

The Real Tort Crisis—Too Few Claims

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I. POSING THE PROBLEM

When James Henderson asked me to speak at the January 1987 AALS Mini-Workshop on the "Tort Crisis" and Tort Reform and to offer a proposal capable of implementation within the present political climate, I wondered if this was a deliberate plan to co-opt a "crit."¹ I am on record as asserting that "[t]ort law is intimately related to the rise of capitalism as both cause and effect," that it discriminates on the basis of class, race, and gender, that it produces illness and injury, and that it reproduces bourgeois ideology by commodifying experience and justifying inequality.² Reanalyzing the best available study of tort law in action³, I concluded:

. . . judges, legislators, and legal scholars will find it hard to deprecate the magnitude of the threat of illness and injury, to claim that tort liability adequately controls risk, to disregard the differential impact of injury and illness and the bias of the systems that respond to misfortune, to pretend that those systems restore victims to the status quo ante, to ignore the catastrophic impact of injury and illness on many households, or to justify our fault-based tort law as an expression of popular morality. Confronted by this bitter reality, the complicated rationalizations of tort law as compensation, control, or justice collapse like a house of cards.⁴

My colleague, Gary Schwartz, introducing the symposium in which that article appeared, concluded that I sought to demonstrate "the basic depravity of tort"⁵—a characterization I enthusiastically embrace.

Because critical legal scholars repeatedly are attacked as nihilists who offer nothing in place of the legal system they so blithely demolish, I have advanced and elaborated several proposals to reform or replace tort law. First, I have argued that courts can, and should, reconsider the damages they award. Damages for non-pecuniary loss require a lengthy and expensive adjudication in every case; uncertainty about what the jury will award discourages settlement; a rationale and a criterion for

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1. I participated in the founding Conference on Critical Legal Studies in Madison, Wisconsin, ten years ago and have been involved with it ever since, most recently in helping to organize the tenth national conference on "Law and Racism" in Los Angeles in January 1987. Those unfamiliar with the scholarship associated with critical legal studies might consult: *THE POLITICS OF LAW* (D. Kairys ed. 1982); several special law review articles, e.g., *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984), *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 693 (1985), or *A Symposium of Critical Legal Studies*, 34 AM. U.L. REV. 939 (1985); or the bibliography, Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

2. Abel, *A Critique of American Tort Law*, 8 BRIT. J. L. & SOC'Y 199 (1981). An abridged version appears in *THE POLITICS OF LAW* 185 (D. Kairys ed. 1982).

3. D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & V. BRITTAN, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984) [hereinafter cited as *COMPENSATION AND SUPPORT*].

4. Abel, *£'s of Cure, Ounces of Prevention*, 73 CALIF. L. REV. 1003, 1023 (1985) (reviewing *COMPENSATION AND SUPPORT*, *supra* note 3).

5. Schwartz, *Foreword: Tort Scholarship*, 73 CALIF. L. REV. 548, 552 (1985).

non-pecuniary damages do not exist; and such damages extend capitalism's commodification of labor to all human experience. I would like to see such damage awards eliminated.⁶ Tort damages for accidental property loss—both physical damage to property and lost wages, profits, and speculative gains—violate the values of equality and community; furthermore, courts have been unable to develop a satisfactory standard for deciding which losses should be compensated. I would like to see these damages eliminated as well.⁷ Neither reform would prevent anyone from purchasing loss insurance, which would correctly reflect the value the purchaser places on security and require the purchaser, rather than others, to pay for such security. Second, I believe that legislatures should replace the entire fault-based tort system with social insurance for medical and other rehabilitative care and some minimum level of income maintenance.⁸ There is nothing original or radical in this suggestion; the experience of many West European countries, some Canadian provinces, and New Zealand shows that it is fully compatible with a capitalist economy and a liberal democracy. But the political feasibility of both these proposals also is their theoretical weakness, for the fundamental problem is not tort law but capitalism. It is capitalism that compels entrepreneurs to pursue profits by minimizing expenditures on safety and externalizing accident costs. And it is capitalism that allows those who own the means of production to subject workers to the risks of injury and illness. In order to render the encounter with risk as equal and autonomous as possible, it will be necessary to struggle for a decentralized democratic socialism, in which workers own and manage their enterprises (and thus control the risks they bear) and equalize those risks by reducing the division of labor and rotating dangerous tasks.⁹

I have reviewed these earlier positions because I want to emphasize that I stand by each of them. I support judicial reform of tort damages, legislative enactment of social insurance, and the struggle for democratic socialism. But if it is essential for critical legal scholars to show the evils of existing legal and social arrangements and to participate in imagining and creating alternative futures, it also is essential that we engage in contemporary debates whose terms are defined by others in order to demonstrate how our critical perspective can point to immediate concrete reforms. In this Article, therefore, I take the present tort system as a given. I assume that individual victims seeking damage awards will have to convince courts that negligent defendants caused their injuries. And I assume that the goals of the system are to compensate victims, discourage unreasonably dangerous behavior, and correct normative violations, all at the lowest costs.

What, then, is the central problem of the tort system? What is the "tort crisis"? Most commentators assert that the crisis is too much tort liability: too many claims, the extension of liability rules to new situations, the relaxation of the requirement of

6. Abel, *supra* note 2, at 206–08.

7. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79 (1986). A slightly different version appears in *THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS* 155 (M. Furmston ed. 1986).

8. Abel, *supra* note 2, at 208–11.

9. Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982).

fault, loose notions of causation, the erosion of defenses, and the inflation of damage awards. These commentators also deplore the consequences: increased liability insurance premiums and the unavailability of insurance; the tendency for potential defendants to "go bare"; and the number of entrepreneurs who have left the market because they no longer can make a profit, thereby depriving consumers of valuable goods and services.

There is a grain of truth in these claims, although I think they often are exaggerated. Changes in substantive tort rules and jury decisionmaking undoubtedly have favored plaintiffs, but it is essential to stress that we still have a fault-based system. Astronomic jury awards constantly are publicized by the media: "Jurors Assess Monsanto \$108 Million Over Death"; "Maker of 'Suicide Doors' for Jeeps Hit With \$19.2-Million Jury Award"—to quote just two examples.¹⁰ But most awards are small (half of Cook County, Illinois awards between 1960 and 1979 were under \$8,000), and if the tiny minority of very large awards is excluded, the median award actually declined during this period.¹¹ Furthermore, the *failure* of tort victims to claim or to recover is never news. The media also have publicized the rise in liability insurance premiums and the consequences of this: "Businesses Change Ways in Fear of Lawsuits"; "Soaring Liability Premiums Threaten Some Bus Lines"; "Ponies in Peril: Insurance Woes Threaten Griffith Park Ride"; "Insurance Costs Imperil Recreation Industry"; "Liability Crisis Complicates Contraception."¹² But insurance costs are at least as much a function of fluctuations in interest rates and market cycles that compel inflated premiums to restore reserves depleted by insufficient premiums charged in earlier years. Thus, the recent "crisis" appears to be ending more because a cycle is over than because of changes in substantive tort law: the return on equity from liability insurance underwriting fell from a staggering twenty-five percent in 1977 to two percent in 1984 but rose again to fifteen percent in 1986.¹³

In any case, insurance costs often appear to be an excuse for producers who wish to raise the price of goods and services rather than a compulsion to do so. The Rochester Lilac Festival bemoaned a 400 percent increase in its liability insurance

10. Reinhold, *Jurors Assess Monsanto \$108 Million Over Death*, N.Y. Times, Dec. 13, 1986, § I, at 10, col. 4 (\$8 million compensatory, \$100 million punitive damages for leukemia allegedly caused by exposure to benzene); Klunder, *Maker of 'Suicide Doors' for Jeeps Hit With \$19.2-Million Jury Award*, L.A. Times, Oct. 16, 1986, Part I, at 22, col. 1 (remittitur from original award of \$17.7 million special damages and \$6 million for pain and suffering).

11. M. PETERSON & G. PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS* (1981), quoted in Rand Corporation, Institute for Civil Justice, *A Report on the First Four Program Years 17-18* (1984). Punitive damages were awarded in 2.5 percent of all trials in Cook County between 1980 and 1984; the median award was \$43,000. M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* (1987).

12. Lindsey, *Businesses Change Ways in Fear of Lawsuits*, N.Y. Times, Nov. 18, 1985, § I, at 1, col. 2 (closing of ice skating rinks, practice of defensive architecture); Lindsey, *Soaring Liability Premiums Threaten Some Bus Lines*, N.Y. Times, Dec. 29, 1985, § I, at 16, col. 1; Harvey, *Ponies in Peril: Insurance Woes Threaten Griffith Park Ride*, L.A. Times, Feb. 11, 1986, Part II, at 1, col. 3; Hanley, *Insurance Costs Imperil Recreation Industry*, N.Y. Times, May 12, 1986, § I, at 1, col. 1 (liquor banned at Candlewood Lake, sailboard races on Long Island Sound, fireworks at festivals, etc.); Dullea, *Liability Crisis Complicates Contraception*, N.Y. Times, May 19, 1986, § II, at 8, col. 2 (IUDs unavailable in the U.S.; "'It's one more example of how the consumer is being hurt by the malpractice crisis,' Dr. Pascario added. 'No sane physician would dare give an IUD today except to his wife.'"). For a dissenting view on the costs and benefits of IUDs, see M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985).

