There is a general consensus among lawyers, judges, and legal scholars that the state should respond to injury and illness with legal remedies that implement three goals. First, the state should ensure that all victims of misfortune, whatever its nature or cause, receive assistance in coping with the misfortune: replacing income lost through inability to work, obtaining medical services and other forms of care and rehabilitation, and dealing with pain and diminished capabilities. Second, the state should reduce the incidence of future misfortune by changing the behavior that caused it. Third, the state should express a moral judgment about the conduct that caused the misfortune and about the victim’s plight. Lawyers, judges, and legal scholars also tend to assume that the present legal regime adequately achieves these goals. Tort damages and social welfare programs realize the first goal, compensation; tort damages and regulation realize the second, deterrence; and tort damages and criminal sanctions realize the third, moral judgment. Legal briefs, judicial opinions, and scholarly articles repeatedly assert these connections between law and society as justifications for particular rules or decisions but rarely test these claims empirically. Compensation and Support for Illness and Injury casts grave doubt on the extent to which tort law and social welfare schemes actually compensate victims, deter inefficient risks, or satisfy the moral judgments of victims or society.

In Compensation and Support, the lawyers and social scientists at the Centre for Socio-Legal Studies at Oxford have conducted the most
comprehensive empirical investigation to date of the response to illness and injury. They also are the first to treat those two phenomena together. And they have been methodologically scrupulous. The authors conducted a screening survey of 35,085 individuals, which identified 4,795 people who had been incapacitated for at least two weeks (pp. 32-34). This is the book's first notable finding—the magnitude of the social problem of extended incapacity: 103.5 per thousand randomly selected respondents had suffered illness or injury leading to incapacity lasting at least two weeks during the preceding twelve months (p. 33). The authors then interviewed 2,142 of these 4,795 respondents: 1,202 accident victims and 940 individuals who had suffered illness. The interviewees included all identifiable victims of work and road accidents, criminal injuries, and industrial illnesses, and a one-in-two sample of the remainder (pp. 34-36).

These data reveal in richer detail than ever before the unfairness and inadequacy of our systems of compensation and support. They highlight biases of gender, age, class, and employment status that distort who recovers and how much. But bias is not the only injustice; tort damages and social welfare programs also are inadequate as mechanisms of compensation. Few victims successfully assert their claims, the source of the


2. See M. MACLEAN & H. GENN, METHODOLOGICAL ISSUES IN SOCIAL SURVEYS (1979). The authors are also contributors to Compensation and Support.

3. The American Bar Foundation study of legal needs found that 58% of all men and 44% of all women surveyed had incurred a serious tort problem during their lifetimes. B. CURRAN, supra note 1, at 117.

4. The data, of course, deal with Britain, not the United States, and direct extrapolation is risky. Among the salient differences between the two legal systems are the following: British tort law is less comprehensive and less generous than American, contingent fees are not permitted in Great Britain, British legal aid is provided by private lawyers and is available to a much larger proportion of the population (including tort victims) than American legal aid, the British social security system is far more comprehensive and generous than the American, and private insurance consequently seems to play a smaller role in Great Britain.
incapacity strongly affects the outcome, ongoing relationships and power differentials inhibit victims, unconscionable delays are pervasive, transaction costs are far too high, most claims are settled for less than their full value, damages are inadequate and inappropriate, and the cumulative inadequacies of the system leave victims and their families permanently disadvantaged.

Tort damages perform no better in deterring inefficient risks. The low probability that a tortfeasor will be held liable undermines and may even nullify the efficacy of tort law as a mechanism for ensuring optimal safety. A rational entrepreneur looking at the probability of having to pay damages almost always will gamble on risk rather than safety. Thus, the actual operation of liability rules encourages risk creators to choose which victim to endanger instead of choosing to reduce risk. Because Compensation and Support has chosen not to discuss the deterrent effects of tort liability I also will not pursue the issue; but the authors' enthusiasm for no-fault remedies suggests that they share my skepticism about general deterrence (pp. 20-21, 327-28).

Finally, the book presents social-psychological analyses of victims' attributions of blame and beliefs in their entitlement to compensation. These analyses demonstrate the considerable divergence between legal rules and moral judgments. This Review presents the authors' rich and revealing data with reference to these three themes: the bias, inadequacy, and normative dissonance of legal systems of compensation and support for the victims of illness and injury.

I

Bias

Bias enters the system of compensation and support at many places. First, although men and women suffer approximately the same number of serious illnesses and injuries, men incur more than twice as many road accidents as women and more than six times as many injuries at work, whereas women experience one and one fourth times as many “other” injuries as men and slightly more illnesses (p. 37, Table 1.2).

5. Of course, some of those who caused these accidents were not negligent. But even discounting for this, a high proportion of negligent tortfeasors escapes liability.


While the authors of Compensation and Support claim that sick-pay plans give employers an incentive to be safer (p. 216) and urge that levies and premiums for any no-fault compensation scheme be tied to the sources of risk (pp. 341-42, 348), they acknowledge the difficulty of identifying the causal nexus. Studies of the deterrent effect of tort liability on dangerous behavior have been rather inconclusive and unpersuasive. See, e.g., Bruce, The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Evidence, 6 Law & Pol'y 67 (1984) (discussing the possible effect of liability insurance premiums on driving behavior).

7. “Other” accidents are more than sixteen times as frequent as road accidents and almost ten
persons have a higher number of road and work accidents than the unmarried (reflecting their respective proportions of the population). But the widowed, divorced or separated have a higher number of both other accidents and illnesses than the married and single together, although the widowed, divorced, or separated represent a smaller proportion of the general population than the married and single combined (p. 31, Table 1.2). Road accidents peak between the ages of 55 and 64, work accidents between 25 and 54, but other accidents and illnesses both peak over 64 (p. 31, Table 1.2). The highest rates of road, work, and other accidents are found among unskilled manual workers, but illness is most frequent among skilled and unskilled manual workers and those who are economically inactive.8 The overrepresentation of men, married persons, the young, and workers in road and work accidents and the overrepresentation of women, the widowed, divorced, or separated, the old, and the unemployed in other accidents and in illnesses will acquire greater significance as we trace the different ways the law responds to these categories of misfortune.

