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BOOK REVIEW

LIBERATING PROGRESS AND THE FREE MARKET FROM THE SPECTER OF TORT LIABILITY

A REVIEW OF

LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES. By Peter W. Huber.* New York: Basic Books, Inc., 1988. Pp. x, 251. \$19.95.

*Reviewed by Vincent R. Johnson***

I. THE TROUBLE WITH TORT

That all is not well with tort law cannot seriously be doubted. The continuing fixation of the press on the size and frequency of damage awards;¹ the convulsive efforts of legislatures to "reform" the laws governing accidents;² the willingness of many judges to rebuff statutory in-

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¹ See, e.g., *Boy's Father Wins \$5.7-Million Suit in Kidnap Death*, L.A. Times, May 10, 1989, at II-3, col. 4; *New York Court Backs Wide Claims on the Drug DES*, N.Y. Times, Apr. 5, 1989, at 1, col. 3 (DES suit endorsing liability based on defendant's market share); *First of Agent Orange Grants Given to Veterans' Agencies*, N.Y. Times, Apr. 1, 1989, at 7, col. 1 (mass tort action); Lewin, *Ruling Raises the Question: Are Unlimited Damages Safeguards or Overkill?*, N.Y. Times, Mar. 11, 1989, at 30, col. 1 (discussing punitive damages); *Judge Limits Punitive Claims for Products*, N.Y. Times, Mar. 10, 1989, at B1, col. 2; Shipp, *Can Courts Put a Price on the Enjoyment of Life?*, N.Y. Times, Jan. 6, 1989, at B9, col. 3; Barrett, *Courts Lend Sympathetic Ear to Claims for Compensation Based on Cancer Fears*, Wall St. J., Dec. 14, 1988, at B1, col. 3; *Jury Finds Tobacco Firm Shares the Blame in Death*, Wash. Post, June 14, 1988, at A1, col. 4; *Texas Law Firm Agrees to Pay Widow \$4.3 Million After Suit for Malpractice*, Wall St. J., May 27, 1988, at 6, col. 1; see also Blackburn, *Bourbon Drinker Sues for Son's Birth Defects*, NAT'L L.J., May 8, 1989, at 14; Moss, *Defective Helmets?*, 74 A.B.A. J., Nov. 1988, at 18 (discussing suit by injured bicyclist against manufacturer); Blakeslee, *Blood Banks Facing Hundreds of AIDS Suits*, N.Y. Times, Apr. 27, 1989, at B18, col. 1.

² See generally Keeton, *Introduction to Symposium on Developments in Tort Law and Tort Re-*

trusions into the traditional common law domain;³ the proliferation of task forces⁴ and symposia⁵ devoted to tort reform; and the recent spate of related public referenda⁶ all attest to the fact that contemporary tort law is under siege.

In *Liability: The Legal Revolution and Its Consequences*,⁷ Peter Huber attempts to chronicle the changes in tort doctrine over the past thirty or so years that have brought tort law to its present crisis and to prescribe sweeping remedial actions capable of defining a more intelligent course of accident compensation. Drastic measures are necessary, he argues, because of the magnitude of the emergency. Indeed, if Huber is to be believed, the current plague of tort liability has all but idled the engines of progress and stripped the shelves of consumer goods, while at the same time thwarting safety advances and subjecting individuals to needless dangers—dangers that could be avoided if courts would refrain

form: Thoughts on Tort Reform, 18 ST. MARY'S L.J. 669, 671-72 (1987) ("During the past ten years or more a counterattack to the judicial revolution [in tort law] . . . has been launched in the legislative branches of the state and federal governments."); Kindregan & Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 ST. MARY'S L.J. 673, 674 (1987) (discussing tort reform); Kramer, *Issues and Ramifications in Texas Tort Reform*, 18 ST. MARY'S L.J. 713, 714 & n.6 (1987) ("Every state legislature which met in regular session in 1986 considered changes to the civil liability system."); see also Slovenko, *Tort Reform Legislation: An Overview*, 1987 DET. C.L. REV. 945.

³ See Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1302 (1987) (discussing frequent invalidation of statutory reforms on due process, equal protection, and other constitutional grounds); Wagner & Reiter, *Damage Caps in Medical Malpractice: Standards of Constitutional Review*, 1987 DET. C.L. REV. 1005, 1006-16 (discussing cases invalidating medical malpractice damage caps); see also Morrison & Morrison, *Constitutional Challenges to Tort Reform: Equal Protection and State Constitutions*, 64 DEN. U.L. REV. 719 (1988).

⁴ See, e.g., TORT POLICY WORKING GROUP, REPORT ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); see also Morrison, *One Member's Reflections on the American Bar Association Tort Commission*, 14 J. LEGIS. 167 (1987) (citing AMERICAN BAR ASSOCIATION, REPORT OF THE ABA ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987)).

⁵ See, e.g., *Symposium on Developments in Tort Law and Tort Reform*, 18 ST. MARY'S L.J. 669-1065 (1987); *Symposium on Tort Reform*, 10 HAMLINE L. REV. 345-622 (1987); *Tort Reform Symposium*, 64 DEN. U.L. REV. 613-732 (1988); *Open Forum: Tort Reform*, 1987 DET. C.L. REV. 937-1094 (1987); *Tort Reform Symposium*, 36 DRAKE L. REV. 667-754 (1987); *Tort Reform Symposium*, 22 GONZ. L. REV. 1-298 (1987); see also *Symposium on Product Liability*, 14 J. LEGIS. 127-274 (1987).

⁶ See, e.g., Allen, *Reformers Gather Steam*, INSIGHT, Oct. 31, 1988, at 17 (discussing California ballot initiatives); Greenwald, *A Head-On Collision*, TIME, Nov. 28, 1988, at 74 (discussing revolt against auto insurance rates in California); *Just Say 'No'—Or 'Yes'*, NEWSWEEK, Nov. 7, 1988, at 63 (noting five different auto insurance initiatives on California ballot); see also *The Prop 103 'Prairie Fire'*, NEWSWEEK, May 15, 1989, at 50 (ballot initiative relating to auto insurance rate upheld in court); Schmitt & Wells, *California High Court Upholds Prop 103*, WALL ST. J., May 5, 1989, at B1, col. 3 (insurance reform measure upheld); Balzar, *Critics See Voter Revolt Group Going 'Political'*, L.A. TIMES, Apr. 7, 1989, at 3, col. 3.

⁷ P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

from meddling in the consensual relations of sellers and buyers.⁸

Huber contends that dissatisfaction with the current tort regime is a product of the progressive destabilization of the third-party liability insurance market. That destabilization, he maintains, is the result of the gradual, but steady, erosion of traditional tort rules (e.g., those concerning duty, fault, causation, defenses, and damages) which until relatively recently circumscribed, tightly and predictably, the scope of civil liability.⁹ In their stead, he asserts, courts have erected flexible (read vague) standards requiring after-the-fact (read unpredictable) determinations by juries whose members are perhaps well-intentioned, but ultimately too naive and prone to sympathy to deal objectively and consistently with the legal issues arising from the complexities of life, as framed by modern tort law.¹⁰

The result of this transformation, Huber alleges, is nothing less than legal chaos. Liability insurers, no longer able to predict with certainty the losses which may result from given endeavors, have raised rates and withdrawn from some fields entirely.¹¹ In response, many suppliers of goods and services have increased prices, limited research in promising but potentially dangerous technologies, and wholly abandoned certain liability-laden activities.¹² Others have opted to "go bare"—that is, to operate without insurance, daring the gods of the tort firmament to impose liability.¹³ In the end, Huber asserts, consumers have been deprived of the full measure of material blessings that progress can provide, including many products needed to make life "safer, healthier, and more comfortable."¹⁴

Although Huber does not propose a wholesale repudiation of all of the changes which have transformed the terrain of tort law during the last three decades, he clearly would move far in that direction. He reveals little affection for compensation of mental distress,¹⁵ discovery rules which toll statutes of limitation,¹⁶ toxic torts,¹⁷ nontraditional cau-

⁸ See *id.* at 154, 164; *cf. id.* at 156 ("As the new tort soldiers marched forward, in whatever field, technologists fell back; it was that simple."). Huber raises strawman arguments suggesting that consumers do better under the new tort rules, then dismisses those arguments as "simpleminded." See *id.* at 149.

⁹ Huber never seriously considers the possibility that the tort crisis may be more the result of abusive practices by insurance companies than of doctrinal shortcomings in tort law. See *id.* at 141-42.

¹⁰ See *id.* at 51, 155-56.

¹¹ See *id.* at 133-40. According to Huber, when the great upheavals in the insurance market occurred in the mid-1970s, and again in 1985, "insurers [simply] responded quite rationally, though late in the day, to hostile changes in tort law that had been accumulating for years before." *Id.* at 138.

¹² See *id.* at 155-56.

¹³ See *id.* at 141, 155.

¹⁴ *Id.* at 208.

¹⁵ See *id.* at 115-27.

¹⁶ See *id.* at 84-97.

sation theories such as market-share liability,¹⁸ rules which shift the burden of proof,¹⁹ and, most of all, strict products liability.²⁰ The same is true of better established principles such as joint and several liability,²¹ punitive damages,²² and the collateral source rule.²³

Mindful of the fact that without these doctrines many seriously injured persons would go uncompensated, Huber proposes an alternative which would complete the cycle of jurisprudential metamorphosis. Just

¹⁷ See *id.* at 65-70.

¹⁸ See *id.* at 81.

¹⁹ See *id.* at 105-09.

²⁰ See *id.* at 33-40, 157.

²¹ See *id.* at 79-80, 217.

²² See *id.* at 127-32.

²³ See *id.* at 193. Huber's critique of the collateral source rule is singularly unpersuasive, which is surprising given the fact that he states that "getting this one right is the key to all that follows." *Id.* at 193. Huber writes:

Defenders of the current rule insist that it is unfair to offset the accident victim's own insurance against any prospective award. Why, after all, should she be penalized for having the good sense to buy some insurance of her own? That view made real sense in an earlier day when tort rights were still tied to ancient principles of fault and duty, and the right to recover was linked closely to wrongs clearly committed by the other side. But those principles have long since been discarded; we now live, it must be recalled, in the age of no-fault. What matters in the spirit of modern times is not where the insurance money comes from but that it's available to as many victims as possible. The best way to ensure that stable third-party insurance remains available in the background when all else fails is to save it for those who need it.

Id.

To assault the collateral source rule on the ground that this is "the age of no-fault" is to distort the facts. Despite the advent of strict products liability, the concepts of fault and duty have not "long since been discarded." They continue to form the analytical core of the law in negligence cases, including many which Huber criticizes, including *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (see P. HUBER, *supra* note 7, at 81, 87); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (see P. HUBER, *supra* note 7, at 77, 167); and *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (see P. HUBER, *supra* note 7, at 124). Moreover, fault (on the part of the plaintiff) is often the critical factor in the apportionment of comparative responsibility, which, in an increasing number of jurisdictions, may be used to offset the defendant's liability, even in an action based on no-fault strict liability. See, e.g., *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982); UNIFORM COMPARATIVE FAULT ACT § 1 (1979).

