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# Tort Law and Communitarianism: Where Rights Meet Responsibilities

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## TORT LAW AND COMMUNITARIANISM: WHERE RIGHTS MEET RESPONSIBILITIES\*

*Robert M. Ackerman\*\**

*In this article, Dean Ackerman suggests how communitarian principles could be utilized within basic tort doctrines. He begins by providing a brief overview of communitarianism, paying great attention to Professor Amitai Etzioni's four-point agenda on rights and responsibilities. Next, Dean Ackerman considers what effects communitarian thought could have on tort law. Dean Ackerman proposes that communitarianism could be used not only to expand tort duties, but also to limit remedies for injuries. He also addresses possible conflicts that arise when these two principles compete. In conclusion, the article suggests how communitarianism might improve the processes used to resolve tort claims.*

### TABLE OF CONTENTS

INTRODUCTION .....	650
I. COMMUNITARIANISM BRIEFLY EXPLAINED .....	652
II. APPLICATION OF COMMUNITARIAN THOUGHT TO TORT LAW ..	654
A. <i>Situations in Which Communitarian Principles        Might Suggest an Expansion of Tort Liability</i> .....	655
1. <i>Rounding out the negligence concept</i> .....	655

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2.	<i>Expanding the negligence concept through imposition of additional duties</i> .....	660
3.	<i>Protecting whistleblowers</i> .....	663
B.	<i>Situations in Which Communitarian Principles Might Suggest a Limitation or Contraction of Tort Liability</i> .....	664
1.	<i>Slapping down SLAPP suits</i> .....	664
2.	<i>Limiting liability for emotional harm</i> .....	667
3.	<i>"Protect me from myself" cases</i> .....	672
4.	<i>"Blame it on city hall" cases</i> .....	675
C.	<i>Brother's Keeper or Culture of Complaint?</i> .....	679
III.	A COMMUNITARIAN TORT REGIME: WHAT IT MIGHT LOOK LIKE, AND HOW WE MIGHT GET THERE .....	683
A.	<i>Changing the Rules</i> .....	683
B.	<i>Changing the Game</i> .....	685
C.	<i>Unburdening the System</i> .....	687
	CONCLUSION .....	690

#### INTRODUCTION

Between the extremes of authoritarianism and libertarianism lies the sane middle ground of communitarianism. Communitarians believe that even (or perhaps especially) in a rights-conscious society, rights have limits, and involve concomitant responsibilities. For example, one has a right to trial by jury, but one also has the responsibility to serve on a jury when called upon. Citizens have the right to be secure from unwarranted governmental intrusion, but air traffic controllers and railroad engineers must submit to periodic drug testing in deference to the legitimate interests of the community. Communitarians support basic civil liberties, but fear that our ability to confront societal problems effectively is compromised by the claims of "radical individualists"<sup>1</sup> who would subordinate the needs of the community to the absolute fulfillment of individual rights. "A Communitarian perspective recognizes both individual human dignity and the social dimension of human existence."<sup>2</sup> Communitarians have therefore suggested an agenda to advance commonly held social values without unduly compromising individual rights.<sup>3</sup>

Most communitarian writing to date has concentrated on the role of the family, schools, business, the media, and governmental institutions.<sup>4</sup> Although there have been some efforts to introduce communitarian thought into the field of contracts,<sup>5</sup> few overt attempts have been made to

1. See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 11 (1993).

2. *Id.* at 253 (quoting the Communitarian Platform).

3. See *id.* at 251-67.

4. See, e.g., *id.*; see generally *THE RESPONSIVE COMMUNITY*, a journal of communitarian thought.

5. See, e.g., IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 71-117 (1980); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829, 842 (1983); Howard O. Hunter, *Creativity and Responsibility:*

graft communitarian philosophy to tort doctrine.<sup>6</sup> This article is an effort to address that void. Tort litigation is frequently our society's method of sorting out the rights and responsibilities of individuals and institutions with respect to one another. The law that emerges from tort litigation helps define the boundaries of human interaction: what is acceptable conduct; what are the limitations of one's rights; what responsibilities to others accompany those rights. During the past thirty years, the protections furnished by the law of torts have expanded, and with that expansion has come an augmentation of the duties owed to one's fellow citizens.<sup>7</sup> Some commentators see a need for additional duties, such as a duty to assist persons in peril.<sup>8</sup> There is, however, a growing sense—evidenced by both scholarly<sup>9</sup> and popular<sup>10</sup> literature—that tort litigation has provided remedies to individuals without due deference to the responsibilities that such individuals owe themselves, and without recognition of the considerable burdens these remedies place on others. Under this view, modern tort law represents a perverse triumph of radical individualism. Tort law—in particular, the law pertaining to remedies for personal injury—is therefore an appropriate area to examine in light of communitarian principles.

This article is an effort to consider how communitarian thinking might apply to tort law. Its intent is exploratory: to suggest a few areas of inquiry, to highlight some problems, to test concepts. I do not mean to “invent” dogma (indeed, that would be contrary to my understanding of communitarianism), but rather to suggest doctrinal guidelines and invite

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*Perspectives on Covenant, Contract and the Resolution of Disputes*, 36 EMORY L.J. 533, 538 (1987); Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 519 (1985).

6. *But see* Mary Ann Glendon, *Does the United States Need “Good Samaritan” Laws?*, 1 RESPONSIVE COMMUNITY 9, (1991) [hereinafter Glendon, *Good Samaritan*] (arguing in favor of a duty to rescue in criminal rather than tort law); Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1561 (1986) [hereinafter Baruch Bush, *Between Two Worlds*] (suggesting that the shift from individual to group responsibility in tort law is a positive development).

7. The “fall of the citadel” of privity, which heralded the expansion of products liability, is the most prominent augmentation of tort duties. *See, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Another example is the expansion of liability for the criminal acts of third parties. *E.g.*, *Atamian v. Supermarkets Gen. Corp.*, 369 A.2d 38, 40-42 (N.J. Super. Ct. Law Div. 1976). The abrogation of charitable, family, and governmental immunities also illustrates the expansion of tort duties. *E.g.*, *Albritton v. Neighborhood Ctrs. Ass’n for Child Dev.*, 466 N.E.2d 867, 871 (Ohio 1984) (subjecting charitable organization to liability for tort to the same extent as an individual or corporation); *Hack v. Hack*, 433 A.2d 859, 868-69 (Pa. 1981) (abolishing defense of interspousal immunity); *Ayala v. Philadelphia Bd. of Pub. Ed.*, 305 A.2d 877, 878 (Pa. 1973) (abrogating governmental immunity in action against school board).

8. *E.g.*, Glendon, *Good Samaritan*, *supra* note 6.

9. *See, e.g.*, PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); PAUL H. RUBIN, *TORT REFORM BY CONTRACT* (1993).

10. *See, e.g.*, JOE KOHUT, *SO SUE ME* (1993); Dave Barry, *Lawyers Get Their Teeth into Some Real Class Action*, CHI. TRIB., Dec. 5, 1993, Sunday Magazine, at 33; Mike Royko, *Legal System Has Had One Too Many*, CHI. TRIB., Sept. 25, 1990, at C3.

comment. I admit to being largely sympathetic toward communitarianism, but claim to be neither a spokesman nor an apologist for the movement. Like many of those who are attracted to communitarianism, I am still feeling my way.<sup>11</sup>

### I. COMMUNITARIANISM BRIEFLY EXPLAINED

The communitarian movement is young, even by American standards. A platform, initially drafted by Professor Amitai Etzioni (who may be appropriately described as the movement's founder),<sup>12</sup> was issued on November 18, 1991.<sup>13</sup> Some seventy "leading Americans" have endorsed the platform, including conservatives and liberals, Republicans and Democrats.<sup>14</sup>

In his definitive book, *The Spirit of Community*, Professor Etzioni describes communitarianism as "a social movement aim[ed] at shoring up the moral, social, and political environment."<sup>15</sup> This can be accomplished, says Etzioni, without fear of plunging into "a dark tunnel of moralism and authoritarianism."<sup>16</sup> To this end, Etzioni proposes a four-point agenda on rights and responsibilities. First on this agenda is a moratorium on "the manufacturing of new rights," because "the incessant issuance of new rights, like the wholesale printing of currency, causes a massive inflation of rights that devalues their moral claims."<sup>17</sup> Professor Etzioni supports this point with several examples, including death row inmates' claims to reproductive "rights" through artificial insemination, a student's claim that he had the "right" to admission to a high school honor society,<sup>18</sup> and a claim by bankers lobbying against federal interest

11. This non-dogmatic approach is probably endemic to middle-of-the-roaders, and is likely to subject me to accusations of fuzzy thinking and namby-pambiness. I will readily confess that I lack the moral certitude of the "True Believer." See ERIC HOFFER, *THE TRUE BELIEVER* xii (1951) (describing the true believer as the man of fanatical faith who is ready to sacrifice his life for a holy cause).

12. Social scientist Amitai Etzioni is currently a professor at George Washington University. A refugee from Nazi Germany, Etzioni grew up in a cooperative settlement in Israel and served in that nation's military. After obtaining a degree from the Hebrew University, Etzioni came to America to attend graduate school at Berkeley. He has since taught and lectured at a number of universities.

13. See Glen Elsassee, "We" Generation, *CHI. TRIB.*, Nov. 3, 1994, *Tempo*, at 1.

14. ETZIONI, *supra* note 1, at 18, 251.

15. *Id.* at 247.

16. *Id.* at 2.

17. *Id.* at 5.

18. To this we might now add Tonya Harding's claim that she had a "right" to a place on the Olympic figure skating team. See Bob Baum, *Harding Strikes Back With Lawsuit*, *PHILA. INQUIRER*, Feb. 10, 1994, at D1.

Of even more recent vintage (and of greater significance) is a promise by a politically beleaguered President of a "Middle Class Bill of Rights." President Bill Clinton, *Televised Address Proposing Middle Class Tax Breaks* (Dec. 15, 1994) (transcript available in N.Y. *TIMES*, Dec. 16, 1994, at A36). To President Clinton's credit, his January 24, 1995 State of the Union Address evidenced a more communitarian approach:

[A]ll Americans have not just a right, but a solid responsibility to rise as far as their God-given talents and determination can take them. And to give something

rate regulation that Americans had a "right" to keep their credit cards.<sup>19</sup> In each instance, Professor Etzioni reminds us that "*each newly minted right generates a claim on someone.*"<sup>20</sup> Rights, in other words, are not cost-free, and therefore should be carefully examined to see if they are important enough to justify the cost.

The second item on the communitarian agenda is that rights presume responsibilities.<sup>21</sup> "Buried deep in our rights dialect," writes Harvard Law Professor Mary Ann Glendon, "is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm."<sup>22</sup> To me at least, the recognition of responsibilities owed to others does not necessarily carry with it the imperative that a new series of legal obligations be imposed through governmental fiat. Underlying communitarianism appears to be the notion that as members of a community we are *morally* obligated to undertake certain responsibilities, and that if we must wait for the authorities to *compel* us to discharge our civic duties, the main point most likely is lost. Whether affirmative obligations to others should be embodied in the law, rather than left to the honor of the individual actor, is an issue which I will later address briefly in a tort context.

Third on the communitarian agenda is the recognition that certain responsibilities may exist without an immediate payback in the form of capturable rights.<sup>23</sup> A responsibility to the environment, the destruction of which may affect future generations far more gravely than our own, is Etzioni's most obvious example.<sup>24</sup> Underlying this concept is a sense of commitment to the greater good, a recognition that we are all part of a larger community that does not end at our doorstep. The selfish pursuit of one's own aggrandizement will not shore up the moral, social, and political environment.

The fourth item on the communitarian agenda calls for "careful ad-

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back to their communities and their country in return. Opportunity and responsibility—they go hand in hand; we can't have one without the other, and our national community can't hold together without both. . . . We simply cannot wait for a tornado, a fire, or a flood to behave like Americans ought to behave in dealing with one another.

President Bill Clinton, State of the Union Address (Jan. 24, 1995) (transcript available in N.Y. TIMES, Jan. 25, 1995, at A17-A18).

19. This brings to mind a case in which I defended a bank that had ordered a customer's credit card confiscated after she had exceeded her credit limit and had failed to pay her bill for several months. Bringing suit for intentional infliction of mental distress, the customer's lawyer told the jury that the bank had interfered with his client's "constitutional right to peace of mind."

20. ETZIONI, *supra* note 1, at 5-6.

21. *Id.* at 9.

22. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 77 (1991).

23. ETZIONI, *supra* note 1, at 10.

24. *Id.* at 11.

justments" to reconcile individual rights with the public welfare.<sup>25</sup> Says Professor Etzioni, "[t]he best way to curb authoritarianism and right-wing tendencies is to stop the anarchic drift by introducing carefully calibrated responses to urgent and legitimate public concerns about safety and the control of epidemics."<sup>26</sup> For example, it is not an unwarranted intrusion to test health care workers for the AIDS virus. Although wholesale testing of the entire population may not be justified, the assertion of individual rights cannot thwart *reasonable* efforts to contain a most serious epidemic.<sup>27</sup>

In short, "I've got mine, Jack," can no longer be the rallying cry; instead, one should "ask not what your community can do for you, but what you can do for your community."<sup>28</sup> No single solution or legislative agenda will fully address the communitarian ideal; indeed, the absence of a doctrinaire solution to problems is endemic to a movement that avoids the extremes and cultivates a diversity of views. Although communitarians will subscribe to common principles, such as the importance of basic civil liberties, the term "doctrinaire communitarianism" is oxymoronic, in that the movement is an eclectic one that views few things in terms of absolutes.<sup>29</sup> What I present in the pages to follow, then, is not "*the* communitarian view" of tort law, but rather how one individual with communitarian leanings might see tort doctrine affected by a communitarian approach.

## II. APPLICATION OF COMMUNITARIAN THOUGHT TO TORT LAW

Much as the philosophy of Sun Yat-Sen was claimed by both Communists and Kuomintang in China, communitarian thought could be appropriated by both those who wish to expand the range of tort liability

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25. In an article that predates Etzioni's book, Professor Baruch Bush explained that "[t]he 'communitarian theory' of society claims to avoid both the individualist excesses of liberalism and the collectivist excesses of welfarism by stressing the central role of community as a personal and social good and as a mediating structure between the individual and the society as a whole." Baruch Bush, *Between Two Worlds*, *supra* note 6, at 1530.

26. ETZIONI, *supra* note 1, at 11.

27. Likewise, reasonable limitations may be placed on the right to bear arms in recognition of the need for public order. The shrill protests of the gun lobby, along with the menace of the militia movement, have demonstrated that radical individualism is not the exclusive province of the left. See Peter Applebome, *Terror in Oklahoma: The Extremists*, N.Y. TIMES, Apr. 23, 1995, at A33.

28. This adaptation of the familiar refrain from President John F. Kennedy's inaugural address raises the question of whether communitarianism is just old wine in new bottles. In many respects, communitarianism resembles New Deal or New Frontier liberalism. President Kennedy's creation of the Peace Corps finds at least a faint echo in President Clinton's establishment of the AmeriCorps. See Taylor Jones, *No Place Like Home for Peace Corps*, SUN SENTINEL, Mar. 19, 1995, at 3. Each generation employs its own language, however, and there is no harm in broadening the tent (to include, for example, Republicans disinclined to follow New Deal rhetoric) by recasting the platform in language suitable to the Nineties.

29. My refusal to capitalize the word "communitarian," as Etzioni does, is consistent with a non-doctrinal approach. The day that communitarians exercise blind allegiance to a little red book is the day I can no longer claim to be a communitarian.

and those who would limit it. Communitarianism's call for greater responsibility to one's fellow citizens might be seen as a rationale for the expansion of tort duties—for example, imposition of a duty to rescue those in peril—resulting in more widespread liability. The communitarian suggestion that we check the expansion of rights, however, could also be applied to the tort law to limit remedies for harm, both real and imagined.