Gender differences may be understated by the study's definition of misfortune as "some degree of deviance from the norm of ordinary activities of everyday life, and some level of consequent dependence on others" (p. 28). More precisely, the authors asked the respondents whether they had experienced "any illness, injury or handicap which made it difficult or impossible to do any of the things on this card," namely, self-care, communication, mobility, housework, school, or work activities (p. 28). I would expect people to perceive difficulties or impossibilities more readily in work activities (where they must satisfy the expectations of others) than they do in the home, and of course a higher proportion of men than women are employed. Furthermore, I would expect men to acknowledge their need for care by women more frequently than women would acknowledge their dependence on men.

8. The incidence of injuries generally varied inversely with socioeconomic group, although this variance was most marked for work injuries and less pronounced for road and "other" accidents and illnesses, except at the extremes of the socioeconomic spectrum (p. 31, Table 1.2). Skilled manual workers appeared to have the highest proportion of illnesses among all workers and more injuries than all workers except those in unskilled manual work (p. 37, Table 1.2).

American data for occupational injuries and illnesses show enormously disparate rates by type of industry, a variable that closely mirrors socioeconomic class. In 1974, for example, the annual incidence of work-related injury and illness per 100 workers was 48 times higher for truckdrivers than for stockbrokers; workers in logging camps lost 79 times more work days per 100 workers than did stockbrokers. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES, BY INDUSTRY, 1974, at 19, 21, 28 (1976). In a 1972-73 American survey, the proportion of workers who reported a work-related illness or injury during the previous three years varied from 18% for those with eight years of schooling or less to 11% for those with a college degree, from 29% for farm laborers and foremen to zero percent for sales personnel, from 17% for blue-collar workers to 8% for white-collar workers. R. QUINN & L. SHEPARD, THE 1972-73 QUALITY OF EMPLOYMENT SURVEY 163-64 (1974). Perception of risk generally correlated with the experience of misfortune. Id. at 156-57. Although the differences between white-collar and blue-collar workers and among occupations persisted four years later, differences between educational levels had diminished. See R. QUINN & G. STAINES, THE 1977 QUALITY OF EMPLOYMENT SURVEY 111-18, 124-26 (1979).
The severity of disability also varies with gender, marital status, age, and employment. Women report more severe disability than do men for all categories of accident and only slightly less severe disability for illness (p. 38, Table 1.5). The single and the widowed, divorced, or separated report greater severity than do the married in all categories of disability except that caused by work accidents (p. 38, Table 1.5). Severity increases most strongly with age, and severity of illness correlates inversely with socioeconomic group (p. 38, Table 1.5). The impact on employment is another measure of misfortune severity. The probability of returning to work (rather than being forced into premature retirement), the speed of return, and the probability of working full-time (rather than fewer hours) all vary directly with the number of hours worked before the incident and the worker's socioeconomic group and prior wage level; they also vary inversely with the regional unemployment rate. In other words, those already disadvantaged are affected most severely. The length of time off work also varies directly with age (those 55-64 are absent more than four times as long as those 25-34), marital status (the widowed, divorced or separated are absent more than twice as long as the single or married), and gender (women are absent a third again as long as men)(p. 264, Table 10.5). These differences, in turn, are largely a function of the fact that those who suffer illness are absent from work an average of almost fifteen months, more than three times as long as those injured in accidents (p. 263, Table 10.4). The cumulative differences in incidence and severity suggest that the need for compensation and support may be greatest among the elderly, women, the economically inactive, and those in the lower socioeconomic groups.

Yet, the distribution of legal remedies is almost the obverse of the pattern of incidence and severity. This results not from bias at the point of adjudication but rather from victims' decisions. It remains possible, therefore, to blame victims for their own passivity, conveniently ignoring that the law powerfully structures their responses. Because victim decisions not to claim are private and invisible, the legal system can retain the image of impartiality demanded by the ideology of liberal legalism.

9. Severity was divided into five categories, ranging from "No residual disability" to "Affected a lot all of the time" (p. 57, Table 2.8).
10. This is a summary of the data contained in Tables 10.1, 10.5, 10.8, 10.9, and 10.12 (pp. 259-71).
11. This same pattern of underclaiming is visible with respect to other grievances, such as consumer complaints. See A. Best, When Consumers Complain: Consumer Justice, Problems and Prospects (1981); A. Best & A. Andreasen, Talking Back to Business: Voiced and Unvoiced Consumer Complaints (1975); Best & Andreasen, Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress, 11 LAW & SOC'Y REV. 701 (1977). Similarly, most of the attrition in the criminal process occurs at the early stages (e.g., apprehension), where bias is most likely to creep in. See Abel, From the Editor, 12 LAW & SOC'Y REV. 333, 338-39 (1978).
But the actual disparities are striking. Women recovered tort damages in 8% of the accidents they suffered, men almost twice as often (p. 52, Table 2.3). This difference is attributable to the fact that women suffer 94% of their accidents in environments "other" than on the road or at work, whereas men suffer only 77% of their accidents in that category (p. 31, Table 1.2). Nearly half the victims of both road and work accidents considered claiming but less than a tenth of the victims of "other" accidents; between half and two-thirds of the former category consulted a lawyer but only a third of the latter (p. 62, Figure 2.2). As a result, 29% of road accident victims recovered damages and 19% of work accident victims but only 2% of "other" accident victims (p. 51, Table 2.2). These differences are reflected in the response of men and women to accidents. Although there were approximately equal numbers of men and women victims, one and a half times as many men as women considered claiming in the first place, and twice as many men actually consulted a lawyer (p. 63, Figure 2.3). Even when victims blamed someone else entirely for their injuries, only 38% of the women sought legal advice compared to