13. Glaberson, *Liability Rates Flattening Out As Crisis Eases*, N.Y. Times, Feb. 9, 1987, § I, at 1, col. 5.

premium, but this still represented only \$0.04 a ticket.¹⁴ Ski lift operators have complained loudly, but their premiums also constitute only three percent of lift ticket prices. The Boy Scouts of America deplored the increase in their liability insurance premium from \$2 million to \$10 million in 1986, but they planned to respond with an annual surcharge of \$20 a troop—hardly a major burden on any Cub or Boy Scout.¹⁵ A 1978 survey found that product, occupier, and general liability costs (insurance premiums plus damage payments) totalled less than 0.2 percent of sales; in that manufacturing sector where they were highest (rubber and plastics), they constituted only 0.58 percent; even among hospitals, they were only 2.35 percent of gross income.¹⁶ In 1983 products liability claims cost industry much less than one percent of total sales.¹⁷ And even the most notorious liability “crisis”—medical malpractice—has been greatly overblown. Among self-employed physicians in 1985, malpractice insurance premiums were only nine percent of the total costs of practice; they ranged from two percent of gross income for those practicing internal medicine to eight percent for obstetrician/gynecologists. For hospitals, malpractice insurance premiums per inpatient day increased from \$3.02 in 1983 to \$5.60 in 1985, but these represented only 0.8 percent and 1.1 percent of total costs, respectively.¹⁸

Although I believe that the empirical evidence for a liability insurance “crisis” is weak and that the “crisis” is actually a mere reflection of an economic cycle produced by market forces, I do not wish to rest my critique on those grounds. Instead, I want to advance three propositions. Everyone working within the generally accepted paradigm of contemporary tort law must concede the first proposition: successful tort claims do not *create* liability costs, they merely *shift* them from victims to tortfeasors. It is the *tortfeasors* who create liability costs by injuring victims.¹⁹ My second proposition is empirical and therefore subject to correction and refinement by further research, but I do not think it is particularly controversial. If liability costs are high, it is because injuries are frequent and serious. The United States Bureau of the Census recently found that fourteen percent of those between ages 16 and 64 and twenty-one percent of those over age 15 have significant physical disabilities²⁰ (of course, not all these are the result of tortious act). The American Bar

14. See Hanley, *supra* note 12.

15. Pear, *Boy Scouts Plan Liability Fee*, N.Y. Times, May 20, 1986, § I, at 17, col. 1.

16. G. EADS & P. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 30-31 (1983).

17. *Id.* at 121.

18. U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 4 (1986) (GAO/HRD-86-112).

19. There are only two possible objections to this statement. First, victims do not really suffer injury either because claims are fraudulent or because damages are inflated. The tort system is no less able today than previously to identify and reject fraudulent claims; and I agree with critics of damages for pain and suffering. Second, those held liable did not cause the injuries. If the assertion is that the victims caused their own injuries, defendants can invoke doctrines of contributory or comparative fault or assumption of risk (although I would prefer to see all three eliminated). If the assertion is that a third party caused the injury, the defendant can invoke doctrines of cause in fact or proximate cause (although I find both hopelessly ambiguous). If the objection is that the tort system imposes high transaction costs, I agree completely, but that is an argument for reforming or abolishing the entire system, not for preventing or discouraging particular claims.

20. *Census Study Reports 1 in 5 Suffering from a Disability*, N.Y. Times, Dec. 23, 1986, § II, at 7, col. 1. See generally COMMITTEE ON TRAUMA RESEARCH, INJURY IN AMERICA: A CONTINUING PUBLIC HEALTH PROBLEM (1985).

Foundation study of legal needs found that fifty-eight percent of all men and forty-four percent of all women reported that they had incurred a serious tort problem during their lifetimes.²¹ And the investigation by the Oxford Centre for Socio-Legal Studies found that forty out of every 1,000 people had suffered at least two weeks of incapacity from an injury during the preceeding *twelve months*.²²

It is my third proposition—the core of this Article—that is controversial. The real tort crisis is old, not new. It is a crisis of underclaiming rather than overclaiming. The tort system does not encourage fraud or display excessive generosity but fails to compensate needy, deserving victims. It does not place undue burdens on socially valuable activities but fails to discourage unreasonable risks. And it does not censure the innocent but fails to condemn the guilty. The rhetoric of those who deplore the burden of liability and insurance costs is simply another expression of the conservative backlash of recent years. It can be summarized in a sentence: "Let's hang on to what we have, and when others seek the same privileges we'll say our society can't afford it." This ideology embraces, reinforces, and unifies diverse positions. Although it concedes that the early civil rights movement expressed legitimate grievances, it contends that racial minorities no longer have any reason to complain and that affirmative action violates the rights of whites. Characterizing them as threats to the family, it rejects the claims of feminists, which never were granted the same legitimacy as those of blacks. It portrays environmentalists as a privileged few pursuing their self-interests at the expense of the economy.²³ Insisting that Americans always have been excessively litigious, it declares that this indulgence now has gotten out of hand.²⁴ It blames our alleged contentiousness on the fact that we have "too many" lawyers—largely because women and minorities insisted on entering the profession beginning in the mid-1960s. Advocates of these views propose a number of solutions. They favor delegating significant areas of social relations.²⁵ They propose alternatives to the formal legal system.²⁶ They favor deregulation of the economy.²⁷ And they seek to privatize as much of the public sector as possible (while enormously expanding the military, police, and prisons). Diatribes about the "tort liability crisis" are simply another manifestation of this defense of privilege. From its perspective, tort victims are like welfare cheats—social parasites who seek riches without effort and often commit fraud to get them.

21. B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 117 (1977).

22. *COMPENSATION AND SUPPORT*, *supra* note 3, at 31.

23. I have criticized such views in Abel, *Blaming Victims*, 1985 AM. B. FOUND. RES. J. 401 (review essay on M. DOUGLAS & A. WILDAVSKY, *RISK AND CULTURE* (1982)).

24. See the extensive citations in Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Galanter, *The Legal Malaise; or, Justice Observed*, 19 LAW & SOC'Y REV. 537 (1985); Galanter, *The Day After the Litigation Explosion*, 46 MO. L. REV. 3 (1986). For another critique of this perspective, see L. FRIEDMAN, *TOTAL JUSTICE* (1985).

25. I have criticized this position in Abel, *Delegalization: A Critical Review of Its Ideology, Manifestations, and Social Consequences*, in ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT 27 (E. Blankenburg, E. Klaus and H. Rottleuthner eds. 1980) (*Jahrbuch für Rechtssoziologie und Rechtstheorie*, vol. 6).

26. I have criticized this position in Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. SOC. OF L. 245 (1981); *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267 (R. Abel ed. 1982); *Informalism: A Tactical Equivalent to Law*, 19 CLEARINGHOUSE REV. 275 (1985).

27. I have criticized this position in *Risk as an Arena of Struggle*, 83 MICH. L. REV. 772 (1985) (review essay on E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982)).

II. MANY INJURY VICTIMS FAIL TO CLAIM

Like the second proposition, my third proposition—that many tort victims fail to claim—also is empirical (I discuss its normative significance in Part III). Proving a negative always is difficult. Proving this negative is costly as well, for it is necessary to establish the population of injury victims who *could* recover tort damages before examining how many of them, and which ones, actually do so. Only a few studies attempt this rigorous task. The joint study of the legal needs of the public by the American Bar Association and the American Bar Foundation in 1973 and 1974 found that only sixteen percent of those who reported tort problems consulted lawyers about them; the proportion ranged from thirty-four percent of those who suffered personal injury to eight percent of those who suffered property damage.²⁸ Other studies have disclosed that the claims rate varies significantly by the environment within which the injury occurs. One investigator compared expert judgments about injuries caused by medical malpractice, based on the 1974 records of twenty-three California hospitals, with claims closed between July 1975 and December 1978 by private insurers and reported to the National Association of Insurance Commissioners. This study found that one in every 126 patients suffered an injury due to negligence. Only a tenth of these filed a claim. And only forty percent of the claims, or four percent of the negligent injuries, resulted in payment. Even among those who suffered major permanent partial disability as a result of medical malpractice, less than seventeen percent filed claims, and only 6.5 percent received any payment.²⁹ Another study of the 1972 records of two hospitals found that only one out of every fifteen significant injuries caused by malpractice led to claims (6.7 percent) and acknowledged that even this was an overestimate because not all incidents of malpractice could be detected from the records.³⁰ And a third study discovered that forty percent of the malpractice incidents physicians themselves report to their insurers never result in claims.³¹

Many workplace injuries also fail to produce claims but for different reasons: employers discourage workers from reporting or claiming, in an effort to conceal such incidents for fear of liability, increases in liability insurance premiums, greater regulatory activity, and criminal penalties. The Occupational Safety and Health Administration and the Bureau of Labor Statistics, which rely on employer reports, recorded 3,750 worker deaths on the job in 1985, whereas the National Safety Council independently estimated the number at 11,600, more than three times as many. The Department of Labor recently cited Chrysler for willful failure to report 182 worker injuries at a single assembly plant and sought a \$910,000 fine. Chrysler settled the charge by paying \$295,000, plus another \$10,502 for offenses at two other plants. The Labor Department also cited Union Carbide, Monsanto, Shell Oil, Fina,

28. CURRAN, *supra* note 21, at 145.

29. P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 19-21, 23 (1985).

30. L. Pocincki, S. Dagger & B. Schwartz, *The Incidence of Iatrogenic Injuries*, Appendix to Report of Secretary's Commission on Medical Malpractice 50-70 (1973) (DHEW #OS 73-89), *quoted in* W. SCHWARTZ & N. KOMESAR, DOCTORS, DAMAGES AND DETERRENCE: AN ECONOMIC VIEW OF MEDICAL MALPRACTICE 11 (1978) (Rand # 2340-NIH/RC).