But even if this were not a distortion, what difference should no-fault principles make? In an action based on strict liability, the cost of the plaintiff's injuries is imposed on the defendant not merely because he is often in a position to spread the losses broadly, as is true of a manufacturer of defective products. That, of course, is also true of an insured plaintiff, at least to the extent of the insurance coverage. Rather, in an action based on strict liability, the losses are placed on the defendant because, unlike the plaintiff, the defendant typically has derived a profit from the injurious venture (e.g., by failing to inspect finished parts for defects or by using blasting power to excavate building sites), so that he may be rightly called upon to bear attendant losses as a cost of doing business, or because the defendant, again unlike the plaintiff, has engaged in conduct which society believes should be strongly discouraged (e.g., the unnecessary harboring of wild animals).

To say, as Huber does, that the defendant should enjoy the benefit of insurance purchased by the plaintiff, without even being obliged to reimburse the plaintiff for the cost of the premiums (which Huber does not suggest), would undoubtedly discourage individuals from purchasing insurance and would lead to noncompensation or undercompensation of injuries in accidents not involving a responsible defendant.

as ever-more-generous incarnations of tort law ascended to the throne of accident compensation following the decline of privity,²⁴ the narrowing construction of disclaimers,²⁵ and the widely heralded "death of contract,"²⁶ so, Huber argues, the decline and fall of tort law should be followed (indeed, hastened) by the creation of liability-limiting "neocontractual" principles.

In the broad range of cases, Huber favors judicial encouragement and enforcement of pre-accident agreements between parties to transactions. Huber proposes that sellers establish

an express insurance policy with the buyer, with the understanding that it is to replace the implicit and vastly more speculative insurance mandated by modern tort law. The benefits are unambiguously spelled out in advance, as too are the limits, in the calm that prevails before anyone has been hurt. Compensation is severed from questions of negligence, defect, or fault, just as it is under any first-party medical or disability insurance program.²⁷

Under Huber's plan, then, it is up to consumers—the same persons allegedly incapable of competently serving as tort jurors in the wake of an accident—to coolly bargain and pay for whatever level of coverage they may need before an accident occurs. Because sellers will be able to charge buyers an amount commensurate with the extent of the coverage, and because insurers will again be capable of confidently gauging the range and risks of liability, the insurance crisis will subside. Coverage will be available to those willing and able to pay the price.

As an auxiliary measure, Huber urges that where a product is produced in compliance with federal safety regulations²⁸ and marketed with agency-prescribed warnings²⁹—as in the case of a drug approved by the Food and Drug Administration (FDA)—the purveyors of the product should be immune from tort liability.

II. RHETORIC AND MYTH

Huber's critique of modern tort law is always provocative³⁰ and

²⁴ See P. HUBER, *supra* note 7, at 28-32 (discussing the decline of privity); see also A. BEST, *Products Liability*, in *PERSONAL INJURY: ACTIONS, DEFENSE, DAMAGES* § 1.02[3] (1987) (discussing abrogation by a majority of jurisdictions of privity requirement in product-related injury actions); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960) (discussing the decline of privity).

²⁵ See, e.g., *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979) (extensive discussion of agreements intended to exculpate a party from the consequences of his own negligence); see also A. BEST, *supra* note 24, at § 4.11 (waivers, modifications, and disclaimers of warranty will be strictly construed).

²⁶ See G. GILMORE, *THE DEATH OF CONTRACT* (1974).

²⁷ P. HUBER, *supra* note 7, at 196.

²⁸ See *id.* at 214-15.

²⁹ See *id.* at 213-14.

³⁰ See, e.g., *id.* at 109 ("Was Agent Orange really a bad risk for U.S. servicemen faced with the alternative of hostile enemy fire concealed by a leafy green jungle? Was asbestos really unreasonably dangerous in the wartime circumstances where it was most extensively used?").

often perceptive and enlightening. The book identifies many jurisprudential trouble-spots which cry out for reform: problems ranging from the unreasonably expensive, hit-or-miss lottery nature of the entire tort system³¹ to more specialized issues, such as the difficulty of legally resolving medical questions in areas where solid scientific evidence is lacking.³² In addition, Huber's examination raises many important questions such as the extent to which rules allowing recovery of damages for loss of consortium exacerbate the "radical indeterminacy of awards"³³ and whether claims for punitive damages against the same defendant in multiple actions can be administered so as to avoid overkill.³⁴

Unfortunately, Huber forfeits many opportunities to persuade or enlighten by engaging in unwarranted exaggeration and indulging in unsubstantiated and inaccurate³⁵ assertions. His efforts to write in a vivid,

³¹ See *id.* at 110, 150.

³² See *id.* at 100-05, 110-11.

³³ *Id.* at 125-26.

³⁴ See *id.* at 131.

³⁵ While the accuracy of Huber's argument is often a matter of interpretation and emphasis, at some junctures, certain factual assertions appear to be simply incorrect or plainly misleading. For example, Huber's discussion of joint liability suggests that contribution is normally available between intentional joint tortfeasors. See *id.* at 72 (hypothetical involving Baker, Burton and Smith). In fact, however, the strong majority position has long been that such a sharing of losses is not available where a tort is committed intentionally. See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 370 (8th ed. 1988) ("The common law rule that contribution is not permitted among intentional wrongdoers has persisted, and there seems little inclination to change it."). Similarly, Huber states that with the rise of strict products liability "the once broad defense of 'contributory negligence' was abandoned." P. HUBER, *supra* note 7, at 40. He neglects to mention that today such failings on the part of the plaintiff are taken into account in such cases in many jurisdictions under the rubric of "comparative fault." See *supra* note 23 and *infra* note 105.

Huber's description of negligent hiring as a "novel theory" (P. HUBER, *supra* note 7, at 76) belies the true origins of that cause of action. The theory can be traced back at least as far as 1906 when the Supreme Judicial Court of Massachusetts recognized that a supplier of messengers was under a duty to "exercise ordinary care in the employment of them" and could be "held liable, either for negligence or upon an implied contract, to any person who suffers loss" as a result of a breach of that duty. *Haskell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 193, 76 N.E.2d 215, 216 (1906); see also *Argonne Apartment House Co. v. Garrison*, 42 F.2d 605, 608 (D.C. Cir. 1930) (evidence held insufficient to take a claim for negligent hiring of a dishonest employee to the jury); *Bradley v. Stevens*, 329 Mich. 556, 46 N.W.2d 382 (1951) (recognizing that an employer can be held liable for injuries caused by his employee's attempted rape of a customer, if the employer negligently failed to "investigate and learn" of the employee's dangerous propensities); *Wishone v. Yellow Cab Co.*, 20 Tenn. App. 229, 232, 97 S.W.2d 452, 453 (1936) (recognizing that, in hiring employees, an "employer must exercise a degree of care commensurate with the nature and degree of business in which he is engaged"); 1 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 4.8 (1983) (negligent hiring "is now, and long has been, a fertile field for tort litigation.").

Similarly, Huber's assertion that courts have grown "increasingly receptive" to libel claims is directly at odds with the fact that during the past 25 years the articulation of constitutional limitations on libel actions have made it substantially more difficult for libel plaintiffs to prevail. Formerly, the falsity of a defamatory statement was presumed and truth was a defense; now, many libel plaintiffs must plead and prove falsity. See Note, 18 ST. MARY'S L.J. 581, 592-95 (1986) (discussing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 757 (1986) and prior law). Further, since 1964, libel plaintiffs in a wide range of cases have been required to prove that the defendant acted with

colorful style (which often succeed and, ironically, carry on the tradition of the late William L. Prosser—one of the “Founders” of modern tort law whose efforts the book impugns³⁶) frequently degenerate into unfair caricature, heavy sarcasm, and one-sided argumentation. Thus, in a typical passage, Huber offers the assurance that, “[i]n the end, compensation clothed in the working garb of contract is far more beautiful than tort dressed up in China silks, cashmere shawls, and Golconda diamonds, because the attire of contract is affordable, earned and paid for, not just seized from others by the compulsion of misguided law.”³⁷

Huber’s penchant for overstatement is clearly evident in his use of the rhetorical ploy, frequently used in politics and elsewhere, of positing a past golden age to illustrate the present dire state of affairs. Wittingly or not, Huber resorts to this device in his efforts to persuade readers that modern tort principles must make way for neocontractual hegemony: “Centuries-old tort law has been rewritten from first word to last in the past thirty years. The question is not whether we should tamper with a venerable body of law. It is whether we should return to one.”³⁸

knowledge, recklessness, or negligence as to the statement’s falsity; previously, no such requirements were imposed and defendants were held strictly liable if a defamatory statement turned out to be false. See Johnson, *Defamation: Libel and Slander*, in *PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES* § 1.02[3] (1986). To state that courts are “increasingly receptive to libel claims” is seriously misleading.

³⁶ See P. HUBER, *supra* note 7, at 6.

³⁷ *Id.* at 225-26. Elsewhere Huber likens courts to “housebreaker[s]” (*id.* at 144) and tort litigation to a “charity barbecue” (*id.* at 70), while noting that doctors drive “hard won” Cadillacs (*id.* at 163) and drug companies are innocent of all faults, save falling short of “unattainable perfection.” *Id.* at 146. As to the duty of manufacturers to warn buyers of dangers, Huber writes, “any fool can stand up and announce that the warning supplied was not quite right.” *Id.* at 56.

³⁸ *Id.* at 227. Huber’s hyperbole is evident from the book’s opening pages, where he states: “Tort law as we know it is a peculiarly American institution. No other country in the world administers anything remotely like it.” *Id.* at 5. Having recently team-taught Comparative Tort Law at the University of Innsbruck with a former Dean of that school’s law faculty, Professor Fritz Raber, the author can assert without hesitation that there are substantial similarities between Austrian and American tort law. They range from the basic forms of tort liability to the capping of damages and the theory of “alternative liability” causation. To be sure, Austrian verdicts do not approach American verdicts in size. But so far as fundamental principles are concerned, it is a misstatement to assert that there is nothing “remotely like” American tort law.