12. Virtually all these claims were for injuries, since tort damages almost never are recoverable in cases of illness. Men were more likely than women to suffer road and work accidents and marginally less likely than women to suffer illness. Nevertheless, illness was more than eleven times as common as road and work accidents combined (p. 31, Table 1.2). When we turn to social security benefits, which respond to illness as well as injury, we find that only 19% of female victims obtained them, compared with nearly three times as many male victims (56%) (p. 180). This disparity is consistent with the findings of the Users' Survey conducted by the Royal Commission on Legal Services. See 2 FINAL REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES 202 (1979) [hereinafter cited as LEGAL SERVICES]. Of those who consulted lawyers in 1977, 6% of men under 30 sought compensation for road injuries, but only 4% of women under 30 did so; 4% of men sought work injury compensation but only 1% of women under 30 did so. Id. Men and women were approximately equal proportions of those consulting lawyers (53% and 47%). Id. at 194.

By contrast, the American Bar Foundation study of the legal needs of the public found that women who suffered personal injuries were more likely than men to consult a lawyer (43% versus 26%). Furthermore, 60% of the women who did not consult lawyers did something about the problem but only 47% of the men not consulting lawyers did so. B. CURRAN, supra note 1, at 148.

13. Women also fare more poorly than men in recovering damages within the category of work accidents (13% versus 20%) (p. 52, Table 2.3).

14. The fact that 89% of women who consulted a lawyer obtained damages compared to 77% of the men suggests that women had the stronger legal claims although they pressed those claims less vigorously.

Some insight into the psychosocial dynamic underlying these differences may be gained from a study of the responses of women to sexual harassment at work. Women who accept traditional sex roles are more likely to blame themselves and other victims for being harassed. Jensen & Gutek, **Attributions and Assignment of Responsibility in Sexual Harassment**, 38 J. SOC. ISSUES No. 4, 121 (1982). Heterosexual women are less likely than lesbian women to be aware of sexual harassment. Schneider, **Consciousness about Sexual Harassment among Heterosexual and Lesbian Women Workers**, 38 J. SOC. ISSUES No. 4, 75 (1982). Self-blame sometimes may be the only way the victim can regain a sense of control over her life (even if an illusory one). Miller & Porter, **Self-Blame in Victims of Violence**, 39 J. SOC. ISSUES No. 2, 139 (1983).

54% of the men (p. 70).  

Similar differences in compensation can be tracked for age, socioeconomic group, and employment status. Those under 16 and over 65 were one-third of all victims but only 11% of successful claimants (p. 52). Once again, this is largely because those under 25 or over 54 suffered a much higher proportion of their accidents in the "other" category than those in between the ages of 25 and 54 (p. 31, Table 1.2). The greatest age disparities occur at the earliest stage of the claims process: 7% of victims under 16 and 17% of those over 65 considered claiming, compared to 37% of those between 31 and 50; 3% of victims under 16 and 6% of those over 65 consulted a lawyer, compared to 20% of those between 31 and 50; and 2% of those under 16 and 5% of those over 65 obtained damages, compared to 16% of those between 31 and 50 (p. 64, Figure 2.4). The correlation between socioeconomic group and successful claiming is counterintuitive: victims in households headed by professionals, and employers, or managers did substantially less well than those in any other category (p. 54, Table 2.5). But this pattern is unambiguous only in work accidents, where professionals and employers generally have no one against whom to claim (p. 55, Table 2.6). Furthermore, professionals, employers, and managers may not lose any
income when they are injured and, when they do, may have loss insurance to cover any such deficit. 20 By contrast, being employed at the time of the accident greatly increased the likelihood of compensation: those in full-time employment, though only half of all victims, were more than three-quarters of all successful claimants, whereas housewives, though 14% of victims, enjoyed only 5% of recoveries (p. 56). Similar differences characterized social welfare programs: 73% of full-time workers obtained social security, compared to only 11% of full-time housewives (p. 180). Thus gender, age, and employment status all cumulate inequities in compensation.

The legal remedies offered to victims both explain the differences in victim behavior and amplify the biases those differences introduce. These remedies have the “overriding aim of protecting the labour force (both earners and potential earners)” (p. 3). Indeed, the Oxford study endorses this emphasis on “productive loss” (p. 276) and on returning “earner-victims . . . to work as quickly as possible” (p. 313). Tort damages, of course, are proportional to income. Eligibility for sick pay and the duration of payments vary with the length of employment (p. 212). Even social security, which initially protected everyone from falling below the same minimum level, increasingly has become a means of preserving the beneficiary’s individual standard of living (pp. 22-23). This

A major American study of nearly 1500 households in which at least one member suffered personal injury in an automobile accident between August 1975 and August 1977 found a very strong correlation between household income and the likelihood of recovery under tort law. R. Houchens, Automobile Accident Compensation III: Payments from All Sources 23-24 (Rand Corporation draft 1984). And the British Users' Survey found a strong correlation between socioeconomic group and use of lawyers' services in property matters. 2 LEGAL SERVICES, supra note 12, at 205.

20. To the extent that either explanation is correct, the legal system is not biased against members of higher socioeconomic groups just because they recover tort damages less often.

Compensation and Support suggests that unions assist members to claim damages for work injuries (p. 53), but the disparity also is found in road and “other” accidents, where unions are less active. See infra note 36 and accompanying text. Furthermore, claims rates were higher for intermediate and junior nonmanual workers, who often are not unionized, than for skilled manual workers, who generally are unionized (pp. 54-55).

