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Stephen D. Sugarman  
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## Proposals For Reform

Stephen D. Sugarman  
University of California at Berkeley, Boalt Hall

### I.

Ideology is an important part of the debate about accidents — their prevention and the compensation of their victims. In order to emphasize my point, I will describe five different models for the management of risk and its consequences, giving these models explicitly ideological labels.<sup>141</sup>

The first I call the libertarian model. In this model, putting aside fraud and other intentional wrongdoing, risk and its consequences are supposed to be managed by the market and by contract.

People see what risks are presented, and they decide for themselves when to take their chances, given the benefits that flow to them from running those risks. Unless the source of a risk has promised in advance by contract to compensate victims, compensation is to be dealt with (or not) through voluntarily purchased first-party insurance. You buy disability and health insurance if you want protection. Or if you don't, you don't buy that insurance. It's your libertarian right to do so or not. What's fair is that you get what you choose in terms of both risk and compensation.

In this model, government adopts a hands-off policy toward the managing of risk. We rely instead on the market to control conduct. For example, we assume that providers are concerned about their reputation because they will want to make future sales and that this helps assure that they won't take advantage of current customers.

This approach reflects, to a certain extent, some views Professor Epstein has put forward.<sup>142</sup> Under his proposals, as a practical matter,

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<sup>141</sup> Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992).

<sup>142</sup> See, e.g., Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES. J. 87.

there would probably be no third party liability in settings where parties deal with each other by contract. Doctors and product sellers could contract with patients and buyers to provide them compensation in case an accident occurs, but probably they would not; rather, the parties would probably agree that the consumer/patient would bear the loss.

This was, in important respects, the law of England in the 19th century with all of its "no duty" rules, especially with respect to product manufacturers.<sup>143</sup> From what Professor Matsumoto said earlier, this model may best describe the de facto law in Japan, even now, given all the barriers to bringing litigation.<sup>144</sup>

My second model I call the conservative model. This model is embodied by the traditional common law tort system. From what we have heard from Professor Klar, this model is well represented by Canadian tort law today.<sup>145</sup>

I call this model conservative because it reflects several appropriately conservative values, most importantly, individual rights to sue and an emphasis on fault. It focuses on deserving victims and aims to provide them with full compensation, for example, replacing all of their wage losses even if they're wealthy.

This model relies upon the decentralized system of individual lawsuits to control behavior. Unlike the libertarian model, the assumption of the conservative model is that the market and individual contracts alone will not sufficiently control wrongdoing, and that society must create enforceable rights to sue by those who are injured by another's fault.

The third model I call the liberal model. It draws on those early 20th century progressive values on which contemporary liberalism rests. Central to this model is the idea that it is primarily organizations and institutions that cause harm, and not so much people that cause harm. Hence, individual fault is de-emphasized. During the 1960s especially, liberals talked about crime in this way too. Crime was seen to be caused not so much by individuals but rather by larger, social forces. Because, in this liberal view, organizations are really responsible for accidents, then they should bear the costs. Workers' compensation clearly embodies the liberal model.

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<sup>143</sup> Robert A. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

<sup>144</sup> See Tsuneo Matsumoto, *supra* beginning at p. 577.

<sup>145</sup> See Lewis N. Klar, *supra* beginning at p. 583.

In the liberal model, victims are to be assured the basic needs they have as citizens. We don't try to restore the wealthy to their pre-accident financial position as in the conservative model. And we don't pay fine-tuned attention to victims' intangible losses either.

The liberal model is congruent with the Japanese compensation systems for drug accident victims and pollution victims as they have been explained here.<sup>146</sup> It also fits the Swedish medical accident scheme<sup>147</sup> and the scheme recently adopted in the United States (as elsewhere) for vaccine damaged children.<sup>148</sup> Under these plans victims are to be assured that their basic human needs are met by the large enterprise or sophisticated actors who cause the loss and regardless of fault.