31. OFFICE OF THE SECRETARY, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, STUDY OF MEDICAL MALPRACTICE CLAIMS CLOSED IN 1970 (1973), *quoted in* W. SCHWARTZ & N. KOMESAR, *supra* note 30, at 12.

and USX Corporation for similar concealment.³² The United Food and Commercial Workers Union has filed a complaint against IMP Inc., a midwest meatpacking plant, alleging that it kept two sets of injury logs in 1985—the one submitted to OSHA showed 160 injuries or illnesses in its processing department, but the plant's own books recorded 1,800.³³ The California Supreme Court has taken the unprecedented step of holding Johns-Manville liable to its employees in tort rather than workers' compensation because, for decades, Johns-Manville concealed from workers the fact that company health records showed they were suffering from exposure to asbestos.³⁴ A contemporary American study found that only about thirty-seven percent of work accident victims claim workers' compensation.³⁵

Even road accidents display significant underclaiming, despite the facts that the police generally record the event, the defendant usually is a stranger to the victim, and liability insurance coverage is very widespread. In New York City, eighty-seven percent of a random sample of those suffering slight shock or contusion in an automobile accident in 1957 had made a claim by September 1959, sixty-six percent had retained a lawyer, and sixty-four percent had obtained some compensation;³⁶ but it seems likely that higher proportions of that *half* of the sample who could not be located failed to take each of these steps. A Michigan study in the early 1960s found that only fourteen percent of all automobile accident victims hired lawyers; but among those who suffered \$500 in medical expenses, two weeks of hospitalization, permanent physical impairment or death, half of the victims or their families did so.³⁷

The most comprehensive study of the rate of claiming has been conducted by the Oxford Centre for Socio-Legal Studies.³⁸ In 1976 and 1977 the Centre interviewed 1,202 individuals who had been identified in a previous survey as having suffered at least two weeks of incapacity due to injury within a recent twelve month period. It found that 5.3 percent had incurred their injuries on the road, 8.7 percent at work, and eighty-six percent in "other" settings. The proportions who considered claiming, however, varied inversely with the importance of the category: forty-seven percent of

32. Noble, *Certain Numbers Can Kill*, N.Y. Times, Nov. 28, 1986, § II, at 16, col. 4. Noble, *Chrysler Will Pay \$295,000 Fine for Violations on Injury Records*, N.Y. Times, Jan. 31, 1987, § I, at 7, col. 5. The Labor Department subsequently fined General Dynamics Corporation \$615,000 for 174 instances of willfully failing to report workplace injuries and illnesses. It was the eighteenth major corporation to be fined more than \$100,000 for record-keeping violations within a sixteen-month period. *General Dynamics Corp. Is Fined \$615,000 by U.S. Safety Agency*, N.Y. Times, July 30, 1987, at 15.

33. Risen, *Injury Rate Soaring, Workers at Meatpacking Plant Say*, L.A. Times, Mar. 2, 1987, Part IV, at 1, col. 2.

34. *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980). A bill recently introduced into Congress would require the government to notify workers when they have been exposed to dangerous substances. It is opposed by the National Association of Manufacturers and 176 associations of small businesses. Several years ago, when the National Institute for Occupational Safety and Health notified 835 workers of Synalloy Company that they had been exposed to a chemical that caused bladder disorders, 171 claimed damages, and the company settled 121 of the claims for a total of \$500,000. *Debating a Bill on Job Hazards*, N.Y. Times, July 13, 1987, at 22, col. 1.

35. Sincere, *Processing Workers' Compensation Claims in Illinois*, 1982 AM. B. FOUND. RES. J. 1073, 1105.

36. R. HUNTING & G. NEUWIRTH, *WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS* 4-8, 36-39 (1962).

37. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 285 (1964).

38. COMPENSATION AND SUPPORT, *supra* note 3.

road accident victims and forty-six percent of work accident victims considered claiming but only nine percent of victims in "other" accidents. The proportions actually obtaining damages were lower still: twenty-nine percent of road accident victims, nineteen percent of work accident victims, and only two percent of victims of "other" accidents. Because this last category greatly outnumbered the other two, a total of only twelve percent of all those who suffered two weeks of incapacity as a result of injury recovered any damages.³⁹

The levels of claiming in the United States and Great Britain are surprisingly similar—about half of road accident victims, somewhat fewer work accident victims, and hardly any victims of other accidents, who are by far the largest category—even though there are several reasons why victim behavior might differ. On one hand, Britain awards costs against an unsuccessful plaintiff, damages are lower, contingent fees are prohibited (although a victim's solicitor may forgive the costs of an unsuccessful claim), social insurance is more comprehensive, and cultural attitudes differ. On the other hand, legal aid is available to tort victims in Britain but not the United States, and the British rule on costs allows a successful plaintiff to keep the entire award, without the deduction of attorney's fees.⁴⁰

A number of qualitative studies tend to support the conclusion that victims of injury are reluctant to sue, not overeager, and that many social environments discourage claims. David Engel uncovered strong social pressures against claiming by injury victims in a rural community in southern Illinois, even when the tortfeasor was a foreign corporation.⁴¹ Donald Landon found that small-town lawyers in rural Missouri were reluctant to sue local notables.⁴² Carol Greenhouse reported that the largely Baptist population of an Atlanta suburb strenuously opposed recourse to the courts.⁴³ These attitudes are not peculiar to the country or the South. M.P. Baumgartner learned that the upper-middle class inhabitants of a Connecticut bedroom community near New York City rarely complained about neighbors, even when their behavior was quite outrageous, although working-class residents expressed their conflicts more openly.⁴⁴ Similar differences emerged in Boston: neighbors in a middle-class area tended not to voice their grievances against each

39. See Abel, *supra* note 4, at 1012-13. A pilot study for this survey found that virtually none of those who suffered accidents in the home sought compensation or recovered. Burman, Genn & Lyons, *The Use of Legal Services by Victims of Accidents in the Home—A Pilot Study*, 40 MOD. L. REV. 47 (1977). An earlier survey of all accident victims, not just those with serious injuries, found that only 6.5% obtained any compensation through the tort system. ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT (1978) (Cmnd 7054-1) (Pearson Commission).

40. ROYAL COMMISSION ON LEGAL SERVICES, 2 FINAL REPORT 252 (1979) (Cmnd 7648-1).

41. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984).

42. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81.

43. Greenhouse, *Nature Is to Culture as Praying Is to Suing: Legal Pluralism in an American Suburb*, 20 J. LEG. PLURALISM 17 (1982).

44. Baumgartner, *Social Control in Suburbia*, in TOWARD A GENERAL THEORY OF SOCIAL CONTROL 79, 82, 93 (D. Black ed. 1984).

other,⁴⁵ but this was less true in a poorer multiethnic community.⁴⁶ Even New Yorkers, renowned for their short fuses, seem to swallow most affronts. A series of psychological experiments inflicted loud noises on subjects trying to take a test, study in a library, or watch a movie but elicited few complaints; there was little difference under more extreme conditions, in which subjects were accused of "taking" another's valuable ring, sometimes in the presence of a sympathetic observer.⁴⁷

Although tort victims are my sole concern in this Article, it is important to note that they are not alone in their reluctance to claim. Consumers are equally restrained in complaining about the failure of products to perform as promised.⁴⁸ A survey of consumers found that only forty-two percent of those who perceived problems with their purchases complained to *anyone*: 32.5 percent of those with weak problems and fifty-two percent of those with strong problems.⁴⁹ The ABA-ABF study revealed that only seven percent of consumers who encountered a problem with a major purchase consulted a lawyer.⁵⁰

Even those who observe criminal behavior tend to look the other way. A German study of shoplifting in a Freiburg supermarket found that almost none of those watching the crime—either shoppers or store personnel—reported it to the store authorities.⁵¹ Even significant proportions of crime victims themselves fail to complain to the police. In the United States in 1983, fifty-eight percent of crimes of violence but only twenty-six percent of theft crimes were reported to the police; within the first category, report rates ranged from twenty-eight percent for attempted robbery without injury to seventy-four percent for larceny of less than \$50 to sixty-five percent for completed purse snatching. Only thirty-seven percent of crimes

45. Buckle & Thomas-Buckle, *Self-Help Justice: Dispute Processing in American Neighborhoods* (1981) (unpublished paper 1981).

46. Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 *LAW & SOC'Y REV.* 891 (1979).

47. Moriarty, *A Nation of Willing Victims: Urban Danger and Urban Insult*, *PSYCHOLOGY TODAY*, Apr. 1975, at 43.

48. See generally *NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM* (L. Nader ed. 1980). The Center for Auto Safety has accused five manufacturers of following a policy of "secret warranties" with respect to thirty million cars and light trucks. They alleged that the manufacturers consistently agreed to make repairs when pressed by consumers but refused to publicize their willingness to do so. The manufacturers have denied the charge. *5 Car Makers Assailed Over Secret Warranties*, *N.Y. Times*, September 6, 1987, at 20, col. 1.

49. Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701, 716 (1977); see also A. BEST & A. ANDREASEN, *TALKING BACK TO BUSINESS: VOICED AND UNVOICED CONSUMER COMPLAINTS* (1975); A. BEST, *WHEN CONSUMERS COMPLAIN: CONSUMER JUSTICE, PROBLEMS AND PROSPECTS* (1981).

50. CURRAN, *supra* note 21, at 146.

51. Blankenburg, *The Selectivity of Legal Sanctions: An Empirical Investigation of Shoplifting*, 11 *LAW & SOC'Y REV.* 109 (1976). In 1986, Marshall Field paid its employees \$114,000 for reporting theft—\$100 if by a customer, \$500 if by a fellow worker—bounties that have allowed the store to reduce its security force by a quarter since 1985. Taylor, *When Everyone Is a Store Detective*, *N.Y. Times*, September 13, 1987, s. 4, at 19, col. 1. And the federal False Claims Amendments Act of 1986, 31 U.S.C. § 3730 (1986), which pays informants double and treble damages, has led to reports of alleged Medicare fraud and other abuses of government expenditure. Spiegel, *Whistle-Blower's Lawsuit Accuses Scripps Clinic, Eye Doctor, of Fraud*, *L.A. Times*, September 9, 1987, Part I, at 3, col. 1.

within the household were reported.⁵² These proportions remained quite constant during the 1970s⁵³ and did not vary greatly by city.⁵⁴

These data indicate that only a small proportion of victims take any action to redress their injuries. I am sure many readers can and will raise methodological quibbles. But in the face of such consistent findings, the burden clearly is on those who insist that there are too many tort claims to support their view with equally persuasive empirical studies.

