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Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer

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Revolutions do not always turn out as well as their makers expect. Hoped-for improvements fail to materialize, or new problems replace old ones, or the old regime is followed by something far worse. Gary Schwartz skillfully conveys the optimism and enthusiasm that ambitious judges and bright young scholars brought to the task of remaking the law of torts in the 1960s, as well as the disillusionment that set in by the late 1980s.[1] As he points out, after the vast changes of the 1960s and 1970s, almost no one is happy with contemporary tort law. Liberals believe it is still too restrictive and want to abolish it in favor of an insurance scheme to compensate victims of accidents, while conservatives think current tort doctrine already favors the plaintiff too much and would cut back on liability.[2] By the mid-1980s, the level of dissatisfaction was so high that state legislatures undertook the most active period of statutory reform of tort rules in western legal history.[3]

As a leading participant in the ongoing debate over the shape of tort law, Schwartz is bound to perceive tort trends in terms of the

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[1] Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); *cf.* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480 (1990) (identifying through empirical study "a significant turn in the direction of judicial decision making away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries").

[2] Schwartz, *supra* note 1, at 680-83 (discussing tort reform statutes); *see also* Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 1 (1988) (stating that criticism of tort system comes from all directions).

[3] *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 220-22 (1990) (tabulating tort reform statutes enacted in 50 states).

framework he himself helped to build. As he sees it, the aim of tort law is to achieve both deterrence and fairness in allocating losses due to unintentional injuries.[4] The central normative problem is whether negligence or strict liability better achieves these ends.[5] His current paper, however, addresses positive rather than normative issues. On the descriptive plane, the big question in the modern history of torts is whether negligence or strict liability is the more important liability rule. Consequently, the focus of his attention is Professor George Priest's view that liability without fault is the dominant theme in the torts revolution.[6] Schwartz effectively rebuts this claim by marshalling the evidence in favor of negligence as the principal liability rule.

I have no quarrel with Schwartz's description of events or his analysis of the cases. Rather, my comments are directed at the foundations of Schwartz's interpretive history of modern tort law. In demonstrating the vitality of negligence, delineating the rise of the new law of torts, and describing the current disappointment with it, Schwartz relies upon the premise, widely shared among leading torts scholars of all ideological and methodological schools, that tort rules do and should serve some social goal or goals.[7] The argument among torts scholars is over what goals we should pursue and how best to realize them. Given the common ground shared by the participants in the torts debate, it is easy enough to see why

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[4] *See* Schwartz, *supra* note 1, at 607 ("Negligence liability . . . is associated with strong fairness values . . . . Yet negligence liability is also supported by a concern for safety. An obvious safety advantage of negligence liability is that it can discourage improper harmful conduct; indeed, a deterrence rationale has been influencing tort judges for over a century."); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 727 (1978) (arguing that considerations of fairness make comparative negligence preferable to contributory negligence); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 365 (1990) [hereinafter Schwartz, *Ethics and Economics*] (stating a belief that principles of compensatory justice provide a major part of the rationale for the tort system).

[5] Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 977-1005 (1981) [hereinafter Schwartz, *The Vitality of Negligence*] (evaluating various strict liability proposals).

[6] *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) (introducing enterprise liability theory); George L. Priest, *Modern Tort Law and its Reform*, 22 VAL. U. L. REV. 1, 7-22 (1987) [hereinafter Priest, *Modern Tort Law*] (explaining that all expansions of liability in modern tort law are variations of accident reduction and insurance themes).

[7] *See infra* text accompanying notes 13-32.

Schwartz directs his attention to Priest's heresy. When the emphasis is on the purposes served by tort law and how to achieve them, whether negligence or strict liability is or should be the rule is a key issue.

