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Enlightened Social Insurance in a World Made Safer

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BOOK REVIEW

Enlightened Social Insurance in a World Made Safer

DOING AWAY WITH PERSONAL INJURY LAW. By Stephen D. Sugarman.* Westport, Connecticut: Quorum Books. 1989. Pp. 215.

*Reviewed by Stephanie M. Wildman***

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I. INTRODUCTION

Tort law is frequently described as a system in "crisis."¹

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1. Recent tort reform law review articles using the word "crisis" in the title include: Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987); Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987); Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987).

Several recent articles, although not explicitly using the word "crisis," allude to the seriousness of problems with the current system in the introductory text of the article. See, e.g., O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985); Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917 (1985); Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941 (1985).

In addition, critiquing American tort law has been a cottage industry for legal scholars.

Although articles criticize the existing tort system, these scholarly assessments try either to justify the common law system² or to construct theoretical support for modifications to the system.³ Criticizing the critics, Izhak Englard noted that the "confidence in the possibility of elaborating systems at a high level of abstraction capable of providing concrete legal solutions" was surprising, particularly given the Anglo-American common law pragmatic tradition.⁴ And so it is with appreciation that the reader concerned with torts and the system's contradictions can study Professor Stephen D. Sugarman's book, *Doing Away with Personal Injury Law*,⁵ and find not only the criticisms of the tort system, but also proposed solutions to the problems and even strategies for making those solutions reality.

In his book, Sugarman proposes moving toward the elimination of personal injury law. He replaces tort law by treating the compensation of victims, whether by accident or illness, separately from any question of deterrence or punishment.⁶ The reader may disagree with Sugarman.⁷ I quarrel with his simplification of deterrence concerns and his handling of compensation for those not fully employed under the current societal definition of employment.⁸ Nevertheless, the book's achievement is in not only cataloging the ills of the personal injury system, but also advocating possible solutions to those

For recent law review symposia on tort reform, see *Alternative Compensation Schemes and Tort Theory*, 73 CALIF. L. REV. 548 (1985); *Issues in Tort Reform*, 48 OHIO ST. L.J. 317 (1987); *Torts Symposium*, 23 SAN DIEGO L. REV. 1 (1986).

2. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

3. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Calabresi, *Faults, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

4. Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 30 (1980).

5. S. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

6. *Id.* at 81.

7. Jeffrey O'Connell writes "one can quarrel with some of his thoughts and ideas." O'Connell, *Forward* to S. SUGARMAN, *supra* note 5, at xi.

8. Homemakers, that is those working full-time at home caring for children, housekeeping, and cooking, as well as all the nurturing tasks that make human life possible, are not included in the present government definitions of "unemployed." See, e.g., EMPLOYMENT DEV. DEP'T, 1984-85 ANNUAL PLANNING INFORMATION 98 (1984) (California's definition of "unemployed persons").

ills. It offers a good beginning for further debate. This Book Review summarizes the arguments for eliminating tort law as it presently functions, describes Professor Sugarman's suggestions for replacing tort law, and comments on these recommendations.

II. WHY DO AWAY WITH PERSONAL INJURY LAW?

For those unfamiliar with the litany of complaints about tort law, Part I of the book provides a good summary. Justifications for tort law classically rely on the goals of safety, compensation, and justice or fairness. Sugarman addresses each in turn and rejects the notion that any of these goals is achieved under the current tort law system. Without minimizing the importance of these goals, Sugarman suggests they would be better accomplished by separating compensation from safety, thereby achieving greater societal justice.

A. *The Safety Goal*

The first chapter addresses the safety goal of tort law, attacking the notion that the existence of tort law deters injury-producing behavior. Sugarman compares arguments made by law and economics theorists and the otherwise ideologically different plaintiffs' personal injury bar, noting that these groups both support the view that tort law serves a deterrent function.⁹ However, the deterrent potential of tort law is undermined by the presence of liability insurance,¹⁰ a phenomenon of relatively recent origin.¹¹ Consequently, a potential tortfeasor, who is insured, may not fear the crushing burden of liability (knowing of the insurance protection) and therefore would not be deterred from acting tortiously.¹² Sugarman urges that even "existing regulatory, economic, moral, and self-preservation pressures fail to control all dangerous conduct that society would like to deter,"¹³ and that the deterrence function of tort law adds only marginal safety gains. He emphasizes that the empirical data proving that tort law works successfully as a deterrent is thin.¹⁴

While Sugarman accuses those defenders of tort law's deterrent

9. S. SUGARMAN, *supra* note 5, at 4.

10. *Id.* at 12 & n.24.