The American Bar Foundation study of legal needs found that income was related inversely to the likelihood that the victim of a serious personal injury would consult a lawyer: 44% of those in the lowest income quintile sought legal advice compared with 25% of those in the highest quintile (significant at the 0.02 level). B. CURRAN, supra note 1, at 156 & n.136. But a study of Detroit city households in the late 1960's found that the likelihood of consulting a lawyer on an insurance problem varied directly with income, occupation, education, and home ownership. Indeed, higher proportions of whites than blacks sought legal advice, as did higher proportions of men than women. Mayhew & Reiss, The Social Organization of Legal Contacts, 34 AM. SOC. REV. 309, 313-15 (1969). These figures combine plaintiffs and defendants, however, and the American Bar Foundation study, see B. CURRAN, supra note 1, found that patterns of lawyer contact varied by party.
greater generosity toward the employed and the highly paid is another reason why they are more likely to press successful claims.

Because of the sexual division of labor and wage discrimination against women, differences based on employment status and on income reappear as gender biases. The mean sick pay award to men was £300.50, whereas women obtained only £133.50 (p. 215). Indeed, because the average time off work was a third longer for women, the mean weekly awards were even more unequal (p. 215; p. 264, Table 10.5).21 Women, especially the elderly, are disproportionately the victims of crime, but the compensation scheme for criminal injuries is less generous than tort (p. 200). Perhaps because women obtain less adequate legal remedies they also rely more heavily on informal systems of support. As we saw above, women are overrepresented in the “other” accident category; 65% of those victims rely on “informal support,” compared to 53-55% of road and work accident victims (p. 245, Table 9.5). “Informal support” is the gift of services, usually by a spouse, parent, child, or in-law; victims often require such support daily for a period of many months (pp. 245-47). Thus remedies for accident and illness are segregated by gender in ways that parallel the segmentation of the labor market.22

Although the authors of Compensation and Support deplore some of these differences in the frequency and magnitude of recovery, they endorse and would perpetuate many of the basic structural inequalities. They argue that those who suffer income loss because of illness or injury should be maintained at a higher standard than those who receive welfare benefits for other reasons (p. 329).23 They support the distinction between earners and nonearners, although they would define the former category broadly (p. 339).24 They would retain a connection between a victim’s contributions to a social welfare program (through taxes) and the benefits a victim can obtain (p. 330). And they see no objection to preserving income differences, through either collective bargaining for

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21. There was, however, no difference in the amount of social security payments between men and women (p. 180).
22. Sex stereotypes also persist in the grant of social security benefits. For example, a male applicant was rejected because he gave up his job to take care of his ill wife (p. 189).
23. The authors do not address the plight of those who suffer income loss because of congenital disability (mental or physical), emotional trauma, substance abuse, or long-term structural unemployment.
24. The vagueness of the definition of “earners” suggests that the authors have been unable to resolve critical issues. Thus, they exclude retirees and “those below retirement age whose previous life-style had shown that they had no intention of earning in the future, viz. those living entirely on unearned income, or those who had clearly chosen to opt out of the labour market” (p. 339). How do we determine that someone has “chosen” to opt out of the labor market? This approach resembles the disqualification of the “voluntary poor” from eligibility for legal services in the United States. See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 1007(a)(2)(B)(iv), 88 Stat. 378, 383 (codified at 42 U.S.C. § 2996(a)(2)(B)(iv)(1982)).
higher levels of sick pay or individual private loss insurance (pp. 345, 349). In short, *Compensation and Support* highlights biases in the compensatory process, but its authors would preserve some, though not all, of these inequities.

II

INADEQUACY

The reproduction of inequalities of gender, socioeconomic group, employment status, and age is just one instance of the gap between the promise of the legal system and its reality. Because the promises of the law express many of our social ideals (though certainly not all), it is worth tracking other disparities through the system from beginning to end.25 One purpose of tort law is to restore the victim to the status quo ante, as far as possible (pp. 17-20).26 Yet we have seen already that the claims rate is very low and varies strongly with the source of disability.27 The more frequent and serious the disability the less likely and adequate is recovery. For those three out of every five victims whose serious disabilities were caused by illness, tort remedies generally are unavailable, and, as we will see below, other support systems also are inadequate (pp. 31, 50). Yet, illness victims may have the greatest need, for they suffered the longest hospital stays and the greatest residual disability (p. 241, Tables 9.1-9.2).28 This same disproportionality between need and remedy also characterizes the three categories of injury victims. Among the two out of every five victims whose serious disability was caused by injury, most (86%) suffered "other" accidents, 8.7% suffered work accidents, and only 5.3% suffered road accidents (p. 31, Table 1.2). Yet the likelihood of recovery was 2% for "other" accidents, 19% for work accidents and 29% for road accidents (p. 51, Table 2.2). Because of this inverse relationship only 12% of all accident victims recovered damages. If we make the plausible assumption that virtually none of those who


26. See, e.g., M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 432 (3d ed. 1983) ("The fundamental goal of damage awards in the unintentional tort area is to return the plaintiff as closely as possible to his condition before the accident."). This, itself, is a mystification—one that is extraordinarily pervasive and deep-seated. The most that tort damages ever achieve is to persuade others that the victim has been compensated—sometimes overcompensated. The victim never agrees. For example, families who lost a loved one or who suffered acute psychological distress as a result of the Buffalo Creek disaster persistently denied that the large monetary settlement, $13.5 million, could repay them. G. GLESER, B. GREEN & C. WINGET, *PROLONGED PSYCHOSOCIAL EFFECTS OF A DISASTER: A STUDY OF BUFFALO CREEK* 22-23 (1981).

27. See supra text accompanying notes 11-20.

28. They also had the highest use of general practitioners and of local authority and community health services (pp. 243-44, Tables 9.3, 9.4).
suffered illness obtained damages (the survey found only two cases (p. 327)), then tort remedies benefited less than 5% of the severely disabled (p. 51, Table 2.2). Nor did the system compensate those accident victims with the greatest need. There was little correlation between disability and successful claims. Once again, the kind of accident was much more important than the extent of disability: only 3% of “other” accident victims with the most serious disabilities recovered damages, but 23% of road accident victims with no residual disability were successful (p. 57, Table 2.8). Thus, the most severely disabled tend to recover the least.