At other points, Huber’s tendency toward exaggeration is less benign. For example, with respect to proximate causation, he presses hard to make the case that there has been a radical change in the law. Huber appears to argue—although the relevant passages leave room for doubt in interpretation—that modern tort theoreticians recently invented the idea that persons “should be held liable for all *reasonably foreseeable* consequences of their actions.” *Id.* at 74 (emphasis in original). In fact, that rule existed in mature form more than sixty years ago when Cardozo wrote the majority opinion in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Cardozo, who saw the case in terms of duty rather than proximate causation, stated: “The risk reasonably to be perceived defines the duty to be obeyed.” *Id.* at 344, 162 N.E. at 100. Because there was nothing in the appearance of the package which was knocked by the trainmen to the tracks to indicate that it contained fireworks which could harm Mrs. Palsgraf or others many feet away, liability was denied. Interestingly, Huber discusses *Palsgraf* but makes no mention of the quoted rule. Instead, he ventures the dubious interpretation—more in line with language in *Andrews’* dissent (see *id.* at 354, 162

Huber blames the desecration of the sacred writs of tort on the activities of “a new generation of lawyers and judges”³⁹ who were “close political cousins” of “[c]ivil libertarians and civil rights activists”⁴⁰ seeking to protect “the little guy.”⁴¹ But the modern tort system, Huber argues, “has benefitted almost no one but the lawyers who run it.”⁴² To Huber’s mind, “[o]nce lawyers take charge of an area of life, the person of low cunning acquires mastery over the person of high simplicity. With lawyers in charge, the mean person gets the better of the generous one.”⁴³

The chief product of the tort revolution wrought by lawyers, Huber charges, is the “omnipresent tort tax”⁴⁴ which is today included in the price of “virtually everything we buy, sell, and use.”⁴⁵ According to Huber, “[t]he courts alone decide just who will pay, how much, and on what timetable. Unlike better-known taxes, this one was never put to a legislature or a public referendum, debated at any length in the usual public arenas, or approved by the president or by any state governor.”⁴⁶ Huber thus contends that the issue of tort reform is not one of “liberal against conservative. . . . The only real line is between lawyers and the rest.”⁴⁷

Huber’s choice of lawyers as scapegoats for the tort crisis is, however, problematic. Anyone who has seen a judge struggle over how to justly decide a tort case, or a personal injury practitioner labor over the presentation of a legitimate claim, may find it difficult to adopt Huber’s view of the legal profession. More importantly, his assertions conveniently overlook the roles which members of the legislative and executive branches have played in such major tort law changes as the statutory enactment of comparative negligence,⁴⁸ the passage of dram shop laws,⁴⁹

N.E. at 104 (stating that the assessment of proximate causation depends in part on whether “the result [is] too remote from the cause”)—that if the guards were negligent, “their error was just too remote from Palsgraf’s injury for her suit to survive.” P. HUBER, *supra* note 7, at 72. It may be that today practitioners more vigorously urge, and juries more readily find, that what was once thought to be improbable is now reasonably foreseeable. But the standard has not changed, and it is not helpful to resolving the present tort crisis for writers to assert that there is a “new foreseeability test.” *Id.* at 74.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 174.

⁴¹ *Id.* at 5. Elsewhere, however, Huber contends that the recent revolution in tort was “created by lawyers for lawyers.” *Id.* at ix.

⁴² *Id.*

⁴³ *Id.* at 223.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 224-25.

⁴⁸ See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 10-15 (2d ed. 1986) (noting that in many jurisdictions comparative negligence has been adopted by statute rather than by court decision).

⁴⁹ See, e.g., IOWA CODE ANN. § 123.92 (West 1987); MICH. COMPILED LAWS ANN. § 436.22 (West 1980); MINN. STAT. ANN. § 340A.801 (West Supp. 1989); see also Annotation, *Liability, Under Dram Shop Acts, of One Who Sells or Furnishes Liquor Otherwise Than in Operation of Regu-*

the abolition of tort immunities,⁵⁰ the allowance of prejudgment interest,⁵¹ and the creation of numerous tort rights expressly based on violation of statute,⁵² not to mention legislative tinkering with statutes of limitation,⁵³ *res ipsa loquitur*,⁵⁴ Good Samaritan laws,⁵⁵ and all manner of rules relating to medical malpractice.⁵⁶ To suggest that there has been no executive or legislative participation in the shaping of modern tort law is both a distortion and a disservice to those interested in understanding the crisis in torts. Any personal injury attorney who eschews statute books in favor of exclusive reliance on case reporters will quickly find himself the defendant in a malpractice action, subject to many rules which may themselves be of statutory origin.⁵⁷

lary Established Liquor Business, 8 A.L.R.3d 1412 (1966) (discussing liability created by statute); Annotation, *Liability of Liquor Furnisher Under Civil Damage or Dramshop Act for Injury or Death of Intoxicated Person from Wrongful Act of Third Person*, 65 A.L.R.2d 923 (1959) (same).

⁵⁰ See, e.g., 28 U.S.C. §§ 1346(b), 2671-80 (the Federal Tort Claims Act, broadly waiving the common law sovereign immunity of the federal government for torts committed by government employees); see also 2 S. SPEISER, C. KRAUSE & A. GANS, *supra* note 35, § 6.43, at 214 (citing statutes abolishing charitable immunity); *id.* § 6.44, at 221, n.97 (citing statutes abolishing spousal immunity); *id.* § 6.5, at 30 (discussing statutory abolition or limitation of sovereign immunity); *cf. id.* § 6.53, at 258 (noting statutory adoption of workers' compensation immunity).

⁵¹ See *id.* § 8.10, at 473 (discussing legislation permitting the award of prejudgment interest in tort actions).

⁵² See, e.g., TEX. PROP. CODE ANN. § 92.151 (Vernon 1984) (permitting tenants to commence tort actions for damages based on a landlord's breach of its statutory duty to install security devices). See generally 3 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 17.5 (2d ed. 1986) (discussing legislation defining the standard of care for negligence actions and expressly creating civil remedies).

⁵³ See, e.g., TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1989) (defining statute of limitations for health care liability claims), *discussed in Kramer, supra* note 2, at 717-24. Huber does eventually acknowledge the legislative pedigree of statutes of limitations. See P. HUBER, *supra* note 7, at 89.

⁵⁴ See, e.g., TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1989) (limiting use of *res ipsa loquitur*). See generally 2 S. SPEISER, *RES IPSA LOQUITUR* § 24.3 (1972).

⁵⁵ See, e.g., MINN. STAT. ANN. § 604.05 (West 1988) (creating a duty to assist another exposed to "grave physical harm," the violation of which is punishable as a criminal misdemeanor, and providing limited tort immunity to those who gratuitously render aid at the scene of an emergency).

⁵⁶ See 4 S. SPEISER, C. KRAUSE & A. GANS, *supra* note 35, at § 15.2:

In attempts to curtail the recent litigation escalation, state legislators have altered rules for tort litigation by: elimination of the collateral source rule, alteration of standard of care statutes, changing and shortening the statutes of limitation applicable to medical and health care malpractice and negligence, eliminating *ad damnum* clauses, limiting contingency fee schedules, setting dollar limits on damages . . . , and removing or eliminating the doctrine of *res ipsa loquitur*.

See also *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (discussing California's Medical Injury Compensation Reform Act); Keith, *The Texas Medical Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction, and Constitutionality*, 36 BAYLOR L. REV. 265 (1984); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417.

⁵⁷ See R. MALLIN & V. LEVITT, *LEGAL MALPRACTICE* §§ 41, 110, 314, 364, & 387 (2d ed. 1981) (discussing statutory actions and remedies available against attorneys, statutes of limitation, and statutory provisions governing indemnity and contribution); see also *id.* at 937-45 (table of statutes relevant to legal malpractice actions).

Regardless of who is responsible for the tort revolution, the question remains whether the good old days of tort were as good as Huber suggests. One might think that a “venerable” body of tort law would equitably compensate accident victims. But prior to the changes Huber deplors that often was not the case. Indeed, until well into the 1960s and 1970s, the 100 per cent bars of contributory negligence and assumption of the risk were regularly invoked to deny injured victims all compensation,⁵⁸ just as the fellow servant doctrine had been employed during an earlier era to achieve similar ends.⁵⁹ Indeed, shortly after the turn of the century—a period which surely falls within Huber’s idyllic “centuries-old” past—

Accident victims—and the surviving members of their families—were compelled to bear the full burden for the risks inherent in dangerous work. Corporate profit was the primary social value. Legal doctrine impeded the opportunity of an accident victim to recover damages; furthermore, legal services were available only to those who could afford to purchase them.⁶⁰

One might well be excused for declining Huber’s invitation to return to the venerable tort law of yesteryear.

Huber’s polemics do, at least, suggest to the reader that closer scrutiny of the many questionable assertions he makes is in order. To cite just a few examples, Huber maintains that “the wealthy defendant is more often part of the safety solution than the safety problem”;⁶¹ that, concerning manufactured goods, “newer, more often than not, is in fact safer than older”;⁶² that the “net effect [of the tort ‘revolution’] was less insurance all around”;⁶³ and that “[i]n nine cases out of ten, the best and cheapest protection from accidents lay very close to the victim herself.”⁶⁴

To the extent that these and similar assertions are viewed as working premises for redesigning the legal system, their truth is less than fully apparent.⁶⁵ Such claims do, of course, harmonize with, and form an at-

⁵⁸ See, e.g., W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 35, at 576 n.1 (“In the mid 1960’s, only six states had a general comparative negligence system.”).

⁵⁹ See C. BURDICK, *THE LAW OF TORTS* § 171 (1926) (discussing fellow servant rule).

⁶⁰ J. AUERBACH, *UNEQUAL JUSTICE* 44 (1976).

⁶¹ HUBER, *supra* note 7, at 12.

⁶² *Id.* at 15.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 176.

⁶⁵ With Huber’s assertion that newer products are more often than not safer than older products, contrast these observations by two veteran observers of the world of accidents and injuries, W. Page Keeton and Jack B. Weinstein. Dean Keeton writes:

[A] drastic change in the accident environment has occurred as a consequence of more technological and scientific advancement during this century than that which occurred in all the prior recorded history of mankind. This development, although a boon to humanity, has resulted in an enormous proliferation of all kinds of damaging events, including automobile accidents, airplane crashes and collisions, industrial accidents, drug mishaps, and toxic injuries.

Keeton, *supra* note 2, at 670. Similarly, Judge Weinstein has observed that “[t]he disasters we create are growing in severity and frequency. Dangers are enhanced by . . . [the] creation of new products through chemical and biological engineering” Weinstein, *Preliminary Reflections on Law’s*

tractive background for, Huber's central thesis: that the public would be better served if the free market and the pursuit of progress were liberated from the burdens of tort liability. "Legal paper," writes Huber, "does not save lives. Our accustomed safety comes from chemistry, medicine, engineering, technology, and services of every description, and it is progress in these areas that will make life safer still."⁶⁶ That the unbridled march of progress may be directed more by the profit motive than by purity of heart, and that the safety of consumers may be sacrificed to the balance sheet's bottom line, are possibilities Huber never seriously discusses.⁶⁷

III. LIMITING LIABILITY: NEOCONTRACTUAL PRINCIPLES

A. Deterrence and Compensation

A recurring theme of Huber's book is that the interests of society would be best served by a tort system that better encouraged entrepreneurship and the unfettered operation of the free market. As the system is presently structured, he argues, the coercive force exerted by the omnipresent threat of postaccident tort liability dissuades sellers from developing and marketing products which would benefit consumers, while at the same time preventing buyers from securing products they need or want. According to Huber, these results are precipitated by a jurisprudential scheme which, at present, too closely links the policy of deterring dangerous conduct with *ex post* determinations of whether victims should be compensated. Accordingly, he proposes that "[t]o make life safer, faster, we must gradually uncouple compensation from deterrence."⁶⁸ Rules premised on deterrence considerations, he argues, stifle the creative spirit, sap entrepreneurial drive, and ultimately produce a rigid, risk-averse society, unwilling to take the chances necessary to maximize human potential.

Regardless of whether an uncoupling of deterrence and compensa-

Reactions to Mass Disasters, 11 COLUM. J. OF ENVTL. L. 1, 1 (1986). In a footnote, Judge Weinstein added: "According to one study, dangers exist in part because 'dramatic scientific and technological advances' have preceded development of appropriate safety data and techniques." *Id.* at 1 n.1 (citing LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY SCHOOL OF LAW, CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS 1 (1963)).