11. "Liability insurance did not appear until the end of the 19th century." M. FRANKLIN & R. RABIN, *TORT LAW AND ALTERNATIVES* 638 (4th ed. 1987).

12. Some would argue that the crushing rates of liability insurance compel tortfeasors to be careful. But rates seem to go up simply from involvement in an accident, whether a party is at fault or not. For an interesting discussion of insurance, see K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986).

13. S. SUGARMAN, *supra* note 5, at 21.

14. *Id.*

value of basing their arguments on thin evidence and of being too optimistic in supposing that deterrence works,¹⁵ this criticism could be directed at Sugarman as well. He asserts that tort law has no deterrent effect or a marginal one at best,¹⁶ but do we really know? This is a place where more empirical data would be helpful, but Sugarman does not provide it.

Arguments about the deterrent potential of tort law are frustrating because no one seems to really know whether it is effective. Evidence is anecdotal,¹⁷ and studies are inconclusive.¹⁸ Legal scholarship is notoriously sparse in the area of empirical research.¹⁹ While more empirical research would be desirable, Sugarman uses the dearth of literature supporting deterrence as justification for his reasoning that deterrence does not work.²⁰ But the absence of such research does not prove the failure of deterrence, but rather the failure of the legal academy to study this problem adequately.

One argument against Sugarman's proposition is the recent analysis of the New Zealand comprehensive no-fault plan now in effect, in which Professor Richard S. Miller concludes that the New Zealand experience has led "to a serious failure of deterrence, to an increase in accidents and accident rates."²¹ Professor Miller proposes reintroducing the tort system in New Zealand to supplement the no-fault compensation plan. He believes that a combination approach, which maintains no-fault compensation as the primary source of recovery for accident victims while allowing access to tort law, would be desirable.²²

15. *Id.* at 21 & n.50 (criticizing W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10-11 (1987)).

16. *See id.* at 23.

17. Richard S. Miller commented to a faculty seminar in New Zealand that "Wellington was an unusually unsafe and hazardous place" and suggested the absence of tort law as the reason. Miller was told, "New Zealand had always been that way, even before [the enactment of a comprehensive no-fault statute covering accidental injury]." Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 6 n.10 (1989).

18. S. SUGARMAN, *supra* note 5, at 22 (elaborating on his problems with these studies as being unconfirmed and discredited).

19. *See, e.g.*, *Ochoa v. Superior Court*, 39 Cal. 3d 159, 181, 703 P.2d 1, 16, 216 Cal. Rptr. 661, 676 (1985) (Grodin, J., concurring) (discussing the need for more empirical evidence); Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989); *see also* Rhode, *Gender and Jurisprudence: An Agenda for Research?*, 56 U. CIN. L. REV. 521 (1987) (commenting on the need for empirical evidence in the area of sex discrimination law).

20. S. SUGARMAN, *supra* note 5, at 21 (noting that Posner and Landes have only thin favorable evidence and, as pro-deterrence advocates, surely would cite more impressive evidence if it were available).

21. Miller, *supra* note 17, at 6.

22. *Id.* at 64-73.

The viability of the tort system in promoting safety is particularly troublesome, given that under Sugarman's proposals, safety, which all theoretically would agree is desirable,²³ is left to regulatory agencies and implicitly to the political pendulum to which those agencies are subjected. While Sugarman concludes that "[t]he idea that tort law might deter that many medical or other accidents seems to be very much wishful thinking to me,"²⁴ he may be "wishfully" minimizing the influence toward safety which tort law might have. Do we have enough safety that we can afford to take a chance with having less?

It is this concern with safety that the plaintiffs' personal injury bar proudly cite when defending their work.²⁵ The personal injury bar's case for deterrence suggests that society must be ever vigilant in advocating safety to make companies improve their products.²⁶ While it is difficult to ignore the personal injury bar's self-interest in perpetuating the present system, its contribution in publicizing dangerous products has been substantial.²⁷

B. *The Compensation Goal*

Compensating the victims of accidents is also a pressing societal need. Yet the common law negligence system, which never purported to be a system designed to compensate accident victims, has been pressed into service to do just that.²⁸ It is a job for which the system

23. *But see* Fairlie, *Fear of Living: America's Morbid Aversion to Risk*, NEW REPUBLIC, Jan. 23, 1989, at 14 (asserting that risk-taking is necessary and that not enough risk-taking is undermining America).