By examining the tort claims process in greater detail, we can gain further insight into why recovery rates are so low and why they differ so greatly by type of accident. The following table presents the successive stages in the transformation of tort disputes.

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29. There was a slight correlation for those with residual disability but not for those over 40 years of age (pp. 56-57; p. 59, Table 2.9). Moreover, the correlation with time off work was imperfect (p. 58, Table 2.10).

A Rand Corporation study of automobile accident victims confirmed the recurrent observation that the tort system compensates those who suffer slight injuries much more fully than those who suffer seriously. See J. Hammitt, Automobile Accident Compensation II: Payments by Auto Insurers 36, 48 (Rand Corporation draft 1984); 3 R. Houchens, supra note 19, at 27.


31. This table is an adaptation of p. 62, Figure 2.2.

An earlier and less elaborate British investigation produced results that tend in the same direction. B. Abel-Smith, M. Zander & R. Brooke, Legal Problems and the Citizen: A
This table graphically reveals that the greatest attrition of grievances occurred at the earliest stages of the dispute and that the failure of victims of "other" accidents to recover damages was attributable largely to their reluctance to consider claiming, not to discouragement at a later stage. More than 90% of "other" accident victims dropped out during this first stage, compared to just over half of road and work accident victims. The other major decline occurred when those who thought a claim was possible contemplated consulting a lawyer: almost one in five of the remaining road accident victims disappeared, more than two in five work accident victims, but nearly three in five "other" accident victims. At every stage "other" accident victims were the least likely victims to press forward or to succeed.

These differences appear to reflect the degree of institutionalization of the claims process in each category of accidents: the existence of regularized procedures for making claims and the availability of lay and pro-
fessional advice. Road accidents occur in public, the defendant generally is identifiable, the police usually are summoned to record the event, and insurance is virtually universal. Similarly, workplace accidents are a common experience, fellow workers provide sympathetic witnesses, the employer is the obvious and solvent defendant, and unions offer advice and assistance. But most "other" accidents happen in private places, such as the home; usually there is no obvious tortfeasor, and victims tend to lead isolated lives. In addition, the road accident victim is claiming against a stranger and the work accident victim against someone already perceived as an adversary (the boss), but the "other" accident victim may be claiming against a family member or a resident landlord.

Compensation and Support offers additional evidence for this interpretation that the institutionalization of the claims process influences the likelihood of claiming. Of those who consulted a solicitor, 90% first discussed the matter with another. Of these, 70% said that the idea to make the claim came from these advisers, most of whom were considered "social superiors": trade union officials, hospital personnel, physicians, police, volunteers in advice bureaus, relatives and friends (pp. 65-66). The trade union was the single most frequent source of advice, but it


The degree of institutionalization can change quite rapidly. Until the 1970's, American workers suffering lung impairment or cancer did not realize they could seek tort damages from third-party manufacturers of asbestos. But once a significant number of successful claims were made, the claim rate rose rapidly. In 1967-68, only 3% of deaths caused by asbestos led to lawsuits; by 1975-76 the proportion had risen to 32%. J. Kakalik, P. Ebener, W. Felstiner & M. Shanley, Costs of Asbestos Litigation 9 (1983) (citing I. Selikoff, Disability Compensation for Asbestos-Associated Disease in the United States (1981)) [hereinafter cited as ASBESTOS LITIGATION COSTS]. For an analysis of claiming behavior that emphasizes resources available to victims, see Randall & Short, Women in Toxic Work Environments: A Case Study of Social Problem Development, 30 SOC. PROBS. 410 (1983) (resistance to company demands that female employees be sterilized).


rarely assisted road or "other" accident victims (p. 66, Table 2.1).36 Lawyers were indispensable: 92% of successful claimants had a solicitor.37 But accident victims differed in their access to solicitors. A third of the lawyers consulted were employed by or had a regular relationship with a trade union, which would help only members, especially with work accidents. Half the victims who consulted a private practitioner were recommended to the solicitor by others; half of these recommenders were relatives, and one quarter were friends or neighbors (pp. 80-81).38 The advice of intermediaries also presumably accelerates the victim's decision to consult a lawyer, and this, in turn, may have affected the likelihood of ultimate success (pp. 104-05).39

A victim who has considered claiming may abandon or lose the claim or accept an inadequate settlement for a number of reasons. The claim may threaten an ongoing relationship with the defendant or provoke retaliation, especially by an employer (pp. 74-5, 115, 155).40 Difficulties of proof may lead a victim to drop a claim (pp. 113-14, Table 3.12; p. 116). But even when the claimant perseveres, evidentiary problems may explain why almost nine out of ten road accident victims and three out of four work accident victims who consulted a lawyer obtained damages, compared to only two out of three victims of "other" accidents, where the setting does not preserve the evidence.41 Problems of proof


Advice also could discourage claimants, especially if it came from an apparently authoritative source: 86% of those told they had no claim did not pursue it further (p. 67). The advisers in these cases were the defendants: employers and local authorities (p. 117). See E. ABEL, TERMINAL DEGREES: THE JOB CRISIS IN HIGHER EDUCATION 180-203 (1984) (discussing effect of advice on women contemplating sex discrimination claims).

37. In an earlier study of three poor London boroughs, 68% of those who sought advice, but only 12.5% of those who acted on their own, obtained compensation. Most of those who succeeded on their own were involved in work accidents. In "other" accidents, those who failed to seek advice secured compensation only 7% of the time. LEGAL PROBLEMS, supra note 31, at 170.

The Rand Corporation study of automobile accident victims also found that retaining a lawyer increased both the likelihood of success and the amount of recovery. See J. Hammitt, supra note 29, at 60.