In this article, I shall first suggest a few areas in which communitarian philosophy—in particular, the notion that we are all our brothers' and sisters' keepers—might serve as a basis for broadening legal responsibilities to others, thereby expanding tort liability. I will then suggest some areas in which the communitarian inclination to check the expansion of rights should result in a limitation of tort liability. Some cases in which the two values may compete are then discussed. Finally, I will suggest how communitarian values might apply to the processes we use to resolve tort claims.

### A. *Situations in Which Communitarian Principles Might Suggest an Expansion of Tort Liability*

#### 1. *Rounding out the negligence concept*

Despite the increased popularity of strict liability, negligence remains the prevailing theory of tort liability.<sup>30</sup> Any first-year law student can recite the elements of a cause of action for negligence: (1) a duty of care; (2) a breach of that duty; (3) a causal connection between the breach of duty and the plaintiff's injury; and (4) a cognizable injury.<sup>31</sup> Difficulty arises, however, in determining the proper duty of care. Generally speaking, the duty of care requires one to behave in such a manner that one's conduct does not expose others to unreasonable risks.<sup>32</sup> Inherent in that statement

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30. Several commentators, including some who decry the expansion of tort liability, attribute this phenomenon largely to expanding notions of negligence. See, e.g., James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 477-522 (1976) [hereinafter Henderson, *Expanding Negligence*]; Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 699-700 (1992). But see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) (describing the development and judicial acceptance of enterprise liability as the foundation of the modern civil liability regime). Even in products liability, "strict" liability often boils down to a test resembling that which is used for negligence. See, e.g., *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 184 (Mich. 1984); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 601 (1980).

31. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984).

32. See, e.g., *Beatty v. Central Iowa R.R.*, 12 N.W. 332, 335 (Iowa 1882); *Chicago, B & Q R.R. v. Krayenbuhl*, 91 N.W. 880, 882-83 (Neb. 1902); *Adams v. Bullock*, 125 N.E. 93, 93 (N.Y. 1919); RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) ("Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.").



is a limitation on liability: one's conduct can expose others to risks without giving rise to liability, so long as those risks are *reasonable*.<sup>33</sup>

Yet the law of torts has traditionally limited duties owed to others short of even this paradigm of reasonableness.<sup>34</sup> There is a long line of "no duty" cases in which no liability has been imposed,<sup>35</sup> despite the fact that the defendant's behavior appears to have imposed unreasonable risks on others.<sup>36</sup> Prototypical is the immunity usually conferred upon social hosts, sued by people who have been injured (usually in automobile accidents) due to the intoxication of guests at events hosted by the defendants. The courts have long held commercial vendors of alcohol liable for such injuries,<sup>37</sup> but have typically proclaimed that social hosts providing alcohol to their intoxicated guests bear no responsibility to their ultimate, foreseeable victims.<sup>38</sup> The social host owes "no duty" and is therefore not liable. Here, what passes for an explanation is no more than a conclusion. Why is there no duty? The social host who continues to lubricate her guests with intoxicants, knowing that they will shortly be taking to the streets in their automobiles, certainly has behaved in an irresponsible manner. The potential harm is imminently foreseeable, and there is little

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33. This view is embodied in the Learned Hand Formula, set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), and the Restatement's utility/risk balancing test, *RESTATEMENT (SECOND) OF TORTS* § 291 (1965).

34. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 556 (1972) (discussing the emergence of the paradigm of reasonableness and the demise of the paradigm of reciprocity).

35. See, e.g., *Chastain v. Fugua Indus., Inc.*, 275 S.E.2d 679, 681 (Ga. App. 1980) (holding that aunt had no duty to warn eleven-year-old nephew of loose seat on power mower); *Union Pacific Ry. v. Cappier*, 72 P. 281, 282 (Kan. 1903) (holding that railroad owed no duty of care to injured trespasser); *Osterlind v. Hill*, 160 N.E. 301, 302 (Mass. 1928) (holding that defendant owed no duty to respond to the deceased's outcries after canoe overturned); *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (holding that defendant owed no duty to rescue drowning victim where defendant did not force victim into dangerous position).

36. For our purposes, we can accept the Restatement's definition of an "unreasonable" risk as one in which the utility of the conduct producing the risk is exceeded by the risk. *RESTATEMENT (SECOND) OF TORTS* § 291.

37. See, e.g., *Largo Corp. v. Crespin*, 727 P.2d 1098, 1102-03 (Colo. 1986) (imposing common law liability on tavern owner who sold alcohol to intoxicated patron who thereafter injured a third person); *Nehring v. LaCounte*, 712 P.2d 1329, 1333-34 (Mont. 1986) (applying Montana statutory law to impose liability on tavern operator).

38. In some jurisdictions, the rationale for this distinction has been the existence of a statutory scheme to regulate commercial vendors, the violation of which gives rise to liability. No liability is imposed on social hosts in the absence of a statutory violation. See, e.g., *Manning v. Andy*, 310 A.2d 75, 76 (Pa. 1973) (holding only persons licensed by statute to sell intoxicants are civilly liable to injured parties). This rationale is supported only if the boundaries of tort law are circumscribed by criminal law, a notion rejected in countless other cases. E.g., *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1028 (1st Cir. 1973) (defendant clothing manufacturer's compliance with federal Flammable Fabrics Act did not preclude verdict against it for marketing dangerously flammable fabric); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 432 N.E.2d 920, 924 (Ill. App. 1982) (evidence of compliance with building code was properly excluded in determining defendant's negligent failure to use safety glass); *Curtis v. Perry*, 18 P.2d 840, 843 (Wash. 1933) (defendant driver's signalling for turn in compliance with law was not due care per se).

or no utility to the host's conduct. Nevertheless, courts tend to view the imposition of liability as an unconscionable burden on an alcohol-infatuated public.<sup>39</sup>

Similar treatment has been accorded manufacturers and retailers of dangerous firearms, who are allowed to place lethal weapons on the streets, seemingly oblivious to the consequences. I am not talking here about legitimate hunting rifles or even handguns which a shop owner might employ in self-defense. I refer instead to weapons such as Colt's AR-15 semi-automatic rifle, a military assault rifle which has no legitimate use on the streets, or even in the forests, of a civilized society.<sup>40</sup> Prior to the enactment of legislation banning such weapons outright,<sup>41</sup> the courts—which had been willing to impose liability for the sale of toys, automobiles, prescription drugs, and numerous other products—feigned paralysis, unwilling to hold merchants of death accountable for the carnage from which they profit.<sup>42</sup> Although application of the most fundamental utility/risk analysis would give rise to liability in many instances, the courts have nevertheless persisted in granting what amounts to a special privilege to purveyors of dangerous firearms, a privilege enjoyed by neither drug manufacturers, the asbestos industry, producers of sports

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39. See, e.g., *Johnson v. KFC Nat'l Management Co.*, 788 P.2d 159, 164 (Haw. 1990); *Miller v. Moran*, 421 N.E.2d 1046, 1049 (Ill. App. 1981); *Klein v. Raysinger*, 470 A.2d 507, 510-11 (Pa. 1983). *But see* *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986); *Kelly v. Gwinnell*, 476 A.2d 1219, 1230 (N.J. 1984), *superseded by statute as stated in* *Wagner v. Schlue*, 605 A.2d 294 (N.J. Super. Law Div. 1992).

I would distinguish between cases brought by innocent third parties who are injured by intoxicated guests, and those brought by the intoxicated guest who is herself injured. The latter "victim" shares in the responsibility, and probably is most to blame. For example, in *Del E. Webb Corp. v. Superior Court of Arizona*, 726 P.2d 580 (Ariz. 1986), the decedent was found dead in the pool of a resort with a .27 blood alcohol level. The decedent's wife sued the resort for wrongful death. The court, in permitting the defendant to raise contributory negligence and assumption of risk as affirmative defenses, stated that "[t]he interests of the public are better served by the common law principles that make most persons responsible for their conduct." *Id.* at 586. For further discussion of this issue, see *infra* notes 127-42 and accompanying text.

40. I have previously referred to this and similar firearms as "the weapon of choice of mass murderers." Robert M. Ackerman, *Mass Murderers Prefer Semiautomatic Rifles*, N.Y. TIMES, Mar. 2, 1989, at A26. In Pennsylvania, such weapons are illegal for hunting, 34 PA. CONS. STAT. ANN. § 2322(a)(2) (1995), yet the courts of that state remain reluctant to impose liability for injuries foreseeably caused by their manufacture and sale. See, e.g., *Mazzillo v. Banks*, 536 A.2d 833 (Pa. Super. Ct. 1987), *allocatur denied*, 542 A.2d 1370 (Pa. 1988).

41. The Violent Crime Control and Law Enforcement Act of 1994 restricts the manufacture, sale, and ownership of a number of assault weapons. Pub. L. No. 103-322, Sec. 110102, 108 Stat. 1796, 1996-98 (1994).

The District of Columbia currently has a statute imposing strict liability upon manufacturers and sellers for injuries caused by assault weapons. D.C. CODE ANN. § 6-2392 (1995).

42. E.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1253 (5th Cir. 1985) (applying Louisiana law); *Delahanty v. Hinkley*, 564 A.2d 758, 762 (D.C. App. 1989); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1299 (Ill. App. Ct. 1985). *But see* *Kelley v. R.G. Industries*, 497 A.2d 1143, 1159 (Md. 1985) (applying strict liability to manufacture and sale of Saturday Night Specials).

equipment, nor any number of manufacturers of seemingly useful products.<sup>43</sup>

The same can be said for manufacturers of alcoholic beverages. Rather than face up to the lethal effect of alcohol, the courts have turned a blind eye to the plain fact that alcohol kills and maims.<sup>44</sup> I do not suggest a return to Prohibition (although I believe that communitarian philosophy would have room for such an intrusion on so dubious a liberty as the "right" to intoxicants); I do suggest, however, that those who profit from activities involving a foreseeable risk of grave harm should be held fully accountable.<sup>45</sup> To wink at such conduct as an inevitable cost of living in a "civilized" society is to provide a cost-free license for irresponsible behavior.<sup>46</sup>

Communitarians might draw a distinction between an outright ban on the sale of intoxicating beverages, which could be viewed as repressive moralism, and a rule imposing liability on those whose action in connection with intoxicants—including manufacture, sale, provision, and consumption—imposes unreasonable risks on others.<sup>47</sup> Such a distinction

43. See, e.g., *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 653 (1st Cir. 1981) (oral contraceptive estrogen pill); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 301 (N.J. 1983) (swimming pool); *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 542 (N.J. 1982) (asbestos); *Gentile v. MacGregor Mfg. Co.*, 493 A.2d 647, 648 (N.J. Super. Ct. Law Div. 1985) (football helmet).

A frequently employed argument is that the harm caused by firearms is intended, while that caused by other products is not. But that argument stands logic on its head. Normally, we are more, not less, willing to impose liability for intentional harm. During oral argument of a case I brought (unsuccessfully) against a firearms manufacturer, one judge suggested that the manufacturer would in fact be liable if the semiautomatic rifle had exploded, thereby injuring its user (a "malfunction"), but that the manufacturer could not possibly be liable to those who were deliberately killed when the weapon functioned "properly." This is an example of mindless application of doctrine in lieu of policy-based logic.

44. See, e.g., *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 568 (Iowa 1986) (en banc); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 584 (Tex. Ct. App. 1987); *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 623 (Va. 1986).

45. Admittedly, problems of proximate cause attend the attachment of such liability. But these problems are surmountable in light of the foreseeability of the harm invited by such products. See generally Robert F. Cochran, Jr., "Good Whiskey," *Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Hedonic Products for Bystander Injury*, 45 S.C. L. Rev. 269 (1994) (elaborating further on imposition of liability on manufacturers of alcoholic beverages).

46. I am reminded of the response credited to Mahandis Gandhi, when asked what he thought about western civilization: "I think it would be a good idea." E.F. SCHUMACHER, *GOOD WORK* 62 (1979).

47. A visitor from another planet would probably be aghast at our insistence on the "right" to abuse our livers through the consumption of alcohol, or, for that matter, to abuse our hearts and lungs through use of tobacco products. Nonetheless, practical politics precludes an outright ban. The experience of Prohibition instructs us that no amount of regulation will stop some people from making backyard hootch. Instructive, however, is the low level of resistance to proposals for increased taxation of tobacco and alcohol products, even during a period of tax revolt. I believe that this may reflect public acceptance of the imposition of burdens on activities which are, objectively speaking, bad for us. If an outright ban will not work, perhaps we can tax and "tort" these activities out of existence. As I have suggested earlier, a strong tinge of eclecticism naturally runs through communitarianism.

allows freedom of action, but shifts losses resulting from such action to those with whom responsibility resides. I would be reluctant to shift the loss *among* those engaged in such activity, for example, by imposing liability for an injured drunk driver on the manufacturer or seller of alcohol. As I will elaborate later on, I do not believe that we should indulge those who claim a "right" to be protected from their own self-destructive behavior.<sup>48</sup> I do believe, however, that the law should distinguish between those who are participants in risk-generating activity and those who are innocent bystanders. Responsibility means protecting the drunk's victim, not the drunk.<sup>49</sup>

By advocating the imposition of liability on people such as social hosts and firearms manufacturers, I am not suggesting an expansion of tort liability beyond normal limits. Rather, I am suggesting a rounding out of liability to comport with the general duty of care, as well as an end to special immunities for which no defensible rationale is available. Professor James Henderson has written (quite convincingly, I believe) that we should be wary of efforts to "purify" the negligence concept by doing away with rules of law in favor of the general standard of "reasonable care under the circumstances."<sup>50</sup> Professor Henderson fears, with some justification, that in at least some cases, the substitution of this rather amorphous general standard for hard and fast rules leaves juries without sufficient guidance to make fair, rational decisions.

Professor Henderson's solution, however, is to invoke legal rules that create special spheres of undeserved protection for wrongdoers. For example, Professor Henderson proposes that conformity with industry standards serve as a defense to products liability claims,<sup>51</sup> despite our longtime realization that such a rule creates a self-serving low standard that will not advance the safety of the public.<sup>52</sup> Although well-defined

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*See supra* note 29 and accompanying text.

48. For a discussion of the "right" to protection from one's own self-destructive behavior, see *infra* notes 127-42 and accompanying text.

49. I am aware of the scientific view that alcoholism is a disease. But not all drunks are alcoholics, and even those who are should be relieved of responsibility no more than the inherently clumsy or dull-witted individual. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 108-09 (1948). We need a baseline of acceptable conduct that overrides the "everyone's a victim" philosophy that has become so popular of late.

50. Henderson, *Expanding Negligence*, *supra* note 30, at 478.

51. James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1556-57 (1973) [hereinafter Henderson, *Judicial Review*].

52. "[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.), *cert. denied*, 287 U.S. 662 (1932). This rule regarding conformity to industry standards has also been applied in strict liability cases. See, e.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 45 (Alaska 1979) (design of gun), *cert. denied*, 454 U.S. 894; *Hancock v. Paccar, Inc.*, 283 N.W.2d 25, 35 (Neb. 1979) (design of truck bumper).

Alternatively, Professor Henderson suggests that conformity with government regulation could be the last word in products cases. This principle, however, is viable only if we

standards work to everybody's benefit, absurdly low standards, which amount to immunities, rarely do. To the extent that we value the negligence principle, either because of its deterrent effect or as a statement of morality, that principle should work to hold persons accountable for their conduct. To grant special exceptions without an adequate rationale undermines the legitimacy of the entire system.