In addition, the notion that "newer is safer" is at least mildly in tension with the common observation concerning planned obsolescence and declining product quality summed up by the adage "they don't make 'em like they used to." "Not only do we make things that wear out sooner than they would have to if we used our technology to make them last longer; we design them in such a way that they are extremely hard (and expensive) to repair, and we change designs so often that after a few years they cannot be repaired at all." R. RODES, *LAW AND LIBERATION* 66 (1986) (arguing that planned obsolescence is intended to encourage and increase consumer consumption).

⁶⁶ See P. HUBER, *supra* note 7, at 207.

⁶⁷ See *id.* at 164 ("[P]eople and corporations most often become wealthy not because they do things that are wicked and dangerous, but because they do things that are valuable and necessary.").

⁶⁸ *Id.* at 218.

tion is theoretically possible or desirable, no such divorce will flow from Huber's plan for judicial enforcement of pre-accident agreements. Such agreements significantly reduce uncertainty as to the extent of a putative defendant's liability, but deterrence and compensation will remain as closely linked as ever, albeit in a different fashion than under the current system. Compensation will be available in accordance with the provisions of the agreement, as is true under any other contract of insurance. Similarly, the agreement will diminish the deterrent effect of otherwise applicable tort principles⁶⁹ on the conduct of the defendant only to the extent that the pact absolves the defendant of financial responsibility for resulting harm. In each case, there will be questions as to which rights a consumer has relinquished by entering into the arrangement. Presumably, such agreements will not relieve defendants of liability for intentional tortious conduct as easily as they will for ordinary negligence. Moreover, as Huber concedes, courts do not give automatic effect to all disclaimers of liability.⁷⁰ As long as the same agreement defines both the plaintiff's recovery and the conditions of the defendant's immunity from suit, the issues of compensation and deterrence will be tightly intertwined.

B. Over-Deterrence and Over-Compensation

The question, then, is not whether there is something to be gained by uncoupling deterrence and compensation, but whether it is beneficial to define the range of potential liability before an accident occurs. Huber's plan targets two related weaknesses of the current tort system: over-deterrence and over-compensation. Over-deterrence occurs where the risk of tort liability prompts persons to spend resources on efforts designed solely to avoid liability (as may be the case where malpractice-wary physicians order unnecessary medical tests) or to abandon fields of endeavor entirely (as is true where doctors refuse to perform obstetric services and companies terminate contraceptive research). In contrast, over-compensation takes place where a defendant is required to compensate an injured individual in an amount which exceeds the monetary value of that person's physical, mental, and economic harm, including liability for attorney fees and other costs entailed by efforts to secure redress. Quite likely, many of the same verdicts that are sufficiently large

⁶⁹ See L. JOHNSON, COST-BENEFIT ANALYSIS AND VOLUNTARY SAFETY STANDARDS FOR CONSUMER PRODUCTS 687 (1982) (noting possible link between product liability system and improved design and manufacturing practices); Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677 (1978) (arguing that the product liability system serves a strong deterrent function); cf. G. EADS & R. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION viii (1983) ("Of all the various external social pressures, product liability has the greatest influence on product design decisions.").

⁷⁰ See P. HUBER, *supra* note 7, at 203.

to contribute to over-deterrence are also ones by which a plaintiff is over-compensated.

Arguably, Huber's proposal for enforcing pre-accident agreements defining the extent of potential defendants' liability could minimize the systemic risks of over-deterrence and over-compensation. Because sellers would be permitted to charge buyers an amount corresponding to their liability exposure, there would be little reason for sellers to fear that accidents generated by given transactions would result in excessive losses. And, because jurors would ordinarily play no role in the compensation process, the risk that victims would receive excessive compensation from defendants as a result of the emotions evoked at trial would effectively be eliminated.

Whether these advantages to Huber's proposal carry too great a price for adoption is a function of at least two considerations: first, the magnitude of the problems of over-deterrence and over-compensation within the present tort system; and, second, the untoward consequences that might attend the adoption of Huber's solution.

Any discussion concerning the present magnitude of over-deterrence and over-compensation must allow for the fact that some degree of each phenomenon may be a necessary by-product of the proper operation of any system which attempts to compensate injuries fully. That is, the occasional, well-publicized excessive verdict that results in over-deterrence and over-compensation may be an inevitable and acceptable cost of operating a system of legal compensation pursuant to rules sufficiently flexible to enable juries and judges to exercise discretion in determining the extent of a plaintiff's injuries and the degree to which they should be compensated. Thus, some quantum of over-deterrence and over-compensation may be unobjectionable because the rules which give rise thereto permit the achievement of another valuable objective, namely full compensation.⁷¹

⁷¹ The need to compensate accident victims for their losses has been a powerful factor in the development of tort law. See P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 20 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]. Tort law's commitment to the policy of full compensation is often qualified and sometimes chaotic however. Several states, for example, have recently modified the traditional rules of joint and several liability. See, e.g., KAN. STAT. ANN. § 60-258a(d) (1988) (abolishing joint and several liability in comparative negligence actions); see also Ball, *A Reexamination of Joint and Several Liability Under a Comparative Negligence System*, 18 ST. MARY'S L.J. 891, 892 (1987) (citing modifications in Ohio and Vermont). In addition, while an injured party generally cannot recover attorney fees (see, e.g., *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967)), awards of punitive damages are allowed and evidence of compensation from collateral sources is excluded from damage calculations in order to help reimburse successful plaintiffs for amounts spent on such fees and thereby ensure full compensation. See W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 35, at 529 (punitive damages have been "defended as a . . . partial remedy for the refusal of American civil procedure to allow compensation for the expenses of litigation including counsel fees"); L. SCHLUETER & K. REDDEN, 1 PUNITIVE DAMAGES 27 (2d ed. 1989) ("a number of jurisdictions allow the jury to consider the plaintiff's litigation expenses as one element of an award of punitive

It is difficult, if not impossible, to define the point at which one passes from “inevitable” and “acceptable” over-deterrence and over-compensation to that which is “unnecessary” and “avoidable.” Huber does not offer statistical evidence on the point, and he probably cannot be faulted for that failing given the distressing paucity of empirical research now available on many aspects of the American legal system. Still, it is incumbent upon one who seeks to restructure tort law radically to produce an acceptable substitute for such data. Whether Huber’s “parade of horrors”—anecdotal reports of cases in which the system has clearly gone awry—is equal to this task is open to debate. Have the shelves indeed been stripped bare? Does the wide range of human needs go largely unmet? Would the ordinary individual—the person who goes to the shopping mall, the drug store, the suite of medical offices, or the amusement park—regard the unavailability of goods and services, high insurance costs, and excessive safety precautions as so pervasive as to constitute proof not of isolated problems, but of a need to restructure the entire system?

Huber’s failure to demonstrate convincingly the problems of over-deterrence and over-compensation makes it difficult to credit his proposed law of neocontract as a cure for tort’s current maladies. While this alone might be a good reason for opposing Huber’s plan, there are in fact more serious objections to his proposals.

C. The Uncertain Contours of Neocontract

Huber leaves the details and applicability of his neocontractual principles more than a little vague. The clearest examples of the type of arrangements he envisions, however, are his proposals for extending the type of collision insurance available as a direct contractual option with

damages”); Branton, *The Collateral Source Rule*, 18 ST. MARY’S L.J. 883, 885 (1987) (discussing relationship between the collateral source rule and the fact that, because of a successful plaintiff’s need to pay attorney fees from his award, “a person is never made whole by our compensatory damage scheme”); Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 12, 465 P.2d 61, 68, 84 Cal. Rptr. 173, 180 (1970) (exclusion of collateral compensation helps to cover attorney fees).

Huber is willing to trade the present tort system’s ability to achieve (at least occasionally) the goal of full compensation for the certainty of a system capable of providing less than fully adequate compensation on a more regular basis. See P. HUBER, *supra* note 7, at 196. At times, such compromises have proved worthwhile, as was initially true of many worker’s compensation schemes. However, in a number of states, worker’s compensation payment schedules have been rendered seriously inadequate by inflationary pressures. See L. DARLING-HAMMOND & T. KNIESNER, *THE LAW AND ECONOMICS OF WORKER’S COMPENSATION* 50 (1980) (noting that “[r]apidly escalating inflation has . . . [rendered] existing benefit levels less and less adequate for disabled workers”); see also Note, *Michigan’s Worker’s Disability Compensation Act: The Intentional Tort Exception to the Exclusive Remedy Provision*, 23 VAL. U.L. REV. 371, 371 (1989) (noting employee dissatisfaction with “the minimal benefits provided through workers’ compensation”); Schachter, *A Disabled System*, L.A. Times, May 15, 1989, at IV-1, col. 2 (citing report concluding that, while the California workers’ compensation system “may have been adequate and equitable when adopted 70 years ago[.] . . . [c]learly it is no longer”).

rental cars to cover physical injuries in addition to property damage⁷² and that airlines offer "a binding insurance contract, sold along with each ticket and each flight, between airline and passenger, one that cuts out the lawyers more or less entirely."⁷³ More often, however, Huber speaks only of "[c]ontract reinvented, with a more human face,"⁷⁴ and "a jurisprudence in which [not] every blanket disclaimer of liability is mechanically enforced, in which sellers are [not] utterly free to put any product on the market no matter how shoddy or dangerous."⁷⁵

If neocontract is to be subject to such limits, how will those limits be set? By courts? By legislatures? If the issue is left to the judiciary, how would that differ from what the legal system does presently to assess the validity of liability disclaimers and to determine whether products are reasonably safe? Huber offers assurances that there is no reason to "return to the nineteenth century notion of contract in all its harsh logic."⁷⁶ But where is the line to be drawn, and by whom?

To which accidents will Huber's neocontractual principles extend? He seems to have in mind run-of-the-mill goods and services of a type where liability-creating or -limiting language might easily be expressed orally or in writing⁷⁷—the kind which you find in a hardware store or secure from a garage mechanic. But what if nothing is said at the time of the transaction? Does the consumer accept all risks because he failed to bargain and pay for coverage?⁷⁸ And what if the accident involves not a defective hammer or an improperly installed fuel pump, but injury to a patron in a slip-and-fall accident or a criminal attack while on the prem-

⁷² P. HUBER, *supra* note 7, at 195.

⁷³ *Id.* at 194. Elaborating on this contract, Huber writes:

If the concern is with the improvident traveler who might decline insurance altogether, the sale of some basic level of coverage (\$1 million per passenger, say) could easily be made mandatory—or the courts might simply continue refusing to enforce arrangements with unconscionably low levels of coverage. Higher levels of coverage could easily be offered. . . . Settlement after the accident . . . [would occur] in a matter of days, not years.

Id.

⁷⁴ *Id.* at 226.

⁷⁵ *Id.* at 226-27.

⁷⁶ *Id.* at 224.