The liberal model depends upon the funding mechanisms of the compensation schemes to achieve socially desirable behavioral effects. That is, the social cost accounting employed by these plans internalizes the costs of accidents so as to give organizations the financial incentive to take the socially appropriate level of precaution.

Auto no-fault schemes don't so neatly fit my liberal model because they don't concern large institutions. Nevertheless, these plans are driven by some of the same broad ideological values — de-emphasizing personal fault, viewing accidents as things that just happen, and internalizing the costs of auto accidents to the enterprise of driving (even if it isn't an enterprise of the sophisticated, complex organizational sort).

I call my fourth model the collective or communitarian model. It rejects the idea that the causes of disability matter. Rather, people become our collective concern simply because they are disabled. In this model the disabled are to be cared for in a reasonably uniform way, and all members of society should contribute to the funding of that care.

On the compensation side, this model employs broad social insurance arrangements to deal with the needs of the disabled. Inasmuch as it doesn't cover all the disabled, New Zealand's approach of the past 20 years lies somewhere between the collective model and the liberal model.<sup>149</sup>

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<sup>146</sup> See, e.g., *infra* at p. 717.

<sup>147</sup> See Jan Hellner, *Compensation for Personal Injury: The Swedish Alternative*, 34 AM. J. COMP. L. 613 (1986) and Carl Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 AM. J. COMP. L. 635 (1986).

<sup>148</sup> See SUGARMAN, *supra* note 24, at 106-110.

<sup>149</sup> Geoffrey Palmer, COMPENSATION FOR INCAPACITY, *supra* note 78.

The proposal by Donald Harris and his group at Oxford for a comprehensive English disability compensation scheme<sup>150</sup> and the Woodhouse proposal for Australia<sup>151</sup> are better exemplars of the communitarian model. My comprehensive income support and health care proposal fits this model as well.<sup>152</sup> In the collective model, neither individual lawsuits for money damages nor targeted cost internalizing through funding mechanisms is relied upon for behavior control. Rather social channeling of conduct is pursued through regulation.

My final model I call the socialist model for which I draw on the writings of Professor Abel.<sup>153</sup> The first principle here is that we currently have inequality in risk-taking which is unfair; that is, the lower classes are involuntarily and disproportionately subjected to too much risk. What we need are collective mechanisms for both redistributing risk and reducing risk. A second principle is that we have too much income inequality in society.

So, under the socialist model, we'd have more worker control over risk creation than we have today. In addition, society would provide a generous minimum income guarantee, restrictions on income inequality, and a nationalized health insurance system. No special compensation arrangements would be provided (or thought needed) for those injured in accidents.

To sum up, each model has its own mechanisms for treating people fairly in terms of paying out benefits and paying for those benefits. Each has its own approach to accident prevention.

Although each model represents a distinctive ideological position, it is not necessary to view these models as mutually exclusive. For example, a society might adopt one model for one type of accident and others for other types. To illustrate, many countries, such as Canada and the United States, have traditionally employed the liberal model for work accidents and the conservative model for most other accidents.

A society can also embrace cascading models. In Japan and Britain, for example, the treatment of worker injuries involves laying the liberal model on top of the conservative model (instead of substituting one

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<sup>150</sup> Donald Harris, et al., *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984).

<sup>151</sup> See *COMPENSATION FOR INCAPACITY*, *supra* note 78.

<sup>152</sup> SUGARMAN, *supra* note 24, at 127-152.

<sup>153</sup> See, e.g., Richard L. Abel, *A Critique of Torts*, 37 *UCLA L. REV.* 785 (1990).

for the other). So, too, many people favor laying the regulatory force of the collective model on top of the behavior control strategy of the conservative model. When you utilize overlapping approaches in these ways, you get an ideological mixed (although not necessarily bad) system.