24. S. SUGARMAN, *supra* note 5, at 24.

25. *See, e.g.*, Dorfman, 'I'm Proud to Be a Trial Lawyer,' San Francisco Banner Daily J., Nov. 14, 1989, at 8, col. 5 (describing a convention of the California Trial Lawyers Association and the pride speakers felt as "keepers of the flame of consumer protection").

26. S. SUGARMAN, *supra* note 5, at 4.

27. One recent example was the highly publicized DES litigation. *See Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d. 625 (1981); *see also* S. FENICHEL & L. CHARFOOS, *DAUGHTERS AT RISK: A PERSONAL DES HISTORY* (1981).

Another example involved litigation over the Ford Pinto. *See Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

Another example concerned the Dalkon Shield. *See In re A.H. Robins Co.*, 880 F.2d 779 (4th Cir. 1989); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); *see also* M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985).

Women were the principal victims in both DES and Dalkon shield cases, where companies were found liable under the tort system for manufacturing dangerous health care products.

28. "More and more we are trying to run a compensation system in a fault liability

is ill-suited. Common law judges have sought to broaden the liability base, ensuring solvent defendants for compensation purposes.²⁹

Sugarman is critical of these "creative judicial expansions" of tort law which have made it easier for some victims to recover because the progressive changes make tort law harder to supplant.³⁰ He believes the expansion of tort law is damaging because better approaches to compensation become less urgent as at least some victims are helped.³¹ Arguments like this, to the effect that the world should be kept bad enough so that people will have to do something to change it, have rarely worked and run contrary to humanitarian concerns.³²

Nevertheless, there is a compelling argument that a viable compensation system cannot be achieved through the use of tort law. As Sugarman points out, many victims are uncompensated and many more are undercompensated.³³ Professor Richard L. Abel agrees that the real tort crisis is that too few claims are brought,³⁴ and that many "needy, deserving victims" are not recompensed.³⁵

Sugarman correctly emphasizes the arbitrariness of tort compensation.³⁶ Tort awards begin to resemble a lottery; they are dependent upon plaintiffs, lawyers, and juries, and yield dissimilar results for similar victims.³⁷ The lump-sum nature of the tort award creates arbitrariness in cases both where the patient's injury heals earlier than anticipated and where the injury is more serious and long-term than

framework." STATE OF NEW YORK INS. DEP'T, *AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? A REPORT TO GOVERNOR NELSON A. ROCKEFELLER* 48 (1970), *reprinted in* M. FRANKLIN & R. RABIN, *supra* note 11, at 658.

29. *See, e.g., J'aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (finding plaintiff entitled to protection from economic losses sustained as a result of negligence); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (finding psychotherapists had a duty to warn intended victim of patient); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (abandoning common law categories insulating landowners or occupiers from liability for their negligence).

30. S. SUGARMAN, *supra* note 5, at 36.

31. *Id.*

32. *Cf. D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 51-56 (1987) (Chapter 2, The Benefits to Whites of Civil Rights Legislation: The Chronicle of the Celestial Curia, uses this theme showing that worsening people's lives is senseless.).

33. S. SUGARMAN, *supra* note 5, at 36-38.

34. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987).

35. *See id.* at 447; *see also id.* at 448-52 (describing empirical studies indicating many injury victims fail to file claims).

36. S. SUGARMAN, *supra* note 5, at 38.

37. *Id.* Marc Franklin was one of the first scholars to use the term lottery in relation to tort. *See Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

originally expected.³⁸

C. *The Justice or Fairness Goal*

Turning to justice or fairness, Sugarman rejects the corrective justice rationalization for tort law. He reviews the literature defending tort law, including Holmes, who based his arguments on the need to punish unreasonable conduct; Fletcher, who focused on nonreciprocal risktaking; and Epstein, who explained tort law as fundamentally related to the causation of harm.³⁹ Sugarman dismisses these arguments, concluding that "the pursuit of corrective justice through ordinary torts cases is an extravagance primarily benefiting lawyers and the insurance industry."⁴⁰