⁷⁷ Huber views this category broadly, asserting that "[i]n most accidents, the person hurt has a pre-existing relationship with those he eventually sues—or could establish one if he were allowed to." *Id.* at 194. Whether this assumption is empirically correct is difficult to say. The most obvious and ubiquitous exception is auto accidents between strangers. No matter. Huber discusses a neocontractual scheme which could aid such unfortunates. Under that plan, persons who carry full medical and disability insurance are entitled to sell their future right to sue others in the event of an accident. *See id.* at 197-98.

⁷⁸ There is some language to indicate that Huber would not go this far, though how he would avoid doing so is vague. For example, he writes with respect to warnings:

Few would suggest returning to the day when a warning had to be particularly sought out and paid for, and the unwary were simply out of luck. The answer is to reanchor the law of warning to its contractual roots by applying the modern rules symmetrically, with a firm sense of balance that is missing from today's how-you-pronounce-it warning jurisprudence.

Id. at 212.

ises before any transaction is consummated? Do similar neocontractual principles govern, or do the usual tort rules apply? If the former is true, who writes the contract? The defendant? The court? If standard tort rules apply to some accidents, but not to others, will there be a flood of cases in which litigants attempt to show that their injuries arose out of an aspect of the relationship to which an agreement limiting liability could not logically have applied? Will courts be eager to accept such arguments in order to save seriously injured plaintiffs from the terms of unfavorable neocontracts?⁷⁹ How will such judicial "interpretations" motivated by sympathy be dealt with? And what of those relations in which typically no money changes hands, such as the use of a municipal playground or beach? Will the posting of a "Use at Your Own Risk" sign save a municipality from all liability unless the prospective victim bargained and paid for a higher degree of care? Huber expresses concern about such accidents,⁸⁰ but do they fall within the purview of neocontractual principles?

D. Barriers to Workability

1. *Complexity*.—Huber optimistically predicts that as "direct insurance is promoted across the board, we will quickly find coverage being extended to all sorts of accidents that today are not covered at all."⁸¹ "Sensibly priced direct insurance," he maintains, "could easily be sold with almost any good or service."⁸²

Huber virtually ignores, however, the problems imperfect information and high transaction costs pose for his plan. What Huber contemplates is not a simple system of accident compensation. Rather, he envisions "[a] return to contract, built on open warning and informed consent," with "*infinite calibration* to the varying needs of individual consumers."⁸³ Such fine-tuning might well be possible with respect to isolated transactions, such as the occasional purchase of a car. There, it may be feasible for an individual to expend substantial time and energy on gathering and evaluating information relating to the safety and prices of alternative products. In light of the individual's available resources and the varying risks, a decision could be made concerning how safe a car to buy and how much direct insurance to obtain. When one considers, however, the extension of this course of information collection and

⁷⁹ Huber would almost certainly agree that similarly motivated judicial mischief has been common in the past. For example, courts have eagerly sought ways to circumvent assertedly unfair rules by straining to find a physical injury to the plaintiff that would support compensation for negligently inflicted mental distress (see PROSSER AND KEETON ON TORTS, *supra* note 71, at 363-64) and "undertakings" sufficient to convert unperformed gratuitous promises into actionable negligence. See W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 35, at 416 nn.1-3.

⁸⁰ See P. HUBER, *supra* note 7, at 138-39, 183.

⁸¹ *Id.* at 225.

⁸² *Id.* at 196.

⁸³ *Id.* at 216.

assessment to *every* commercial transaction—every purchase of a product in a store, every engagement of professional services—the enterprise becomes daunting. Consumers would spend an inordinate amount of resources on efforts to perform often duplicative, time-consuming tasks relating to assessment of the risks of injury and the need for economic protection.

There is an important economy to knowing that if one purchases a tire, a soft drink, or an appliance, the seller will be held strictly liable for all physical harm resulting from a defect. That knowledge not only relieves the consumer of the burden of ferreting out and weighing extensive information relating to product safety, but it avoids such possible problems as the unwillingness of sellers to disclose information unfavorable to their products and insufficient sophistication on the part of some consumers to evaluate data relating to complex products. As Huber himself acknowledges, laypersons often “[do not] know the first thing about designing a car, a contraceptive, or an airplane engine”⁸⁴—and the lack of such knowledge undoubtedly affects the ability of consumers to assess risks. Under Huber’s plan, it would be entirely possible that despite good faith efforts and the expenditure of considerable funds, a customer would fail to obtain a fully accurate and complete picture of potential harms, with the result being an unintentional and undesired assumption of risk by the consumer.

Huber criticizes the present tort system on the ground that it discourages manufacturers from marketing new products with unproven safety records and unknown liability risks.⁸⁵ Even assuming, *arguendo*, that such inertia is an undesirable impediment to technological progress, the plan which Huber offers is a questionable solution. His proposal redistributes the risk of those losses caused by defective products in a way which renders it likely that consumers will (or logically should) prefer to opt for the status quo when making purchases, rather than incur the high transaction costs related to evaluating the liability potential of new products. That reluctance to embrace new products might well be overcome by advertising hype, but in such instances there would surely be a serious question as to whether consumers are well served by marketing practices which entice them to make uninformed decisions.

2. *Under-Insurance.*—A second barrier to the workability of Huber’s plan is the propensity of consumers to understate their prospective needs for injury protection.⁸⁶ As Huber recognizes, this premise has

⁸⁴ *Id.* at 50.

⁸⁵ *See id.* at 14, 155-56.

⁸⁶ *See* G. CALABRESI, *THE COSTS OF ACCIDENTS* 45, 55-64 (1970) (discussing reasons that private insurance gives rise to inadequate loss spreading); *see also* G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 12-13 (1985) (discussing the role of “self-paternalism” in circumventing “desires for short-run maximizations”).

been one of the foundations of the modern law of products liability.⁸⁷ The prevailing wisdom is that because individuals tend to purchase inadequate amounts of insurance to meet their needs—whether because of optimism or financial exigency—compensation schemes which do not depend upon such forecasts are preferable to those which do.

Huber does little to refute the validity of the under-insurance postulate, other than to assert conclusorily, in Panglossian terms, that “most people, most of the time, know their individual needs better than any jury ever can.”⁸⁸ Is that really the case? Does the consumer in the drug store, before making a purchase, assess the chances that a product will result in blindness, sterility, or cancer? Does she estimate the cost of securing medical care for those injuries, and the impact such a tragedy would have on the support and care of family members? Is it so apparent that shoppers on a tight budget, comparing prices, colors, and styles from store to store, will consult their personal utility calculators at each stop along their routes, opting ultimately for the product carrying just the right amount of personal injury protection?

Huber’s suggestion that states legislatively mandate the purchase of minimum insurance coverage⁸⁹ is, for several reasons, not a viable solution to consumer underestimation of the costs of accidents. To begin with, the complexity and cost of defining minimum levels of coverage would preclude legislatures from undertaking the task in all but a handful of cases. Under any logical scheme, the appropriate level of injury protection would differ from product to product, and service to service, according to the dangerousness of the article or undertaking. Whereas blasting powder, snowmobiles, experimental drugs, and neurosurgery may have substantial destructive powers, the same can less readily be said of personal computers, kitchen brooms, coffee mugs, and haircuts. To say that every item in the grocery basket should come with the same basic level of insurance as every power tool at Sears would both affront common sense and ignore the realities which shape the world of accidental losses. Any legislative or administrative effort to rank the relative dangerousness of all goods and services—or even those several hundred or thousand most commonly used by consumers—would consume a vast amount of resources.

In addition, evaluation processes would be subject to distortion by pressures from special interests. Manufacturers would undoubtedly lobby legislators to ensure that their products were not burdened by heavy insurance costs. The same would be true of providers of services, such as dentists, chiropractors, and yes, even lawyers. As a result of these efforts, the level of mandatory direct insurance might well differ arbitrarily from one product or service to the next, depending more on

⁸⁷ See P. HUBER, *supra* note 7, at 6-7, 203.

⁸⁸ *Id.* at 226.

⁸⁹ See *id.* at 194, 196.

the political and economic strength of the supplier than upon legitimately perceived risks of danger.

Similarly, ordinary political considerations would surely play a substantial role in the enactment of mandatory insurance. Just as legislators subject to reelection are hesitant to raise taxes or legislative salaries, they would likely be unwilling to tackle another pocketbook issue by compelling constituents to purchase levels of coverage adequate to meet the high costs of medical care, rehabilitation, and income replacement, particularly when such insurance may never be needed by the consumer.

It seems likely, therefore, that mandatory insurance would be established, if at all, at minimum levels. Such basic coverage would eliminate the possibility which exists under the present tort system that a victim will go wholly uncompensated.⁹⁰ It would do little, however, to address the problem of under-insurance in cases where injuries are particularly serious. At best, statutorily mandated insurance coverage would seem to be a solution to the dilemma of under-insurance only in those relatively rare instances where the extent of potential harm is so clear that a legislative commitment to act can be expected to withstand the winds of both partisan interest and public opinion.

3. *Adhesion*.—Perhaps most seriously, Huber's proposal for widespread enforcement of neocontractual agreements is unfeasible due to the inequalities of bargaining power which pervade many consumer transactions.⁹¹ Purveyors of goods and services frequently employ standardized contracts which leave consumers little choice but to accept a deal as presented—including contractual terms which purport to limit the provider's liability to the consumer.⁹² The conduct of state legislatures

⁹⁰ Cf. *id.* at 196 ("First-party insurance will not pay as much in the most lurid cases, but it will surely pay more often and more reliably.").

⁹¹ See Nader, *Alternatives to the American Judicial System*, in NO ACCESS TO LAW 5 (L. Nader ed. 1980):

Parties that buy and sell are often strangers to each other; production is centralized; and large organizations control information, condition the terms of purchase, and shape perceptions through advertising. These forces have culminated in increased dependency, which has brought with it a redistribution of power in our society; *most product and service complaints are between people of greatly unequal power.*

Id. (emphasis added); see also Nader & Shugart, *Old Solutions for Old Problems*, in *id.* at 76 (noting that relative equality of power is uncommon in most consumer disputes); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 154 (2d ed. 1980) (noting that courts have found that "even an intelligent middle class consumer may have little bargaining power in a one-on-one situation against a sizable organization").