38. This is consistent with numerous other studies confirming that individual clients obtain lawyers by asking the advice of relatives or acquaintances. See, e.g., B. CURRAN, supra note 1, at 200-02; F. MARKS, R. HALLAUER & R. CLIFTON, THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES 67-71 (1974); 2 LEGAL SERVICES, supra note 12, at 211-14; 2 REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES IN SCOTLAND 62-63 (1980); R. TOMASIC & C. BULLARD, LAWYERS AND THEIR WORK IN NEW SOUTH WALES: PRELIMINARY REPORT 68-69 (1978); Ladinsky, The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channelling of Clients, 11 LAW & SOC'Y REV. 207, 219 (1976); see also B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 197-201 (1970) (discussing the lawyer referral system).

39. Of those victims who consulted a lawyer within the first four weeks following the accident, 81% recovered; of those who waited six months, only 45% obtained compensation (p. 105, Table 3.7). Of course, it is not possible to infer the direction of causation from this correlation.

40. Crime victims also were more likely to report attacks by strangers (p. 203). On the relation between social distance and tort claims, see Engel, supra note 35.

41. See Table 1 supra at text accompanying note 31.
also contributed to much of the one and a half to two-year delay experienced by successful victims.42 Once a victim consults a lawyer (which more than 90% of successful claimants do), the latter dominates the proceedings. Only 4 out of 182 successful victims even knew what fees their solicitors charged (p. 132).43 Although 178 out of 182 successful claims were settled (98%), solicitors apparently neither kept clients informed of the negotiation process nor explained how the final figure was reached (pp. 92, 110).44 Almost all victims accepted the settlement on the advice of either a lawyer or trade union official (p. 124).45 But there is some evidence that British solicitors, whose full fees are paid by the defendant regardless of the size of the settlement, may be less energetic in seeking the maximum recovery for their clients than American lawyers, whose contingent fees are proportional to the amount recovered.46 Although 90% of the solicitors themselves thought damages were adequate in each case, 17% of the clients complained about the lack of lawyer interest, delay, or the inadequacy of damages (pp. 123, 127). Six cases were dropped because of solicitor negligence, though the clients seemingly never considered switching lawyers or suing for malpractice (p. 118).

Because virtually all claims were settled, the relative bargaining power of claimant and defendant strongly influenced the outcome.47 It was a very unequal battle. The capacity of the victim to hold out for

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42. Victims reported an average delay of nineteen months, while solicitors reported an average of twenty-two and a half months (pp. 105-06, 109). No-fault systems of compensation are a great deal faster in making initial payments to victims, although they do not conclude the matter more quickly. J. Hammitt, supra note 29, at 112-13.

43. In Great Britain, the legal fees of a successful plaintiff are paid by the defendant. In the British Users' Survey, more than half those who used lawyers in tort matters said that the solicitor had not issued a bill, and only 12% knew in advance what the bill would be. 2 LEGAL SERVICES, supra note 12, at 246, 250.


45. The first offer was accepted in 59% of the 58 cases where a trade union official was consulted (p. 135 n.14).

46. Although the contingent fee is illegal in England, the fact that almost all clients recover something when represented strongly suggests that solicitors take only cases they know they can win, expecting their fee to be paid by the defendants (pp. 98-99). Compensation and Support reveals that 94% of the 51 solicitors who provided data were paid their fees by the defendant (p. 128).


However, a recent study found little difference in time invested in cases by plaintiffs' lawyers paid on an hourly and a contingent fee basis. See Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 U.C.L.A. L. REV. 72, 108-09 (1983).

47. There was a positive correlation between the size of plaintiff's solicitors' firm and the plaintiff's determination to hold out for better offers (p. 100). Jerome Carlin also found a positive relationship between what he called upper-level solo practitioners and willingness to sue. J. CARLIN,
more correlated strongly with the value of the ultimate settlement: second offers were a third to a half higher than first; third offers were a third higher than second and almost twice as high as first (pp. 97, 101-04, Table 3.6). Yet victims accepted the defendants' first offers in almost two-thirds of settled cases, second offers in half of the rest, and third offers in four-fifths of the remainder (a total of 96% of all settlements) (p. 95, Table 3.3). The most severely disabled were under the greatest pressure to settle (because they were the most needy) and also evoked the greatest resistance from defendants (because the damages were highest). Thus, although the likelihood of filing a claim varied directly with severity of disability, the likelihood of recovery varied inversely with severity (p. 65). And though victim determination to hold out for a better offer generally varied with the degree of disability, those most severely disabled accepted the defendant's offer about as promptly as those with no residual disability (p. 96).

These institutional obstacles and distortions not only prevented many needy victims from recovering anything, they also deprived successful victims of adequate compensation. Half of all accident victims obtained less than £500, three-quarters less than £1000, and eight-ninths less than £2000 (pp. 86-87). The median was highest (£750) for "other" accident victims (who were least likely to recover) and lowest (£412) for road accident victims (who were most likely to do so) (pp. 87, Table 3.1). Where solicitors reported the breakdown of damages, average compensation was £248 for lost earnings, £93 for out-of-pocket

Lawyers on Their Own: A Study of Individual Practitioners in Cook County 78-79 (1962).

The prevalence of settlement as the dominant mode of resolving disputes, especially tort claims, has been documented in numerous contexts. A study of workers' compensation claims in Illinois found that 69% were settled prior to arbitration. See Sincere, supra note 31, at 1087. In the Australian state of Victoria, 86% of the 9,107 formally contested workers' compensation claims in 1981 were settled by the parties before a hearing. Friend, Workers' Compensation: Who's Ripping Off Whom?, 8 Legal Service Bull. 109, 110 (1983). See generally H.L. Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment (1970); authorities cited supra note 1.