Sugarman argues that the theory of corrective justice is unrealistic as applied to defendants. The advent of liability insurance and the doctrine of respondeat superior ensure that plaintiffs are not compensated by their injurers.⁴¹ He also examines the notion that the personal injury award is the victim's basic source of compensation. Noting that victims are often paid by collateral sources, he questions the fairness of requiring a defendant's employer or insurer to pay a second time.⁴² Sugarman contends that it is unrealistic to assume that victims naturally want redress from their injurers.⁴³ He asserts that it is "the lure of substantial financial awards," not the need to soothe one's outrage, that encourages victims to file tort claims.⁴⁴ Finally, Sugarman reviews the arbitrariness of tort law. Recognizing that luck plays an important role in the receipt of a tort award, he concludes that "the current system functions whimsically and not in accord with anyone's sense of justice."⁴⁵

38. See S. SUGARMAN, *supra* note 5, at 35-41 (discussing uncompensated and under-compensated victims and excessive and unnecessary compensation).

39. *Id.* at 57-60.

40. *Id.* at 62. For an interesting and different corrective justice justification for the tort system, see Hantzis, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. — (1990) (forthcoming) (arguing that pragmatism provides a corrective justice rationale for tort law). If there is a corrective justice case for tort law, Hantzis article articulates it, but given the cost issues of the tort system and its failure as a compensation system, I remain unconvinced.

41. S. SUGARMAN, *supra* note 5, at 54-55.

42. *Id.* at 56.

43. *Id.*

44. *Id.* While Sugarman may be correct in most instances, some would argue that it is unrealistic to dismiss human nature's penchant for vengeance and retribution.

45. *Id.*

III. SURVEYING CURRENT REFORMS

Given the valid criticisms of tort law, some changes in the tort compensation system seem certain to occur in our legal lifetime. The only question is what form will these changes take. Sugarman describes the reform efforts begun by the Reagan administration and representatives of corporate defendants and their insurers to curtail victim's rights.⁴⁶ These reform proposals, which Sugarman calls "tort tinkering,"⁴⁷ include repudiating strict liability in products cases,⁴⁸ limiting attorney contingent fees,⁴⁹ limiting awards for pain and suffering and punitive damages,⁵⁰ abandoning the collateral source rule,⁵¹ and eliminating joint and several liability.⁵²

These efforts on the defense side to alter tort law and yet keep it afloat, counterpoised with the plaintiffs' personal injury bar's attempts to maintain the status quo,⁵³ are reminiscent of the jockeying between first- and third-party insurers in the early 1970's over whether to retain tort law with the modification of comparative fault or whether to adopt no-fault automobile compensation schemes.⁵⁴ As Sugarman points out, however, even the reform package most advantageous to the defense will not solve the high insurance premium crisis because the uncertainty of lawsuits will remain.⁵⁵

Sugarman believes that these current reform ideas are false starts, and he attacks the "timid" American Bar Association which con-

46. See *id.* at 75 (Chapter 4, Curtailing Victims' Rights). Sugarman also addresses tort reform designed to benefit victims, noting that judicial developments have served plaintiffs well. *Id.* at 76-77.

47. *Id.* at 77.

48. *Id.* at 79; see, e.g., Jones, *Products Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U. MIAMI L. REV. 731 (1990) (arguing that tort liability should be abolished in cases involving commercial loss).

49. S. SUGARMAN, *supra* note 5, at 79-83 (discussing legislative reforms).

50. *Id.* at 79.

51. *Id.*

52. *Id.* at 79-80. California voters eliminated joint and several liability for noneconomic harms by voter initiative in 1986. Fair Responsibility Act of 1986, CAL. CIV. CODE §§ 1431-1431.1 (West 1986).

The notion that tort reform can be accomplished by voter initiative, requiring voters to understand the complex, interconnected issues of tort reform seems an abdication of legislative responsibility. See Wildman, *Propositions Are the Wrong Way for Tort Reform*, Los Angeles Daily J., Nov. 7, 1988, at 6, col. 3.

53. See S. SUGARMAN, *supra* note 5, at 85 (acknowledging that the plaintiffs' personal injury bar is a political force).

54. The adoption of comparative negligence in many states "saved" the tort system in the auto accident arena from yielding to no-fault. See M. FRANKLIN & R. RABIN, *supra* note 11, at 380 (describing the flood of legislation favoring comparative negligence as having "received a considerable boost from efforts to undermine proponents of no-fault auto insurance").