## 2. *Expanding the negligence concept through imposition of additional duties*

Several commentators have suggested expanding the law of negligence to include an affirmative duty to render aid to those in peril, if such assistance can be provided at little risk to oneself.<sup>53</sup> While such a duty would be at odds with the traditional absence of liability for nonfeasance, it would appeal to "[p]ersons who are interested generally in emphasizing the responsibility side of the rights coin."<sup>54</sup> Indeed, most of us are appalled when bystanders fail to perform such a minor task as summoning help for victims of accidents or crimes.<sup>55</sup> The question remains, however, whether the moral imperative to render assistance should give rise to a legal rule that imposes civil or criminal liability for its violation through

would want administrative regulation of product safety to be so pervasive as to fully occupy the field. See Henderson, *Judicial Review*, *supra* note 51, at 1574-78. Thankfully, this is not the law. See, e.g., *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1445 (10th Cir. 1993) (state law claims against aircraft manufacturer not preempted on ground that Federal Aviation Administration had approved airplane's design).

53. See Glendon, *Good Samaritan*, *supra* note 6, at 10; Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33 (1988); Kent W. Feuerhelm, *Taking Notice of Good Samaritan and Duty to Rescue Laws*, 11 J. CONTEMP. L. 219, 230 (1984); Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 MICH. J.L. & REFORM. 439, 517-19 (1994); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 881 (1986); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 292 (1980); A.D. Wozzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1299-1300 (1983); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 8-9 (1993).

Four states—Minnesota, Rhode Island, Vermont, and Wisconsin—have Good Samaritan statutes creating an affirmative duty to rescue. See MINN. STAT. ANN. § 604A.01 (West Supp. 1995); R.I. GEN. LAWS § 11-56-1 (1994); VT. STAT. ANN. tit. 12, § 519 (1973); WIS. STAT. ANN. § 940.34(2) (West Supp. 1994). Rhode Island and Wisconsin, along with five other states, have statutes punishing failure to report serious crimes. See R.I. GEN. LAWS § 11-37-3.1 (1994); WIS. STAT. ANN. § 940.34(2) (West Supp. 1994); FLA. STAT. ANN. § 794.027 (West 1992); COLO. REV. STAT. § 18-8-115 (1986); MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992); OHIO REV. CODE ANN. § 2921.22(A) (Anderson Supp. 1994); WASH. REV. CODE ANN. §§ 9.69.100, 9.92.020 (West 1988).

54. Glendon, *Good Samaritan*, *supra* note 6, at 9.

55. A prime example of this phenomenon is the March 13, 1964 attack on Kitty Genovese, a New York woman who was repeatedly and fatally stabbed as her screams were heard by thirty-eight neighbors. The failure of Ms. Genovese's neighbors to even lift a telephone to summon police evoked widespread expressions of shock and criticism. Beth Holland, *Her Cries Recall Another Murder*, NEWSDAY, Aug. 14, 1989, at 3.

inaction.<sup>56</sup>

Opponents of such a rule have attempted to draw a distinction between law and morality, claiming: "With purely moral obligations the law does not deal."<sup>57</sup> But it is absurd to suggest that the law bears no relationship to morality. Consider, for example, the law pertaining to the military draft, a measure which has required a significant compromise of individual liberty in order to promote the general welfare.<sup>58</sup> The draft could be viewed simply as a matter of practical necessity, a utilitarian measure necessary to preserve the community against outside threats. But the manner in which we have gone about imposing the draft is imbued with moral considerations. For example, we ceased to allow wealthy people to purchase a substitute, recognizing that shared sacrifice is morally necessary as a matter of fundamental fairness.<sup>59</sup> We have allowed people to perform alternative service if their religious beliefs precluded their participation in warfare.<sup>60</sup> Even the draft lottery, and the random selection it generated, was based on the fairness principle. Morality plays a role here, as it continues to play a role in countless other legal rules. Who can deny that the criminalization of murder, along with different levels of culpability based on the defendant's state of mind, is morally grounded? The fault principle in tort law, while supported by practical and economic considerations, also finds a basis in morality.<sup>61</sup> Clearly, the law is a reflection of our moral principles, and we should be neither ashamed nor embarrassed by this fact.

It is equally clear, however, that legal rules alone do not and cannot fully define the moral universe. Although I disagree with Professor Richard Epstein's assertion that an act loses its moral value when compelled<sup>62</sup>

56. Professor Glendon differentiates between rules imposing tort and criminal liability for failure to rescue. Glendon, *Good Samaritan*, *supra* note 6, at 11. I doubt that it makes much difference, as a matter of policy or moral suasion. To the extent enforcement is deemed important, however, it is more likely to be obtained through private tort actions than through public prosecutions, given the demands on most district attorneys' offices.

57. *Buch v. Armory Mfg. Co.*, 44 A. 809, 810 (N.H. 1897).

58. "[I]n a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy. 50 App. U.S.C. § 451(c) (1988) (empowering Congress to reinstate the draft).

59. There remains concern that an all volunteer army, instituted in lieu of the draft, would result in a poor man's army. *The All-Volunteer Armed Force: Hearing Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Forces*, 95th Cong., 1st Sess. 10 (1977) (statement of Professor William R. King) (indicating a disproportionate amount of lower income groups and minorities enlisted); Thomas J. Bradley, *The All Volunteer Force, Conscription, and Other Alternatives*, 7 J. LEGIS. 125, 130, 138 (1980) (suggesting that an all-volunteer army is inequitable, as it involves disproportionate numbers of poor, uneducated, and minority enlistees).

60. See 50 App. U.S.C. § 456(j) (1988).

61. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

62. Professor Epstein states:

One line of moral thought emphasizes the importance of freedom of the will. It

(is it amoral to pay one's taxes?), certainly morality dictates that we do many things that are not legally required of us. Unfortunately, as Professor Glendon has lamented, the public "incurably refuses to draw as neat a line between law and morality as lawyers have been taught to do."<sup>63</sup> The tendency on the part of the public to equate law with morality, to assume that if something is not illegal then it is not immoral, may suggest the practical need for a rule requiring rescue in situations in which the potential rescuer is not in peril.<sup>64</sup> Compared to the perils connected with the military draft, it does not seem especially onerous to demand that citizens call the police when they see a neighbor being attacked, toss a life preserver to a drowning swimmer, or render first aid during a medical emergency if they are equipped to do so. A rule imposing tort liability on those unwilling to do so may be a small price to pay for life in a society in which one cannot help but obtain support from one's fellow citizens.<sup>65</sup>

There remain, however, legitimate objections to such a rule. There is, for one thing, the problem of defining the limits of our public obligation. Professor Richard Epstein furnishes the example of the charitable solicitation in which the relatively comfortable citizen is asked to contribute but ten dollars to save the life of a starving child.<sup>66</sup> The contribution would work no hardship upon the citizen, and would appear to be a reasonable thing to do. But should it be compelled? "Where tests of 'reasonableness'—stated with such confidence and applied with such difficulty—dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins."<sup>67</sup> I am not nearly so disturbed as some conservative political leaders are about preserving the "purity" of individual charity. I do, however, share Professor Epstein's concern regarding the boundary between public obligation and private choice.

It is not altogether clear that communitarianism requires government compulsion, through legal rules or otherwise, to encourage people to play an affirmative role for the good of the community. Those calling for less government intrusion into peoples' lives might best lead by example.<sup>68</sup>

is the intention (or motive) that determines the worth of the act; and no act can be moral unless it is performed free from external compulsion. Hence the expansion of the scope of positive law could only reduce the moral worth of human action.

*Id.* at 200.

63. Glendon, *Good Samaritan*, *supra* note 6, at 11.

64. I do not rule out the need to educate the public, and in particular, political and corporate leaders, regarding the inadequacy of the law as a substitute for individual moral judgment. We cannot go around legislating every moral imperative; sometimes people should be obligated to do more than use law as a moral crutch.

65. For example, even the most ardent libertarian benefits from public highways, the national defense, police protection, and the public education of the young, among other things.

66. Epstein, *supra* note 61, at 199.

67. *Id.*

68. An example which immediately comes to mind is that of a former President,

Perhaps public debate over the need for a Good Samaritan rule will spur a greater sense of public obligation, and ultimately eliminate the need for such a legal rule.<sup>69</sup>

### 3. *Protecting whistleblowers*

Communitarian ideals would be greatly advanced through increased tort protection for government and corporate whistleblowers. Presently, employees who report wrongdoing on the part of their employers receive surprisingly little protection.<sup>70</sup> Actions for wrongful discharge—the common law cause of action on behalf of persons unfairly discharged from employment—tend to be treated under narrow exceptions to the general doctrine of employment at will.<sup>71</sup> Where whistleblower protection statutes have been enacted, coverage typically has been limited to public employees.<sup>72</sup> Only whistleblowing of a very narrow sort tends to be protected; under several statutes, there must be a clear statutory violation by the employer.<sup>73</sup> Moreover, most states protect whistleblowers only where the exposed violation presents a substantial and specific danger to public health and safety.<sup>74</sup>

Federal protections for whistleblowers are riddled with exceptions. In some instances, the federal statutes preempt other remedies, thereby depriving whistleblowers of common law causes of action.<sup>75</sup> Substantial

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Jimmy Carter, whose contributions to the community since leaving office have come to eclipse his record in the White House. Other politicians lecture to us about the virtue of private charity; Jimmy Carter demonstrates it on a regular basis. *See, e.g., L.A. Watch; Aid Thriller*, L.A. TIMES, Jan. 28, 1993, at B6.

69. This effect will be produced only if the debate spills beyond the scholarly journals and into the public consciousness through *Larry King Live*, *Oprah*, and other crucibles of public opinion.

70. *See generally* Thomas M. Devine and Donald G. Alpin, *Whistleblower Protection—The Gap Between the Law and Reality*, 31 HOW. L.J. 223 (1988) (describing the hollow benefit of whistleblower protection laws); Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991) (explaining that the Whistleblower Protection Act of 1989 has failed to provide the intended level of security for whistleblowers).

71. The courts of thirty-nine states have recognized a common law public policy exception to employment at will. Susan Sauter, *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment at Will*, 59 U. CIN. L. REV. 513, 517 n.21 (1990). The exception is frequently quite limited, generally only protecting whistleblowers only where there is a “clear mandate of public policy” to do so. *See, e.g., Geary v. United States Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974).

72. Of the thirty-three states with statutes protecting whistleblowers, only fifteen extend that protection to the private sector. Tim Barnett, *Overview of State Whistleblower Protection Statutes*, 43 LAB. L.J. 440, 442 (1992).

73. HAW. REV. STAT. § 621-10.5 (1984); KAN. STAT. ANN. § 75-2973 (1989); MICH. COMP. LAWS § 15.362 (1993) (MICH. STAT. ANN. § 17.428(2) (Callaghan 1989)); MINN. STAT. ANN. § 181.932 (West 1993); PA. STAT. ANN. tit. 43, § 1422 (1991); R.I. GEN. LAWS § 36-15-3 (1994); TEX. LAB. CODE ANN. § 411.082 (West 1995); TEX. GOV'T. CODE ANN. § 554.002 (West 1995).

74. *See, e.g.,* FLA. STAT. ANN. § 112.3187(2) (West Supp. 1995); N.Y. LAB. LAW § 740(2)(a) (McKinney 1988).

75. *See, e.g., Cox v. Radiology Consulting Assoc.*, 658 F. Supp. 264, 266 (W.D. Pa.



problems in proving causation—including proof that whistleblowing was the cause of the employee's dismissal, demotion, or failure to obtain promotion—make federal and state causes of action very difficult to pursue.<sup>76</sup> Finally, statutes of limitations for these causes of action tend to be quite short.<sup>77</sup>

If we wish to encourage more responsible citizenship, we should give more than lip service to whistleblower protection. An employee who exposes an employer's malfeasance, in order to protect a public interest, should be able to do so with assurance of legal protection. Communitarianism demands effective participation, not martyrdom, from our citizens. On the other side of the coin, the "right" of an employer to have a free hand with respect to personnel matters should not include a "right" to terminate or otherwise discriminate against an employee who acts in the public interest to expose employer wrongdoing. An employer's "right" to act freely with respect to personnel matters is already compromised by statutes prohibiting discrimination on account of race, sex, age, and disability.<sup>78</sup> Communitarian principles should afford the same type of protection to employee efforts in furtherance of important public interests. I suggest a rounding out of statutory and common law liability to provide meaningful, comprehensive protection for employees in both the public and private sectors.

## *B. Situations in Which Communitarian Principles Might Suggest a Limitation or Contraction of Tort Liability*

### *1. Slapping down SLAPP suits*

An additional means of advancing the communitarian ideal of promoting effective citizen participation in the public interest is the eradication of SLAPP suits. SLAPP suits, or Strategic Lawsuits Against Public Participation, are actions brought against citizens or citizens' groups in order to stifle political debate over a particular issue. SLAPPs may be filed by real estate developers, polluters, or even government agencies.<sup>79</sup> The pattern is fairly consistent: A group of citizens mounts a grass-roots campaign over an issue of local concern, such as the proposed development of local property. The target of their campaign, frustrated by the interference, files a multimillion dollar<sup>80</sup> lawsuit against the citizens alleg-

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1987). A few state statutes similarly preempt common law tort remedies. *See, e.g.*, *Ohlsen v. DST Industries, Inc.*, 314 N.W.2d 699, 701-02 (Mich. Ct. App. 1981); *Davis v. Boise Cascade Corp.*, 288 N.W.2d 680, 684 (Minn. 1979); *Walsh v. Consolidated Freightways, Inc.*, 563 P.2d 1205, 1208-09 (Or. 1977).

76. Fisher, *supra* note 70, at 362.

77. Half of the states with whistleblower statutes in force have a statute of limitations of one year or less, with some as short as thirty days. Barnett, *supra* note 72, at 445.

78. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Supp. I 1994).

79. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 26 (1989).

80. On average, SLAPP suits demand nine million dollars in damages. *Id.* at 23.

ing defamation, interference with business relations, or some similar tort theory.<sup>81</sup> The target of the SLAPP finds its resources diverted from the original battle to a defense of the SLAPP, and both the target and those who hear of the suit learn a chilling lesson on the dangers of involvement in public debate.

The bitter irony of SLAPPs is that while most fail on the merits,<sup>82</sup> even the unsuccessful lawsuits can nonetheless achieve their underlying goal. SLAPP plaintiffs are motivated not so much by the expectation of collecting large damage awards as by strategic goals, such as retaliation for political frustration, prevention of future opposition, or intimidation of political opponents.<sup>83</sup> On average, a SLAPP does not achieve ultimate disposition until thirty-six months after it has been brought<sup>84</sup> and can cost the target thousands of dollars in legal fees.<sup>85</sup> A SLAPP can succeed, therefore, in discouraging both the target and other members of the public from continued opposition to the plaintiff's plans.

It is this chilling effect on public debate which is most alarming to those who see value in encouraging greater public participation in the political process.<sup>86</sup> The goals of SLAPP suits run directly counter to the First Amendment's Petition Clause,<sup>87</sup> to numerous state constitutions and statutes,<sup>88</sup> and to our desire as a democratic society to encourage debate over issues of public concern. Communitarian principles would therefore be advanced by limiting the chilling effect of SLAPPs on free speech and public debate.

Since the goal of SLAPPs is to involve the target in lengthy, expensive litigation, they are best frustrated by speedy disposition. Because

81. For an analysis of the tort actions used as substantive bases for SLAPP suits, see George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989).

82. Defendants ultimately prevail in over 77% of SLAPPs. *Id.* at 12.

83. Canan, *supra* note 79, at 30. See also Pring, *supra* note 81, at 5-6 (discussing the goals of SLAPPs to punish opponents and impose a price for community activism).