The asbestos litigation also confirms the relationship between the plaintiff's ability to hold out and the amount of compensation obtained. Victims who settled before trial received an average of $60,000, those who settled after the trial began received $189,000, and those who won a jury verdict recovered $388,000. J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom, & M. Shanley, Variation in Asbestos Litigation Compensation and Expenses 19-21 (1984). Of course, this also may represent a self-selection: victims with larger and stronger claims may hold out for a jury verdict. Yet there was a strong relationship between mode of disposition and amount of compensation even when other variables were controlled. Id. at 56, 58.

48. A study of jury awards to tort victims in Cook County (Chicago) between 1960 and 1979 found that the average was only $7,800 (in 1979 dollars) and that most claims for lost income and medical expenses were about $1,000. Civil Justice, supra note 16, at 20-21 (citing M. Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County (1984)). The Rand study of automobile accidents found that the median wage loss awarded was $160, or just over a week's pay, and the median medical expenses awarded were $100. R. Houchens, supra note 19, at 18-19.
expenses, and £973 for nonpecuniary damage (p. 90). In almost half the cases, damages were reduced by reason of the victim's own negligence (p. 91). Because of the delay in obtaining the award, it no longer could serve as "compensation": only 18% of successful claimants used their recoveries for living expenses, whereas 45% added to savings, and 37% invested in consumer durables (pp. 120-22).

Compensation and Support also reconfirms the extraordinary inefficiency of the tort system as a means of compensating victims, even though 98% of claims are settled. The legal fees of successful victims averaged 18% of their recoveries. But fees were higher in the small cases, which were far more common. In the three out of four cases settled for less than £1000, the victim's legal expenses averaged 29% of the recovery, and in a quarter of the latter cases it was 48% or more (p. 129, Figure 3.5A; p. 130, Figure 3.5B; p. 132). And these figures, of course, represent only the plaintiff's legal expenses; the Pearson Report estimated that the total costs of the tort system, including insurers' costs, were 87% of the damages paid (p. 132).

In view of the inadequacy of tort remedies for injury and their complete failure to respond to illness, it is essential to look at the other systems of support. Social security originally was intended to protect the entire population against destitution. We have seen already that it favors full-time workers over the unemployed or underemployed and thus men

49. In assessing these figures, it is important to remember that all victims were disabled for at least two weeks (p. 33) and that 40% of all cases involved permanent disability (p. 90). Nevertheless, the median award for lost earnings appears to represent only about three to four weeks wages (p. 87, Table 3.1).

50. These percentages total more than 100% because of multiple uses.

51. See supra note 1.

52. American studies have estimated defense (not total) expenses as a proportion of compensation paid at 27-28% for medical malpractice, 35% for product liability, and 42% for asbestos cases. ASBESTOS LITIGATION COSTS, supra note 33, at 37. In the $1 billion of asbestos claims closed thus far, plaintiffs and defendants have spent $425 million (excluding plaintiffs' damages) to pay compensation of $236 million, or an average expense of $60,000 per case to pay $35,000. Id. at 39-40. These are not the costs of extended trials; only 4% of all claims went to trial. Id. at 14.

In addition, the public cost of operating the judicial system in civil matters has been estimated at $2 billion a year, of which about $300 million is for tort claims. Civil Justice, supra note 16, at 16 (citing J. Kakalik & R. Ross, Costs of the Civil Justice System: Court Expenditures for Processing Civil Cases (1984)). If a tort case is settled after filing, it costs the government $50 or less. If there is a hearing and a conference but the case is settled before trial, it costs state governments $311-393 or the federal government $2,193-5,213. If there is a nonjury trial, it costs state governments $4,225-4,501 (based on California) or the federal government $4,503-14,698. And if there is a jury trial it costs state governments $3,386-8,991 or the federal government $8,422-15,028. Id. at 15-16 (citing J. Kakalik & A. Robyn, Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases (1982)).

The workers' compensation system is not that much more efficient. Australian estimates suggest that it costs $1.47 in Victoria and $1.59 in New South Wales (in Australian dollars) for each Australian dollar paid to a beneficiary. 3 National Comm. of Inquiry, Compensation and Rehabilitation in Australia, Part 6, ¶ 10 (1974).
over women. Yet even this would not prepare us for the fact that 62% of the victims in this survey received no social security benefits or that 31% of the support granted took the form of supplementary benefits—a non-contributory welfare program intended to function as a last resort (pp. 174-76, Table 5.2). Although social security presents fewer obstacles to claimants than does the tort system (only 10.9% of the social security claimants interviewed reported difficulties), more than a quarter of the problems encountered by social security applicants concerned eligibility and about two-fifths revealed bad administration (pp. 186, 190-91, 193).

A compensation program for the victims of criminal injuries reached even fewer of its ostensible beneficiaries. Out of the twenty victims the authors thought were entitled to recover, only seven made successful claims. Victims did not seek compensation following eight crimes reported to the police, nor did the police encourage an application. The Criminal Injuries Compensation Board could deny an award if the victim’s lifestyle was “inappropriate” or if the victim was living with the offender or might live with him again. And the average award was only £245, even though the statutory minimum was £50 (pp. 201-03, 208-09).

Sick pay schemes, a form of involuntary group loss insurance purchased by the employer, cover nearly four-fifths of full-time workers. Yet only 56% of the full-time worker victims surveyed obtained sick pay (p. 213). Furthermore, the mean weekly sick-pay benefit was only £8, although this was sufficient, when combined with social security, to restore nearly four-fifths of sick pay recipients to full pay (pp. 213-14, Table 7.2). Finally, even though some victims are covered by individual loss insurance, the numbers compensated by this source and the amounts recovered are trivial. Only 11% of the respondents to a 1975 British survey carried any loss insurance for personal accidents. Indeed, the total annual premium for all of Britain in 1976 was less than £130 million, little more than a tenth of all life insurance premiums, despite the fact that the number of disabling accidents far exceeds the number of premature deaths (pp. 223-24, Table 8.1). Compensation and Support found that only 41% of those covered by private loss insurance (5.7% of all victims) received any payment from their insurers, and the mean recovery was only £81, of which £30 was lost earnings (pp. 224-26, Table 8.2).