III. INJURED VICTIMS SHOULD CLAIM

Demonstrating empirically that many injured victims fail to claim is only half of my argument; I also must explain normatively why they *should* do so. I want to postpone for the moment a discussion of tort theory and see what we can learn by analogy from several other realms of behavior where participation is positively valued: politics, the market, cultural life, and social services.

All theories of democratic politics strongly encourage citizen participation. Indeed, we compel certain forms of public service, such as jury duty or the wartime draft. We view an informed, engaged public as the prerequisite of a healthy polity. The New England town meeting remains a nostalgic symbol of direct democracy. Readers who are lawyers or law teachers will feel a sense of obligation to participate in bar associations or faculty self-governance. Indeed, the voluntary associations that de Tocqueville characterized as the foundation of American democracy more than 150 years ago remain an essential building block of liberal pluralism.⁵⁵ Many states have a long tradition of submitting important issues to popular referenda. Because the size of our nation makes representative institutions a necessity, we view the level of participation in electoral politics as an index of the quality of political life. It is an ineradicable source of shame that Americans excluded racial minorities and women from both voting and holding political office for so long—anyone who saw the recent television documentary, “Keep Your Eyes on the Prize,”⁵⁶ must have been horrified to relive the racist efforts to prevent blacks from registering to vote. The poll tax and the literacy test are historical embarrassments. Today, ballots and voter information pamphlets often are published in several languages in order to reach the largest number of people. Starting with *Baker v. Carr*⁵⁷, the Supreme Court repeatedly has struck down gerrymandering and insisted on a standard of one person, one vote. The

52. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1983, at 85 (1985) (NCJ-96459). The federal National Crime Survey itself may greatly understate the number of rape victims who fail to report to the police. It stated that between 2 and 4 out of every thousand college-age women had been raped in the previous six months. A survey of 6,159 students at 32 colleges found that 38 out of every 1,000 women had been raped in the previous six months, and 275 out of every thousand reported having been raped since the age of 14. N.Y. Times, April 21, 1987, at 22, col. 5.

53. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1981, at 234–35 (T. Flanagan, D. van Alstyne & M. Gottfredson eds. 1982).

54. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, CRIMINAL VICTIMIZATION SURVEY IN 13 AMERICAN CITIES (1975).

55. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (2 vols.) (H. Reeve Trans. 1900).

56. For the printed version see J. WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 (1987).

57. *Baker v. Carr*, 369 U.S. 186 (1962).

Voting Rights Act of 1965 is seen today as an essential contribution to strengthening democracy. One of the major obstacles to William Rehnquist's recent confirmation as Chief Justice of the U.S. Supreme Court was the allegation that he encouraged Republican challenges to black and Latino voters in Arizona. We condemn South Africa for continuing to exclude blacks from the franchise; and many are equally critical of one-party states that deny voters any real choice. Nations in Western Europe and elsewhere in the democratic world are justly proud of their high levels of voter participation: some even compel citizens to vote. By contrast, the United States has reason to be ashamed of its low voter turnout, which rarely exceeds half the qualified electorate, even in presidential contests, and often falls much lower at other times. We do not view this with indifference as just another form of "consumer preference." The California legislature, dismayed by the fact that only 43.4 percent of those eligible to register and vote actually did so in the November 1986 presidential election, presently is considering bills that would allow registration to take place on election day, upon obtaining a driver's license, and in government offices, and would keep the polls open an additional two hours.⁵⁸ Furthermore, we have become increasingly uncomfortable about the extent to which electoral choices are shaped by control over the economic resources necessary to buy the media coverage that has become the dominant means of influencing voters, at least in the larger constituencies that characterize national politics.⁵⁹

The health of a market economy, like that of a democratic polity, is measured by the degree of participation. High and rising productivity is good; unutilized productive capacity and stagnant production are bad. Full employment is good; high levels of unemployment and underemployment are bad. Consumer spending and confidence are good; underconsumption can cause a crisis. Free markets are good; anything that interferes with market activity is bad, whether it is state regulation, monopoly, or restrictive practices. I mentioned the Reagan Administration's attack on regulation earlier; the monopolies and restrictive practices of the professions also have been under attack in recent years.⁶⁰ Indeed, the Chairman of the Board of the Legal Services Corporation, in a speech at the 1987 mid-year meeting of the American Bar Association, proposed to satisfy the needs of the poor for legal representation by abolishing unauthorized practice rules and allowing anyone to

58. Ingram, *Package of Bills Aims at Boosting Voter Turnout*, L.A. Times, Mar. 5, 1987, Part I, at 3, col. 5. Governments also encourage other forms of political participation:

Acknowledging that illegal immigrants have been slow to sign up for amnesty, a West Los Angeles consortium of media agencies hired by U.S. immigration authorities plans to mount an "aggressive" wave of nationwide advertising early next month to encourage more to apply. . . .

The campaign is part of an 18-month, \$10.7-million contract awarded by the immigration service in April to the Justice Group, a consortium of three media companies headed by Republican Party activist and businessman Fernando Oaxaca, to persuade illegal aliens, historically mistrustful of *La Migra*, that federal authorities are sincere in carrying out the provisions of the landmark immigration law that was signed last year. . . .

In addition to the ads, the group has produced booklets and brochures in several languages, including English, Spanish, Chinese, Korean, Polish and Arabic.

Ramos, *Amnesty Ad Campaign Hopes to Heat Up Cool Response*, L.A. Times, June 25, 1987, Part I, at 36, col. 1.

59. Michael Walzer mounts the most powerful criticism of the capacity of wealth to buy political power in *SPHERES OF JUSTICE* (1983).

60. See Abel, *Lawyers*, in *LAW AND THE SOCIAL SCIENCES*, ch. 8 (L. Lipson & S. Wheeler ed. 1987); Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

practice law.⁶¹ Observers seeking to explain the failure of third-world economies to grow have praised the "informal sector" and recognized the inevitability and value of black and gray markets.⁶² Although, as we have seen, consumers rarely complain about unsatisfactory goods and services,⁶³ commentators argue that they should be encouraged to do so in order to provide producers with the information necessary to improve quality. And some retailers do welcome complaints for just this reason.⁶⁴

We also value participation in cultural life, encouraging it by investing substantial resources in public education and even making education compulsory. Obviously, literacy and numeracy are essential for participation in political and economic life as well. We view functional illiteracy as a national and personal tragedy. The debate over bilingual education is, among other things, a disagreement about how to achieve the highest level of participation in public affairs. But we value involvement in cultural life for its own sake, too. Americans are proud of their diverse cultural heritages and seek to preserve them. And even though many deplore the banality and superficiality of much popular culture, others argue that the consumption of both television and popular music is not a passive process but rather an active critical engagement.

By contrast with our commitment to political, economic, and cultural participation, our attitude toward the consumption of social services is ambivalent. On one hand, the image of the welfare scrounger constantly is invoked by both politicians and the media, successfully persuading many that welfare services should be kept to a minimum. On the other hand, we feel very differently about the consumption of some social services. I already mentioned education: high school dropouts are considered a failure of the system, and the high levels of enrollment in tertiary and adult education are a matter of national pride. We feel the same way about public health services: consumption of antenatal and infant preventive care is strongly encouraged. The value of public (and philanthropic) subsidies for cultural and recreational activities also is measured by consumption levels: museum attendance figures, public library circulation, viewers of public television programs, crowds at public celebrations, use of the state and national parks. In Western European countries more committed to social welfare, "take-up" rates for all social services are viewed as measures of success, not failure.

I believe that our enthusiasm for participation in politics, the market, cultural life, and social services should extend to participation in the legal system.⁶⁵ Litigation is an important form of political activity: courts exercise political authority, modify substantive laws, and allocate resources. Litigation also affects the economy,

61. Wall St. J., Feb. 23, 1987, at 18, col. 1.

62. Vargas Llosa, *In Defense of the Black Market*, N.Y. Times Mag., Feb. 22, 1987, at 28, col. 1.

63. See *supra* note 49 and accompanying text.

64. Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 LAW & SOC'Y REV. 199 (1978).

65. Economists view "exit" as both a material incentive and an informational signal. See A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970). This also may be true, if to a lesser extent, in cultural life and social services. But it is not true in politics and certainly not in the legal system. Legal systems that are shunned by the majority of citizens are a sign of imperialism (the transfer of European codes to Africa), authoritarianism (Ataturk's importation of the Swiss codes into Turkey), or simply elite indifference (the Manchu dynasty's desire to discourage litigation).

conveys information, alters prices, and corrects market imperfections. Litigation declares and changes fundamental cultural values. Additionally, litigants consume a vital social service, since courts (and of course legislatures) are subsidized by the state. As I noted at the beginning of this Article, many commentators deplore the levels of law, lawyers, and litigation in contemporary America. We can certainly imagine and strive to create a society in which the role of law would be greatly diminished—Marx, after all, hoped that the state would wither away under communism. But it is only realistic to acknowledge that such an ideal is either utopian (in the good sense of that word) or romantically nostalgic. Our society possesses only weak historical traditions; it constantly experiences rapid change; our population is extremely heterogeneous; there are substantial inequalities among classes, races, genders, ethnic groups, and regions; monopoly capitalism enormously concentrates power; national, state, and local governments all threaten individuals. In such an environment, law is an essential ingredient of social order.

If readers have followed me this far, accepting the view that participation in the legal system is socially valuable, I still must show that injury victims should be encouraged to claim tort damages. I will construct this argument within the conventional paradigm of tort policy, even though I have been harshly critical of it in the past, because my goal is to persuade those committed to the existing system that more claims are desirable. Most scholars agree that tort law has three principal objectives: redressing the violation of important norms, compensating victims, and discouraging unsafe behavior. I will take those up in sequence.