It may be valuable to view contemporary tort law from a somewhat different angle, examining the analytical framework that Schwartz takes for granted. The trends Schwartz describes reflect a more basic issue in tort theory than the choice between negligence and strict liability. The expansions of liability in the 1960s and 1970s resulted from a massive shift in the premises of tort law, and the recent disenchantment with the new rules may reflect unhappiness with the very foundations of the contemporary tort regime. Before World War II, the central (though not exclusive) methodology in addressing tort problems was to make rules that reflected, in a straightforward way, the social expectations of the laymen whose conduct they governed.[8] By the 1960s, a radically different methodology had gained ascendancy in the law schools and in courts on the frontier of doctrinal development. Ambitious judges and scholars viewed tort rules not as a direct reflection of the mores of the citizenry, but as a means of implementing social policy decisions arrived at through the application of philosophical, scientific, and technical knowledge to social problems.[9] The recent loss of momentum for expanded tort liability may indicate that decisionmakers are increasingly skeptical of the new methodology.

My argument will make heavy use of a distinction, introduced by Professor Bruce Ackerman, between two styles of reasoning in addressing legal issues.[10] One is the perspective of the "Ordinary Observer," who begins his analysis by looking at the common practices of laymen and makes legal rules based on the expectations of a well-socialized member of society, without regard to whether the resulting body of law fits into any coherent pattern. Ackerman contrasts this method with that of the "Scientific Policymaker," who begins from the premise that the law should serve some goal or small group of goals and who views adjudication as an exercise

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[8] *See infra* text accompanying notes 72-89.

[9] *See infra* text accompanying notes 13-32.

[10] *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-20 (1977) (labeling and distinguishing two types of legal reasoning as Ordinary Observation and Scientific Policymaking).

in crafting rules that will help to realize those goals. I maintain that traditional tort law better fits the model of the Ordinary Observer, while the new regime in torts is largely the product of Scientific Policymaking.

Professor Ackerman's scheme sharply distinguishes between these two styles of adjudication and treats them as mutually exclusive.[11] In practice, the gap between them may not be as great as he thinks. The Scientific Policymaker must take account of widely held beliefs, and the Ordinary Observer will find it useful to keep in touch with the latest theoretical developments. In contemporary legal practice, each mode of analysis plays a significant role in adjudication.[12] Even so, Ackerman's categories do identify real differences between two methodologies. Granted that tort law is always composed of some mixture of the two, the torts revolution is the result of a shift of emphasis. Ordinary Observing used to play the larger role, but Scientific Policymaking has now surpassed it.

I. Two Modes of Legal Reasoning

Contemporary torts scholars argue bitterly over many issues: whether economic efficiency or loss spreading or fairness or some combination of these ought to be the fundamental premise of liability rules; whether strict liability or negligence is the better rule; whether tort ought to be replaced with a statutory compensation scheme. The dispute between Schwartz and Priest over whether liability-expanding doctrines are better characterized as applications of negligence or as "absolute liability" is typical of the genre. In this and other contemporary debates, the two factions disagree about either the ultimate aims of tort, or the best means of achieving those aims, or how best to describe current doctrine. Yet they share a common premise: Tort law should have some intellectual foundation—like maximizing utility, or achieving fairness between the parties, or some mixture of the two. Schwartz, for example, asserts that the negligence rule "achieves a certain synthesis of

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[11] *See id.* at 183-84, 267 n.105 (recognizing that combinations of the two styles are possible but expressing skepticism that an eclectic approach would prove stable).

[12] *See* James E. Krier & Gary T. Schwartz, *Talking About Taking*, 87 YALE L.J. 1295, 1315-17 (1978) (reviewing BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) and concluding that Ordinary Observing and Scientific Policymaking are not mutually exclusive legal styles).

fairness and deterrence values,"[13] and generally prefers it over strict liability on ethical grounds.[14] In this view, the task of courts is to work out the implications of abstract ideals like fairness and utility, pushing the liability rules to their logical ends and discarding, as obsolete,[15] any fragments of doctrine that cannot be defended in terms of those goals.