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53. Women are disproportionately the victims of criminal violence and thus are more affected by the inadequacies of the compensation scheme. The exclusions based on “lifestyle” and cohabitation obviously express sexual stereotypes.

54. Part of the reason may be that most schemes exclude victims of crime, alcohol, self-injury, willful misconduct, negligence, and sports, and some give employers discretion to deny payment in any case (pp. 212, 214).

55. The authors of Compensation and Support note that an earlier British study, the Pearson...
have remedied the inadequacies of tort law.

Further evidence of the compensation and support system's failure to restore victims to the status quo ante is the devastating effect of illness and injury on victims and their families. First, of those victims who were in full-time work or education at the time of the misfortune, 20% said it had affected their job situation, earnings, or education (p. 276). Of those who retired subsequent to the event, 53% did so because of it; of those who changed jobs, 62% attributed this to the misfortune (p. 270). Even among those who stayed with the same employer, 10% worked fewer hours, 11% suffered a pay cut, and 18% performed different work (p. 270). Second, households containing a victim were worse off than other households: less than half as many had weekly household incomes over £100 (13.6% versus 30.5%); one and a half times as many had weekly household incomes below £60 a week (58.4% versus 38.5%); the mean weekly income was a quarter less (£62 versus £82); because victim households were larger than those in the general population, they were even poorer than these statistics indicate; and one and a half times as many were below the poverty line (23% versus 16.5%) (pp. 285-86, Table 11.1; p. 287, Table 11.2; p. 312).\textsuperscript{56} Combining these two sets of observations reveals that the impact of illness and injury on some households is truly catastrophic. A victim who is head of a household is much less likely to work following the event than one who is not (47.5% versus 71% of victims) (p. 293, Table 11.6). This is one reason why the mean weekly income of households headed by victims was less than two-thirds the national average (p. 294, Table 11.7). And where the victim was unemployed at the time of the interview or was severely disabled, household income dropped to half the national average (p. 294, Table 11.8; p. 296, Table 11.9).\textsuperscript{57}

Report, found that 7% of victims recovered a mean of £70 from their insurers (p. 225). Figures for the ratio of premiums to losses are difficult to obtain, but consider the following:

A study by the Insurance Department of New York State revealed that in 1968 air trip insurers paid out only 5.2 cents of every premium dollar. Over the period 1961-68 the average payout was 25.7 cents. The Department then ordered an adjustment—either lower rates or higher benefits—that would produce a minimum payout of 40 cents per premium dollar.

M. FRANKLIN, INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 633 (1971). Recently, an exposé of the insurance industry asserted that payouts were the following percentages of premium dollars: flight insurance—10%, rental car insurance—20%, cancer insurance—41%. A. TOBIAS, THE INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW 72 (1982).

56. These differences cannot be explained by the incidence of injury and illness (though even if they could, such an explanation would condemn the social system that exposes the poor to greater risk). Only skilled manual workers were consistently overrepresented among the ill and injured; otherwise, socioeconomic group correlated with exposure to work and road accidents but not with exposure to the other four-fifths of all injuries and illnesses (pp. 36-37, Table 1.4).

57. Finally, if the victim was displaced as the main earner, household income dropped below half the national average: £39 rather than £82 (p. 304, Table 11.15).
In short, the promise of the law to restore victims to the status quo ante is unfulfilled. Few victims ever assert their claims for compensation, fewer recover, and those who do recover inadequately. Again, the pattern of legal compensation appears inversely related to the victim’s need.

III
NORMATIVE DISSONANCE

Tort law fails as a system of compensation and support for illness and injury and as a means of controlling risk; it is not redeemed by either social security or private insurance. How does it fare as an expression of moral judgments? Although there is some congruence between the victim’s attribution of fault and the victim’s belief that the person at fault should pay compensation, the divergence between these two judgments is just as striking. Half the accident victims who thought that a particular person or organization should compensate them did not view that person or organization as at fault. Conversely, nearly a fifth of those who believed someone was at fault felt that the culpable person should not compensate them (p. 149, Table 4.1). The first type of dissonance appears most strongly at work, the only category of injuries in which the proportion of victims feeling that someone should pay is higher than the proportion believing that anyone is at fault (p. 151, Table 4.3). Indeed, one out of every five work accident victims who believed they deserved compensation justified this claim solely on the ground that the injury occurred at work (p. 154). The second type of dissonance is victim reluctance to draw the conclusion that they deserve compensation from the mere fact of fault or blame. A fifth of those victims who judged someone at fault still did not hold that person morally to blame; of the victims who held this view, half thought such a person should not pay compensation. Even among the victims who thought that a particular person was both at fault and morally to blame, two-fifths still did not think the wrongdoer should pay compensation (p. 156-57, Table 4.6). This suggests that compensation is paramount in the minds of victims. Moral judgments are instrumental, not ultimate; they are shaped so as to justify claims against the likeliest source of compensation and are subordinated when they interfere with this goal. Thus the inadequacies of the system of compensation and support also distort the moral judgments formed by victims (pp. 159-60).
CONCLUSION

*Compensation and Support* makes a major contribution to our understanding of the system of compensation and support for illness and injury. In the face of the extensive empirical data it has carefully collected and analyzed, judges, legislators, and legal scholars will find it hard to deprecate the magnitude of the threat of illness and injury, to claim that tort liability adequately controls risk, to disregard the differential impact of injury and illness and the bias of the systems that respond to misfortune, to pretend that those systems restore victims to the status quo ante, to ignore the catastrophic impact of injury and illness on many households, or to justify our fault-based tort law as an expression of popular morality. Confronted by this bitter reality, the complicated rationalizations of tort law as compensation, control, or justice collapse like a house of cards.