A tort is, among other things, a normative violation. The tortfeasor has behaved dangerously and has caused injury to another. In order to preserve and strengthen the norm against dangerous behavior it is imperative to publicize the violation and punish the wrongdoer. Durkheim argued that the function of transgressions is to give society an opportunity to punish, thereby reasserting its commitment to the norm that has been broken.⁶⁶ The Oxford Centre's study found that attributions of moral blame are strongly influenced by the victim's perception of the possibility of obtaining damages from the person or entity blamed.⁶⁷ Consequently, increasing victim confidence in the possibility of recovery would have the salutary effect of reviving moral judgments.

But the norm against negligently injuring another also must be redressed for the sake of the victim's psychological well being. Our legal system does little to respond to the sense of violation and outrage experienced by victims, especially those injured seriously and permanently.⁶⁸ Indeed, fear of liability in the particular case and of its

66. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY*, ch. 2 (G. Simpson trans. 1933); K. ERIKSON, *WAYWARD PURITANS* (1966). The prosecution of white collar crime is an example of the use of a normative violation to strengthen the norm. See F. CULLEN, W. MAAKESTAD & G. CAVENDER, *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* (1987).

67. *COMPENSATION AND SUPPORT*, *supra* note 3, at 149–59; Abel, *supra* note 4, at 1022.

68. The criminal justice system recently has displayed increased concern toward involving crime victims in the prosecution of criminals. See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* 55–57 (1974); A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT* 174 (1976); DuBow & Becker, *Patterns of Victim Advocacy*, in *CRIMINAL JUSTICE AND THE VICTIM* 147 (W. McDonald ed. 1976); Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 *LAW & Soc'y Rev.* 349 (1979).

precedential value in others often leads defendants to continue denying moral responsibility even after paying damages. Other societies, notably Japan, require the tortfeasor to apologize to the victim as part of the remedial process.⁶⁹ And where interpersonal honor is highly valued, victims or their kin must seek revenge.⁷⁰ There are obviously strong cultural reasons why it would be difficult, and perhaps undesirable, to incorporate apologies or feuds into our own tort process. But that does not alter the necessity of responding to legitimate hurt and anger by encouraging the victim to seek legal redress in *every* case. Unredressed wrongs allow resentment to fester, breeding a feeling of pervasive injustice, and sometimes leading to acts of vengeance.⁷¹

If late twentieth-century American tort law deemphasizes the normative element of the defendant's act and the victim's grievance, it clearly makes compensation the central objective. For some the motivation is compassion; for others the concern is economic: restoring the productive capacity of the victim and preventing the victim from becoming a public charge.⁷² In either case, it is essential that *every* needy victim have the greatest possible opportunity to claim. It will not do to invoke laissez-faire economism, arguing that victims may "choose" not to claim. For the laissez-faire economist first must eliminate the market imperfections that lawyers have created—the monopoly of representation, the rules against intraprofessional competition—before insisting that such "choices" maximize individual utility. Lawyers continue to debate whether the amount of compensation should be diminished by payments from "collateral sources"—such as private and social insurance—or whether these constitute repayments for value given.⁷³ But even were we to endorse deductions for collateral sources (which I do not), this would not alter the importance of increasing the *frequency* of claims.

The Oxford study found that the households of victims with injuries resulting in two weeks of incapacity were significantly poorer than average—if, at the time of the interview, the victim still was unemployed or seriously disabled as a result of the accident, household income was only half of the national average.⁷⁴ Both the personal tragedy and the social cost are compounded by the fact that victims are disadvantaged in other ways as well. Because women suffered more of their injuries in "other" environments, where claims and recoveries are rare, they obtained damages only half as often as men.⁷⁵ The young (under age 25) and the elderly (over

69. Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REV. 579, 587 (1976); Wagatsuma & Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

70. See, e.g., HONOUR AND SHAME (J. Peristiany ed. 1965); GIFTS AND POISON: THE POLITICS OF REPUTATION (F. Bailey ed. 1971); Abel, *The Rise of Capitalism and the Transformation of Disputing: From Confrontations over Honor to Competition for Property*, 27 UCLA L. REV. 223, 244 (1979) (review of J. STARR, *DISPUTE AND SETTLEMENT IN RURAL TURKEY*); Grönfors, *Social Control and Law in the Finnish Gypsy Community: Blood Feuding as a System of Justice*, 24 J. LEG. PLURALISM 101 (1986).

71. For fictional accounts, see S. YURICK, *FERTIG* (1975) and M. BORGENTICHT, *EXTREME REMEDIES* (1967).

72. COMPENSATION AND SUPPORT, *supra* note 3, at 3, 276, 313.

73. The amounts that English accident victims recovered from *all* sources did not cover their actual losses. See COMPENSATION AND SUPPORT, *supra* note 3, at 312–13.

74. Abel, *supra* note 4, at 1021.

75. COMPENSATION AND SUPPORT, *supra* note 3 at 52.

age 54) were similarly disadvantaged compared to those in the middle, and the employed were much more likely to receive compensation than those outside employment.⁷⁶ An American study found that the likelihood of retaining counsel and the ratio of net reparations to economic loss in serious automobile accidents varied directly with family income.⁷⁷

The ABA-ABF study of the legal needs of the public, by contrast, found that women with personal injury problems were more likely than men to consult lawyers (forty-three percent versus twenty-six percent), blacks and Latinos more likely to do so than whites (forty-four percent versus thirty-two percent), and those with incomes in the lowest fifth more likely than those in the highest (forty-four percent versus twenty-four percent); and the mean years of schooling of those suffering property damage who consulted a lawyer were lower than that of those who did not (11.5 versus 12.5 years).⁷⁸ One reason for these counterintuitive findings may be the fact that those in the lower income brackets were significantly less likely to carry loss insurance than those in the upper, so that tort claims were their only alternative (a remedy less likely than loss insurance to produce compensation).⁷⁹ Most of the differences in the proportions of those perceiving a tort problem who consulted a lawyer were reversed when the study looked at who reported experiencing a tort problem: the proportion of male respondents was higher than that of women, that of whites higher than that of blacks and Latinos, and that of the better educated and wealthier higher than that of the less well educated and poorer.⁸⁰ These differences seem to reflect perceptions rather than objective experience: the United States Bureau of the Census has found that twenty-five percent of blacks aged 16 or older are disabled compared to twenty percent of whites and twenty-three percent of women are disabled compared to eighteen percent of men.⁸¹ If those categories with fewer injuries are more likely to perceive the extent of their injuries, one reason may be that their general sense of social empowerment allows them to recognize their situation as remediable.⁸² When the two processes of naming an experience as a tort and deciding

76. Abel, *supra* note 4, at 1008–10.

77. U.S. DEPARTMENT OF TRANSPORTATION, 1 ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 54 (1970).

78. CURRAN, *supra* note 21, at 148, 151 n.123, 156, 159.

79. *Id.* at 157. This also may explain the inverse correlation between income and tort claims in the Oxford survey. See Abel, *supra* note 4, at 1009–10.

80. CURRAN, *supra* note 21, at 122–28.

81. *Census Study Reports 1 in 5 Suffering from a Disability*, *supra* note 20, at 7. Racial minorities also are disproportionately the victims of less visible forms of tortious activity.

Although 53 percent of white Americans live in areas with [hazardous] waste sites . . . communities with the greatest numbers of dumps had the highest concentration of non-white residents. . . . [M]ore than 15 million of the nation's 26 million blacks lived in communities with one or more uncontrolled toxic dump; . . . more than 8 million of the nation's 15 million Hispanic residents lived in communities with one or more uncontrolled sites; and . . . three of the five largest commercial hazardous waste landfills in the country were in predominantly black and Hispanic communities.

The study also said that in communities with at least one waste dump, the proportion of the black and Hispanic residents was 24 percent, twice the national average. Communities with two dumps had an average of 38 percent minority residents.

Williams, *Racial Discrimination Charged in Location of Toxic Waste Dumps*, N.Y. Times, April 16, 1987, at 12.

82. The likelihood that consumers would voice claims about nonprice problems varied directly with consumer income. Best & Adreassen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, *supra* note 49, at 721 (1977). Since it is highly unlikely that wealthier consumers

to consult a lawyer about it are combined, the proportion of male respondents who consulted lawyers about automobile accident torts was higher than the proportion of women, and the mean 1973 discretionary income and mean years of schooling completed of those who did so was quite high (\$10,000 and twelve years), although a higher proportion of black and Latino respondents than white respondents consulted lawyers about automobile accidents.⁸³ When we encounter similar differences across class, race, gender, or age in the level of participation in political life (voting), the economy (unemployment rates, incomes), culture (literacy), or social services (years of schooling completed, health), we are deeply upset. One of the reasons why the California legislature is seeking to increase registration and voting is that sixteen percent of voters are racial minorities compared to forty-one percent of non-voters and that twenty-eight percent of voters had incomes over \$50,000 a year, whereas only forty-one percent of non-voters earned more than \$30,000.⁸⁴ Thus, compassion, efficiency, and equity all argue for increasing tort claims rates in order to compensate more victims.

Although tort lawyers and scholars differ about the relative virtues of negligence and strict liability, they agree that tort law must play an important role in discouraging dangerous behaviour. Indeed, even were we content to allow victims to decide whether or not to seek apologies or compensation from tortfeasors, we could not adopt an equally laissez-faire attitude towards the deterrent role of tort liability. When our society views the danger of injury as particularly salient, it does not rely exclusively on victims to mobilize the legal system. We subject driving behavior to extensive regulation; and both the police and insurance companies help accident victims record the evidence and initiate claims. We also regulate safety at work; and both fellow workers and unions assist victims in correcting dangerous conditions and obtaining redress for injury. In the other realms of behavior, which actually account for the vast majority of accidents, tort law has become an even more crucial deterrent as the Reagan Administration has dismantled the already inadequate regulatory apparatus.