55. S. SUGARMAN, *supra* note 5, at 92.

cluded that tort law is an achievement that should be left alone.⁵⁶ No one escapes Sugarman's critique. He has attacked the right, center, and left. The political question remaining is how might his own proposed changes be brought about.⁵⁷ Before approaching that practical problem, Sugarman turns to the existing and proposed no-fault alternatives to tort law.

Sugarman is critical of piecemeal no-fault alternatives to tort law because the resulting system would "look like a crazy quilt."⁵⁸ He reviews the development of no-fault in the automobile area,⁵⁹ and the use of elective plans in high school athletics,⁶⁰ but prefers elective no-fault plans only "on the way to some other arrangement."⁶¹

The most ambitious modern no-fault accident compensation plan, that of New Zealand, replaces tort damages with "guaranteed compensation for lost income, medical expenses, and rehabilitation costs without regard to type of accident or fault."⁶² A British proposal originating at Oxford is even more sweeping, covering all disabled under a single social welfare scheme, but it has not yet been adopted.⁶³ Sugarman commends the British for "rethinking these problems from the ground up,"⁶⁴ and recognizes that their approach is similar to his own.

Arguing for a more comprehensive approach to disability than the confines of tort law permits, Sugarman challenges the reader to consider whether it makes sense to treat the victims of accidents and illness differently.⁶⁵ Others before Sugarman have asked and answered this question in the negative. As early as 1967, Marc Franklin wrote, "I do not see why, as an initial proposition, today's law should care *how* a limb was broken, whether by an intentional wrongdoer, a negligent automobile driver, a non-negligent driver, a wall toppled by an earthquake or a fall in the bathtub."⁶⁶

Two recent natural disasters, the earthquake in Northern Cali-

56. *Id.* at 88.

57. *See id.* at 167 (discussing the political realities that could result in the adoption of his proposed changes).

58. *Id.* at 103.

59. *Id.* at 103-04.

60. *Id.* at 104.

61. *Id.* at 106.

62. *Id.* at 110. Sugarman uses this phrase to describe several proposed comprehensive compensation plans, including New Zealand's. For extensive literature on New Zealand's plan, see *id.* at 120 n.37; Miller, *supra* note 17.

63. S. SUGARMAN, *supra* note 5, at 114-15.

64. *Id.* at 115.

65. *Id.* at 113.

66. Franklin, *supra* note 37, at 777, cited in S. SUGARMAN, *supra* note 5, at 110.

fornia⁶⁷ and Hurricane Hugo in South Carolina,⁶⁸ underscore the logic of Franklin's and Sugarman's pleas to address the needs of the disabled, regardless of the source of their illness or misfortune. In an uncharacteristically swift legislative response to the earthquake, California enacted a no-fault compensation plan providing injured earthquake victims with prompt monetary relief.⁶⁹ This type of legislation, which allows prompt victim compensation and preserves later tort claims, might prove to be a useful prototype for a combination reform approach, joining immediate compensation and preservation of tort claims, that could extend beyond merely disaster relief.

IV. REPLACING TORT LAW

In Part III of the book, entitled *Better Ideas*, Sugarman sets forth his ideal solution to the problems of the personal injury system. He advocates separating the compensation and behavior control functions of the existing structure.⁷⁰

Sugarman's plan meets the compensation goals through an employment-related compensation package: "If we could put nearly everyone in a broadly equivalent position to those with good employee benefits, our need to use tort law to compensate for economic loss would essentially disappear."⁷¹ His definition of "good employee benefits" includes income replacement and compensation for medical expenses, while it excludes non-economic losses, presumably pain and suffering and emotional distress.⁷²

Another issue raised by Sugarman's proposal is how to award benefits to those citizens not covered by an employee benefits plan.

67. See generally Magnuson, *Earthquake*, TIME, Oct. 30, 1989, at 30.

68. See generally Magnuson, *Winds of Chaos*, TIME, Oct. 2, 1989, at 16.

69. San Francisco—Oakland Bay Bridge and I-880 Cypress Structure Disaster Relief [New] Act, CAL. GOV'T CODE § 997 (West 1989); see also Dresslar, *Legislature Poised to OK No-Fault, Fast Payment Quake Claims Legislation*, Los Angeles Daily J., Nov. 6, 1989, at 4, col. 2; Dresslar, *CTLA Supports Quake Tort Claim Plan*, Los Angeles Daily J., Nov. 2, 1989, at 4, col. 4.