⁹² See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Rakoff, *Contracts of Adhesion—An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); cf. D. PRIDGEN, CONSUMER PROTECTION AND THE LAW 1-1 to 1-2 (1988). In a discussion of the historical context underlying the recent enactment of consumer protection laws, Professor Dee Pridgen states:

The common law of tort placed significant barriers in the path of a consumer who had been misled by a seller and wanted some legal redress. Sellers appeared to be perfectly capable of getting away with outright lies under the prevailing legal doctrines. The commercial law of

strongly indicates that sellers pervasively tend to employ unfair and deceptive practices if given the opportunity to do so. Since the late 1960s, every state in the union has passed some form of legislation aimed at protecting consumers from sales abuses.⁹³

That these and similar practices attributable to disparate bargaining power routinely work to the disadvantage of individuals in their dealings with large entities is a point which wholly fails to impress Huber.⁹⁴ In romanticized terms, he asserts:

Contract law—the whole idea of making persons stick to their agreements and promises—is . . . rooted in a notion of consumer protection. . . . [I]t serves to put the powerful and the humble on the same plane. . . . It is surely one of the greatest ironies of modern law that latter-day reformers have come to see contracts as nothing more than a stacked game in which producers hold all the cards History teaches otherwise.⁹⁵

What it is in “history” that “teaches otherwise” is far from clear. Huber offers no evidence—empirical, historical, or even anecdotal—to refute the idea that the game is “stacked.” He is content to reduce the problem of the adhesion contract to caricature: “The consumer . . . [is] now viewed much as a fly near flypaper, ever in danger of sudden death by glue, no different in any important respect from the unwitting pedestrian who suddenly . . . [finds] himself adhering to the fender of a stranger’s car.”⁹⁶

Huber suggests that under the old law of contract, “courts viewed the . . . [plaintiffs] of this world as intelligent adults, whose freely made contractual commitments were to be respected and enforced as *bargained for*.”⁹⁷ In fact, however, the notion that bargaining had taken place was usually nothing more than a fiction.⁹⁸ And based upon that fiction, those persons with control over the greatest engines of destruction were often held to the lowest standards of social responsibility.

contract worshipped the sanctity of the written agreement, and made no exception for consumer transactions, where the document was under the total control of the seller and was not the subject of real bargaining. Harsh adhesion clauses could be forced on buyers who had no viable alternatives.

Id.

⁹³ See *id.* at 3-2.

⁹⁴ See P. HUBER, *supra* note 7, at 30 (denigrating, but not refuting, the theory of adhesion).

⁹⁵ *Id.* at 22.

⁹⁶ *Id.* at 30-31.

⁹⁷ *Id.* at 21 (emphasis added); see also *id.* at 8 (the “old contract-centered law placed enormous confidence in individuals to manage the risks of their personal affairs”).

⁹⁸ See *supra* note 92; see also A. LAFRANCE, M. SCHROEDER, R. BENNETT & W. BOYD, *LAW OF THE POOR* 2 (1973):

Consumer, as contrasted with commercial transactions, rarely are characterized by any bargaining but rather tend to be basically adhesion arrangements in which consumers simply accept terms dictated by creditors. Consumers, moreover, frequently do not understand the legal consequences of customary commercial terms; consequences that often directly conflict with their expectations concerning the respective obligations of the parties.

Id.

It is difficult to see what has changed in recent years to warrant turning back the clock. Indeed, with an ever-increasing percentage of consumer products produced by ever-larger corporations, often located abroad, the disparity in bargaining power between buyer and seller arguably is becoming greater. Moreover, the much discussed, if seldom substantiated, deterioration of the American public educational system may be exacerbating this decline by depriving individuals of the knowledge and skills necessary to recognize and assess the risks they would be exposed to in Huber's world of neocontract.

Huber's assertion that adoption of neocontractual principles will spur a broad give-and-take between sellers and consumers in defining liability coverage reflects a belief in the capacity of individuals that is, at best, naive and unrealistic, and at worst, Darwinian.⁹⁹ Most consumers never bargain for a single modification in the terms of an apartment lease, a car warranty, a ski lift ticket, or an airline baggage tag.¹⁰⁰ The idea that the same people will suddenly begin to undertake such negotiations with respect to all of their affairs—every sale, lease, rental, or exchange transaction—or that they will redirect their business to other vendors offering better terms¹⁰¹—doing their Saturday shopping at ten stores rather than three—is more than a little preposterous.

E. Consenting to Take One's Chances

Much of Huber's concern about the current condition of the tort system stems from his apparent belief that the right to consent to take one's chances is dead.¹⁰² In fact, the idea of individual accountability for one's actions has long been,¹⁰³ and remains, a foundation of American

⁹⁹ Huber's failure to appreciate the problem of adhesion (*e.g.*, "who is to say, anyway, what is adhesive and what is not?" P. HUBER, *supra* note 7, at 210) appears to be rooted in a belief that the current reluctance of courts to enforce contracts limiting the liability of producers and sellers is an affront to the dignity of consumers. He writes:

The model of consumer ignorance and flypaper contracts is dangerous. By dismissing the consumer as one with the intelligence and free will of a fly, the modern law ultimately leaves her with no greater freedom to shape her own environment. Flies do not help themselves very wisely nor each other very often, but people can and will, if they are only allowed to.

Id. at 211.

¹⁰⁰ *Cf. id.* at 30.

¹⁰¹ *See id.* at 210.

¹⁰² *See id.* at 188 ("consent counts for nothing"); *id.* at 191 ("The freely made agreements of the parties are legal nullities. . . . At every turn, payment through juridical process is to supersede payment based on—and limited by—private agreement."); *id.* at 221 ("[Modern tort law] robs us of . . . the freedom to plan in advance, to make commitments, to arrange deals on terms mutually agreeable to the parties involved. Modern tort law abrogates our freedom to cooperate."); *id.* at 222 ("We no longer have a functioning law to encourage and enforce the settlement of accidents beforehand, through . . . assumption of risk."); *id.* at 175-76 ("There was a law of contract once, which respected personal choice, assumption of risk, and the like. But no one [has] paid any attention to that for decades . . .") (emphasis in original).

¹⁰³ *See* R. POUND, *THE SPIRIT OF THE COMMON LAW* 37, 48-49 (1921) (discussing ultra-individualism in Anglo-American law and its role in the shaping of tort doctrines under which each individ-

law. The dispute has never been over whether the principle is sound, but over how strongly it should influence the shaping of legal rules.

The present tort system is not incapable of accommodating the wishes of individuals to accept partial or full responsibility for the risks inherent in dangerous conduct. The digests are replete with cases—recent decisions, not the “venerable” ones mourned by Huber—in which recovery was denied to plaintiffs on the authority of the *volenti* principle.¹⁰⁴ As of late, we have seen courts in comparative negligence states treat certain forms of assumption of risk not as a partial defense, but as a total bar to liability on the ground that the defendant was under no duty to protect the plaintiff.¹⁰⁵ We have also recently witnessed, in many jurisdictions, the replacement of the defense of comparative negligence with a more flexible comparative causation analysis (sometimes called comparative responsibility or comparative fault) in which a plaintiff’s contribution to an accident may offset recovery from a defendant, even where an action is based on strict liability.¹⁰⁶ These changes clearly indicate the willingness of courts to hold individuals accountable for their own actions; there is no reason to conclude that the right to consent to take one’s chances is dead.

Huber is probably correct in asserting that some courts are all too eager to set aside written agreements in order to compensate seriously injured persons. However, the solution to this problem is not to negate the broad assurances of modern products liability law which provide, in the ordinary case, that personal injuries resulting from product defects will be compensated. Nor is the answer to impose on consumers en masse the burdens, on the one hand, of custom-designing liability coverage for every good and service, or, on the other hand, of accepting the terms of standardized (and often adhesive) agreements limiting liability. Custom-tailoring may indeed be advantageous in particular cases, but it is an entirely different question as to whether individualized agreements should be the rule, rather than the exception. Rather, the solution is to

ual was deemed to have chosen his field of employment freely and to have taken responsibility for his own injuries).

¹⁰⁴ See, e.g., *Maddox v. City of New York*, 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985) (holding that the defendant had proved implied assumption of risk based on the conduct of the plaintiff); *Arbegas v. Board of Educ.*, 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985) (holding that express assumption of risk survives the enactment of comparative negligence as a complete defense); *McCrimmons v. Cornell-Yound Co.*, 171 Ga. App. 561, 320 S.E.2d 398 (1984) (as a matter of law, plaintiff assumed the risk of injury from an allegedly defective tire rim assembly which he inspected).

¹⁰⁵ See, e.g., *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986) (holding that professional jockey’s informed assumption of risk by participating in horse race barred partial recovery under comparative fault statute) (citing 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 52, at § 21); PROSSER AND KEETON ON TORTS, *supra* note 71, at § 68.

¹⁰⁶ See W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 35, at 783 (“Thirty jurisdictions now apply comparative fault to product liability either by statute or by judicial expansion of a comparative negligence rule.”); V. SCHWARTZ, *supra* note 48, at § 12.2.

address specifically those weaknesses in the tort system which make it possible for courts to improperly circumvent agreements that wholly or partially relieve one party of liability for resulting injuries. In particular, there is a need for more careful lawyering by those seeking either to opt out of the tort system or to rely upon another's opting out. There is also a need for better oversight of errant judges by appellate courts, colleagues, and critics in academia.

IV. REGULATORY ABSOLUTION

Huber proposes barring recovery in tort where a product which causes harm has been placed on the market with regulatory agency approval¹⁰⁷ or where an allegedly defective warning conforms to agency-prescribed standards.¹⁰⁸ Aside from the fact that to so hold would remove important incentives for manufacturers to improve many products,¹⁰⁹ this plan for short-circuiting the ordinary channels of judicial review is subject to criticism on at least four grounds.¹¹⁰ To a greater or lesser extent, each of these arguments goes to the central issue of whether the final word on product safety and accident compensation should reside in a regulatory agency.

A. Budgetary Limitations

First, regulatory agencies—such as those which license or regulate new drugs, medical devices, aircraft, nuclear power, and a wide range of consumer products—all operate on limited budgets. History demonstrates that they are frequently underfunded and lack the personnel and other resources that are needed to set standards effectively¹¹¹ or to evalu-

¹⁰⁷ See P. HUBER, *supra* note 7, at 214-15.

¹⁰⁸ See *id.* at 212-13. Others have also proposed the creation of an absolute defense based on compliance with government regulations:

Many of those who propose compliance with government standards as an absolute defense justify the result on the ground that because non-compliance is negligence per se, compliance should preclude liability. Other justifications are promoting certainty, and avoiding the "cost-benefit analysis" that juries are asked to make in determining the feasibility of a safer alternative. A governmental standard defense would be easy to apply, as compliance could be proved or disproved as a fact. Juries would not be required to consider factors such as product effectiveness, cost and aesthetics, because the trade-offs involved have been legislatively determined.

A. MURPHY, K. SANTAGATA & F. GRAD, *THE LAW OF PRODUCT LIABILITY: PROBLEMS AND POLICIES* 52-53 (1982); see also, Johnson, *supra* note 69, at 687 & n.50.

¹⁰⁹ See *id.* at 688.

¹¹⁰ A fifth possible objection is that "[t]he creation of a process defense in product liability litigation would surely lead the courts to reject many existing standards and the regulators to behave even more cautiously." G. EADS & P. REUTER, *supra* note 69, at 143.

¹¹¹ See K. VISCUSI, *REGULATING CONSUMER PRODUCT SAFETY* 40 (1984) (noting that the ultimate effectiveness of the Consumer Product Safety Commission hinges on the resources it commands and that its budgetary history has been erratic, with funding sometimes involuntarily "slashed"); G. EADS & P. REUTER, *supra* note 69, at 141-42 (noting that the National Highway Traffic Safety Administration "has stated ambitions which it lacks the powers and resources to achieve"); Quirk, *Food and Drug Administration*, in *THE POLITICS OF REGULATION* 206 (J. Wilson

ate thoroughly the applications and products which they are called upon to review.¹¹² These budgetary limitations, coupled with often “staggering workloads,”¹¹³ counsel caution, to say the least, in according conclusive status to agency determinations concerning which products may be used or purveyed and what warnings must be given.¹¹⁴

An affirmative decision by an agency to permit the use or sale of a product may more accurately reflect a scarcity of regulatory resources than a thoroughly considered judgment that a product is harmless or that it would be unfair to hold the purveyor liable for resulting injuries. Similarly, an agency’s lack of dispatch in revoking previously conferred approval for marketing of a product may be more a function of budgetary constraints than of doubt as to the validity of new evidence tending to demonstrate the unsoundness of a prior decision.¹¹⁵

ed. 1980) (noting that FDA lacks the resources needed for reasonable speed and accuracy); cf. G. EADS & P. REUTER, *supra* note 69, at x (“Except for a small number of high-hazard industries, product standard setting by regulatory agencies has not been effective.”).