A single study will illustrate the failure of regulation and the magnitude of the problem that the tort system confronts. The Food and Drug Administration is responsible for inspecting imported fruits and vegetables for contamination with pesticides and other toxic chemicals banned in the United States. Imports accounted for a fourth of the total consumption of fruits in the United States in 1984, and the proportion was rising rapidly. However, the FDA actually inspects less than one percent of the one million annual shipments. Even this lamentable effort disclosed that six percent of the sample contained illegal residues. Yet once violations were identified, enforcement was unbelievably lax. A General Accounting Office study of 164 lots of adulterated food detected by the FDA found that ninety-one were stopped and seventy-three were admitted to the country. Within the latter category, the FDA

bought goods of lower objective quality than those bought by poorer consumers, the more plausible explanation is that wealthier consumers had higher standards of performance and felt more capable of securing redress.

83. CURRAN, *supra* note 21, at 197-99.

84. Ingram, *supra* note 58, at 3.

decided not to seek damages in fifty-two cases. Of the twenty-one prosecuted, damages were imposed in only eight and paid within the following year in only two cases.⁸⁵ Producers and importers acting rationally could only conclude that they should ignore FDA regulations.

In the absence of effective regulation, what must the tort system do to discourage dangerous behavior? Years of research on the deterrent effect of sanctions repeatedly has confirmed that the likelihood of suffering punishment is at least as important as the severity of that punishment and probably more influential. Indeed, we cannot increase the efficacy of deterrence by raising penalties indefinitely because society grows more reluctant to impose punishment as penalties become more severe. In any case, punitive damage awards remain rare,⁸⁶ and compensatory damages, by definition, are limited to the victim's actual loss. Therefore, critics of the tort system who would curtail punitive damages, eliminate or cap elements of compensatory damages, such as pain and suffering, and deduct collateral sources should *welcome* a proposal to make up for the loss of deterrent efficacy by increasing the frequency of claims.

Tort liability presumably is most effective in influencing the behavior of economically rational actors—medium or large profit-seeking enterprises in competitive markets engaged in repetitive activities and thus capable of learning how to modify their behavior as a result of tort damages imposed on themselves or others. Therefore, we probably should discount the efficacy of tort liability as a deterrent in precisely those situations where research shows that such liability is most likely, namely road accidents.⁸⁷ And in the United States we cannot use *tort* liability to reduce danger at work—the environment in which victims are next most likely to claim—because workers' compensation generally is the exclusive remedy, and it consciously is designed not to reflect the full costs of accidents. Consequently, tort liability is most likely to be an effective deterrent of "other" accidents.

Tort damages not only instruct potential tortfeasors how to be safer, they also inform consumers about dangerous goods and products. Lawsuits for toxic shock syndrome, IUDs, or airplane crashes undoubtedly changed consumer choices. The federal government has begun making data available about mortality rates at hospitals so that consumers of medical services can make more informed choices.⁸⁸ When a

85. Molotsky, *FDA Is Faulted on Imported Food*, N.Y. Times, Dec. 4, 1986, § I, at 23, col. 1. Nevertheless, the U.S. Commissioner of Food and Drugs reassured a House subcommittee that "the U.S. food supply is safe." Shabecoff, *F.D.A. Chief Defends Safety of Imported Produce*, N.Y. Times, May 1, 1987, at 11.

In the first six years of the Reagan Administration, only one criminal prosecution was brought for violation of the Occupational Safety and Health Act—for an assault on an inspector by a company representative. Rosenblatt, *Justice Dept. Accused of Ignoring Safety Cases*, L.A. Times, Part I, at 2, col. 6. The Utah coal mine fire in which 27 workers died led the Mine Safety and Health Administration to seek fines of only \$111,000. *\$111,000 in Fines Assessed in Utah Mine Fire That Killed 27*, L.A. Times, May 12, 1987, Part I, at 20, col. 1.

86. Less than an average of 16 Cook County tort trials and 8 San Francisco tort trials a year awarded punitive damages between 1980 and 1984. M. PETERSON, *PUNITIVE DAMAGES: PRELIMINARY EMPIRICAL FINDINGS* (1985) (N-2342-ICJ), quoted in INSTITUTE FOR CIVIL JUSTICE, RAND CORPORATION, *AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS* 69 (1986).

87. See *supra* notes 36–38 and accompanying text.

88. Brinkley, *U.S. Distributing Lists of Hospitals with Unusual Death Rates*, N.Y. Times, Mar. 3, 1986, § I, at 10, col. 2; Brinkley, *U.S. Releasing Lists of Hospitals With Abnormal Mortality Rates*, N.Y. Times, March 12, 1987, at 1. And the Aviation Safety Institute has sought to disseminate similar information about airplane crashes to travellers. *Aircraft Data for the Public Is Debated by Industry Aides*, N.Y. Times, August 23, 1987, at 11.

Los Angeles medical society established a "hot-line" to warn physicians about new patients who had filed medical malpractice claims in the past, the Los Angeles plaintiffs' personal injury bar threatened to respond with its own computer service informing prospective patients of malpractice claims filed against doctors; both sides eventually backed down.⁸⁹ And recent California legislation requires lawyers to report to the State Bar the filing of three or more malpractice suits against them within a twelve month period, a report that becomes a public record.⁹⁰ The free-market advocates who decry the "litigation explosion" and the "liability insurance crisis" must, if they are to be true to their ideology, applaud all these efforts to reduce market imperfections by increasing consumer information.

Yet our limited data strongly suggest that tort liability for "other" accidents fails to deter because too few victims claim. The Oxford study found that only three percent of those incapacitated for at least two weeks by an "other" accident (eighty-six percent of all those so incapacitated by injury) made a claim, and only two percent recovered any damages.⁹¹ A profit-seeking entrepreneur in a competitive market would have to discount the threat of tort liability by *ninety-eight percent* in deciding how much to spend on safety. This is not a matter of personal callousness or indifference because it is not a matter of individual choice. An entrepreneur who fails to cut safety costs whenever the tort system allows such savings will be put out of business by a competitor who does. A 1976 survey of 210 members of the Machinery and Allied Products Institute confirms the suspicion that liability is an insubstantial threat—only eighteen percent said they had serious tort problems.⁹² Thus, raising the frequency of claims is essential if tort is to play its central role in discouraging dangerous behavior.

This concludes my argument for increasing the frequency of claims by tort victims. I have shown that the level of claiming presently is extremely low. I have argued that claiming should be encouraged just as we encourage participation in political, economic, and cultural life and the consumption of social services. And I have asserted that the generally accepted theories of tort law require the highest possible level of claiming in order to strengthen norms against endangering others, relieve victims' feelings of injury, compensate victims, and generally discourage dangerous behavior. The failure to claim actually erodes norms and encourages risk. And even if one accepted the dubious deterrent theory that increasing the magnitude of the penalty could make up for its infrequency, it still is necessary to respond to the victims' hurts and needs for compensation in *every* case. Before suggesting how the claims rate might be raised, I want to insist on the importance of doing so. A higher claims rate has the potential to change the functioning of the tort system more substantially than *any* other politically feasible change. If we could persuade all tort

89. *Doctors and Lawyers Square Off on Legal Records*, L.A. Times, Dec. 26, 1985, at 11. U.D. Registry Inc., of Van Nuys, California, has information on more than one million Southern California tenants who have been the object of eviction proceedings, which it sells to local landlords. Klein, *Data Sold by Firm Unfair to Tenants, Court Suit Alleges*, L.A. Times, April 28, 1987, Part II, at 1.

90. CAL. BUS. & PROF. CODE § 6068(n)(1) (West 1987).

91. Abel, *supra* note 4, at 1012-13.

92. G. EADS & P. REUTER, *supra* note 16, at 74 n.2.

victims to claim, we would more than double the efficacy of the tort system in road and work accidents and increase it *fiftyfold* in the remaining situations, which constitute eighty-six percent of all serious accidents according to the Oxford study. No change in substantive or procedural rules could have an equivalent impact. This demonstrates the contribution that a critical sociology of law can make to social reform as well as to our theoretical understanding of the legal system.

IV. HELPING VICTIMS CLAIM

There are many ways to assist tort victims in making claims. We could seek to increase the number of lawyers by reducing entry barriers, such as the length and cost of formal education or the low pass rates on bar examinations (neither of which has any proven connection with the quality of legal services). This should lower the cost of those services. We could increase government subsidies for legal services by extending legal aid eligibility to the middle class.⁹³ But given the prevalence of contingent fees, these reforms would have limited consequences, encouraging claims only where damages were small or liability uncertain. We also could, and certainly should, increase the speed with which courts decide tort claims, since delay may discourage claimants from filing and lead them to abandon claims.

I believe, however, that the most effective means of increasing the level of claiming would be for lawyers to take a more active role in encouraging victims to claim. The Oxford study shows that the greatest attrition among accident victims occurs at the earliest stages of the claims process—considering whether to claim and deciding to consult a lawyer.⁹⁴ Less than half of all road and work accident victims and less than a tenth of all other accident victims considered claiming; four-fifths of road accident victims who thought a claim possible consulted a lawyer, less than three-fifths of work accident victims, and slightly more than two-fifths of other accident victims. Once the victim consulted a lawyer, some recovery was very likely: nearly nine-tenths of road accident victims who saw a lawyer recovered damages, three-fourths of work accident victims, and two-thirds of other accident victims. Furthermore, it is during attrition at the early stages of the claims process that bias is

93. See Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 616 (1985). Group prepaid legal service plans also can encourage claiming. The AFL-CIO recently announced that it would offer a plan to its 12.8 million members, more than doubling national enrollment in such plans. Weinstein, *AFL-CIO Starts Legal Services Program*, L.A. Times, Feb. 17, 1987, Part I, at 4, col. 4.

94. Abel, *supra* note 4, at 1013. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981). We argued in the Article that "naming" an event as a wrong was the *most* important step in the legal process and could be learned. The neurologist Oliver Sacks offers a striking analogy to the process by which physicians recognize a disease.