84. Canan, *supra* note 79, at 26.

85. Laura J. Ericson-Siegel, Comment, *Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 FLA. ST. U. L. REV. 487, 494 (1992).

"Loser pays" legislation now being considered by Congress is unlikely to seriously deter SLAPP suits. The most recent version of this legislation requires the tendering of a settlement offer before a party is entitled to attorneys' fees. H.R. 988, 104th Cong., 1st Sess. (1995). SLAPP defendants may lack the means to make a substantial offer, or may refuse to do so on the basis of principle. In addition, the prospect of payment of citizens' attorneys' fees may be an inadequate deterrent to a well-heeled corporation attempting to advance a multimillion dollar project.

86. For a discussion of the centrality of public political participation to communitarian ideals, see ETZIONI, *supra* note 1, at 226-27.

87. U.S. CONST. amend. I. The First Amendment provides in part: "Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances." *Id.*

88. See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 945 n.20 (1992).

courts must take the plaintiff's allegations as true for purposes of a motion to dismiss, however, it can be difficult to get a SLAPP dismissed solely on the pleadings. A hesitancy on the part of judges to impose sanctions under Federal Rule 11 and similar state provisions,<sup>89</sup> and the insufficiency in the size of those sanctions which are imposed,<sup>90</sup> may allow SLAPP plaintiffs to persist in contriving pleadings that preserve a cause of action.

Three leading authorities on SLAPPs<sup>91</sup> advocate widespread adoption of the approach taken by the Colorado Supreme Court in *Protect Our Mountain Environment, Inc. v. District Court (POME)*.<sup>92</sup> Under the *POME* approach, the Petition Clause is used to place a heavy burden on a SLAPP plaintiff facing a motion to dismiss.<sup>93</sup> Similarly, other states have devised statutory schemes to discourage SLAPPs.<sup>94</sup> So long as they

89. Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuit Against Public Participation): How Can the Legal System Eliminate their Appeal?*, 25 CONN. L. REV. 547, 574 (1993) (citing SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 4 (1985)). The frequent application of sanctions in civil rights cases does not appear to be replicated in environmental litigation. See Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 434-35 (1992).

90. There is a very real concern that the sanctions awarded under Rule 11 may be small enough that SLAPP filers can regard them as part of the expense of the SLAPP, rather than as a deterrent. See Mark A. Chertok, *Sanctions as a SLAPP Deterrent: How Effective Are They?*, in SLAPPs: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT, C935 A.L.L.-A.B.A. 117, 148-150 (1994). The largest reported sanction for a SLAPP to date is \$20,000. *Id.* at 150.

91. See Robert Abrams, *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 33, 42 (1989); Pring, *supra* note 81, at 18-19; Pring & Canan, *supra* note 88, at 951-53.

92. 677 P.2d 1361 (Colo. 1984).

93. Under the *POME* standard, a motion to dismiss by reason of the constitutional right to petition is treated as one for summary judgment, enabling the parties to present all material pertinent to the motion. Thereafter,

the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

*Id.*

94. See generally Geoffrey Paul Huling, Note, *Tired of Being Slapped Around: States Take Action Against Lawsuits Designed to Intimidate & Harass*, 25 RUTGERS L.J. 401 (1994) (discussing judicial, legislative, and strategic tactics to combat SLAPPs).

Washington's anti-SLAPP statute essentially codifies the First Amendment petition privilege, immunizing from civil suit any good faith communication to a public body regarding issues of public concern. WASH. REV. CODE § 4.24.510 (1995). Under the statute, Washington requires the agency to which the communication was made to provide the target with counsel in defending the SLAPP. *Id.* § 4.24.520.

A number of other states have passed statutes taking a more moderate approach to discouraging SLAPPs. See CAL. CIV. PROC. CODE § 425.16 (Deering 1994); N.Y. CIV. PRAC. L. & R. 3211(g), 3212(h), 3403 (McKinney 1995); N.Y. CIV. RIGHTS LAW § 76-a (McKinney 1995); R.I. GEN. LAWS §§ 9-33-2 to -3 (1994).

do not stifle legitimate litigation, such statutes, together with effective whistleblower protection legislation, should promote the communitarian goal of greater citizen participation in the creation and enforcement of public policy.

## 2. *Limiting liability for emotional harm*

Sometimes too great a burden is imposed on the legal system by efforts to compensate for harms which, while genuine, are not amenable to legal redress. Courts have long wrestled with the issue of whether to award damages for emotional distress. These damages are typically awarded as a matter of course in cases involving physical harm; the plaintiff's "pain and suffering" is viewed as another element of damages.<sup>95</sup> This element tends to result not only in inflated verdicts, but in gross disparities between verdicts for similar injuries, because damages of this type elude objective quantification.<sup>96</sup> Placing caps on these damages, as some state legislatures have done,<sup>97</sup> might restore a measure of sanity to the "tort lottery" and diminish the role of tort litigation as a cottage industry for those who view it not just as a means of obtaining compensation for injury, but as a chance for the big score.

The major legal issue addressed by the courts, however, has been whether to award damages for emotional distress resulting from negligent conduct when such distress is unaccompanied by physical harm. Fearing trumped-up, fraudulent claims, but recognizing that emotional distress can nevertheless be a serious, genuine injury, the courts have imposed various hurdles that plaintiffs must overcome in order to recover for such injuries. First came the impact rule—a requirement that the plaintiff must have suffered some physical impact in order to recover for emotional distress.<sup>98</sup> That rule proved to be both overinclusive and underin-

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95. KEETON ET AL., *supra* note 31, § 54, at 362-63.

96. See, e.g., Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 892 (1994); W. Kip Viscus, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 203-04 (1988).

97. E.g., CAL. CIV. CODE § 3333.2 (West Supp. 1994) (\$250,000 limit on non-economic losses in cases brought against health care providers); COLO. REV. STAT. ANN. § 13-21-102.5 (West 1994) (\$250,000 cap on non-economic damages absent clear and convincing evidence; but in no case may such damages exceed \$500,000); MD. CODE ANN. CTS. & JUD. PROC. § 11-108 (1995) (\$350,000 cap on non-economic losses; \$500,000 after October 1, 1994); cap increases by \$15,000 each October 1 thereafter); see also Medical Malpractice Fairness Act, H.R. 352, 104th Cong., 1st Sess. (1995) (establishing national standards for the resolution of medical malpractice claims, and limiting total amount of non-economic damages).

98. E.g., *Christy Bros. Circus v. Turnage*, 144 S.E. 680, 681 (Ga. App. 1928) (emotional distress caused by horse voiding in plaintiff's lap), *overruled by* *OB-GYN Assocs. of Albany v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989). In an unreported case, a Tennessee woman recovered \$2,000 after a soda bottle exploded in her hand. *Victim of Nightmares Gets \$2,000 Judgment*, N.Y. TIMES, Sept. 18, 1980, at A20. Her psychiatrist testified that the plaintiff had suffered recurring nightmares of giant bottles chasing her since a 32-ounce Coca-Cola container exploded in her hand. *Id.*

clusive,<sup>99</sup> and therefore was abandoned by most courts in favor of a rule requiring that the plaintiff be in the zone of physical danger in order to recover for emotional distress.<sup>100</sup>

Courts were then confronted by a series of bystander cases, in which close relatives of accident victims, who were not themselves in peril but who experienced shock upon seeing their loved ones maimed or killed, brought actions for their emotional distress. Many courts extended recovery to these plaintiffs, this time subjecting them to a series of guidelines to determine whether the distress was genuine and worthy of redress.<sup>101</sup> Even this proved insufficient, however, when courts were asked to consider cases in which plaintiffs sustained no physical impact, suffered no physical manifestations of the emotional distress, and witnessed no accident, but nevertheless suffered emotional harm caused by the negligence of the defendant. The California Supreme Court faced this issue in *Molien v. Kaiser Foundation Hospitals*.<sup>102</sup> In that case, a physician and health maintenance organization were sued after the physician had incorrectly diagnosed not the plaintiff, but the plaintiff's wife, as carrying a

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99. The rule was overinclusive in that it allowed recovery for all sorts of emotional distress once there was proof of the most trivial impact. For a discussion of the types of physical impact required to recover for emotional distress, see *supra* note 98 and accompanying text. The rule was underinclusive in that many cases of serious emotional distress went uncompensated in the absence of impact. *E.g.*, *James v. Harris*, 729 P.2d 986, 988 (Colo. Ct. App. 1986) (parents denied recovery after seeing their child run over by a car); *Woodman v. Dever*, 367 So. 2d 1061, 1063 (Fla. Dist. Ct. App. 1979) (child denied recovery after witnessing robbery and sexual assault upon her mother).

100. *E.g.*, *Reed v. Moore*, 319 P.2d 80, 82 (Cal. 1957) (to recover for injury, plaintiff must fear detriment to own safety); *Cook v. Maier*, 92 P.2d 434, 436 (Cal. 1939) ("fright must be accompanied by fear of immediate personal injury, and physical injury must occur").

A variation on this theme involves cases in which the plaintiff was exposed to danger, and thereafter feared contracting some dreaded disease. For example, in *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991), a security guard was bit by an unruly patient who was infected with AIDS. The guard, who never developed AIDS, nevertheless was allowed to recover for "post traumatic stress disorder" because he had been exposed to the disease. *Id.* at 897; see also *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 817 (Cal. 1993) (recovery for fear of developing cancer allowed if toxic exposure that caused fear was result of oppressive, fraudulent, or malicious conduct); *Ayers v. Macoughtry*, 117 P. 1088, 1090 (Okla. 1911) (recovery allowed for dogbite resulting in fear of rabies).

101. See, *e.g.*, *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968); see also *Sinn v. Burd*, 404 A.2d 672, 686 (Pa. 1979) (holding that recovery for negligently inflicted emotional distress should be granted when such distress is reasonably foreseeable even if the plaintiff was outside the zone of danger). *Contra* *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (holding mother could not recover for emotional damages caused by seeing a hospital employee drop her baby because she was not within the zone of danger). The guidelines for recovery under *Dillon* were turned into conditions precedent to recovery in *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989), thereby making recovery more difficult.

Most emotional distress cases involve a sudden, catastrophic event, such as an automobile accident. However, in *Carey v. Lovett*, 622 A.2d 1279, 1280 (N.J. 1993), parents were allowed to recover for emotional distress caused by medical malpractice resulting in the premature birth and death of their child.

102. 616 P.2d 813 (Cal. 1980).

venereal disease.<sup>103</sup> As might be expected, the patient/wife confronted the plaintiff/husband with this information, and things went from bad to worse, tearing the marriage asunder.<sup>104</sup> The husband subsequently sued for the emotional distress resulting from the breakup of his marriage.<sup>105</sup>

The *Molien* court devoted most of its opinion to a discussion of whether a plaintiff could recover for emotional distress in the absence of any physical manifestations.<sup>106</sup> Noting that a requirement of physical manifestations had often led to distorted pleading, and recognizing that virtually every emotional response has some physical counterpart, however minute, the court decided that the absence of physical manifestations should not pose an artificial barrier to recovery.<sup>107</sup> “[T]he jurors are best situated to determine whether and to what extent the defendant’s conduct caused emotional distress, by referring to their own experience.”<sup>108</sup> Theoretically, the court’s language is appealing. Unfortunately, however, jurors do not possess a magic divining rod to distinguish genuine claims from bogus ones, or to place an accurate value on such injuries, however real. Professor Henderson’s admonition regarding the need for objective rules to direct the jury in its decisionmaking<sup>109</sup> may be particularly well-advised in cases such as *Molien*. Requiring that the plaintiff suffer from objectively determined physical manifestations of his emotional distress would deny recovery to relatively few worthy plaintiffs. Moreover, such a requirement would relieve courts, juries, and defendants of the burden of cases involving speculative decisionmaking and defenses that amount to shadow-boxing.

The *Molien* court also considered the issue of duty, and decided that the doctor could, in fact, be found to owe a duty to a person who was not his patient, so long as the injury was foreseeable.<sup>110</sup> That is fair enough. Were a doctor negligently to diagnose her patient as being free from any venereal disease, and as a consequence the patient’s spouse were to suffer physical harm, we would not have too much difficulty tracing the responsibility for such harm back to the doctor.<sup>111</sup> The problem in *Molien* is that the plaintiff was asking for damages for emotional distress allegedly caused by the dissolution of his marriage, which in turn was allegedly caused by the doctor’s erroneous diagnosis.<sup>112</sup> To ask a court and jury to pinpoint, with any degree of accuracy, the cause of a marital breakup is to invite judicial involvement in intimate and complex human relationships

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103. *Id.* at 814.

104. *Id.* at 815.

105. *Id.*

106. *Id.* at 818-21.

107. *Id.* at 820.

108. *Id.* at 821.

109. Henderson, *Expanding Negligence*, *supra* note 30, at 469-77.

110. *Molien*, 616 P.2d at 817.

111. Indeed, to state that the doctor had “no duty” to the patient’s spouse would confer the same immunity for foreseeable harm that I complained about earlier in the context of social hosts. For a discussion of this issue, see *supra* notes 35-39 and accompanying text.

112. *Molien*, 616 P.2d at 814-15.

to a disturbing degree.<sup>113</sup>

The law's tendency, of late, has been in the opposite direction, and for good reason. The *Griswold* privacy decision,<sup>114</sup> the enactment of no-fault divorce laws,<sup>115</sup> and the elimination of "heart-balm" actions for breach of promise to marry, seduction, alienation of affections, and criminal conversation<sup>116</sup> have all been designed to get the courts out of our bedrooms, and to reserve judicial scrutiny for matters that the courts are more capable of determining and which are more appropriate to a public forum.

The area of emotional distress, with its fabricated pleadings and speculative damages, is an appropriate area in which to invoke Professor Etzioni's call for a moratorium on the minting of new "rights."<sup>117</sup> Nevertheless, lawyers and scholars are busy at work, like the Hydra monster, finding new injuries to redress and new causes of action to invoke. Not long ago, Professor Jane E. Larson published an article in which she suggested the creation of a new tort of sexual fraud.<sup>118</sup> Professor Larson proposed the following addition to the *Restatement (Second) of Torts*:

One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.<sup>119</sup>

To be sure, Professor Larson is sincere in her effort to redress the age-old problem of deceit and seduction. Some of the harms she de-

113. I suspect that the Moliens' marriage was not made in heaven. Even if it was, to pinpoint the erroneous diagnosis as a proximate cause of the harm and saddle the physician and HMO with damages for all of the attendant emotional distress strains our notions of responsibility under tort law. To those who suggest a role for comparative negligence, I would ask, "Compared to what? To the negligence of husband or wife, whose fault is deemed immaterial under our no-fault divorce laws?" See CAL. FAM. CODE § 2310 (West 1994) (listing two grounds for dissolution of marriage: (1) "[i]rreconcilable differences, which have caused the irremediable breakdown of the marriage" and (2) "[i]ncurable insanity"); *id.* § 2311 (defining "irreconcilable differences"); *id.* § 2312 (defining "incurable insanity").

114. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing that a right to privacy under the Constitution protected the purchase and use of contraceptives by married adults).

115. *E.g.*, CAL. FAM. CODE § 2310 (West 1994); FLA. STAT. § 61.052 (1985); KAN. STAT. ANN. § 60-1601 (1983); PA. CONS. STAT. ANN. § 3301 (1991).

116. *E.g.*, FLA. STAT. ANN. §§ 771.01-771.03 (West 1986); MINN. STAT. ANN. § 553.02 (West 1988); N.J. STAT. ANN. § 2A:23-1 (West 1987). See generally Jeffrey D. Kobar, Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770 (1985) (discussing the impact of "heart-balm" statutes that abolished many of these causes of action).