This is the perspective of Ackerman's "Scientific Policymaker . . . who (a) manipulates technical legal concepts so as to illuminate (b) the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system."[16] Thus, contemporary torts scholars "conceive[] the distinctive constituents of legal discourse to be a set of technical concepts,"[17] whether those of welfare economics or Kantian philosophy[18] or a mixture of the two, "without continuing reliance upon the way similar-sounding concepts are deployed in nonlegal talk."[19] What is more, they "understand the legal system to contain . . . a relatively small number of general principles describing the abstract ideals which the legal system is understood to further."[20]

Ackerman, writing about the Takings Clause of the Constitution

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[13] Schwartz, *supra* note 1, at 607; *see also* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 699-703 (1978) (concluding that negligence formula has both an efficiency and a moral content).

[14] *See* Schwartz, *The Vitality of Negligence*, *supra* note 5, at 1003 (explaining that negligence concept "does a reasonably good job" identifying wrongful conduct ethically deserving liability, whereas strict liability concept encounters difficulties).

[15] *See* Schwartz, *supra* note 1, at 608-09, 638-39, 671.

[16] ACKERMAN, *supra* note 10, at 15.

[17] *Id.* at 10.

[18] In contemporary scholarly usage, "Kantian" is used not merely to signify ideas derived from the philosophy of Immanuel Kant, but more broadly to refer to theories that, in contrast to utilitarianism, insist on treating individuals as ends valuable in themselves, having rights against the state, rather than merely as means to the end of maximizing social welfare. *See id.* at 72, 221 n.6 (explaining use of Kant as a symbol and considering appropriateness of using "Kant" as a label); Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 104 n.4 (1979) (defining "Kantian" as referring generally to ethical theories premised on self-respect and human autonomy and not necessarily those of Immanuel Kant).

Some "Kantians" really are disciples of Immanuel Kant. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) [hereinafter Weinrib, *Duty to Rescue*] (relying on the teachings of Immanuel Kant to establish a legal duty to rescue); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 472 (1987) ("[W]e are all Kant's children.").

[19] ACKERMAN, *supra* note 10, at 10-11.

[20] *Id.* at 11.

in the mid-1970s, relied principally on just two scholars to illustrate Scientific Policymaking in that context.[21] In contrast, that mode of analysis had by that time already asserted its dominance in tort scholarship.[22] Matters were so far along in torts, Ackerman thought, that "even the traditionalist's counterattack has now been fairly launched." Ackerman cited the work of Richard Epstein as representative of the reaction.[23] While Epstein's early work supports that characterization,[24] shortly after the publication of Ackerman's book Epstein began to clothe his arguments in utilitarian garb[25] and eventually recanted some of his earlier views.[26] Whether the topic is Guido Calabresi's Coasian analysis of causation,[27] the efforts of Calabresi and others to design legal rules so as to achieve equitable "loss distribution,"[28] Ernest Weinrib's Kantian approach to tort,[29] or James Henderson's focus on the legal process in torts

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[21] *See id.* at 49-56 (relying on Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)).

[22] *Id.* at 170.

[23] *Id.* at 170, 275 n.14 (citing Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973)).

[24] *See, e.g.*, Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) (viewing tort law "as a system of corrective justice appropriate for the redress of private harms); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975) (concluding that in tort law intention has subordinate role to liberty, property, and causation); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (arguing for strict liability on the basis of individual liberty).

[25] *See, e.g.*, Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) (examining the compromise between utility and justice in nuisance law).

[26] *See* Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 657-60 (1987) (modifying his "sole ownership" argument).

[27] Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

[28] *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS 39-67 (1970) (analyzing the loss spreading and deep pocket methods to secondary accident cost avoidance); HENRY J. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS 64-66 (1987) (analyzing the utilitarian justifications for loss spreading); Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 359-62 (1990) (discussing liability insurance, victim compensation, and loss spreading).