¹¹² See L. JOHNSON, *supra* note 69, at vi (noting sharp reduction in the budget of the Consumer Product Safety Commission and anticipating weakened standard-setting and enforcement).

¹¹³ See Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 392 (J. Wilson ed. 1980).

¹¹⁴ It might be argued that, in terms of reliability, a distinction may be drawn between agency decisions approving and banning products. Where the final determination of an agency holds that a product is so dangerous that it should be kept out of the market, arguably there are special reasons to trust the validity of that finding, notwithstanding a scarcity of regulatory resources. In making such a decision, an agency will be fully aware that affected enterprises will have great incentive to strongly contest the soundness of the ruling. Consequently, during the decisionmaking process, the energies of the agency will focus on the full range of pertinent issues, if for no other reason than to fend off potential criticism by a disappointed applicant and to protect those in charge from the possibility of rebuke.

Where, however, an agency approves rather than disapproves a product, similar guarantees of decisional trustworthiness may be lacking. In reaching its decision, the agency knows that affected companies will have no reason to complain or request reconsideration; typically, no adverse party presents opposing views, and there are no special incentives for the agency to spend precious resources on double-checking the correctness of a ruling likely to go unchallenged—at least for the near future.

The foregoing analysis would suggest that agencies are biased in favor of acceding to requests for approval. In fact, however, commentators agree that many agencies—particularly the Food and Drug Administration—are reluctant to grant such requests. See Quirk, *supra* note 111, at 204 (the FDA regulatory structure provides grounds for “extreme caution”). The consensus is that agency officials are far more concerned about the possibility that a hazardous new drug or other product will lead to highly publicized catastrophes, and will thus harm the reputation of the agency and particular individuals therein, than about the risk of sustaining largely unpublicized criticism from spurned applicants based on the agency’s refusal to approve a purportedly nonhazardous product. See Wilson, *supra* note 113, at 375 (agency “careerists” are threatened by the possibility of a major scandal such as the “dramatic loss of life or catastrophic injury among people nominally protected by the decisions of the agency”); see also G. EADS & P. REUTER, *supra* note 69, at 37 (“The regulator and the regulated often share the same concerns to ensure that the existing safety system does not come into disrepute through a major safety failure.”).

¹¹⁵ See K. VISCUSI, *supra* note 111, at 82 (asserting that although the Consumer Product Safety Commission “had misgivings about the desirability of the [swimming pool slide] standard, in 1981 it decided that the cost of formally revoking it was too high to be worthwhile”); see also Quirk, *supra*

Safety statutes implicitly recognize, in many cases, these fiscal realities of the regulatory process. Thus, it is not surprising to find, for example, that the statutory charge to the Federal Aviation Administration (FAA) is defined in terms of prescribing and enforcing "*minimum standards*" for civilian aircraft safety.¹¹⁶ As commentators have observed:

Far from being able to do the whole job [of ensuring health and safety], regulatory agencies can do so little that they must be used carefully if they are to have any effect. Their first task must be to curtail the worst abuses, not wasting time on unimportant issues, and their second task must be to influence *but make no pretense of controlling* the decisions of manufacturers and consumers.¹¹⁷

In contrast to the dearth of resources available to regulatory bodies, personal injury attorneys representing injured individuals often enjoy both the contingent-fee incentive and the financial wherewithal necessary to promote a full exploration of questions relating to product safety through litigation.¹¹⁸ Potential liability provides regulated firms with good reason to vigorously defend their practices, thus ensuring a sharp, adversarial presentation of the relevant arguments in court. To slam the courthouse door pre-emptively on all cases where regulatory approval has been obtained would in many instances preclude a proper resolution of important issues never before fully considered.

This is not to suggest that regulatory agencies play an unimportant role in the advancement of public safety, or that courts should freely disregard their findings. Indeed, regulatory determinations may make substantial contributions to product quality control, and at least where the process is adequately funded and working well, agency findings are entitled to some degree of deference.¹¹⁹ Nevertheless, the competence of regulatory agencies is sufficiently variable¹²⁰ and budgetary limitations are frequently so severe, that there is good reason for not according regu-

note 111, at 223 (discussing other factors which may account for a decision to revoke initial approval).

¹¹⁶ See 49 U.S.C. app. § 1421(a)(1) (1982) (emphasis added).

¹¹⁷ L. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY 3* (1981) (cited in G. EADS & P. REUTER, *supra* note 69, at 140, emphasis added therein); see also Brodsky & Cohen, "*Uncle Sam, the Product Safety Man: Consumer Product Safety Standards in the Marketplace and in the Courts*," 2 HOFSTRA L. REV. 619, 648-49 (1974) ("Consumer product safety standards set a floor below which consumer products must not fall.").

¹¹⁸ *But see* Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOKLYN L. REV. 539, 545-51 (1988) (discussing the difficulties in financing the Agent Orange litigation).

¹¹⁹ See G. EADS & P. REUTER, *supra* note 69, at 142-43 (supporting a "process defense" in areas in which "the regulatory process is, in fact, working"); Johnson, *supra* note 69, at 688 ("If a court finds that a governmental standard is rigorous, up-to-date and directly addresses the defect alleged, compliance with that standard should be dispositive of the manufacturer's due care.").

¹²⁰ See, e.g., G. EADS & P. REUTER, *supra* note 69, at 142-43 (contrasting the pervasive regulatory surveillance and efficacy of the Federal Aviation Administration and Food and Drug Administration with the National Highway Traffic Safety Administration's questionable ability to exercise a meaningful standard-setting or design-certification role).

latory agency approval or compliance with agency prescribed warnings the status of an irrebuttable defense to tort liability.

B. Pressure from Special Interests

Second, unlike courts,¹²¹ regulatory agencies frequently are the object of direct and indirect lobbying by special interests which may affect not only the nature of applicable standards,¹²² but the extent of their enforcement.¹²³ The representatives of commercial enterprises, in many instances, endeavor to persuade agency decisionmakers of the merits of a position through advocacy that is neither objective nor balanced in its presentation of the relevant facts. The risk of distortion of the decision-making process is serious because managers in regulated industries often have close working relationships with regulatory officials.¹²⁴ In contrast, the interests of the victims of product defects may go largely unchampioned by persons outside of the regulatory agency, since public interest lobbies "rarely have the legal staffs or war chests of a well-heeled business lobby."¹²⁵ The risks that agency determinations may unfairly favor

¹²¹ Judges are prohibited by rules of professional ethics from considering any *ex parte* or other communication concerning a pending or impending proceeding. See CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972). This rule precludes out-of-court lobbying by an interested party.

¹²² See Johnson, *supra* note 69, at 687 ("Manufacturers have enormous power to influence the formation of government standards, with the result that the standards are frequently political compromises at best. Some regulations adopted by governmental bodies are 'rubber-stamped versions of existing, voluntary standards adopted by manufacturers within an industry.'").

¹²³ See *id.* at 689 ("decisions on the administrative level are easily influenced by manufacturers").

¹²⁴ One scholar has described the regulatory imbalance at the FDA:

Undoubtedly the most significant pressure on the FDA to approve drugs results directly from industry lobbying of the agency. In the drug-evaluation process there are necessarily frequent contacts between agency officials and representatives of drug companies. . . . [I]ndustry usually behaves itself during such contacts, using factual and reasoned arguments in support of its position, rather than hard-sell tactics, threats, or bribes. Nevertheless, having frequent contacts with industry representatives, getting to know and perhaps like them personally, and seeing their anxiousness to have drugs approved obviously will tend to create some sympathy for industry viewpoints and interests. Such contacts on a regular basis over a period of years may strongly shape the attitudes of FDA officials. Moreover, there are no regular, direct contacts between reviewing officials and any parties inclined to oppose drug approvals. In addition to its psychological effects, this lobbying imbalance also creates an imbalance of information and analysis—arguments favorable to a drug approval will be discovered and articulately put by company representatives while criticisms must be discovered by the reviewer unassisted. Quirk, *supra* note 111, at 211 (footnote omitted). This relationship may cut both ways, however. See G. EADS & P. REUTER, *supra* note 69, at 37 (noting that industry officials may be influenced by government regulators). And, of course, some agency employees deliberately maintain an adversarial relationship with representatives of regulated entities. See Quirk, *supra* note 111, at 208 (discussing FDA).

¹²⁵ Wilson, *supra* note 113, at 385; see also Quirk, *supra* note 111, at 215 ("the financial resources and personnel of . . . [consumer groups] are completely eclipsed by the resources that the drug industry is able to devote to regulatory affairs"); cf. Johnson, *supra* note 69, at 687 ("Because of the expense involved, the only outsiders interested in . . . [taking part in the development of Consumer Product Safety Commission standards] are manufacturers' organizations."). But see Wilson, *supra* note 113, at 385-86 (noting that public interest groups often find it easy to attract media attention and may be able to recover attorney fees in court).

the interests of the companies seeking regulatory approval are all the more ominous in view of the revolving door between government work and the private sector, which tempts agency employees to render decisions which may enhance their own employment chances with the same regulated firms they are charged with overseeing.¹²⁶

C. Political Pressures

Third, administrative agencies, far more than courts, are subject to political pressures.¹²⁷ When a new Administration comes into power at the federal level, its political agenda has an impact on the entire range of agency actions, from enforcement of pollution laws, to approval of vaccines and food additives, to disposal of toxic chemicals.¹²⁸ The chances of an abrupt, and perhaps ill-considered, change in administrative course with respect to product safety are not insubstantial¹²⁹—despite the fact that many would argue that rights of individuals to compensation for injuries should depend on principles more lasting than the results of the latest election.

Similar political pressures might, in theory, also imperil tort judgments rendered by the judicial branch. All federal judges, and many state judges, however, are permitted to serve long terms of office under conditions which permit them to enjoy a substantial degree of independence and insulation from political pressure.¹³⁰ Moreover, the discretion of judges is procedurally constrained by principles not necessarily appli-

¹²⁶ See *id.* at 378 (“speculation is not unfounded” that political appointees to agency positions will “cater to industry in exchange for lucrative positions after government service or material favors . . . while still in that service”); see also *id.* at 374 (noting that some agency employees hope to use their agency-acquired credentials to move on to better jobs elsewhere). See generally P. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 143-74, 176 (1981) (discussing the relationship between the pro-industry bias of some agencies and opportunities for agency employees to obtain more lucrative jobs with regulated industries). But see Quirk, *supra* note 111, at 213 (discounting argument that movement from public sector to private sector employment is often facilitated by the making of lenient regulatory decisions).