Some people in the United States would find it odd that I call the tort model the conservative model because people associated with Liberalism, such as the consumer activist Ralph Nader, are big supporters of the tort system.<sup>154</sup> The reason for this, I suggest, is that, over the past 25 years the tort system in practice in the United States has taken on a lot of the ideology of the liberal model. Indeed, this is a large part of what Professor Priest and others have been complaining about.<sup>155</sup> U.S. tort law is no longer only about lawsuits on behalf of individuals; instead, we have many mass actions. Fault has become much de-emphasized as courts use rhetoric endorsing the principle that organizations should pay for harms they "cause" without being too concerned about whether we can identify any wrongdoing on their part.

## II.

In my own writings I have proposed interim reforms inspired by the liberal model. For some accidents I would substitute a liberal model solution in place of tort law;<sup>156</sup> additionally, I would alter tort law's damages rules to mimic the benefit arrangements of liberal compensation schemes.<sup>157</sup> But for the longer run, as noted above, I favor solutions that embrace the collective model.

Because Professor Klar has argued that there is no necessarily logical connection between criticisms of the tort system and proposals such as mine,<sup>158</sup> I'd like to try to make that connection here.

I believe that the U.S. tort system fails miserably to achieve the various social objectives set forth in its defense, including the "mor-

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<sup>154</sup> See, e.g., Ralph Nader, *The Assault on Injured Victims' Rights*, 64 DENV. U. L. REV. 625 (1988).

<sup>155</sup> See, e.g., George L. Priest, *supra* at p. 544, and PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

<sup>156</sup> See, e.g., Stephen D. Sugarman, *Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977 (1989).

<sup>157</sup> Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987).

<sup>158</sup> See Lewis N. Klar, *supra* beginning at p. 583.

alizing'' function which Professor Miller has addressed.<sup>159</sup> On the other hand, I concede that the U.S. tort system does in fact provide substantial victim compensation, albeit at an extravagant administrative cost.

So this leaves me in somewhat of a quandary. If I simply do away with U.S. personal injury law, I am left with uncompensated victims, an especially acute problem in a nation with such a porous social safety net. Therefore, I feel I must offer to replace tort with an alternative compensation scheme that will better address victim needs. By the same token, even though I conclude that U.S. tort law does not effectively achieve sufficient accident reduction, I of course find that a desirable goal, and hence my proposal contains new measures aimed in that direction too.

I admit that I am being politically expedient when I say that if we eliminate personal injury law this will free up money to be used to pay for my proposal. But, on the other hand, it hardly seems fair to make a proposal like mine without giving some attention to how it is to be financed.

I agree that the U.S. is not going to adopt my long run solution right now all in one large step. But I want to explain how we might move towards my vision of the collective model through several smaller steps.

The first strategy, I think, is to try to get the little cases out of the tort system. I mean cases where people are only temporarily unable to perform their normal activities and are not either permanently impaired or permanently disfigured in a serious way. Nor have they been intentionally or gravely wronged by the conduct of another. These little cases cost a lot of money in both awards and claims adjustment expense. They generate, at least in the United States, a lot of what I consider to be nonsense pain and suffering awards that are the result of the nuisance value of the cases; indeed, the availability of substantial pain and suffering awards promotes fraudulent claims.

Furthermore, I think that most people in these smaller injury situations would be quite satisfied if they could get their basic needs promptly and sensibly taken care of — their income needs, their medical expenses and their other costs. And I believe that through a collective approach we in the U.S. could more cheaply provide for the basic needs of a larger number of minor and modest accident victims than tort law does

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<sup>159</sup> See Richard S. Miller, *supra* beginning at p. 626.

today. This means eliminating pain and suffering awards and largely cutting the lawyers out and then redirecting the savings (or much of it) towards compensation for out-of-pocket losses.

Here's how I think we should take care of the small injury cases. First we need a universal health care scheme which, of course, other countries such as Canada, New Zealand and Japan already have. But with more than 30 million people currently uninsured, we don't really have a health care system in the United States.