Justice Clark, dissenting in *Molien*, pointed out that California had, several years earlier, statutorily eliminated the tort of *intentional* alienation of affections; by allowing Mr. Moliens' case to go forward the state was now, in effect, recognizing a cause of action for *negligent* alienation of affections. *Molien*, 616 P.2d at 825 n.3.

117. ETZIONI, *supra* note 1, at 5.

118. Jane E. Larson, *Women Understand So Little, They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 453 (1993).

119. *Id.*

scribes—for example, physical harm from the failure to disclose a sexually transmitted disease—are quite real, quite tangible, and already actionable without benefit of a new *Restatement* section.<sup>120</sup> There are some areas, however, even areas in which wrongdoing persists, in which we are better off leaving things in bad shape for fear of tinkering them into worse shape. The same politically correct people who cringe at Borkian critiques of the *Griswold* decision<sup>121</sup> would now invite the courts under our bedsheets in order to recognize yet another cause of action.<sup>122</sup> There exists in the academic community an urge<sup>123</sup> to find a remedy for every wrong, while leaving to courts and juries the difficult and sometimes impossible task of sorting out the evidence and determining appropriate damages. I do not mean to belittle the harm that can result from sexual betrayal. We must, however, recognize the limitations of judicial redress.<sup>124</sup> As *The New Yorker* comments,

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120. *E.g.*, *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) (imposing duty on one who knows or should know that he or she is infected with genital herpes to either abstain from sexual conduct with others or to warn others of infection prior to having contact; breach of this duty gives rise to cause of action for tortious transmission of disease); *Gabriel v. Tripp*, 576 So. 2d 404, 404 (Fla. Dist. Ct. App. 1991) (recognizing causes of action for negligence based upon violation of statute making it first-degree misdemeanor to transmit sexually transmissible disease); *Long v. Adams*, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (allowing unmarried person who contracts genital herpes from unmarried sexual partner to recover damages under negligence theory); *B.N. v. K.K.*, 538 A.2d 1175, 1179-84 (Md. 1988) (recognizing cause of action for fraud, intentional infliction of emotional distress, or negligence resulting from sexual transmission of dangerous, contagious and incurable disease); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. 1986) (holding that spousal immunity is not a bar to action in negligently transmitting sexual disease); *Cowell v. Cowell*, 105 S.E. 206, 210 (N.C. 1920) (allowing wife to maintain action against husband for infection with venereal disease); *DeVall v. Strunk*, 96 S.W.2d 245, 246-47 (Tex. Civ. App. 1936) (allowing cause of action based on allegations that plaintiff consented to intercourse under promise to marry, and was thereby infected). See generally Robert A. Prentice & Paula C. Murray, *Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships*, 11 J. CONTEMP. L. 67 (1984) (providing a historical overview of tort liability for the transmission of sexually transmitted diseases).

121. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95-100 (1990).

122. *The New Yorker*, in a quick take on Professor Larson's article, forecasts that if the language of the proposed *Restatement* section is taken literally, the courts will be entertaining actions

for the distress caused by counter-promissory seismic stasis (he told her the earth would move and it didn't); reckless parental-nonreturn assurances (her parents showed up two hours earlier than she told him they would); breach of natal-site removal contract (he said he would take her away from this two-bit burg and didn't); and lunar nondelivery (she promised him the moon and never came across).

*Empty Suits*, *THE NEW YORKER*, July 12, 1993, at 6.

123. *Id.* *The New Yorker* calls this an "Erehwonian yearning," referring to Samuel Butler's utopian novel *Erewhon*. *Id.*

124. Professor Larson states, "The . . . premise of my proposal is that trust rather than deceit should be nurtured as the ground for sexual relationships, and that mutuality and reciprocity are 'the rules' by which sexual partners should play." Larson, *supra* note 118, at 465. I quite agree. I do not agree, however, that trust in such intimate relationships is nurtured through judicial action, rather than moral development and social prodding.



[W]hile it's true that reason, as represented by the law, can often repress wrongs and chastise wrongdoers, we won't ever be able to take human nature to court, as we seem to want to, in our increasingly frequent, increasingly righteous, and sometimes increasingly daffy resort to litigation. The ultimate defendants--God, fate, evolution, or simply our innermost selves—are beyond the reach of the process servers.<sup>125</sup>

*De corde non curat lex.*<sup>126</sup>

### 3. "Protect me from myself" cases

The widespread perception that tort liability has run amuck has produced many cries for a limitation on tort duties. To some extent, this perception is unjustified, and stems from "man bites dog" cases—the odd cases that attract public attention because they are the exception to the rule.<sup>127</sup> A prominent example is the \$2.9 million verdict awarded in 1994

Indeed, Professor Larson's frequent resort to "literature, opera, popular culture, history, philosophy, and political theory" to support her thesis may suggest that her moral ideal is best advanced through non-judicial mechanisms. *See id.* at 472.

125. *Empty Suits*, *supra* note 122, at 6.

126. This Latin phrase roughly translates as: "The law does not deal with affairs of the heart."

127. Empiricists have debated the contention that litigiousness is an essential part of our national character. *See, e.g.*, Marc 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, 55-56 (1983). A recent study indicates that, contrary to popular perception, there was no nationwide increase in the filing of tort claims from 1986 to 1992 (the most recent year covered). BRIAN J. OSTROM ET AL., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992 16 (1994). In 1989, 447,374 tort cases were filed, which is less than half of 1% of all cases filed in state courts. Roxanne Barton Conlin, *Litigation Explosion Disputed*, NAT'L L.J., July 24, 1991, at 26. That small percentage includes every auto collision that resulted in litigation. *Id.*

I believe that the greater problem lies not so much in a profusion of litigation, but in the grossly inflated damages that have, of late, attached to that litigation. The first jury award in excess of one million dollars occurred in 1962. Miles J. Zremshi & David J. Schwartz, *Commentary: Finding Fault With "No Fault"*, 36 CASE W. RES. L. REV. 1107, 1109 n.6 (1986). In 1984, there were 401 jury awards above the million dollar mark. *Id.* at 1107 n.1. Between 1962 and 1970, there were twenty-seven separate million-dollar verdicts in personal injury cases. Pamela Buck Fort et. al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 541 (1986). Between 1970 and 1977, that number had grown to 224, and there were 251 such verdicts in 1982 alone. From 1975 to 1984, the average size of products liability jury awards grew from \$393,580 to \$1,850,452 (a 370% increase). ATTORNEY GENERAL, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AFFORDABILITY 36, 39 (1986).

Recent reports suggest moderation in the growth of jury awards. *See* Richard Perez-Pena, *U.S. Juries Grow Tougher on Those Seeking Damages*, N.Y. TIMES, June 17, 1994, at A1 (citing statistics indicating that the average personal injury award has remained constant in the early 1990s).

For further illustration, see Marie Reubi & Jill Foster, *Current Award Trends in Personal Injury*, JURY VERDICT RESEARCH SERIES 1.20.0 (1994). The study traces jury verdicts from 1989 to 1993, and the statistics show that huge awards remain exceptional. For example, in 1993, 57% of jury verdicts involved awards of \$100,000 or less, 20% of the verdicts involved awards between \$100,000 and \$400,000, and fewer than 15% involved awards of

to a woman who had spilled hot McDonald's coffee on her lap. The initial jury award was widely reported and criticized, and even used to demonstrate the need for tort-reform measures proposed by Republicans in Congress.<sup>128</sup> The court's subsequent remittitur, reducing damages to \$480,000, went virtually unnoticed.<sup>129</sup>

I believe, however, that there are two classes of cases in which liability is too often imposed, with consequences that should be objectionable to communitarians. The first class involves those cases in which the plaintiff demands that the defendant "protect me from myself." Some obviously silly cases fall into this category. For example, one man sued the Purolator company for its negligence in allowing a sack of cash to fall out of an armored truck, resulting in the plaintiff's appropriating the cash to his own use and, ultimately, his conviction for a crime.<sup>130</sup> In another case, a man's estate sued the owner of a parking lot, the inadequate security of which enabled the plaintiff's decedent to steal a car which he subsequently crashed, killing himself.<sup>131</sup> Because these cases were quickly dismissed, I regard them as less serious than those brought by adult trespassers against the owners of premises which had not been rendered safe for their use,<sup>132</sup> or by drunks against social hosts and others for the consequences of their own intoxication,<sup>133</sup> or by non-users of seat belts

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\$1,000,000 or more. *Id.* at 3.

128. *E.g.*, Nancy Mathis, *House OKs Limits to Civil Suit Damages*, HOUS. CHRON., Mar. 11, 1995, at A1 (discussing the "Contract with America" as an approach to ending "excessive jury awards such as the \$2.9 million in punitive damages awarded to an 81-year-old woman who spilled McDonald's coffee on her lap"); Peter Kendall & Janan Hanna, *Push to Cap Jury Awards Promises no Clear Winners; Backers, Opponents Have Few Facts to Cite*, CHI. TRIB., Feb. 10, 1995, at D1 (addressing the McDonald's coffee case); Terry Moran, *Eye the Jury: But Give Them Credit for Prevailing Over Lawyers*, WASH. POST, Oct. 2, 1994, at C1 (discussing the fact that damage awards in civil cases that reach into the millions of dollars for seemingly trivial injuries, like spilling hot McDonald's coffee on oneself, fuel the public's discontent with the system).

129. *McDonald's Settles Out of Court Over Coffee Burns*, LEGAL INTELLIGENCER, Dec. 5, 1994, News at 4.

130. *Coyle v. Purolator Armored, Inc.*, 729 F.2d 1446 (3d Cir. 1984) (unpublished opinion). For a description of this case, and of the district court decision dismissing it, see Denise Waldon, *Judge Kills Coyle's Suit vs. Purolator*, PHILA. INQUIRER, June 22, 1983, at B1.

131. Jesse Birnbaum, *Crybabies: Eternal Victims*, TIME, Aug. 12, 1991, at 16-17 (referring to the suit of Christopher Duffy). In another case, the plaintiff and two companions stole a pizza delivery car which had been left running while the driver made a delivery. *Matos v. Rivera*, 648 A.2d 337, 338 (Pa. Super. 1994). The thieves crashed the car, causing injury to the plaintiff, who then sued the pizza deliverer as well as the pizza parlor, alleging that their negligence in failing to prevent the theft was the proximate cause of his injury. *Id.* at 338-39. Dismissal on the pleadings was affirmed. *Id.* at 340-41.

132. *E.g.*, *Mark v. Pacific Gas & Elec. Co.*, 496 P.2d 1276 (Cal. 1972); *Schofield v. Merrill*, 435 N.E.2d 339 (Mass. 1982); *Denton v. Vail*, 541 P.2d 511 (Or. App. 1975).

133. *E.g.*, *Merino v. City of New York*, 583 N.Y.S.2d 397 (N.Y. App. Div.), *appeal dismissed*, 600 N.E. 2d 652 (N.Y. 1992). For a discussion of the *Merino* case, see *infra* notes 162-75 and accompanying text. A majority of jurisdictions impose no duty on hosts to consumers of alcohol. *See, e.g.*, *Cory v. Shierloh*, 629 P.2d 8, 11-12 (Cal. 1981); *Fisher v. O'Connor's Inc.*, 452 A.2d 1313, 1315-16 (Md. 1982). A few jurisdictions, however, have held that, under proper circumstances, an injured drinker has a cause of action against the party

against automobile manufacturers who, after all, should have realized that automobile occupants could not have been expected to take simple precautions for their own safety.<sup>134</sup> There is no shortage of people who could have protected themselves through simple, inexpensive measures but preferred to expose themselves to injury and then sue others who arguably might have protected them through more complex, expensive measures.<sup>135</sup>

Communitarians have expressed concern that neoliberal notions as to the merits of private ordering will restore an era of classical tort and contract theory in which legal duties are bargained away.<sup>136</sup> In the context of tort law, this could mean a return to a pre-*Henningsen*<sup>137</sup> regime in which hard bargains are enforced against an unwary public. I see little evidence, however, that this will be the case.<sup>138</sup> Instead, I see a healthy reemergence of the assumption of risk doctrine with respect to discretionary activities, such as sports, which are not necessary to the sustenance of life and

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serving the drinks. *E.g.*, *Lyons v. Nasby*, 770 P.2d 1250, 1256 (Colo. 1989); *Boehm v. Kish*, 517 A.2d 624, 627 (Conn. 1986); *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1044-45 (Fla. 1991); *Klingerman v. SOL Corp.*, 505 A.2d 474, 478 (Me. 1986); *Sommerness v. Quadna Resort Serv.*, 416 N.W.2d 178, 180 (Minn. Ct. App. 1987); *Jevning v. Skyline Bar*, 726 P.2d 326, 328 (Mont. 1986); *Christiansen v. Campbell*, 328 S.E.2d 351, 355 (S.C. Ct. App. 1985).

134. *See, e.g.*, *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978). The *Daly* case involved a man who died in an automobile accident when he was thrown from his Buick Opel, which had struck a median guardrail. *Id.* at 1164. There was evidence that Daly was intoxicated, that he had failed to lock his door, and that he had failed to fasten an available seat belt. *Id.* at 1165. His heirs sued General Motors, claiming that the push-button design of the door latch was responsible for his injuries. *Id.* In other words, a safer design would have protected Daly from the consequences of his own negligence. The California courts used the case to reintroduce comparative fault concepts to products cases. *Id.* at 1172. The *Daly* court also noted that in considering whether the vehicle was defective in design, the trier of fact could take into account the safety features that the manufacturer had already built into the car (but that Daly had failed to use). *Id.* at 1175.

135. The law of products liability is deficient in this regard, in that it tends to be both overprotective and underprotective. It is overprotective of product users who claim that the manufacturer failed to protect them from misuse of the product. *See, e.g.*, *Jonescue v. Jewel Home Shopping Serv.*, 306 N.E.2d 312, 318 (Ill. App. Ct. 1973) (holding that manufacturer may be liable for child's ingestion of liquid cleaner left in vanity under sink by mother). Products liability law is underprotective to third party victims who were injured due to the foreseeable consequences of a product's inherently dangerous design. For a discussion of courts' unwillingness to hold gun merchants and manufacturers of alcoholic beverages accountable for the injuries caused by their products, see *supra* notes 40-46 and accompanying text.

136. John C. Coffee, Remarks at Session on Communitarian Approaches to Law and Social Policy, Association of American Law Schools Annual Conference (January 8, 1994); *see also* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 833 (1983) (viewing current state of contract law as being somewhere along a continuum anchored at one end by classical theory).

137. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 63 (N.J. 1960) (voiding a limited warranty which covered only replacement of defective parts on a motor vehicle).