¹²⁷ See K. VISCUSI, *supra* note 111, at 39 (“Political considerations may . . . influence the effectiveness of a commission.”); Wilson, *supra* note 113, at 379 (“a ‘political market’ [for persons with career ambitions] has arisen in regulatory agencies”); Quirk, *supra* note 111, at 223 (noting instances where “intense congressional criticism” forced the FDA to reconsider matters).

¹²⁸ See Quirk, *supra* note 111, at 317 (presidential influence on the FDA has occurred primarily through appointments of high-level officials); cf. Wilson, *supra* note 113, at 387 (noting the tradition of political campaign contributions by regulated industries).

¹²⁹ See G. EADS & P. REUTER, *supra* note 69, at 12 (noting the “conscious attempt” during the early years of the Reagan Administration “to reduce the intrusiveness of safety regulation”); *id.* at 33 (noting “the political weaknesses of regulatory agencies in the U.S.”); cf. K. VISCUSI, *supra* note 111, at 38 (noting, with respect to the Consumer Product Safety Commission, “that the political appointment of the commissioners is certain to affect the policy outcomes”); Quirk, *supra* note 111, at 218 (politics accounts for “noticeable fluctuation in the orientation of the . . . [FDA] over time”).

¹³⁰ Cf. Wilson, *supra* note 113, at 390:

It is possible, of course, to devise a “maximizing” or “capture” model of judicial behavior, but thus far none seems especially useful or persuasive. Judges, like professors, have the occupa-

cable at the administrative level, such as due process, stare decisis, and the right to trial by jury. It seems likely, then, that the standards imposed on providers of goods and services will be less consistent and predictable under Huber's policy of deference to regulatory authority than under the standards established by institutions less politically sensitive than regulatory agencies, such as courts of law.

D. *Insufficient Warnings*

Finally, Huber's proposal that the duty of a potential defendant to warn consumers of product dangers should extend no further than compliance with agency-prescribed warnings¹³¹ is ill-conceived on at least two accounts. First, as courts have frequently recognized, "[t]he warnings required by such agencies may be only minimal in nature."¹³² Where that is the case, and the manufacturer or supplier has reason to know of greater dangers not included in the prescribed warning, the only sound course for minimizing accidents and preventing the wasting of human and material resources is to require disclosure of the added dangers to otherwise unknowing consumers. This is all the more true in view of the fact that prescribed warnings may be not merely minimal, but out of date¹³³ or plainly ill-advised.¹³⁴ As an example of the latter point, one commentator has suggested that, with respect to the Consumer Product Safety Commission's actions requiring manufacturers to warn consumers of such risks as those posed by power lawn mowers, "[t]here is little evidence that the purpose or effectiveness of these labels has been fully analyzed or that informational alternatives to regulatory standards have been considered."¹³⁵

Second, even where an agency-prescribed warning is adequate to insure disclosure of all dangers which would ordinarily be encountered, the warning may be eroded or even nullified by overpromotion of the product through a vigorous sales program that may persuade users to disre-

tional security that permits them to indulge, to an even greater degree than most political actors, in the explication and application of ideas.

Id.

¹³¹ See P. HUBER, *supra* note 7, at 212-13.

¹³² *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973); see also Johnson, *supra* note 69, at 677 n.2 ("Label information required by courts has . . . been clearer and more detailed than that required by regulatory agencies."); *id.* at 688 ("safety standards . . . often address only some aspects of design").

¹³³ See *id.* at 688 ("government regulations may be seriously out of date even if they were adequate when enacted").

¹³⁴ In some instances, the contents of official labeling requirements are the result of negotiations between agency and company representatives. See Quirk, *supra* note 111, at 202 (discussing FDA procedures). But see Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 133 (1985) (opining that, in some cases, "negotiated rulemaking appears to hold great promise for remedying the crisis of regulatory legitimacy").

¹³⁵ K. VISCUSI, *supra* note 111, at 60.

gard warnings.¹³⁶ Again, the better course is to evaluate the adequacy of a warning in light of the surrounding circumstances—with due deference paid to the extent of the disclosures required by regulatory agencies.

Huber is properly concerned that excessively detailed warnings may overdeter consumers and prevent them from using products that would avert more serious harms than they would cause.¹³⁷ The same criticism, however, can be leveled at Huber's willingness to defer blindly to regulatory conformity—again, the risk trade-off may be unbalanced. And again, the better solution is to allow courts to exercise their independent judgment to determine how far the duty to warn extends in particular cases.

E. Dealing Effectively with Mass Torts

The foregoing notwithstanding, it is important to note that Huber raises several valid objections relating to products liability law. Under the present system, defendants may be compelled to relitigate, in new suits, legal issues on which they have previously prevailed in other suits,¹³⁸ and judgments on similar legal questions¹³⁹ frequently differ from one court to the next.¹⁴⁰ These problems call for reform. Until administrative agencies are more adequately funded, enjoy greater independence, and are better insulated from improper pressure by politicians and lobbyists, however, the answer is not to accord conclusive status to agency determinations regarding product safety.

A promising course for dealing with these difficulties is to consider carefully the alternatives which have been proposed for mass tort dispute resolution, including expanded use of class actions and multidistrict litigation procedures.¹⁴¹ Such measures would undoubtedly fail to satisfy

¹³⁶ See *Stevens v. Parke, Davis & Co.*, 9 Cal.3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973) (rule stated with respect to overpromotion of a drug to prescribing physicians).

¹³⁷ See P. HUBER, *supra* note 7, at 15-16.

¹³⁸ *Id.* at 209 ("No positive safety judgment is ever really final in the courts . . ."); *id.* at 210 (noting the "endless repetition of identical lawsuits"); *id.* at 102, 110 (discussing determinations concerning the safety of the anti-nausea drug Bendectin).

¹³⁹ See, e.g. *id.* at 110 (discussing the duty of crane operators to furnish warnings of certain dangers).

¹⁴⁰ See *id.* at 225.

¹⁴¹ See, e.g., Johnson, *supra* note 118, at 578 ("The class action procedural device, by avoiding unnecessary multiplication of essentially similar actions, has substantial potential for fairly redressing the widespread harm defective products and technological disasters wreak upon contemporary society."); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 908 (1984) ("Class treatment of mass exposure claims would enable plaintiff attorneys to achieve the same economies of scale that defendants already enjoy."); *id.* at 910 ("Class actions would serve in several respects to increase the system's productivity in handling marketable mass exposure claims."); Weinstein, *supra* note 65, at 28 (class action litigation is "useful" in bringing together many plaintiffs and defendants in single binding litigation); *id.* at 22-28 (discussing advantages and limitations of existing multidistrict litigation procedures).

Huber,¹⁴² for he seeks to secure for producers and other agents of progress not merely the benefits of consistent and efficient post-accident judgments, but pre-accident assurances of no liability—"a definitive bill of health,"¹⁴³ a "green [light] to signal full speed ahead."¹⁴⁴ Those less confident that the fruits of the profit-driven pursuit of progress will be benign, rather than malignant, however, may be content with a more internally consistent compensation system which offers producers only the "flashing yellow [light] of brooding equivocation" that Huber disdains.¹⁴⁵

V. CONCLUSION: BETTER ALTERNATIVES ARE AVAILABLE

Huber's book is interesting because it is a wide-ranging effort to re-think the world of accident liability. Unlike so many recent legislative efforts, Huber does not hack away at the liability tree in senseless, piecemeal fashion, inspired by the narrow goals of special interests. Instead, he approaches the problem broadly. Ironically, however, in this virtue also lies the book's greatest fault. Modern tort law is not fatally flawed. And rather than felling the entire tree, as Huber proposes, what is needed is merely selective pruning of weakened limbs and dangerously oversized branches.

There are many candidates for correction. Compensation of pain and suffering and other forms of mental distress seems all too often ready to careen out of control,¹⁴⁶ and there may be few options other than to cap such damages or narrow the range of compensable injuries. Attorneys' fees must also be a subject of continuing concern—not because the average plaintiff's attorney is wantonly avaricious, as Huber implies, but because the law must always show special solicitude for ensuring that accident victims are adequately compensated from all too scarce resources.

At the same time, however, the law must not renege on its commitment to seek intelligent solutions to the problems created by life in an ever more technologically complicated world. Science and the march of progress did not halt in the nineteenth century, and it would be absurd to think nineteenth century legal reasoning—in which tort liability was routinely denied and injuries were chalked up to bad luck and deficiencies of

¹⁴² Huber's comments on the role of class actions in the development of toxic-tort litigation reflect his distaste for such procedural devices. See, e.g., P. HUBER, *supra* note 7, at 69-70.

¹⁴³ *Id.* at 209.

¹⁴⁴ *Id.* at 210.

¹⁴⁵ *Id.*

¹⁴⁶ Cf. Brookes, *The High Cost of Nadar-tort*, Wash. Times, May 10, 1989, at F1 ("[I]n California bodily injury and 'pain and suffering' claims have skyrocketed 15.5 percent a year since 1983, twice as fast as in the nation as a whole, even though property-damage claim frequency has been virtually flat.").

character¹⁴⁷—is an adequate legal framework for America as it begins to move into the twenty-first century. Thus, Huber's protestations notwithstanding, it may be that traditional views of factual causation must give way to innovative theories of liability, at least where the nature of products and marketing techniques make a just resolution of compensation issues otherwise impossible.¹⁴⁸

It is doubtful that any single proposal—such as Huber's rebirth of contract—can cure the tort crisis. The solution, more likely, lies in careful, continuing judicial reassessment of the viability of specific doctrines, coupled with special vigilance against ill-considered, partisan legislative reforms.

Huber's book should be read, but not because it is an even-handed, accurate portrayal of modern tort law, nor because its proffered remedies are an adequate solution to current problems. Rather, it should be read because it forces one to think deeply about liability issues, and that, of course, is an essential step in curing all that is not well with tort law.

¹⁴⁷ See G. WHITE, *TORT LAW IN AMERICA* xv (1980).

¹⁴⁸ Discussing statutes of limitation, Huber extols the "fussy precision" of the "old timeliness rules" as having "the great advantage of making life, in court and out, orderly and predictable." P. HUBER, *supra* note 7, at 86. But what of the unfortunate individual who has no reason to know of a product's defect until after the period of limitations has elapsed, as where a gun is loaned to the plaintiff and soon thereafter misfires, putting out an eye? Huber offers the hapless victim only lines from a clever dissent about "topsy-turvy land," *id.* at 87, and confirmation that "the timing rules could also appear frustratingly harsh and unfair." *Id.* at 86. Surely that is reason enough to change the ancient timing rules.

Huber correctly points out that the adoption of a discovery rule under which the plaintiff's subjective state of mind is critical poses considerable fact-finding difficulties, in terms of the range of evidence relevant to the issue and the undoubtedly self-serving nature of the plaintiff's testimony. *Id.* at 91. However, judges and juries have long dealt with questions of honesty and good faith. Arguably, society is better served by requiring fact-finders to undertake the sometimes intractable task of applying a discovery rule than by routinely denying compensation to an entire class of persons who, no matter how blameworthy the defendant's conduct, could not have discovered the injury before the statute of limitations expired.