[29] *See* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (treating causation and wrongdoing in Kantian fashion); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) (arguing that tort law has no ulterior end); *see also* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989) (arguing that moral principles of freedom and utility lie at root of punitive damages).

adjudication,[30] tort scholars of all ideological stripes have cast their lot with Scientific Policymaking and burnt their bridges behind them. Perhaps the most influential effort at Scientific Policymaking in tort scholarship is Learned Hand's famous formula for determining negligence.[31] Judge Hand proposed that whether an actor's conduct was negligent should depend on whether the burden of a precaution was greater than the gravity of the injury discounted by the probability that the injury would occur in the absence of the precaution,[32] a formulation that obviously lends itself to elaboration in economic terms.

Yet there is another way of dealing with tort issues. In Ackerman's terms it is the perspective of the "Ordinary Observer . . . who (a) elaborates the concepts of nonlegal conversation so as to illuminate (b) the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice."[33] Unlike the Policymaker, the Observer does not ground his decisions in "the ideals the legal system is understood to serve."[34] Rather, he "seek[s] to identify the norms that in fact govern proper conduct within the existing structure of social institutions. . . . [The Observer] then selects the legal rule which, in his best judgment, best supports these institutionally based norms."[35] In his elucidation of legal principles, the Ordinary Observer will abjure abstraction and generality in favor of the layperson's attitudes toward the particulars of a given context.[36]

Torts scholars have banished the Ordinary Observer from their books, or use him as little more than a foil against whom they may demonstrate the superiority of their theories in achieving coher-

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[30] *See* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) (developing a process perspective on tort law).

[31] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); *see also* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (expanding on the Hand formula); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981) (introducing economic tort theory based on scientific study).

[32] *Carroll Towing*, 159 F.2d at 173.

[33] ACKERMAN, *supra* note 10, at 15.

[34] *Id.* at 12.

[35] *Id.*

[36] *See id.* at 12-14 (defining Ordinary Observer).

ence in the law and making the world a better place.[37] Yet his influence persists in the actual adjudication of cases at trial and on appeal. Tort cases are still tried to juries of laymen who do not bring to the courtroom some general view of what the legal system should accomplish (the "Comprehensive View" of Ackerman's Policymaker), much less a theory of tort designed to further the grand scheme. Apart from products liability, an exception to which I will return, they are not instructed in a utilitarian vein to apply cost-benefit analysis. Nor are they told, echoing Kantian theories, to focus on enforcing the parties' rights or to employ any other abstract and general principle from the world of Scientific Policymaking. Rather, the focus on dominant social expectations is quite explicit. In negligence cases they are told to assess whether the defendant's conduct meets the requirements of "ordinary prudence,"[38] or "ordinary care,"[39] or "ordinary caution and prudence,"[40] or some similar formulation.[41]

While some appellate courts reviewing jury determinations speak of negligence as an exercise in cost-benefit analysis aimed at providing the proper incentives for safety,[42] others conceive of the reasonable person standard in terms of the dominant social expectations of well-socialized persons. The reasonable person acts like "the great mass of mankind";[43] he represents "the general average of the community,"[44] has human frailties,[45] and sometimes makes

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[37] *See, e.g.*, Gary T. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 764 (1985) (explaining that "[c]ommon sense . . . no longer suffice[s] to sustain or substantiate a scholar's assessments").

[38] 1 COMM. ON STANDARD JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS: CIVIL 54, 56-57 (7th ed. 1986).

[39] 1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL No. 2:10, at 126 (2d ed. 1974).

[40] ADMIN. OFFICE OF DIST. COURT, COMMONWEALTH OF MASSACHUSETTS, MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT, No. 7.04, at 2 (1989).

[41] *See, e.g.*, Warrington v. New York Power & Light Corp., 300 N.Y.S. 154, 158 (App. Div. 1937) (endorsing a "typical prudent man" standard).

[42] *See, e.g.*, Davis v. Consolidated Rail Corp., 788 F.2d 1260, 1263-64 (7th Cir. 1986) (applying Judge Learned Hand's negligence theory); United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (defining negligence as function of three variables: burden, probability of harm, and loss).

[43] Osborne v. Montgomery, 234 N.W. 372, 375 (Wis. 1930). *Osborne* illustrates the tension between the two modes of reasoning, for it also contains language suggesting that negligence is aimed at social utility. *Id.* at 376.