To be sure, those 30 million plus people do get some health care. But they don't have advance arrangements for the payment of that care. Rather, they often wander into public hospitals long after they should have seen a doctor; they use emergency room service when cheaper care would be better; they tend not to seek preventive care; and sometimes they simply do without much needed medical care. So we need a better system — both for its own sake and so as to be able to say that tort law isn't really needed to provide for accident victims' medical care.

Next, we need a good system of income replacement for people with moderate injuries. I have offered two alternatives in my writings. One combines mandatory sick leave for very temporary disabilities with mandatory temporary disability insurance for disabilities lasting up to six months<sup>160</sup> — programs that are already mandatory in many other countries.<sup>161</sup> My alternate income replacement proposal is even more ambitious. I call it Short Term Paid Leave, and it envisions a kind of forced savings scheme.<sup>162</sup> Under the plan for every five days you work, you would earn one day of paid leave. Whenever you don't work and you want to get paid, you draw down one of your earned days. This plan would replace paid holidays, paid vacations, sick leave, temporary disability insurance, unemployment compensation, and so on, as well as eliminating the need to resort to tort law for short term income replacement. Details are set forth in other writings of mine.

Notice that both of my proposals for short term income replacement have nothing to do with particular types of accidents. Indeed, they are not at all restricted to accidents. Rather, the first one is organized around disability generally, and my Short Term Paid Leave plan is even broader in its reach.

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<sup>160</sup> Sugarman, *Serious Tort Law Reform*, *supra* note 157.

<sup>161</sup> Stephen D. Sugarman, *Personal Injury Law Reform: A Proposed First Step*, 16 *INDUS. L.J.* 30 (1987).

<sup>162</sup> Stephen D. Sugarman, *Short Term Paid Leave*, 75 *CAL. L. REV.* 465 (1987).

Once the small cases are removed from the tort system, we would be in a far better position to think carefully about our social obligation to people who are seriously injured. These are relatively few, but, of course, the total amount of their harm is very substantial.

It is important to appreciate here that many people who are clearly victims of tortious conduct by others go uncompensated or are vastly under-compensated through U.S. tort law today because their injurer is uninsured or underinsured. In California, for example, in perhaps two-thirds of automobile accident cases there's no possibility of obtaining more than \$50,000 from the other driver. This is because we have 20 to 25 percent uninsured motorists, and of those who are insured, half or more carry \$50,000 or less in coverage.<sup>163</sup>

There is more than a little irony here. In the U.S., where tort law is relatively pro-plaintiff and promises Rolls Royce level damages for those who are successful in the system, the cost of auto insurance is relatively high. Hence many don't purchase it, or else buy too little of it. In Canada and Japan and in Europe generally, where tort law is formally less generous, auto liability insurance is more affordable, coverage limits are typically much higher or unlimited and more people buy it. Indeed, other countries are politically more able to insist upon insurance as a condition of car ownership than are we in the U.S. Furthermore, we let people who do insure get away with intolerably low limits of liability. But, of course, a seriously injured person would rarely be fully compensated with \$50,000 or less.

The failure of U.S. tort law to compensate seriously injured victims runs through other areas as well. Consider medical malpractice. A recent Harvard study and Professor Paul Weiler's book *Medical Malpractice on Trial* tell us that of 100,000 hospital admissions, there are 4,000 medical accidents, which is four percent. One thousand of those accidents are caused by negligence.<sup>164</sup> So upon entering a U.S. hospital you run a one percent chance of a medical malpractice injury.

Out of those 100,000 hospital admissions about 125 tort claims are filed, and about 60 people actually get money. Of those, 25 to 30 are undeserving, in the sense that they really weren't the victims of malpractice. In fact, they may not have even been injured, but they recover at least something by way of settlement. The other 30 to 35 who recover really were the victims of malpractice. In short, of 1,000 victims of negligence, 30 to 35 are compensated by tort law.

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<sup>163</sup> Stephen D. Sugarman, *Nader's Failures?*, 80 CAL. L. REV. 289 (1992).

<sup>164</sup> Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499 (1991).

