as a means of deterrence or ethically as a system of distributive justice, sanctions must satisfy two criteria: certainty and proportionality. However, the percentage of compensable injuries that lead to tort claims is notoriously low,\textsuperscript{187}

\textsuperscript{186} In an earlier article, I argued that tort liability for personal injury should be replaced by social insurance providing income maintenance at some minimum level together with medical care. See Abel, \textit{supra} note 2. If that recommendation were followed, as well as those proposed in the present Article, we would lose the deterrent value of tort liability altogether. I am not convinced that this would invite an unacceptable level of negligent behavior. In addition to the other influences discussed in the Article, there are the disincentives provided by the market (a reputation for dangerous products), the media, and regulatory and criminal law. On the other hand, even if civil litigation is not an efficient deterrent by itself, it does engender responses in the market, the media, and the regulatory apparatus, and this stimulus would be missing.

\textsuperscript{187} Studies of tort claims (the equivalent of victimization studies in the criminal law) are few and fragmentary. Except for automobile accidents, where the defendant is an anonymous, insured stranger (R. Hunting & G. Neuwirth, \textit{supra} note 9), all investigators concur that only a tiny fraction of compensable injuries lead to claims. \textit{E.g., Royal Commission, supra note 10; P. Atiyah, supra note 10, at 217-30; Burman, Genn & Lyons, The Use of Legal Services by Victims of Accidents in the Home—A Pilot Study, 40 MOD. L. REV. 47 (1977); D. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield & Y. Brittan, Compensation and Support for Illness and Injury (1984); Abel, \textit{E's of Cure, Ounces of Protection} (Book Review), 73 CALIF. L. REV. 1003 (1985); H. Genn, \textit{supra} note 10; A. Bloembergen & P. Van Wersch, Verkeersslachtoffers en hun schade (1973); A. Bloembergen, \textit{supra} note 4; B. Curran, The Legal Needs of the Public (1977); B. Abel-Smith, M. Zander, & R. Brooke, Legal Problems and the Citizen (1973); Morris & Paul, \textit{The Financial Impact of Automobile Accidents}, 110 U. PA. L. REV. 913 (1962); Miller
and there is reason to believe that those who incur property losses make claims even less frequently than those who suffer personal injuries.\textsuperscript{188} The frequency of claims as a percentage of injuries also is very unevenly distributed, so that there is much greater incentive to protect some forms of property and some property owners than others. The institution of insurance, together with liberal interpretations of the doctrines of respondeat superior and proximate cause, all of which serve to enhance the likelihood that a property owner will be compensated, simultaneously dissipate much of the deterrent effect of tort liability. The considerable ambiguity of the substantive law\textsuperscript{189} renders outcomes uncertain, discourages claimants, and invites those who create risks to hope they will escape liability. The penalty is proportioned not only to the iniquity of the actor's conduct (as distributive justice requires) but also to the magnitude of the damages that fortuitously transpire and to judgments about the victim's own conduct. Concern for compensation frequently leads courts to impose liability on the party best able to make good the loss rather than on the one whose conduct merits control and punishment.

The justification of tort liability as a system of control and punishment seems to me to typify a pervasive hypocrisy. Our social system encourages, even compels, "undesirable" behavior by creating a normative order that purports to disapprove of such behavior but actually is ambivalent and maintaining an institutional structure that purports to control the behavior but uses sanctions that are rare, avoidable, unpredictable, and weak. Thus we can indulge in the luxury of high moral sentiments and fidelity to the ideal of safety (even "optimum" safety) while continuing to enjoy the benefits of a system that consistently disregards both, even condemns them. Examples of this hypocrisy abound. Capitalism mandates that entrepreneurs spend as little on safety as possible but then occasionally punishes a tortfeasor for "reckless disregard" of safety.\textsuperscript{190} In order to maximize

\textsuperscript{188} In a 1973 sample of 548 low-income respondents in Sydney, Australia, 62% of those who suffered physical injury in an automobile accident (N=21) consulted a lawyer but only 23% of those who suffered property damage in an automobile accident did so (N=77). M. Cass & R. Sackville, The Legal Needs of the Poor 90 (1975). In a representative sample of 2064 adults in the United States in 1973-1974, 340 instances of personal injury were taken to lawyers for every 1000 experienced, whereas only 80 instances of property damage were taken to lawyers for every 1000 experienced.