70. S. SUGARMAN, *supra* note 5, at 125.

71. *Id.*

72. For an interesting discussion of "intangible losses," in the present tort framework, suggesting that damage awards be limited to "transferable, out-of-pocket expenses," see Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 809 (1985).

Sugarman does not directly address negligent infliction of emotional distress, a tort of recent origin, particularly as it applies to bystanders watching a tortfeasor's negligence. He leaves open the question of whether a victim could be compensated for therapy bills under the medical coverage part of his plan, or whether the interest presently protected by this tort would not be covered.

The implication of the book is that this interest would not be protected. Sugarman does say he would eliminate tort law for defamation plaintiffs, who would have to be recompensed

Conceding that "policy makers must address our collective responsibility toward all people who do not have income because they are not at work,"⁷³ Sugarman examines how this problem has been handled under other compensation regimes. Existing tort law considers the probable future earnings of disabled children, students, or homemakers as a means for placing a dollar value on their recovery.⁷⁴ No-fault compensation plans have not been consistent in their treatment of this issue: Israel covers disabled homemakers,⁷⁵ while New Zealand's plan has been criticized for failing to cover non-earning groups "well and consistently."⁷⁶ Providing the funding for the compensation of non-earners is a problem; Sugarman's solution is that homemakers or disabled adults who do not qualify for earning related benefits should receive Social Security disability benefits.⁷⁷

The problem of compensation for non-earners is exacerbated by the problem of the replacement cost of household services that must be purchased when the injured non-earner, who probably was the provider of these services, is unable to perform that work.⁷⁸ While replacement costs are a problem not just of tort victims but of any disabled citizen, tort law with its imprecise recovery package may cushion that loss. Sugarman is overly optimistic about temporary replacements by family and friends, contending that "other household members, friends, and more distant relatives can pick up the slack at least for a time."⁷⁹

Though pain and suffering awards are frequently criticized,⁸⁰ Sugarman would retain such compensation, but limit maximum

by the same mechanism used for accident victims. S. SUGARMAN, *supra* note 5, at 162. The problem of defamation plaintiffs and the harms they suffer bears further discussion.

For a good discussion suggesting ways tort liability might augment no-fault plans by allowing tort recovery for nonphysical harm, thereby protecting a victim's dignitary interest, see Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (with an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857 (1985).

73. S. SUGARMAN, *supra* note 5, at 128.

74. *Id.* at 132.

75. *Id.* at 149 n.11 (providing a source for further details on this coverage).

76. *Id.* at 149 n.12.

77. *Id.* at 139. Sugarman concedes, "[t]he level of benefits provided to such people and the degree of disability necessary for eligibility are difficult questions." *Id.*

78. *Id.* at 133.

79. *Id.* at 193 n.13.

80. See, e.g., *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 511-13, 364 P.2d 337, 345-47, 15 Cal. Rptr. 161, 169-71 (1961) (Traynor, J., dissenting) (discussing the criticism of pain and suffering awards); see also O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333; O'Connell & Simon, *Payment for Pain & Suffering: Who Wants What, When and Why?*, 1972 U. ILL. L.F. 1.

awards to \$150,000.⁸¹ The New Zealand plan provides compensation for pain and suffering as well.⁸²

With compensation covered by social insurance, Sugarman looks briefly at safety regulation. He advocates "accident prevention through regulatory strategies, with the increased involvement of citizens, victims, and citizen groups."⁸³ Conceding that administrative agencies may be captured by those they supposedly regulate and admitting the need to make agencies "more responsive and more effective,"⁸⁴ Sugarman's reliance on regulatory agencies to insure safety seems a bit naive.

Sugarman would reply, correctly, that the presence or absence of tort law does not solve the problem of regulatory agencies failing to perform their job. Yet putting safety regulation exclusively into the hands of administrative agencies would not make them more effective either. Sugarman believes that tort law is too expensive a safety net to maintain, given its minimal returns.⁸⁵ Although tort law is expensive, I am unable to take this step with him, at least until we see whether some of his idealism about greater safety through agency regulation can happen in reality.