To be sure, many of those who don't recover have relatively small injuries. But, still, there are many patients in that 1,000 who suffer serious injuries (including a large number who die from malpractice) who are not compensated by tort law.

In the face of these numbers, one strategy is to shift the treatment of serious medical injuries away from the conservative/tort model and over to the liberal/no-fault model. Indeed, that is exactly what Professor Weiler proposes. Moreover, he argues that by redirecting the money now put into the medical malpractice system, we could provide sensible compensation to all seriously injured victims of medical accidents, not just seriously injured victims of medical malpractice. Under such a plan, he argues, not only would those seriously injured by accident be better off, but, as a class, medical malpractice victims too would be better off, even though, of course, many of those 30 in 100,000 who recover huge pain and suffering awards in tort today would come away with far smaller recoveries.

I have proposed a somewhat similar approach to serious auto accidents. In homage to New Zealand, I call for the creation of an Auto Accident Compensation Corporation (AACC).<sup>165</sup>

In the tradition of the liberal model, the AACC would collect revenue from three sources: (1) gasoline taxes; (2) drivers, based upon their driving record and driver experience so that young people and other novices would be charged more; and (3) vehicle safety, determined by an index measuring the safety of the car. These funding sources are designed to target costs in ways that promote both behavior control and a sense of fairness as to who should pay.

With these revenues, the AACC would pay no-fault benefits at a very generous level: Income replacement of 80 or 85 percent up to twice the average weekly wage, that's up to at least \$50,000 a year; medical expenses of up to at least \$500,000; plus other kinds of first party benefits such as for replacing home services. In addition, if this were socially desired, the plan could afford to pay modest lump sums of the New Zealand sort for pain and suffering, impairments and disfigurements.<sup>166</sup>

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<sup>165</sup> Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 711-714 (1990) and Sugarman, *Nader's Failures?*, *supra* note 163 at 299-305.

<sup>166</sup> Palmer, COMPENSATION FOR INCAPACITY, *supra* note 78. For recent New Zealand developments, see Richard S. Miller (forthcoming).

When I say the plan could afford those benefits, I mean that the AACC would have enough money to cover them even by setting contribution levels such that most drivers would pay into the AACC substantially less than they now pay for auto insurance that would no longer be needed. Obviously the AACC would provide many auto victims with much better compensation than does the current U.S. system, including many people who are victims of the fault of others. Combined with one of my proposals for handling smaller injuries, the AACC could sensibly concentrate on seriously injured victims of auto accidents.

Other liberal model schemes like this are also clearly possible. For example, we could adopt a no-fault air crash compensation plan. I've discussed this elsewhere.<sup>167</sup> Drug accident compensation plans, vaccine damage compensation plans, and so forth could add to the list.

Imagine now that the U.S. has adopted liberal model plans of this sort covering many types of accidents. At this point people would have to start asking themselves: why treat these classes of the disabled better than the disabled generally? And I think such distinctions would be difficult to maintain.

Once that conclusion were drawn, the logical policy response in the U.S., I believe, would be to improve the benefits paid by our Social Security disability system, a scheme aimed at the disabled in general.<sup>168</sup> In this way, the compensatory role for the specialized schemes would be reduced. This assumes, of course, that eligible claimants were required to seek social security first and the liberal model compensation plans paid only where social security coverage was lacking. That is, I am assuming that social security would be "primary" and the focussed no-fault plans "secondary."

I admit that not everyone would prefer social security to be primary even in a nation with a generous social net. For example, in Germany today, in the name of good social cost accounting, social security is secondary; the liberal model compensation plans and tort law are liable first and the social net is ultimately liable only where the others fail to apply. The upshot is that much accident litigation there essentially involves one insurance pool suing another. I am highly skeptical about whether any important gains in terms of fairness or behavior channeling

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<sup>167</sup> Stephen D. Sugarman, *Right and Wrong Ways of Doing Away with Commercial Air Crash Litigation*, 52 J. AIR L. & COM. 681 (1987).