138. Nor do I see widespread adoption of the theories of the Chicago School of economics in tort cases, the opinions of Judge Richard Posner notwithstanding. *See, e.g.*, *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989).

limb.<sup>139</sup> For example, in *Hammond v. Board of Education of Carroll County*,<sup>140</sup> a teenage girl sued her school board for injuries she had sustained while playing varsity football, alleging failure to warn. The court dismissed the suit, recognizing that the plaintiff could be held to understand that voluntary participation in the sport of football entails some danger.<sup>141</sup> This type of result should be applauded by communitarians, as it recognizes that individuals should take some responsibility for their own well-being, and should not be able to avail themselves of legal remedies when their venturesome conduct results in foreseeable harm to themselves.<sup>142</sup>

#### 4. "Blame it on city hall" cases

The second class of cases in which liability has been imposed too frequently involves plaintiffs who view the government as the ultimate protector against all that may befall them. Some of these cases are outright silly, like that of the man who sued the State of Utah because he was attacked by a wild coyote while sleeping at a rest area on an interstate highway,<sup>143</sup> or the woman who sued the Pennsylvania Lottery Commission, alleging that the Commission owed her \$1.5 million in compensation

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139. Initially, waivers of tort protection were voided by the courts where they involved the necessities of life, such as food and housing. *E.g.*, *Railroad Co. v. Lockwood*, 84 U.S. 357, 382 (1873) (common carrier); *Papakalos v. Shaka*, 18 A.2d 377, 379 (N.H. 1941) (rental housing); *McCutcheon v. United Homes Corporation*, 486 P.2d 1093, 1097 (Wash. 1971) (rental housing); *Tunkl v. Regents of Univ. of Calif.*, 383 P.2d 441, 447-48 (Cal. 1963) (medical care); *see also* ILL. ANN. STAT. ch. 765, para. 705/1 (Smith-Hurd 1993) (any covenants or agreements exempting lessor from liability are void); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1989) (exculpatory clauses in rental of real property void). In the 1960s and 1970s, courts and legislatures, usually acting on an ad hoc basis, adopted a paternalistic view under which tort waivers were voided even with respect to non-essential activities such as sports and the acquisition of luxury items. *See Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (Wash. 1988) (interscholastic sports); *Baker v. City of Seattle*, 484 P.2d 405, 406 (Wash. 1971) (rental of golf cart, where exculpatory clause was in standard form agreement); *see also* N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1989) (agreements exempting from liability owners of pools, gyms, and places of amusement or recreation void where owner receives compensation for use). This type of action serves, in the long run, only to stifle venturousness and economic activity, and to place certain activities out of the reach of the economically deprived. *See* MILTON R. FRIEDMAN, *PRICE THEORY* 98-100 (1962); *cf.* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 356-59 (1977) (arguing that enforcement of housing code reduces supply and raises the cost of low income housing).

140. 639 A.2d 223 (Md. Ct. Spec. App. 1994).

141. *Id.* at 227.

142. I would be among the first to applaud this young woman's venture into a traditionally male undertaking, although Etzioni's concern about the minting of new rights cautions me against saying that she had a "right" to do so. But underlying her choice to participate in football should be an assumption of the risks involved in that venture. She simply cannot have it both ways; if rights are indeed involved, then she has a right to take her lumps with the rest of the guys.

143. *See* KOHUT, *supra* note 10, at 32-33. My inability (and that of my research assistants) to find any reference to this case in a more "respectable" source causes me to wonder whether this story is apocryphal.

for ten years of losing tickets.<sup>144</sup> Other cases, however, are a good deal more serious, like that of Linda Riss.<sup>145</sup> Linda Riss, a resident of New York City, repeatedly asked for police protection from a jilted suitor who had been threatening her.<sup>146</sup> The police told her that they could not provide protection unless and until she was actually attacked.<sup>147</sup> Indeed, after a thug hired by the suitor had thrown lye in Ms. Riss' face, the police provided around-the-clock protection.<sup>148</sup> By then, however, Ms. Riss had been scarred for life. Ms. Riss sued the city, but her case was not allowed to reach the jury.<sup>149</sup> The New York Court of Appeals, over a strong dissent by Judge Keating, felt that the city could not be responsible for the protection of all of its citizens, even those whom it knew were in peril.<sup>150</sup>

The *Riss* case presented an attractive, sympathetic plaintiff against an institutional defendant which, despite reports of financial hardship, continues to have substantial, but finite, resources at its disposal. How easy it would have been to allow this suit to go forward and allow a jury blessed with twenty-twenty hindsight to determine that a reasonable police department would have provided the requested protection. Nevertheless, liability in this case would have had to rest on the premise that the city—simply by dint of establishing a police department—had a duty to protect its citizens from harm. A noble aspiration, to be sure, but it is not a duty to be imposed lightly through judicial decision. The ultimate reasoning of the majority was that the expenditure of some of New York's limited resources to protect Linda Riss (and others like her) was a legislative policy decision, and not a judicial decision.<sup>151</sup>

Too many recent tort cases involve citizens imposing demands on beleaguered governmental units, insisting that the government do more, provide more, spend more.<sup>152</sup> These demands are in part a product of our

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144. See Jackie Cohen, *She Hopes for a Lotto Legal Luck*, NAT'L L.J., May 9, 1994, at A27.

145. *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

146. *Id.* at 862 (Keating, J., dissenting).

147. *Id.*

148. *Id.*

149. *Id.* at 860-61.

150. *Id.*

151. *Id.* at 861. Linda Riss went on to marry the man who had hired the thug to throw lye in her face, after his release from prison. Carol Angus, *City Legend: What They Did for Love*, NEWSDAY, April 26, 1990, at 4. I am not sure that this proves anything, but it may suggest that there is a realm of personal responsibility for things that "happen" to us, and that our fortunes, good and bad, cannot all be attributed to the misdeeds of others, or to "society."

152. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (arguing that state failed to protect child from abusive father); *Smith v. City & County of Denver*, 726 P.2d 1125 (Colo. 1986) (regarding failure to fill in natural swimming hole to protect trespassing swimmers); *Seiber v. State*, 211 N.W.2d 698 (Iowa 1973) (failure to post deer crossing signs); *Lucas v. Dinkins*, 608 N.Y.S.2d 403 (N.Y. App. Div. 1994) (demanding more public toilets); *Babcock v. State*, No. 84-2-00850-1 (Wash. Super. Ct., Benton County, 1994) (regarding placement of children in foster care with abusive uncle, resulting in a \$2,475,000 verdict against the state).

culture of complaint,<sup>153</sup> and in part a reflection of our growing expectations of government—the latter probably being a function of the former.<sup>154</sup> We seem to have abandoned responsible political decisionmaking for squeaky-wheel-gets-the-grease adjudications, in which individuals line up at the trough to have their complaints addressed by the courts.<sup>155</sup> A rising conservative tide in state and national legislatures might actually exacerbate this problem, as frustrated citizens increasingly turn to the judiciary to address complaints better suited to the legislative agenda.<sup>156</sup> The result, I fear, is a gross misallocation of public resources.<sup>157</sup>

Thus, we have the Big Apple Pothole and Sidewalk Protection Cor-

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153. For a discussion of the "culture of complaint," see *infra* note 169 and accompanying text.

154. Recent election returns would seem to indicate that the voters would actually prefer that the government do less. Less for others, that is. As one retiring congressman, Fred Grandy, said a few days before the 1994 mid-term elections: "We in Congress are the products of the conflicted consumers that send us to the polls every year, the people that want their entitlements expanded and their taxes cut, pork trimmed and bacon brought home." Interview with Rep. Fred Grandy, *All Things Considered*, National Public Radio (Oct. 26, 1994).

155. This is, quite possibly, a reflection of gridlock or lack of confidence in the political system, a problem addressed by Professor Etzioni at great length. ETZIONI, *supra* note 1, at 209-25. I am not sure that I fault individuals for trying to get their complaints addressed by the courts, in light of their frustrations with the political system. Certainly Linda Brown had every right to have her frustration with Topeka's segregated school system addressed by the courts. *Brown v. Board of Education*, 347 U.S. 483 (1954). I would much rather see the courts reserved for challenges such as Ms. Brown's, involving the deprivation of fundamental rights, than the relatively trivial challenges to government like those mounted by New York's pothole brigade. See *infra* notes 158-61 and accompanying text. I like to think that this is what Professor Etzioni means when he suggests a moratorium on the minting of new rights. See *supra* note 17 and accompanying text.

156. As conservative legislatures reduce funding for services to the general public (like public education), resources will be further squeezed by tort damages that are not subjected to legislative scrutiny. Trespassers injured on public school property might thereby obtain large tort awards, while the children inside the schools sit forty to a classroom.

157. Nathan Glazer has spoken and written eloquently of New York's decline as a "world city," in which "emblems of pride such as skyscrapers, bridges, the Statue of Liberty, and the grand entrance to New York Harbor . . . have been joined by new emblems: garbage-strewn streets, graffiti-marred subways and buildings, half-abandoned housing, an ever more visible disturbed and derelict population." Nathan Glazer, *Fate of a World City*, *CITY J.*, Autumn 1993, at 20. Glazer attributes this decline to the City's having undergone "a massive change in the 1960s, as a result of which it still suffers." *Id.* at 21. Glazer writes:

New York stopped trying to do well the kinds of things a city can do, and started trying to do the kinds of things a city cannot do. The things a city can do include keeping its streets and bridges in repair, building new facilities to accommodate new needs and a shifting population, picking up the garbage, and policing the public environment. Among the things it can't do are redistributing income on a large scale and solving the social and personal problems of people who, for whatever reason, are engaged in self-destructive behavior—resisting school, taking to drugs and crime, indulging in self-gratification at the expense of their children, their families, their neighbors.

*Id.* I fear that by mandating performance of certain obligations, the courts may burden cities like New York with more and more things that they cannot do (to the betterment of a few), to the detriment of those things they can and should do, to the betterment of all.

poration (Big Apple), a public-spirited enterprise dedicated to the protection of New Yorkers from the hazards of the city's potholes. In 1979, New York City enacted an ordinance requiring that it receive prior notification of a pothole's existence in order to be held liable for any accident attributable to its lack of repair.<sup>158</sup> In response to the ordinance, the New York Trial Lawyers Association established Big Apple to map each and every one of New York's potholes, and to furnish these maps to the City.<sup>159</sup>

One might thank the trial lawyers for providing this service *gratis* to New York's citizens. Ideally, the pothole list works as a deterrent to shoddy street maintenance. But the existence of toll-free city streets should not carry with it a duty on the part of the municipal government to keep them in perfect repair for the benefit of every private automobile and truck driver who should choose to use them and every pedestrian who cares not to look where she is going. Moreover, the availability of damages for the city's failure to fix potholes is not matched by tort remedies for deficient schools, inadequate public health facilities, or a myriad of other important functions one might lay at the city's doorstep. There is no "Big Apple Student Protection Corporation" sending a list of overcrowded schools to New York's Board of Education, with the implicit threat of tort liability.<sup>160</sup> Thus, New York City repairs potholes and delays the opening of school to remove asbestos from city classrooms,<sup>161</sup> while reducing the number of teachers in an already overburdened school system. The municipal budget process becomes not a matter of rational prioritization, but a contest to see who can best capture the attention of court and jury.

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158. New York City Administrative Code § 394a-1.0(d).

159. See *Big Apple Pothole and Sidewalk Protection Comm., Inc. v. Ameruso*, 442 N.Y.S.2d 860, 860 (Sup. Ct. 1981); Joseph P. Fried, *Just in Case Anybody Decides to Sue*, N.Y. TIMES, Dec. 16, 1993, at B1; Clyde Haberman, *Lawyers' Group Files Long Brief on City Hazards*, N.Y. TIMES, June 5, 1980, at B3.

160. A federal mandate does obligate New York and all other states to provide a "free appropriate public education" to all school-age children with disabilities. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1988). This mandate is enforceable through court actions that can be brought by parents, and the costs of compliance can be quite high. In some states, students identified as "gifted" have similar rights. See CONN. GEN. STAT. §§ 10-76a, 10-76d(d) (Supp. 1994); N.M. STAT. ANN. § 22-13-5 (Michie 1993); 24 PA. CONS. STAT. §§ 13-1371, 13-1372 (1992). Attention to the educational needs of disabled students had been long overdue, but the legislative mandates, in the absence of similar provisions to protect all students, require financially strapped school districts to provide a disproportionate amount of services to a favored class of students.

161. Removal of asbestos from school buildings is obviously a laudable enterprise in furtherance of public health. But what made asbestos removal a sudden "emergency" in the fall of 1993 was not an increased health risk; rather, it was an alarmist attitude reflective of the fickleness of the culture of complaint, which finds a new itch to be scratched each day. For a discussion regarding the degree of actual risk posed by asbestos in the New York Schools, see Matthew L. Wald, *Experts Say Fear of Asbestos Exceeds the Risk in Schools*, N.Y. TIMES, Sept. 4, 1993, § 1, at 1.

C. *Brother's Keeper or Culture of Complaint?*

The recent case of *Merino v. City of New York*<sup>162</sup> demonstrates the paradox between two communitarian ideals: the urge to encourage humane acts for the benefit of one's fellow citizens and the desire to foster individual responsibility. Francisco Merino was a thirty-year-old dishwasher who, while intoxicated, fell on a set of New York subway tracks and was struck by a train.<sup>163</sup> Having lost his left arm in the accident, Merino sued the New York Transit Authority and obtained a jury verdict for \$9.3 million.<sup>164</sup> Popular reaction to the nationally publicized verdict was typified by Chicago-based columnist Mike Royko, who wrote, with obvious sarcasm:

What kind of cruel society are we, to let someone like Francisco get himself drunk, buy a subway token, then fall in front of a train? Where were the transit police when Francisco needed them? Or, for that matter, where were you? Where was I? How indifferent can we get?<sup>165</sup>

Mr. Merino's claim falls into both of the categories about which I am concerned. He is a victim of his own foolishness, and he has asked that the City of New York (just in case it had nothing else to worry about) protect him from the consequences. As Mr. Royko said:

Most of us would wake up in the hospital [after such an accident] and moan: 'Oh, boy, I got drunk, fell off a subway platform, and now I have only one arm. Am I stupid or am I stupid?' So that's why we need lawyers—to explain to us that what we did wasn't really our fault. And to find those who really were to blame for what we did and make them take responsibility.<sup>166</sup>

Most of us—even Royko, by his own admission—would be sympathetic to a man who had just lost his arm in a needless accident. But many of us would also say that he had *chutzpah*<sup>167</sup> to blame someone else for harm for which he was primarily responsible.<sup>168</sup> Merino's situation

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162. 583 N.Y.S.2d 397 (N.Y. App. Div.), *appeal dismissed*, 600 N.E.2d 652 (N.Y. 1992).

163. *Id.* at 397-98.

164. *City Liable for Injuries Sustained by Man who Fell onto Subway Tracks; Failure to Adequately Light Subway Station*, VERDICTS, SETTLEMENTS & TACTICS, available in LEXIS, VERDCT Library, SHEPJV File [hereinafter *City Liable*].

165. Royko, *supra* note 10, at C3.

166. *Id.*

167. For the legal etymology of this word, see Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463, 463-64 (1993).

168. Two qualifications should be inserted here: First, it is more than a semantic quibble to contend that Merino did not blame the Transit Authority, that he merely sued the Transit Authority. Obviously the suit was based on legal blame. But one cannot fault a one-armed dishwasher for taking advantage of the opportunity provided by the legal system to obtain substantial compensation for his disabling injury. Nor can we fault his lawyer for playing his assigned role in an adversarial system and arguing legal theories that could produce a large judgment for his client. If a miscarriage of justice has occurred here (and we reserve judgment on this issue), responsibility lies with the courts and juries that allowed



typifies what Robert Hughes has called a "culture of complaint,"<sup>169</sup> in which the popular pastime is to claim some form of victimization. In such a culture, the sense of shared experience and ideals becomes frayed. Life becomes not an effort to see what one can contribute to the community; rather, it becomes an effort to see what compensation one can obtain for one's victimization. Thus, an injured dishwasher, assisted by lawyers in pursuit of a contingent fee, grasps with his remaining arm for the brass ring, and tries to get what he can while he can. Moreover, a jury of alienated citizens, identifying more with the victim than with the body politic, responds sympathetically to his complaint against a municipal corporation.<sup>170</sup>

The trial judge set aside the *Merino* verdict (a dog-bites-man event that garnered far less press attention than the original jury verdict) and, after an appeal, the case was remanded for a new trial.<sup>171</sup> At the second trial, an award of \$3.6 million was reduced to \$2.7 million to reflect the second jury's finding that Merino was twenty-four percent at fault.<sup>172</sup> The Transit Authority was found liable due to its failure to adequately light the station, which in turn prevented the subway brakeman from spotting Merino on the tracks in sufficient time to stop the train. At the first trial, Merino's attorney also had advanced the theory that the Transit Authority had a duty to come to Merino's assistance before his fall, and that it had violated its own procedures by failing to dispatch someone to the platform to assist Merino after a token clerk had reported Merino's condition.<sup>173</sup>

Communitarians could respond sympathetically to Mr. Merino's claim. We have previously discussed Professor Glendon's suggestion that, in keeping with our responsibilities to the community, the law ought to impose a duty to act as a Good Samaritan and rescue someone in peril.<sup>174</sup>

Merino's claim to go forward and have thus far rewarded him with two favorable verdicts.