\textsuperscript{189} See supra text accompanying notes 140-79.

the profits of their shareholders, insurers must pay as few claims as possible, but sometimes an insurer will be punished for breaching its duty to the insured. Professions aggressively strive for dominance over their clients but then proclaim high-sounding ethical codes and punish the practitioner who is too crude in violating them. Both regulatory and criminal law are riddled with examples of conduct that is commonplace because society generously rewards it but simultaneously declares it to be illegal and punishes it conspicuously if haphazardly. Illustrations include conspiracies to restrain trade and reduce competition, the emission of pollutants and other threats to the environment, the production and distribution of unsafe consumer products and services, workplace dangers, the drug trade, prostitution, and so forth.

We can test the seriousness of our commitment to using liability rules to control and punish damage to property by asking whether we would want to adopt a regime of strict liability in order to increase the number of claims and the likelihood of their success. Much of the recent literature on torts has argued that the reduction of primary accident costs should be our highest priority. This writing assumes that liability rules (whether fault-based or strict) are the best way of achieving primary accident cost reduction. I share the goal, but I find the empirical evidence for the instrumental value of liability rules to be weak and unconvincing. Rather than continue


192. For insight into the way in which lawyers seek professional dominance, see Abel, Toward a Political Economy of Lawyers, 1981 Wis. L. Rev. 1117; on the promulgation and non-enforcement of ethical rules, see Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639 (1981).

193. Cf. T. ISON, THE FORENSIC LOTTERY 89 (1967). Doubts about the efficacy of tort liability rules in shaping behavior have infiltrated even the heartland of deterrence theory, the University of Chicago. See Epstein, Automobile No-Fault Plans: A Second Look at First Principles, 13 Creighton L. Rev. 769, 785 n.31 (1980); Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717 (1982); see also Diamond, Single Activity Accidents, 3 J. Legal Stud. 107, 163 (1974). O'Connell, supra note 4, at 618-19, also observes that a number of empirical studies have revealed

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elaborating rules whose benefits are uncertain and whose costs are known to be enormous, it makes more sense to choose paths along which we know we can advance. Our legal regime should reflect the ideals of autonomy, equality, and community. State action should refrain from preserving or legitimizing the existing distribution of property. And tort law should eliminate arbitrary, unprincipled distinctions.

For these reasons I conclude that tort law should cease to protect property against accidental damage. Naturally I am concerned about personal injuries affecting the victim's capacity to earn a living, but I think this problem is best handled by a system of social insurance that guarantees everyone some minimum entitlement. I also am troubled by intentional and reckless threats and damage to property, but the criminal law is the appropriate means of controlling and punishing such antisocial behavior. My position is not particularly radical. Property owners still would be able to protect their entitlements through contracts (which might make explicit provision for the rights currently derived from notions of third-party beneficiary and implied warranty), by insurance, and by avoiding or reducing risks to their property. This proposal would effect no major change in the distribution of wealth or power, although enjoyment of property would become more expensive. It would not threaten capitalism. Indeed, my proposal may have greater ideological affinity with laissez-faire economics than with socialist ideals. There are a few identifiable interest groups that stand to lose—personal injury lawyers, for instance—but they have no real power base, notwithstanding their successful defense of the status quo in recent years. Private insurance companies are likely to make as much money writing loss insurance as they have writing liability insurance. Courts little or no effect and that the adoption of no-fault automobile insurance schemes has not increased the level of car accidents. On whether a movement from fault-based liability rules to no-fault recovery through loss insurance would result in a loss of deterrence, see the dialogue between Landes, Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents, 25 J. L. Econ. 44 (1982), and O'Connell & Lemore, A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault, 38 Mo. L. Rev. 649 (1983). See also Sugarman, Doing Away With Tort Law, 73 Calif. L. Rev. 555 (1985); Brown, Deterrence in Tort and No-Fault: The New Zealand Experience, 73 Calif. L. Rev. 976 (1985).

194. In the American context, there is a question whether this might require amendment of some state constitutions. See J. O'Connell, supra note 5, at App. V. Of course, this is not a problem in the United Kingdom.


196. See, e.g., J. O'Connell, supra note 6, at 158-59.

197. Indeed, a number of major insurance companies and trade associations support no-fault plans. See J. O'Connell, supra note 6, at 158 nn.4-5; J. O'Connell, Ending Insult to Injury, 115 n.16 (1975). However, O'Connell recently revised his san-
cannot be attacked for judicial activism because they will be narrowing rights, not expanding them; indeed, they can claim to be responding to the outcry against "litigiousness." All they need to do is reject the false analogy between personal integrity and property and acknowledge that the state should not use liability rules to protect the latter against accidental loss.

guine view of the insurance industry, noting that only the District of Columbia has adopted a no-fault plan since 1975. Instead, he sees corporate defendants who pay the premiums of insurance companies as a primary force for change. O'Connell, supra note 4, at 595, 597, 627-30.

198. Galanter, Reading The Landscape Of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society, 31 UCLA L. REV. 4 (1983).