Turning to the practical politics of instituting his reforms, Sugarman assesses the "traditional legislative fight" about tort reform as one between business and insurance on one side against consumers and plaintiffs' lawyers on the other.⁸⁶ Seeking to change the political alignment, Sugarman's proposal is meant to "link together victim, consumer, and business interests."⁸⁷ His goal is to eliminate personal injury claims for those disabilities lasting less than six months, by providing temporary disability benefits to those injured.⁸⁸ Serious injury cases would remain in the tort system and blunt "the criticism of those who still believe that tort serves important deterrence and punishment functions."⁸⁹

81. S. SUGARMAN, *supra* note 5, at 143.

82. *Id.* at 134.

83. *Id.* at 153.

84. *Id.*

85. *Id.* at 155. "[T]he contention that tort law keeps regulatory agencies alive is ultimately unconvincing." *Id.* at 154.

86. *Id.* at 167.

87. *Id.*

88. *Id.* at 169. Non-earners, of course, receive no benefits, but Sugarman assumes they are relying on some other income source anyway. The problem of replacing their labor in the family unit remains. However, Sugarman does urge that non-earners who were recently in the labor force should be paid temporary disability benefits (presumably this solution would cover the maternity leave problem). *Id.* at 170.

89. *Id.* at 191.

Once this initial step of removing small claims from the system and changing the rules in cases of serious injury is adopted, Sugarman says the stage would be set "for the additional intermediate steps that might be necessary to reach a comprehensive long-run program [for compensating accident victims] that did not at all rely on private accident law."⁹⁰

V. INITIATING CHANGE

One way to look at the social problem of tort reform is to ask: What is the reality?; what is the ideal?; and how might we get there from here?⁹¹ The next question becomes whether to move incrementally or all at once.

For example, the California Supreme Court in *Molien v. Kaiser Foundation Hospitals*⁹² took the leap of allowing recovery in emotional distress cases absent proof of physical consequences of the emotional distress, relying on the jury to look for "genuineness" in the circumstances of the case.⁹³ The New York Court of Appeals, however, moved incrementally by creating a landscape dotted with exceptions⁹⁴ to the requirement of physical consequences in cases involving negligent handling of corpses,⁹⁵ wrongful notification of death by telegraph,⁹⁶ and negligent counseling regarding the need to obtain an abortion.⁹⁷ No physical injury was required in these exceptional cases; perhaps when the landscape is filled with exceptions the rule will be swept away.⁹⁸

Although he advocates two steps to his goal of sweeping tort law away, Sugarman's approach is more like the approach taken by California. A more incremental approach might involve doing away with

90. *Id.* at 212.

91. Cf. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977) (taking this approach on the issue of affirmative action); Radin, *The Pragmatist and the Feminist*, 63 S. Cal. L. Rev. — (1990) (forthcoming) (taking the same approach in this work in progress).

92. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

93. *Id.* at 926, 616 P.2d at 818-19, 167 Cal. Rptr. at 836-37.

94. Professor Marc Franklin compared New York's and California's approaches. Conversation with Marc Franklin, Professor of Law at Stanford Law School, in San Francisco (Fall 1983).

95. *Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 95 N.E. 695 (1911).

96. *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

97. *Martinez v. Long Island Hillside Jewish Medical Center*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

98. For cases sweeping away the many exceptions to the landowner-land occupier no duty or limited duty rules and replacing all the exceptions with a single standard of reasonable care, see *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

tort law in specific areas, as we already have done in workers' compensation⁹⁹ and in the no-fault automobile accident arena in some states.¹⁰⁰ When a substantial number of these compensation systems have taken over, people might feel more comfortable with tort reform. Sugarman acknowledges this possibility,¹⁰¹ but seems to ask, "Why wait?"

VI. REFLECTIONS

We live in a society that commodifies everything, giving everything a price tag and trying to make it fungible.¹⁰² As a response in the tort arena, Richard L. Abel advocates eliminating damages for emotional distress.¹⁰³ According to Abel, maintaining "such damages extend[s] capitalism's commodification of labor to all human experience."¹⁰⁴ But money is the societal medium of exchange. It is no less demeaning to quantify the cost of a limb or of a life than one's emotional harm. Those personal injury damages are as much commodified and objectionable on that basis. And yet money is the universal symbol of value in this culture. Until we change that fact, the failure to award monetary damages for nonpecuniary harms devalues their loss. Insofar as those damages are about connection and caring, which are already undervalued in this culture,¹⁰⁵ not to award damages for their loss perpetuates that undervaluation and renders invisible their importance to society.¹⁰⁶

99. See Love, *supra* note 72, at 857 & n.1 (discussing the enactment of workers' compensation legislation by every jurisdiction in the United States).