The second qualification is that some of us who have viewed this case from afar (Mr. Royko and I among them) have substituted our assessment of fault for that of a jury that, after having heard all the evidence proffered by both sides, found Merino to have been only 24% at fault. Had Mr. Royko or I sat on that jury, perhaps we would have persuaded our peers that Merino's fault was much greater; fortunately for Mr. Merino, neither Mr. Royko nor I (both of whom live outside the jurisdiction) were selected. Or perhaps Mr. Royko and I, having seen and heard the evidence first-hand, would have agreed with the other members of the jury, and found for Mr. Merino. I have my doubts, however.

169. ROBERT HUGHES, *CULTURE OF COMPLAINT* 67 (1993).

170. The criminal law counterpart to this phenomenon is exemplified by the Menendez case, in which two brothers accused of killing their parents have thus far escaped conviction by claiming that they were victims of child abuse. *People v. Menendez*, No. BA 068880 (Los Angeles County Super. Ct., Calif., filed March 12, 1990). This very nearly approaches the classic definition of *chutzpah*, in which a man kills both his parents and begs the court for mercy because he's an orphan. Kozinski & Volokh, *supra* note 167, at 467.

171. *Merino v. City of New York*, No. 18730/89 (Bronx County Sup. Ct. N.Y., March 19, 1993).

172. *City Liable*, *supra* note 164, at \*1.

173. *Merino*, 583 N.Y.S.2d at 398.

174. For a discussion of the duty to rescue, see *supra* notes 6-8 and accompanying text.

A fellow citizen on the platform, once aware of Merino's condition, might thereby have a duty to keep him out of danger, so long as that duty could be fulfilled at relatively little personal cost. If that be the case, it is easy to see how the Transit Authority, which had taken on the duties of a common carrier, could owe a duty to protect Merino once it became aware of his condition. Indeed, such a result could be reached without expansion of the Good Samaritan doctrine. The provision of adequate lighting is an even easier, self-evident duty to impose on a common carrier. Viewed in this manner, the verdict is not at all shocking. The Transit Authority breached its duties, Merino was injured as a consequence, and his own fault is dealt with under the rubric of comparative negligence, which, in New York as in most jurisdictions, reduces but does not bar recovery.<sup>175</sup>

One searches for an articulable rule that will produce a result consistent with the popular reaction to the case. Assumption of risk does not work here because the plaintiff was too intoxicated to knowingly assume any risk. Nor would we want to revert to a system in which contributory negligence served as a complete defense. That system punished the victim, exonerated the wrongdoer, and was justifiably abandoned as draconian.<sup>176</sup> A modified comparative negligence system, in which the plaintiff is denied recovery if his negligence is greater than that of the defendant,<sup>177</sup> is appealing. Likewise, the "gross/slight" approach used in South Dakota—in which contributory negligence bars recovery unless the plaintiff's negligence is slight compared to that of the defendant<sup>178</sup>—has similar appeal. Neither of these systems, however, holds a negligent defendant accountable to the appropriate extent;<sup>179</sup> both are prone to mathematical tinkering. And both would produce a plaintiff's verdict in the *Merino* case, assuming that the jury were to hold fast to its determination that the plaintiff was only twenty-four percent at fault. Perhaps, in the end, our only problem with the *Merino* verdict is the modest percentage assigned by the jury to the plaintiff's fault.

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175. N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1995).

176. Only six United States jurisdictions continue to apply the common-law rule that contributory negligence completely bars an injured person's recovery against a negligent tortfeasor. These are: Alabama, the District of Columbia, Maryland, North Carolina, South Carolina, and Virginia. See *Tyler v. City of Enterprise*, 577 So. 2d 876, 878 (Ala. 1991); *District of Columbia v. Brown*, 589 A.2d 384, 387 (D.C. 1991); *Board of Trustees of Baltimore County Community Colleges v. RTKL Assocs., Inc.*, 559 A.2d 805, 810 (Md. 1989); *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73 (1992); *Cooper v. County of Florence*, 412 S.E.2d 417, 418 (S.C. 1991); *Kelly v. Virginia Elec. and Power Co.*, 381 S.E.2d 219, 223 (Va. 1989).

177. *E.g.*, COLO. REV. STAT. § 13-21-111 (1994); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1994); WIS. STAT. § 895.045 (1995).

178. S.D. CODIFIED LAWS ANN. § 20-9-2 (1995).

179. For much the same reason, I have advocated employment of the seat belt defense, even in cases where the negligence of another person (typically the driver of another vehicle) is the principal cause of the accident and the plaintiff's resulting injury. See Robert M. Ackerman, *The Seat Belt Defense Revisited: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 248-49 (1986) [hereinafter Ackerman, *Seat Belt Defense*].

Communitarians looking at the *Merino* case might proclaim that we are all our brothers' keepers, and impose an obligation on the Transit Authority. Alternatively, we might see too great a strain imposed on the community by the insistence (abandoned in the second trial) that it respond to every citizen in apparent need of assistance. Had the transit police moved Mr. Merino to a place of relative safety—Central Park, for instance—and he then fell victim to further mischief, they might again have been held liable.<sup>180</sup> Perhaps they should have placed him in a position of even greater safety—a room with a view on Riker's Island—and invited a civil rights complaint. Damned if you do and damned if you don't: such is life and liability in the culture of complaint.

I do not wish to push this too far, nor do I wish to make poor Mr. Merino the scapegoat for the widespread deficit in responsibility that plagues our nation.<sup>181</sup> It is tempting to rant and rave about tort actions that make seemingly outrageous demands of others or involve trivial offenses. For too long, however, the law of torts has been rigged against those who have had to endure disproportionate harm for the sake of the "community."<sup>182</sup> In many of those cases, the "community" turned out to be corporate or government interests that were, in effect, being subsidized by the uncompensated harm inflicted upon citizens.<sup>183</sup> An assortment of "no duty" rules, the doctrines of sovereign and official immunity, and the negligence doctrine itself have all resulted in the absorption of a disproportionate amount of loss by relatively small pockets of the community, presumably for the greater good. The negligence doctrine grew out of the theory that the community prospers when people engage in risk-generating activity; therefore one is held liable only for the creation of *unreasonable* risks. If *reasonable* risks harm one's neighbor, that is just something she has to suffer for the betterment of all.<sup>184</sup> Into each life a little rain

180. Something very much akin to that occurred in *Parvi v. City of Kingston*, 362 N.E.2d 960 (N.Y. 1977). In that case, police officers "rescued" a pair of drunks from a downtown street, depositing them in an abandoned golf course to sleep it off. *Id.* at 962. When one of the drunks, aroused from his slumber, stumbled into thruway traffic near the golf course, he sued the city for his injuries and recovered. *Id.* at 965.

181. Professor Etzioni provides some examples of this deficit in responsibility. One such example: During a program on the savings and loan mess, a member of the television audience says, "The taxpayers should not have to pay for this; the government should." ETZIONI, *supra* note 1, at 3. Another example: Politicians, instead of committing tax dollars to public education or drug elimination, grasp for "nontaxing solutions" such as school choice and saying "no" to drugs. *Id.* at 4.

182. In many cases that harm resulted in secondary costs that the community ultimately had to bear, in the form of either increased costs of medical care, public assistance to victims' families, or decreased productivity. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 27-29 (1970).

183. See Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 152 (1946); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 467-87 (2d ed. 1985).

184. For example, in *Surocco v. Geary*, 3 Cal. 69 (1853), the plaintiff sued the Alcalde of San Francisco for blowing up and destroying his house and property, in order to stop the progress of a fire. The appellate court reversed a plaintiff's verdict, based on the defense of public necessity. *Id.* at 74-75. The case is frequently reproduced in torts casebooks and cited

must fall, and if it falls disproportionately into some lives, the unfortunate few can just maintain a stiff upper lip for the sake of the "community." "It's a shame your son Billy died in the war, ma'am, but we're all better off for his sacrifice," says the war profiteer as he shuffles off, pocketing his ill-gotten gains. It is easy to bemoan the culture of complaint when one has no complaints.

### III. A COMMUNITARIAN TORT REGIME: WHAT IT MIGHT LOOK LIKE, AND HOW WE MIGHT GET THERE

#### A. *Changing the Rules*

The challenge for communitarians, then, is to mold liability rules that impose costs on those who are most responsible for harm, without coddling those who are in the best position to look out for themselves.<sup>185</sup> We should also promote rules that emphasize the need for people to take greater responsibility for their own well-being. Enforcement of the seat belt and motorcycle helmet defenses, for example, would be a way to underscore the need to take reasonable measures for one's own protection.<sup>186</sup> The insistence that one has the "right" to have one's brains smashed to pieces through failure to exercise these simple precautions is the epitome of radical individualism.<sup>187</sup> All too often, it is the community that has to pick up the pieces—through subsidized medical care, support for families, and other services—when this "right" comes to fruition in the form of

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for that generally accepted principle. Granted, however, that there was a public need to destroy the plaintiff's property, could not the public (through the City and Alcalde) have compensated the plaintiff for his disproportionate loss, rather than leave him to bear it alone? If this is viewed as too great a toll to assess against the public coffers, then how much greater a loss was it for one individual to bear alone? *See also* United States v. Caltex, Inc., 344 U.S. 149, 155-56 (1952) (denying compensation to owner of petroleum facility destroyed by U.S. Army before it could fall into enemy hands); *id.* at 156 (persuasive dissent by Justices Black and Douglas); Lockett v. United States, 938 F.2d 630, 639 (6th Cir. 1991) (denying recovery to residents of polluted area against federal government agency that had deliberately concealed health dangers created by toxic disposal).

185. Judge Guido Calabresi's suggestion that liability be imposed on the best cost avoider deserves greater attention in this regard. CALABRESI, *supra* note 182, at 135. While Judge Calabresi's solution would fail to impose a degree of liability on every person playing a role in the harm, it would concentrate responsibility on the party best able to avoid harm, thereby eliminating the dilution of incentive for accident avoidance arguably imposed by a comparative negligence regime.

Perhaps Judge Calabresi's rule could be modified to deal with those situations in which the best cost avoider is judgment-proof (perhaps by imposing secondary liability on the next-best cost avoider), thereby reducing the likelihood that the plaintiff will go uncompensated and impose secondary costs on the community.

186. I have advocated the seat belt defense elsewhere, and will not belabor the point here. *See generally* Ackerman, *Seat Belt Defense*, *supra* note 179 (advocating seat belt defense). Correctly applied, neither the seat belt nor helmet defenses eliminate all recovery on the part of the injured party; the person responsible for the initial collision remains liable for a large part of the damages, in recognition of the fact that her lack of care remains a cause of all of the damages. *See id.* at 232-33.

187. *See* Russell Baker, *Observer; The Belted Coward*, N.Y. TIMES, Feb. 2, 1985, at 21.

greater accident costs. Therefore, it is altogether fitting for the community to demand that people take better care of themselves (at least as a condition to tort recovery) and to adopt rules consistent with this maxim.<sup>188</sup>

Many of these rules can be adopted by the courts in the process of common law adjudication. Others, such as enhanced protection for whistleblowers,<sup>189</sup> will probably require legislative intervention. Because of the episodic nature of litigation and the politically erratic nature of state and national legislatures (which tend to address the hot button issues of the moment), it may be difficult to advance a cohesive communitarian agenda on all fronts. But judges, legislators, and administrative rulemakers can keep communitarian principles in mind while considering measures that have a potential impact on the community at large. Moreover, a communitarian agenda need not be entirely dependent on governmental rule making. The choices of whether to assist a person in need, to press one's advantage through a lawsuit, or to cause environmental damage involve decisions with communitarian implications which are made by private individuals and institutions on a daily basis. Advancement of a communitarian agenda should entail a commitment on the part of private actors to take responsibility for the societal consequences of their decisions, not to wait for government to take charge and impose a regime of repressive moralism.

None of the foregoing will be accomplished unless a cadre of committed communitarians commits itself to advancing a communitarian agenda in business, law, government, education, and every other phase of life that has an impact on the community. The very nature of communitarianism makes this problematic. Communitarians, by and large, are not rabid believers chanting a simplistic, one-note philosophy. Rather, we tend to be moderates who recognize the dangers of the extremes of left and right and reject facile, simplistic solutions. Lacking the zeal of religious fundamentalists, civil libertarians, and even self-proclaimed "federalists," communitarians may be ill-suited to advance a consistent program of reform on a broad front. But advance it we must, lest the community be overrun by the shrill call of radical individualists or authoritarian extremists.

Prominent among those private actors capable of advancing a communitarian agenda are lawyers. Lawyers, although ethically obligated to

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188. We might concede to libertarians a "right" not to protect oneself in this manner, by not imposing criminal sanctions for failure to wear a helmet or fasten a seat belt, so long as they do not avail themselves of the civil justice system (through tort actions) and the social support system (through public hospitals, disability payments, and the like) when injury occurs. As a practical matter, however, it is hard to isolate services supported by the community when accidents occur. And we would be most reluctant to allow entire families (including children) to suffer from a lack of social services because Mommy or Daddy decided to go riding without a helmet. We are all inextricably bound to one another; that is, perhaps, the central message of communitarianism.

189. For a discussion of the issue of increased protection for whistleblowers, see *supra* notes 70-78 and accompanying text.

carry out legitimate client objectives,<sup>190</sup> nevertheless exert considerable influence over client choices. I refuse to blame lawyers, particularly plaintiffs' personal injury lawyers, for pushing the buttons that the legal apparatus provides for the benefit of their clients. I believe, however, that lawyers frequently base their advice to clients on purely legal considerations, ignoring the moral, economic, social, and political factors that may be relevant to the client's situation.<sup>191</sup> Too often lawyers go charging ahead, asserting legal claims, without pausing even to allow the client to reflect on the impact of these claims on others in the community.<sup>192</sup> I also believe that lawyers should be held accountable for failing to avail their clients of devices such as mediation and other appropriate forms of dispute resolution,<sup>193</sup> through which they can resolve their disputes and at the same time heal the wounds that divide our society into warring camps of victims and those worthy of blame.

### B. *Changing the Game*

That our government maintains a system of courts through which people may obtain compensation for injury, and that access to these courts is in fact available to all those with colorable claims,<sup>194</sup> is a credit to the American legal system.<sup>195</sup> My fear, however, is that in our preoccu-

190. Rule 1.2(a) of the Model Rules of Professional Conduct states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1987). This rule illustrates the distinction between the objectives of the representation and the means necessary to accomplish those objectives. The lawyer remains in charge of determining the means of representation. See AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 30 (1992).

191. Rule 2.1 of the ABA Model Rules of Professional Conduct provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1987).

192. In similar fashion, I would hold corporate lawyers accountable for failing to alert their clients to non-legal concerns such as "moral, economic, social and political factors" which might influence decisionmaking. See *id.*

193. I prefer the term "appropriate dispute resolution," coined by Albie Davis and Howard Gadlin, to the more popular term, "alternative dispute resolution." See Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOTIATION J. 55, 62 (1988); see also Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 510 (1989) (advocating introduction of alternative dispute resolution into first-year law school curriculum). With most cases being resolved through some form of pre-trial settlement, it is unclear which process is the "alternative." Thus, it is better to emphasize use of the dispute resolution methodology *appropriate* to a given case.