<sup>168</sup> SUGARMAN, *supra* note 24, at 127-152.

are achieved by this, and I would want to save the administrative costs involved (although I admit that others see this differently).

I would be even more comfortable with the collective approach if other mechanisms were put in place to harness the talents of those who now try to police corporate wrong-doing through the personal injury system. Hence I favor arrangements that give ordinary citizens and their representatives better leverage to prod the regulatory process to act and that reward citizen efforts to uncover negligence by enterprises.

I am happy to see the personal injury lawyer well-rewarded for coming forward and identifying corporate wrongdoing. Certainly there are some areas where personal injury lawyers seem to have exposed dangers before others have done so, and we wouldn't want to lose that source of socially desirable disclosure. But the work of most plaintiffs' lawyers has nothing to do with uncovering secret wrongdoing; and even where products are newly shown to be harmful, the current system most rewards those lawyers who bring a series of cases concerned with the same basic problem, rather than moving on to new problems.

I admit that my proposals for more citizen involvement in the regulatory process may turn out to be naive and might not function as I hope. Nonetheless, this is the direction I think we should be heading. In short, we should combine a more populist approach to regulation with a community responsibility approach to compensation; or, as I have said in my writings, the idea is to de-couple the compensation of victims from the behavior control and fair punishment of wrongdoers.

This, of course, is a radically different approach from one which would try to improve tort law so as to have it better serve multiple goals simultaneously. Recently a study team engaged by the American Law Institute undertook a comprehensive examination of U.S. tort law.<sup>169</sup> This study at least collected data on the libertarian, liberal and communitarian alternatives to the conservative/tort approach. But when it came to making recommendations, the team largely proposed a modest tinkering with tort.<sup>170</sup> So far as the communitarian model is concerned, the ALI team begged off on grounds of (a) political implausibility and (b) lack of expertise. I find the latter reason so modest as to be disingenuous. The former reason might be right, but it is a little sad to have scholars shy away on those grounds, especially when

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<sup>169</sup> ALI REPORTERS' STUDY, *supra* note 2.

<sup>170</sup> Sugarman, *A Restatement of Torts*, *supra* note 141.

so much of what the study team did propose (much of it very clever) is now being ignored by the U.S. political process.

The authors of the study appear to have tried to generate support for their recommendations by portraying them as a compromise between the selfish interests of the plaintiff and defendant sides. But the report seems not to have been received in that way. Many advocates on both sides believe (or fear) that the report's recommendations would, on balance, be harmful to them.<sup>171</sup>

Perhaps the hostility of the defense side to the report is explained by the fact that in the wider U.S. political arena the defense interests have been trying to use their muscle to push back tort law in a one-sided way, that is, without giving up something in return. Some advocates want to push it back to the very modest role it played in the 1950s.<sup>172</sup>

Yet these defense-side efforts have not been all that successful. Business, physicians, and municipal governments have won some roll-backs here and there, but the changes have been uneven from state to state and not enormously great anywhere. This suggests to me that there may be room for some sort of compromise after all.

But rather than trying to compromise within tort law, the key might just lie in taking a wider vision. For example, business could say: "We'll agree to provide better compensation benefits for our workers and our customers through other mechanisms if we can be relieved from some of the burden tort law." And through this sort of deal, steps could be taken in the direction of the collective solutions that I favor.<sup>173</sup> Whether this will really happen, of course, only time will tell.

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<sup>171</sup> For a good example from the plaintiffs' side, see JERRY J. PHILLIPS, COMMENTS ON THE AMERICAN LAW INSTITUTE STUDY OF ENTERPRISE LIABILITY FOR PERSONAL INJURY (Apr. 1991 processed).

<sup>172</sup> Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987).

<sup>173</sup> For a proposal to achieve a similar solution via contract, see Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *NEW DIRECTIONS IN LIABILITY LAW* (Walter Olson ed. 1988) at 174.