[44] Koch v. Southern Pac. Co., 513 P.2d 770, 774 (Or. 1973).

[45] *See* Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 9-10 (1927) (discussing difficulty in describing qualities of ordinary prudence).

mistakes.[46] He is, in one famous formulation, "the man in the street, or . . . the man in the Clapham omnibus, or . . . the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[47] These descriptions invite the feminist critique that they give too much weight to the characteristics and values of the average male, and none at all to those of women.[48] The criticism is well taken, but it hardly undermines the legitimacy of making tort rules from the perspective of the Ordinary Observer. Rather, the critique embraces the premise that the focus of negligence law should be social practices (of both women *and* men) and not some abstract view of the legal system and its purposes.

Most partisans of Scientific Policymaking acknowledge that current rules do not perfectly reflect their theory of what tort law should accomplish. One of the aims of their scholarship is to point out the differences and criticize the departures. Weinrib, the foremost exponent of a Kantian theory of tort, argues that the current rule rejecting an affirmative duty of easy rescue should be changed.[49] Henderson issues dire warnings that the failure of courts to respect process values in adjudicating torts issues will lead to ruin.[50] Calabresi criticizes current doctrine from an economic perspective.[51] Schwartz himself recommends reforms affecting a wide range of torts issues.[52] Regardless of whether these theo-

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[46] *See* Whitman v. W.T. Grant Co., 395 P.2d 918, 920 (Utah 1964) (noting that an "ordinary" man is not necessarily a "supercautious individual devoid of human frailties").

[47] Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (1933) (internal quotation marks omitted).

[48] *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) (suggesting that feminist theory can help in reexamining traditional tort law structure).

[49] *See* Weinrib, *Duty to Rescue*, *supra* note 18 (arguing that imposition of duty of easy rescue is legally and morally justifiable).

[50] *See supra* note 30 & accompanying text.

[51] CALABRESI, *supra* note 28; Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); *see also* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 294 (1987) (acknowledging that there "seems to be substantial ambiguity and inconsistency between the liability system that we observe and the regime that is best given the criteria of optimality and the models examined here").

[52] *See, e.g.*, Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) (arguing that deterrence and punishment objectives of punitive damages should be considered separate justifications for such damages); Schwartz, *Ethics and Economics*, *supra* note 4 (considering whether liability insurance is consistent with tort law's fundamental objectives); Gary T. Schwartz, *Explaining*

rists should prevail or not, their scholarship does not threaten the distinction drawn here between two approaches to torts, Scientific Policymaking and Ordinary Observing. On the contrary, criticism of traditional doctrine for failure to fit the author's theory positively affirms the existence of alternatives to the theory.

Avid economists like William Landes and Richard Posner, on the other hand, seem to deny the very existence of Ordinary Observing. They maintain that any apparent differences between tort doctrine and the economic approach to torts are largely illusory.[53] For them, Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*[54] is not merely one of a number of formulations of the negligence rule and a particularly good statement of what the content of that rule ought to be; rather, it "epitomized" the negligence rule.[55] When courts speak of the person of ordinary prudence, they really mean a person who takes precautions whose benefits, measured by the losses averted discounted by the probability those accidents would occur in the absence of a precaution, outweigh their costs.[56] Even if some tort rules cannot be rationalized in economic terms, "what is surprising . . . [according to Posnerians] is how much of tort law can be explained on the simple hypothesis that it is indeed a system for bringing about an efficient allocation of resources to safety."[57]

There is substantial literature taking issue with this proposition,[58] and there is no need to repeat it all here. For present pur-

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and Justifying a Limited Tort of False Light Invasion of Privacy, 41 CASE W. RES. L. REV. 885 (1991) (arguing that "false light" invasion of privacy should be recognized by courts but should be limited to false statements that are highly offensive yet nondisparaging); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979) (arguing that courts should use a risk-benefit test rather than a consumer expectations test in products liability cases).

[53] *See* Landes & Posner, *supra* note 31, at 851.