194. In light of the underfunding of legal services programs, this access is largely provided through a maligned contingent fee system.

195. An impassioned defense of this system may be found in Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089-90 (1984). Professor Fiss writes:

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste

pation with litigation, we have ignored other equally valid means to obtain redress for our problems. Our system of resolving tort claims can respond through creative solutions that serve the interests of all parties while healing the wounds of the community. For example, what if the New York Transit Authority, in response to Mr. Merino's claim, were to provide the costs of his medical treatment, placement in a program for alcoholics (if his drunkenness was not an isolated incident), and gainful, long-term employment, perhaps as a token clerk? A bit fanciful, you might say, in light of the multimillion dollar judgment Mr. Merino may *someday* enjoy. But while such a settlement would furnish far less cash to Mr. Merino, it would provide him with greater dignity and opportunity than any money award he might ultimately receive.<sup>196</sup> Mr. Merino would have the opportunity to resume his role as a productive member of the community, rather than viewing himself as a lifelong victim. The Transit Authority would be a true partner in that enterprise, instead of being cast as a legal gladiator, preoccupied with fending off blame in costly and seemingly endless litigation.<sup>197</sup>

Tort disputes are too readily transformed so as to shift the focus away from the parties' real interests into a stylized battle between proxies (i.e., lawyers and insurance companies) in an adversarial system.<sup>198</sup> An

structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame . . . . Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

*Id.*

While I agree with Professor Fiss' accolades to the manner in which our system protects individual rights, I disagree with his tendency to view alternative means of dispute resolution as instruments of repression rather than as instruments of empowerment. Cf. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 229-59 (1994) (advocating mediation as a powerful substitute for litigation).

196. What such a resolution would *not* do is satisfy the financial expectations of most plaintiffs' personal injury lawyers. How do you take one-third of a job, of an alcohol treatment program, or of an apology? Likewise, the settlement would not fit into the pattern of disputing of most liability insurers, who can speak knowingly of cash and structured payouts, but are not in the habit of providing services. More humanistic responses to injury claims will therefore require adjustments on the part of those who play an integral role in the litigation process.

197. A parallel may be seen in Leslie Bender's call for a feminist ethic of care, which would approach legal accountability in terms of responsibility and care, rather than rights-based liability expressed in financial terms. Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 901-12 (1990). As a practical matter, this ethic of care is more likely to be achieved through negotiated and mediated solutions, rather than through traditional adjudication. Thus, Professor Baruch Bush has suggested that the communitarian approach to tort law may serve as "a mediating structure between the individual and society as a whole." Baruch Bush, *Between Two Worlds*, *supra* note 6, at 1530.

198. As one commentator states:

In counseling clients lawyers may tell them what remedies are legally possible . . . and thus preclude inquiry into alternatives which the client might prefer or which might be easier to obtain from the other party. . . . [S]ome disputants

injured party's desire to be restored to full participation in the community, an injurer's desire to make amends for a wrong, and the longing of both parties for reconciliation and healing, all give way to a litigation dance played by a plaintiff's lawyer dependent upon a contingent fee and a defendant's insurer looking to minimize its exposure.<sup>199</sup> Because of the way in which we insist on doing legal battle—and plaintiffs' lawyers share the blame here with defendants' representatives and the insurance industry—too many of our conflicts are settled (either by adjudication or grudging agreement) but not resolved, and we part company all the more convinced of our victimhood, rather than being reconciled to a world populated by decent but erring individuals.<sup>200</sup>

### C. *Unburdening the System*

Our system of tort litigation places a significant burden on the community in the form of transaction costs. Tort litigation involves not only direct public expenditures to support the court system, but also expenditures to support the phalanx of lawyers, insurance adjusters, expert witnesses, and law professors (myself included) who are directly or indirectly sustained by such litigation. Before proceeding any further, I must add an important caveat: While tort litigation has expanded over the past three decades, the expansion of commercial litigation and its attendant costs

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prefer an acknowledgment that wrong has been done to them to receiving money. Once lawyers are engaged and the legal system, even if only informally, has been mobilized, the adversarial structure of problem-solving forces polarization and routinization of demands and stifles a host of possible solutions.

Carrie J. Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 Mo. J. OF DISPUTE RESOLUTION 25, 33 (1985).

199. Even settlements often place the immediate interests of the parties, their counsel, and their insurers ahead of the long-term interests of the public. An increasing number of civil cases are concluded with a settlement and a court order sealing the record. According to one U.S. District Judge who has been instrumental in the settlement of several mass tort cases, "it is almost impossible to settle many mass tort cases without a secrecy agreement." Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 510 (1994).

Apart from general First Amendment concerns, secrecy in cases involving mass torts, environmental hazards, and products liability serves to hide ongoing dangers to the public. The rationale that parties in an adversary system are entitled to resolve their own disputes, without regard to the public interest, is unconvincing when the parties have used the public courts to process their disputes and maintain secrecy. Says Judge Weinstein, "A publicly maintained legal system ought not protect those who engage in misconduct, conceal the cause of injury from the victims, or render future victims vulnerable." *Id.* at 516-17. Through either legislative or judicial intervention, the interests of the community should be protected, even at the settlement stage. *See, e.g.*, FLA STAT. ANN. § 69.081 (West 1990) (prohibiting concealment of public hazards and giving standing to affected third parties to challenge rulings).

200. By the conclusion of litigation, this "victimhood" includes not only plaintiffs, but also defendants, who feel abused by the process and the superficial manner in which disputes are settled. *See, e.g.*, RICHARD SELZER, *DOWN FROM TROY: A DOCTOR COMES OF AGE* 102-23 (1992) (describing the dehumanizing effect of medical malpractice litigation).



has far eclipsed that in the personal injury field over the same period.<sup>201</sup> Those who cast tassel-loafed personal injury lawyers as scapegoats might redirect their outrage at the business community, which imposes an increasingly heavy burden on the public court system to adjudicate private commercial disputes. If anything, tort litigants have greater reason to avail themselves of the public court system. Most parties to tort actions are strangers who, prior to the dispute, had no occasion to agree upon a private forum in which to resolve their differences. Parties to commercial cases, however, have had pre-existing relationships, usually governed by contract, through which they can agree to a private forum—such as arbitration or a rent-a-judge program—to resolve disputes, should they arise. The availability of public courts charging only token filing fees to adjudicate these disputes amounts to a public subsidy of private commercial activity.<sup>202</sup> This may be necessary to the functioning of the community, but we should be cognizant of the costs.

I have discussed earlier the far more serious toll that tort litigation exacts upon the community. The prevailing system of tort litigation contributes to the sense that we are engaged, not in a common enterprise, but in a race to the courthouse to see who can grab the brass ring while it is still there. The overwhelming impression is that tort litigation is all a game, that justice, fair play, and responsibility have little to do with it, that one can at least extract (dare I say extort) a few grand from the defendant and its insurance company by bringing suit, and that this is all part of the American way.<sup>203</sup> To the extent this attitude is incorporated into jury behavior, it gathers momentum, as verdict after verdict tells the Francisco Merinos of our country that they are suckers if they miss out on the payoff.<sup>204</sup>

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201. A study by Marc Galanter and Joel Rogers shows that contract cases, not tort cases, represent by far the category of greatest growth. Milo Geyelin, *Feuding Firms Cram Courts, Study Says*, WALL ST. J., Dec. 31, 1990, at 9.

202. See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 372 (1986). Judge Posner states:

I am not persuaded that making settlement cheaper to the parties is the solution to the caseload crisis. I would prefer to make the parties bear a larger fraction of the total costs of trial, including the queueing costs that trials impose on other parties. A recent study found that the average out-of-pocket cost to the federal government of certain tort cases tried by jury is \$15,028—and this excludes the queueing costs. But the fee for filing a case in federal district court is only \$60.

*Id.* at 392-93.

203. I am not sure whether this attitude is shamed or fostered by the popular literature excoriating the tort system, as exemplified by Mike Royko's earlier-cited column. See Royko, *supra* note 10, at C3; see also Barry, *supra* note 10, at 33 (describing "the Case of the Denture Adhesive Menace," in which SmithKline Beecham paid \$1,000,000, plus \$2,800 in coupons, in settlement of a class action products liability suit over a denture adhesive found to contain the carcinogen benzene, despite the absence of any showing of actual harm to the plaintiffs).

204. At least one recent study suggests that juries are conscious of this problem, and have become less charitable toward plaintiffs. See Perez-Pena, *supra* note 127, at A1.

This phenomenon both contributes to and reflects the fraying of the communal fabric that Etzioni and Hughes so deplore. When injured parties and the juries before which they appear feel alienated from the American enterprise, when they see corporations more interested in the bottom line than in producing worthwhile goods and services,<sup>205</sup> when politicians, preoccupied with the next election, pander to narrow interests rather than committing themselves to public service,<sup>206</sup> there appears little reason not to pursue (or aid another in pursuing) one's piece of the pie, regardless of the costs to the greater community. That is why some of us see such promise in the alternative dispute resolution movement, and in mediation in particular. Mediation is an attractive alternative not because it reduces transaction costs, for sometimes it does not. Rather, the true virtue of mediation is the possibility that disputing parties might develop respect for each other's legitimate interests, and seek mutual accommodation.<sup>207</sup> Instead of pursuing a larger piece of a fixed pie, through alternatives to litigation we can perhaps find ways to enlarge the pie, for the betterment of the greater community.<sup>208</sup>

The present state of tort litigation reflects a society which has become increasingly fragmented by the relentless pursuit of self-interest. So long as insurance adjusters are schooled in obtaining quick, cheap settlements, plaintiff's lawyers will continue to descend like locusts upon mass-disaster scenes. So long as legislators continue to vote as directed by lobbyists, rather than after careful study of the merits of proposed legislation, jurors will continue to vote their prejudices and fears, rather than

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It may be significant that excessive jury awards receive far more media attention than do cases in which apparently worthy plaintiffs fail to recover. About the same time as the widely reported coffee burn suit against McDonald's, see *supra* notes 127-29, a U.S. District Court in Massachusetts dismissed an action brought on behalf of a woman who had died due to failure of a heart catheter which the manufacturer knew to have been defective ten months prior to death. *Talbott v. C.R. Bard, Inc.*, 865 F. Supp. 37 (D. Mass. 1994), *aff'd*, 1995 WL 470265 (1st Cir. 1995). For a commentary on the *Talbott* case, see Mitchell Zuckoff, *Two U.S. Agencies Side with Missouri Women in Bard Catheter Suit*, BOSTON GLOBE, Dec. 5, 1994, Business at 19. The case escaped the attention of most of the media.

205. Until fairly recently, corporations, however rapacious, seemed to care genuinely about the products they made and the services they provided. Henry Ford (whatever his faults, which are legend) wanted to make *cars*. Andrew Carnegie wanted to make *steel*. Walt Disney wanted to make *movies*. Too many modern corporate managers simply want to make *money*.

206. ETZIONI, *supra* note 1, at 209-25.

207. "Mediated outcomes empower parties by responding to them as unique individuals with particular problems, rather than as depersonalized representatives of general problems faced by classes of actors or by society as a whole." Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 268 (1989). Mediation also promotes "the value of escaping our alienated isolation and rediscovering our common humanity, even in the midst of bitter division." *Id.* at 270.

208. See Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1878-79 (1986) (discussing "communitarian mediators"); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 4 (1983) (advancing a communitarian argument for non-judicial resolution of conflicts).

decide cases on the merits. But if we pause to inquire about what really makes us whole, if we become willing to make a living instead of a killing, we may find a longing that is satisfied not by the big win, but for something more modest yet more fulfilling: a spirit of community.

### CONCLUSION

The law of torts should be a mechanism for improving the overall quality of life in our society. It can perform this function by supporting whistleblowers who serve the public interest; by holding accountable corporations that pollute the air, poison our bodies, and inflict carnage on the public; and by encouraging each one of us to be a little more responsible toward ourselves and toward each other. There are those who view the tort system merely as a device for providing compensation to individuals who have suffered harm. But that goal, laudable as it may be, could be achieved through a less expensive no-fault system. If we are to find any justification for the expensive, time-consuming apparatus of the tort system, it is in its ability to reinforce a code of conduct that implores us to be more responsible citizens for the greater good.

At the same time, the law of torts must not exact such a toll on public resources, both through the duties it imposes on civic institutions and the transaction costs of operating the system, so as to impair the ability of public institutions to function for the community's benefit. In this context, we should view government not as nursemaid to an ever-demanding public, but as the apparatus through which citizens enforce a code of conduct and maintain a measure of equilibrium in our society. The theories of liability now being employed to stretch the limits of recovery could be used as crude bludgeons to inflict grave damage on the community. More judicious exercise of the legal machinery, recognizing the fragility of existing social structures, is needed.

I have not attempted to explore comprehensively all tort issues as they relate to communitarianism. An entire article could be devoted to the communitarian implications of environmental torts, including perhaps the need to relax requirements of standing and causation in order to advance the public good.<sup>209</sup> Likewise, we could devote considerable time and space to the communitarian ramifications of a no-fault social insurance system. Such a system might focus less on blame and more on the restoration of injured people to productive lives in the community, through a broader distribution of responsibility for compensation.<sup>210</sup> On

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209. For example, Professor Baruch Bush has suggested that communitarian theory could be used to justify the relaxation of the rules of causation in environmental and other toxic torts. Baruch Bush, *Between Two Worlds*, *supra* note 6, at 1551-61.

210. For example, Professor Stephen D. Sugarman has proposed replacing the tort system with an alternative compensation scheme for accident victims. First, his scheme would take the small cases out of the tort system, eliminate pain and suffering awards and cut out the lawyers in order to redirect funds toward compensation for temporarily disabled victims who have not been intentionally or gravely wronged by conduct of another. This would be achieved by providing universal health care and an income replacement system for

the negative side of the communitarian coin, such a system might erode a sense of responsibility and produce inefficiencies through externalization of costs.

I suspect that this article will disappoint, and even anger, some adherents to the communitarian cause. While others have seen in communitarianism a basis for expanding tort duties and consequent liability, I have also seen it as a rationale for limiting the largess of the tort system. Deny me credentials as a "true" communitarian if you must. But I see a need to give short shrift to marginal cases if we are to preserve the apparatus that gives meaning to important cases. A sense of community requires giving as well as taking, and generosity of spirit may, in some instances, require that we demand less rather than more of our fellow citizens.

I do not believe that we should all meekly tuck in our tails, forego our legal remedies, and become team players. I do believe, however, that we should fashion our legal rules in a manner conducive to individual responsibility, recognizing that the public should give as well as get, and thereby play the role of citizens, not supplicants. We also should promote dispute resolution methods conducive to mutual understanding and accommodation, and the realization that we are not disparate entities looking only for self-aggrandizement, but interdependent beings in search of a sense of community.

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people with moderate injuries.

Second, for serious medical injuries, Sugarman proposes a no-fault system similar to that of New Zealand. This system would collect revenues from gasoline taxes, from drivers based on their driving records and experience and from a vehicle safety index in order to promote behavior control and fairness.

Finally, Professor Sugarman proposes improving Social Security benefits to even out the treatment of the disabled generally, and not favor accident victims. Social Security would be the primary source and no-fault compensation would be supplemental. Therefore, claimants would seek Social Security first and resort to the no-fault compensation scheme for further needed funds.

Professor Sugarman favors a community responsibility approach to compensation and believes that compensation should be separated from behavior control and fair punishment. Steven D. Sugarman, *Beyond Compensation: Dealing With Accidents in the 21st Century*, 15 U. HAW. L. REV. 659, 663-70 (1993).