100. S. SUGARMAN, *supra* note 5, at 103 (discussing broad no-fault auto plans).

For a discussion of specific areas where tort law is being replaced incrementally, see *id.* at 106-10 (discussing no-fault benefits for children injured by vaccines); see also Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 46 (1988) (suggesting that changes in the tort system are likely to be "addressed in narrowly-focused, incremental terms, barring a broadly conceived social reform movement").

101. See, e.g., S. SUGARMAN, *supra* note 5, at 88-89 (discussing the ABA's Action Commission to Improve the Tort Liability System, which adopted an incremental approach to reform).

102. See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing contested market-inalienable areas).

103. Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y. 199 (1981).

104. Abel, *supra* note 34, at 444.

105. For the classic work on connection and caring as part of women's moral structure unrecognized by the dominant culture, see C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). But see *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 28 (1985) (MacKinnon states that the feminine voice is unrecognizable as long as a foot is placed on our necks.).

106. See Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) (articulating ways in which tort law has developed in terms of the male societal norm); see also Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 51-54 (1989) (discussing caretaking issues in the law of damages).

Also, to the extent that Sugarman's proposals institutionalize the invisibility of nonearner work, it poses a serious problem for all womanist thinkers.¹⁰⁷ Sugarman's plan for compensation is tied to workers. Women who labor without employment benefits as child-care workers or housecleaners are not compensated under this plan because they are not paid in the workforce and therefore are not identified as workers, or as present in the labor force. Thus, the homemakers' work is rendered invisible, and devalued as well, because paid labor is the important and legitimating category.¹⁰⁸

The devaluation of household work is not a problem Sugarman invented, and it is a relief that his work at least recognizes and is concerned about the homemaker situation. But Sugarman seems to think all homemakers are attached to someone in the workforce who can foot the recovery bill, when this may not be the case. Women who are divorced, living on child support, working part-time without benefits or another household earner, or in the labor force, but invisible to it (for example, a housecleaner getting paid cash), may find their income sources inadequate if they became injured and could not turn to tort recovery.

In addition to the personal compensation of these workers, a significant problem relating to work performed in the home, generally unpaid women's work, is that the cost of replacing household work is staggering. Tort law theoretically does take care of that need by providing a large cushion of recovery for those who do win the tort lottery.

These problems may not be reasons *not* to do away with tort law, but these issues should be addressed as part of any wholesale reform. If we are traveling the road from reality to a more ideal state of affairs, that future should be as ideal as possible.

107. Like Alice Walker, I prefer the term womanist. Walker explains:

"Womanist" encompasses "feminist" as it is defined in Webster's, but also means *instinctively* pro-woman. It is not in the dictionary at all. Nonetheless, it has a strong root in Black women's culture. It comes (to me) from the word "womanish," a word our mothers used to describe, and attempt to inhibit, strong, outrageous or outspoken behavior when we were children: "You're acting *womanish*!" A labeling that failed, for the most part, to keep us from acting "womanish" whenever we could, that is to say, like our mothers themselves, and like other women we admired.

Walker, *Coming Apart*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 95, 100 n.* (L. Lederer ed. 1980); see also Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543.

108. This predicament is not exclusive to homemakers' work. Others not identified as present in the labor force would also be affected.

VII. CONCLUSION

Is it a fantasy to think that employers, interested in profit to the exclusion of all else, will enact an enlightened social welfare system for their workers without government regulation or intervention? Sugarman believes they might if it will save them money in insurance premiums (for liability insurance),¹⁰⁹ but will it really save money?¹¹⁰ Some employers without high premiums in low risk businesses will face increased costs because of these augmented employee benefits. Can taking good care of their workers be sold to businesses as a good idea, even if it will not enhance profits, just because it is the right thing to do?

I would like to be as optimistic about human nature as Sugarman. We have much to lose by not trying, given the coalition that stands poised to make changes in tort law anyway, which will undermine victim compensation considerably. Accident victims seem unlikely to have the political clout to be able to retain the status quo. If changes are inevitable, looking in Sugarman's direction will certainly move us toward a more just society.

109. S. SUGARMAN, *supra* note 5, at 187.

110. Sugarman concedes "providing firm answers to these important questions is not easy, and at this point I am able only to provide some analysis about tendencies." *Id.*