The day after I saw Ray [his first patient with Tourette's syndrome], it seemed to me that I noticed three Touretters in the street in downtown New York. I was confounded, for Tourette's syndrome was said to be excessively rare. It had an incidence, I read, of one in a million. . . . The next day, without specially looking, I saw another two in the street. . . . Suppose (I said to myself) that Tourette's is very common but fails to be recognised but once recognised is easily and constantly seen. . . .

Three years later, in 1974, I found that my fantasy had become a reality: that there had indeed come into being a Tourette's Syndrome Association. It had fifty members then: now, seven years later, it has a few thousand.

SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* 94-95 (1987).

introduced: more women drop out than men and more of the young and elderly than those in between.⁹⁵ Finally, we know that lawyers themselves have constructed the public's sense of legal entitlement by institutionalizing their services in some situations and not others.⁹⁶ Thus, lawyers have the power, and the obligation, to alter existing patterns of legal mobilization and can do so most efficiently by intervening at the early stages of the claiming process.

Lawyers could do so in two ways. Since the Supreme Court decision in *Bates v. State Bar of Arizona*,⁹⁷ lawyers have been allowed to advertise, and plaintiff's personal injury lawyers regularly do so. However, the Supreme Court, in *Ohralik v. Ohio State Bar Association*,⁹⁸ sustained the power of states to limit solicitation where the lawyer expects financial gain from representing the client, and all jurisdictions continue to prohibit such solicitation. Although I agree that Ohralik's behavior in that case was contemptible and deserved punishment, I regret that the Court used the occasion to condemn all personal solicitation.⁹⁹ Existing limitations on fraud and overreaching and the kind of cooling-off period often imposed on door-to-door selling adequately could protect potential clients against lawyer abuses. Our concern for the privacy of tort victims—sometimes invoked to justify the ban on solicitation—does not extend to protecting victims against the importunities of insurance claims adjusters.¹⁰⁰ Presently, only those lawyers willing to risk disciplinary sanctions engage in ambulance chasing;¹⁰¹ there is at least some truth in the conventional faith of economists that freer competition among lawyers would eliminate the worst abuses of solicitation. Furthermore, given the dominance of market incentives under capitalism, it makes sense to harness the profit motive of individual lawyers to the task of increasing the frequency of tort claims.

Nevertheless, I reluctantly have concluded that it is unrealistic to expect that state bars or supreme courts voluntarily will allow lawyers to engage in individual solicitation or that the U.S. Supreme Court will overrule *Ohralik* and extend first amendment protection to such behavior. Lawyers continue to find it objectionable on two grounds. Even more than advertising, solicitation intensifies intraprofessional competition, potentially driving down prices (and thus profits for some), and accelerating the concentration of business, to the detriment of solo and small firm practitioners. Solicitation is also more threatening to the view that lawyers are unconcerned with financial gain, an image the profession believes is essential to maintain its social status. Therefore, I propose that the legal profession engage in collective solicitation directed to accident victims. Because this would be done by

95. Abel, *supra* note 4, at 1008-09.

96. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401 (1975).

97. 433 U.S. 350 (1977).

98. 436 U.S. 447 (1978).

99. *Id.* at 472 (Marshall, J., concurring). In other decisions, the Supreme Court has indicated that the first amendment protects at least some mailings by lawyers to those who are not already clients, *In re R.M.J.*, 455 U.S. 191 (1982), and advertisements that target the victims of particular accidents, *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985) (involving advertisements directed to victims of the Dalkon Shield).

100. Ross, *SETTLED OUT OF COURT* (1970); Reichstein, *Ambulance Chasing: A Case Study of Deviation and Control Within the Legal Profession*, 13 SOC. PROBS. 3 (1965).

101. J. CARLIN, *LAWYERS ON THEIR OWN* 85-89 (1962); Reichstein, *supra* note 100, at 3.

professional associations rather than individual lawyers seeking personal gain, it should enjoy first amendment protection.¹⁰² Because it would be collective, offering no competitive advantage to any lawyer or category of lawyers, it should avoid widening the numerous fissures within the profession. Moreover, I believe it can be presented in such a way as to enhance rather than diminish the public image of lawyers. Indeed, collective solicitation is simply an incremental extension of lawyer referral services, which the profession has embraced enthusiastically.¹⁰³ Finally, collective solicitation may pave the way for individual solicitation, just as collective advertising preceded individual advertising; collective activity allays fears about loss of professional status; and once it is attempted, individual promotional activity quickly is seen to be far more effective.

My proposal is modeled on the experience of the Greater Manchester [England] Legal Services Committee.¹⁰⁴ In March 1979, it began distributing leaflets explaining the legal rights of accident victims (including their right to legal aid) and suggesting how they could obtain advice; the leaflet included a coupon offering a free initial interview with a solicitor.¹⁰⁵ Victims were encouraged to send the coupon to the Committee at the Manchester Law Society office, which referred each inquiry to a local solicitor, who contacted the applicant to arrange an appointment. Within the first twenty-one months, 20,000 leaflets were distributed to hospitals, public libraries, Citizens' Advice Bureaux, and other agencies that advise the public (another 10,000 subsequently were translated into Bengali, Gujarati, Hindi, Punjabi,

102. In re Primus, 436 U.S. 412 (1978); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971). The New York Emergency Civil Liberties Union offered to represent victims of police brutality in the course of studying those abuses. See P. CHEVIGNY, POLICE POWER (1969).

103. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS, ch. 5 (1970); Berg, *Lawyer Referral Services*, in LEGAL SERVICES FOR THE MIDDLE CLASS I (1979).

104. H. GENN, MEETING LEGAL NEEDS? AN EVALUATION OF A SCHEME FOR PERSONAL INJURY VICTIMS (1982).

105. *Id.* at 68-69.

<p>Coupon</p> <p>I wish to have a free interview with a solicitor. Please send me a coupon for a free initial interview with a solicitor. Put down the address where you live (or work).</p> <p>Name _____</p> <p>Address _____</p> <p>Please send it to:</p> <p>Legal Services Committee The Law Society P.O. Box 100 Manchester M2 1AX</p> <p>Send to:</p> <p>Legal Services Committee The Law Society P.O. Box 100 Manchester M2 1AX Tel. 061 425 7112</p>	<p>Accidents can happen!</p>  <p>Get legal help if it happens to you</p> <ul style="list-style-type: none"> *Legal Aid can give you a solicitor's help at low cost or no cost *FREE interview *This leaflet tells you more 	<p>Accidents can happen!</p> <ul style="list-style-type: none"> • At work • On the road • In the home • On the road if you are a driver, passenger or pedestrian - if you just trip over a paving stone <p>Is someone else to blame?</p> <p>It could be -</p> <ul style="list-style-type: none"> • Your employer • A workmate • Another driver • Your landlord • The council • A shopkeeper • A seller of faulty goods <p>Can I get compensation?</p> <p>If someone else is to blame, you may get compensation for your injuries, loss of wages, damage to clothing and so on.</p> <p>A solicitor can advise you whether you have a good case.</p> 	<p>How do I get advice?</p> <p>Here are a few ways of getting legal advice. Choose the one that suits you best.</p> <ul style="list-style-type: none"> • See your solicitor • If you don't have a solicitor, fill in the coupon on the back of this leaflet for a FREE INTERVIEW with a solicitor. Send it to the address on the coupon. A solicitor will then write to you and suggest an appointment. • If you have had an accident at work, your trade union official may be able to advise you. • Go to your local Citizens Advice Bureau. (The address is on the phone book.) Or go to another local Advice Centre. • If you are kept in hospital, ask to see the Medical Social Worker. <p>What will it cost me?</p> <p>If you send off the coupon, your first interview with a solicitor will be free. The solicitor will tell you if you can get Legal Aid.</p> <p>With Legal Aid, a solicitor's help need not be expensive. Many people pay nothing at all for Legal Aid.</p> <p>Whether you get it depends on your income and savings.</p> 
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and Urdu). The Oxford Centre for Socio-Legal Studies surveyed a sample of those who returned coupons between March 1979 and December 1980 (353 usable responses, seventy-eight percent response rate).

This experiment (hereinafter called the Program) significantly altered the composition of the claimant population and increased the rate of claiming. Whereas the Centre's National Compensation Survey (hereinafter called the Survey) had found that male victims of serious accidents were nearly twice as likely to recover damages as women, fifty-five percent of those who responded to the Program were women.¹⁰⁶ Whereas the Survey had found that only three percent of victims under age 16 and six percent of victims over age 65 consulted a lawyer, compared to twenty percent of those between the ages of 31 and 51, the Program reached higher proportions of those in the age categories of 10–19, 50–69, and especially over 70.¹⁰⁷ The Survey had found that those in full-time employment were only half of all victims but three-fourths of successful claimants; by contrast, those employed full-time were only forty percent of the respondents to the Program, with the rest distributed among part-time employees, the retired, housewives, those in full-time education, and the unemployed, the sick, and the disabled.¹⁰⁸ However, the Program did not alter the class bias of tort remedies; indeed, professionals, employers and managers, and skilled manual workers were even more overrepresented among its respondents than among those accident victims who already obtain legal advice, according to the Survey.¹⁰⁹

Just as the source of bias identified by the Survey was the unequal distribution of victims by gender, age, and employment status among the three categories of accidents—road, work, and other—in which legal responses were institutionalized to different degrees, so the Program was able to reduce this bias by reaching victims of “other” accidents. The Survey had found that among those serious accident victims who sought legal advice, forty-three percent had suffered accidents on the road, forty-six percent at work, but only eleven percent in other situations; among respondents to the Program by contrast, road accident victims were twenty-seven percent, work accident victims thirty-four percent, and other accident victims thirty-eight percent—more than a threefold increase in the last category.¹¹⁰ The Survey found that the likelihood of filing a claim varied directly with the severity of the injury, but the likelihood of recovery varied *inversely* with severity; those who responded to the Program, by contrast, tended to be the most seriously incapacitated, including a significant number who had been “ill” for more than two months.¹¹¹

Two-fifths of those who responded to the Program said, retrospectively, that they had not considered claiming before seeing a leaflet, and nearly two-thirds never previously had consulted a solicitor about any matter.¹¹² Qualitative evidence

106. Abel, *supra* note 4, at 1008; GENN, *supra* note 104, at 8–9.

107. Abel, *supra* note 4, at 1009; GENN, *supra* note 104, at 10–11.

108. Abel, *supra* note 4, at 1010; GENN, *supra* note 104, at 11–12.

109. Abel, *supra* note 4, at 1009; GENN, *supra* note 104, at 11, 13–14.

110. COMPENSATION AND SUPPORT, *supra* note 3, at 62; GENN, *supra* note 104, at 13–15.

111. Abel, *supra* note 4, at 1018; GENN, *supra* note 104, at 16–18.

112. GENN, *supra* note 104, at 21–22, 24.

supports the conclusion that the Program reached victims who otherwise would not have claimed:

Most working class people have an inbuilt fear of solicitors and legal matters. . . . I would not have gone to see a solicitor as I was worried about any possible costs I may incur. . . .

The scheme is really marvellous, especially for people who are nervous when it comes to seeing a solicitor because it breaks the ice when a solicitor is picked for them.¹¹³

. . . .

It helped to make my mind up to see a solicitor. The posters and leaflets are displayed so that many people who would not think about claiming are persuaded to try by the posters. I was dithering about going to see a solicitor. The leaflet convinced me that at least I could try for some compensation if a solicitor advised me that I had a claim.¹¹⁴

Those who deplore the "litigation explosion" suggest, if they do not always assert outright, that many lawsuits are frivolous, unfounded, trivial, and unnecessary. Proponents of collective solicitation of accident victims must anticipate and respond to such criticisms by showing that the claims they encourage are legally valid and socially valuable. The solicitors who interviewed the respondents to the Manchester Program advised eighty percent of them to claim, and the proportions were as high in "other" accidents as in work accidents (though lower in both categories than in road accidents).¹¹⁵ Men and women claimed in equal proportions, thereby helping to reduce the gender bias built into the tort system.¹¹⁶ The solicitors who advised the Manchester Program respondents to claim reported that forty-two percent of those claims had been settled by the time of the Centre's study, forty-one percent were the subject of ongoing negotiations, and only sixteen percent had been abandoned.¹¹⁷ Furthermore, the amounts paid to the claimants were substantial: an average of £1,210, ranging from £647 for "other" accident victims (most of whom were unemployed women) to £1,853 for road accident victims.¹¹⁸ It seems clear that both the victims and society benefitted as a result of these claims.

Fears that collective solicitation might damage the professional status of solicitors seem wholly unfounded. On the contrary, it appears to enhance the legitimacy of both the profession and the legal system. One user of the Program responded:

I must say not having been for an interview before I was struck by the helpfulness of the solicitor. My workmates, family and friends are totally ignorant of aspects of the law. I now know that legal aid or legality is open to all, not just the rich but the lowly as well.¹¹⁹

Solicitors agreed:

This is a particularly worthwhile scheme in that if the claim is successful then there will invariably be a benefit—however great or small—for the client at the end of the day. It appears

113. *Id.* at 4.

114. *Id.* at 22. Other first users also sought help in choosing a lawyer. See F. MARKS, R. HALLAUER & R. CLIFTON, *THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES* 67-71 (1974) [hereinafter *THE SHREVEPORT PLAN*].

115. GENN, *supra* note 104, at 27.

116. *Id.* at 28.

117. *Id.* at 30.

118. *Id.* at 31. The mean damages recovered by victims in the Centre's Survey were: £1,135 all victims, £1,369 road accidents, £850 work accidents, and £1,202 "other" accidents. The median damages were £500 in the Survey and £600 in the Program. *Id.* at 31-32; COMPENSATION AND SUPPORT, *supra* note 3, at 87.

119. GENN, *supra* note 104, at 24. Not all users were equally satisfied, however. *Id.* at 34-35.

that many people simply do not know or even think of the possibility that there may be a right of action, and a further number clearly don't think of seeing a solicitor about this.¹²⁰

Since 1979, the scheme has spread to thirty of the 120 local law societies in England and Wales. The National Law Society therefore decided to extend the "Accident Free-Interview Scheme" throughout the country in May 1987.¹²¹ All solicitors who include personal injury as a subject they practice in the legal aid lists available to potential clients will be asked if they wish to offer a free initial interview to accident victims. The Scheme will be publicized through Citizens Advice Bureaux, libraries, local offices of the Department of Health and Social Services, community health councils, and local health authorities. Leaflets will indicate a freepost address and a London telephone number to call, which will refer the applicant to a local participating solicitor. Physicians and hospitals have been hostile to the Program, and the British Medical Authority has refused to endorse it; but there is reason to believe that private medicine in the United States would be more receptive to a program that could help to pay its bills.

Collective solicitation of accident victims could have benefits beyond increasing claims in those cases. A number of empirical studies suggest that claiming is learned behavior—those who claim successfully once are more likely to do so again. Victims of automobile accidents in New York City in 1957 were more likely to claim if they had done so successfully in the past.¹²² Black unskilled workers in Shreveport, Louisiana, who belonged to a group prepaid legal services plan in 1971, were more likely to use the plan if they had consulted lawyers previously.¹²³ The mere existence of the plan, furthermore, increased the likelihood that members would perceive lawyers as a useful resource in a wide variety of situations.¹²⁴ The most comprehensive American study of lawyer use confirmed these findings: although two-thirds of the sample had used a lawyer at least once during their lifetimes, seventeen percent had done so twice, ten percent three times, six percent four times, three percent five times, one percent six times, and one percent more often.¹²⁵ The more frequently a respondent had used a lawyer, the more likely the respondent was to believe that the legal system could help claimants.¹²⁶ The most comprehensive English study, the Users' Survey conducted for the Royal Commission on Legal Services in 1978, found that, although only fifty-seven percent of the respondents had ever used a lawyer, forty-six percent of those who had done so had used *that* lawyer more than once.¹²⁷ Furthermore, seventy percent of those who had used a solicitor in 1977 said they would return to that solicitor if they encountered a similar problem in the future.¹²⁸ A similar study in Scotland found that, although only thirty-nine percent of

120. *Id.* at 50.

121. 83 THE LAW SOCIETY'S GAZETTE 3648-49 (Dec. 3, 1986).

122. R. HUNTING & G. NEUWIRTH, *supra* note 36, at 11.

123. THE SHREVEPORT PLAN, *supra* note 114, at 63.

124. *Id.* at 79.

125. CURRAN, *supra* note 21, at 190.

126. *Id.* at 235.

127. ROYAL COMMISSION ON LEGAL SERVICES, 2 Final Report 185, 210 (1979) (Cmnd 7648-1).

128. *Id.* at 232.

respondents had ever consulted a solicitor, among those who had done so within the previous five years, fifty-eight percent had done so more than once, and twelve percent had done so more than five times.¹²⁹ Thus, persuading injury victims to claim compensation may have the beneficial effect of increasing their willingness to use the legal system again in the future.

CONCLUSION

For too long the media have disseminated and the public uncritically has believed the pronouncements of self-styled Jeremiahs decrying the alleged litigiousness of Americans. Their claims are unsubstantiated and false. Litigation rates are low and rising too slowly.¹³⁰ Vast numbers of accident victims fail to seek and thus to recover any compensation whatever. The most significant reform of the tort system—far more consequential than any incremental change in substantive or procedural law—would be to make it begin to fulfill its promises by responding to a higher proportion of victims.¹³¹ This would strengthen the norm against dangerous behavior, relieve the anger of victims, ameliorate the financial plight of victims, and encourage safety. Collective solicitation of the injured would be an important step in this direction. The organized legal profession, and the plaintiffs' personal injury bar in particular, have a strong interest in supporting collective solicitation. They can initiate such a scheme by themselves, without the need to wait for state action.¹³² Of course, the reform will be opposed by many: the insurance industry; manufacturers, retailers, and other potential defendants; the medical profession; and the personal injury defense bar.¹³³ But these opponents will have great difficulty justifying their hostility to the public. Proponents of the reform, by contrast, can invoke many powerful political symbols. They will be seeking to help victims and to reduce the dangers to all. They will be increasing access to the legal system and reducing bias against those disadvantaged by race, sex, and class. Most importantly, they will be assisting tort victims to serve society while seeking to help themselves. To assert a legal claim is to perform a vital civic obligation.

129. ROYAL COMMISSION ON LEGAL SERVICES IN SCOTLAND, 2 Report 55, 58 (1980) (Cmnd 7846-1).

130. I found that the rate of tort litigation per unit population, which was higher in Africa than in the United States, tended to decline in Africa during the process of "modernization." Abel, *Customary Laws of Wrongs in Kenya: An Essay in Research Method*, 17 AM. J. COMP. L. 573 (1969); Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW* 167 (S. Burman & B. Harrell-Bond eds. 1979). Lawrence Friedman and Robert Percival found a similar decline in the United States. See Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1976). But see Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC'Y REV. 91 (1978).

131. For an argument that a critical social theory of law must hold law to its promises while critically examining those promises, see Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529 (1977).

132. Indeed, they already have done so. Personal injury lawyers cooperating with labor unions have begun contacting workers who have been exposed to asbestos, offering free medical evaluations to all and, of course, legal representation to those found to be suffering from asbestosis. These screenings have resulted in thousands of lawsuits. Richards & Meier, *Lawyers Lead Hunt For New Groups Of Asbestos Victims*, WALL ST. J., February 18, 1987, at 1, col. 6.

133. "Bouyed by last year's voter approval of the 'deep-pockets' insurance initiative, a coalition of business groups, manufacturers and physicians unveiled an ambitious agenda of more radical proposals Thursday that would limit awards in personal injury and product liability cases across the board." Wolinsky, *'Gouging Lawyers' Hit by 'Deep-Pockets' Group*, L.A. TIMES, March 27, 1987, Part 1, at 3, col. 4.