[54] 159 F.2d 169 (2d Cir. 1947).

[55] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85 (1987) (discussing basic principles of accident law).

[56] *See* Posner, *supra* note 31, at 32-33 (discussing Hand formula as economic theory of negligence).

[57] LANDES & POSNER, *supra* note 55, at 28.

[58] *See, e.g.*, J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987), and sources cited therein (questioning Lands's & Posner's assumptions and methodology); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 703-21 (1978) (maintaining that safety-incentive rationale of law-and-economics literature does not explain contributory negligence principles).

poses, the central objection to the positive economic theory of tort law is that the asserted congruence rests on the premise that ordinary people sitting on juries, when asked to determine whether the defendant acted like a reasonable person, evaluate risks and benefits in the same way as economists. Landes and Posner seem to be under the false impression that juries are told to employ the Hand Formula in determining negligence.[59] Actually, juries are told to apply the "reasonable person" or "ordinary prudence" standard.[60] Perhaps these are merely alternative ways of expressing the Hand Formula. But if juries really are expected to apply a cost-benefit test like the Hand Formula, it is odd that they are not told to do that, but rather are instructed in the familiar rhetoric of ordinary care.[61] The reason cannot be that the cost-benefit test is too complicated for them to understand if put to them directly, for juries are instructed in just this way in products liability cases for design defect in many jurisdictions.[62] It seems more plausible that courts want just what they ask for: a judgment as to dominant social practices and whether the defendant has complied with them.

Nor is the familiar jury instruction on ordinary care the only evidence against the congruence Landes and Posner posit. There is a growing body of evidence that laymen (who, after all, make up juries) do not evaluate risks in the way that economists and other policymakers do. While an economist would make a strictly objective measure of the risks and benefits of a precaution, no matter what the context, many laymen worry less than an expert would about common risks voluntarily undertaken in everyday life, like the risks associated with driving down the street without a seat belt on. At the same time, laymen may worry more than the expert would about unfamiliar risks imposed upon them by others, like those associated with environmental pollution and nuclear power.[63]

An especially vivid example of the gap between Scientific Policy-

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[59] Landes & Posner, *supra* note 31, at 917 (complaining that nowadays "juries bias the application of the Hand formula in favor of the accident victim").

[60] *See supra* text accompanying notes 38-41.

[61] *See* Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 294-303 (1984) (discussing effectiveness of "reasonableness" standard).

[62] *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978).

[63] *See* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1070-85 (1990) (discussing how lay risk assessment effects deference to agency decisions).

makers of the economics persuasion and Ordinary Observers is furnished by the sharp differences in their reactions to a familiar hypothetical case. In a famous products liability case, a Ford Pinto stalled on the highway, where it was struck from the rear by another car.[64] On impact, the gas tank exploded, killing one plaintiff and maiming another for life.[65] Ford was held liable, not only for a design defect, but also for punitive damages for designing the car as it did, with the gas tank vulnerable to puncture in rear end collisions.[66] Indeed, the jury awarded $125 million in punitive damages.[67] The decision was affirmed on appeal.[68]

According to a somewhat inaccurate (but widely believed) version of the facts,[69] Ford had prepared a memo acknowledging that its design would cost a substantial number of lives, but concluding that the cost of changing the design would outweigh the cost of the lives to be saved by the modification. Presented with this set of facts, Scientific Policymakers of an economic bent and Ordinary Observers take radically different positions. Policy analysts and other members of the culture of cost-benefit analysis maintain that if such a memo had been prepared, and if the figures were accurate, then Ford would have correctly decided to keep the design as it was. The proper precaution would have been to provide notice of the danger to potential buyers.[70]

Laymen, including judges and law professors who are not socialized into the ways of cost-benefit analysis, are typically appalled by this kind of reasoning. Rightly or wrongly, they think that if a manufacturer knows its product poses a serious risk to life and limb, and can take steps to remove the danger, it should do so.[71] Whatever the merits of economic analysis or other policymaking approaches to torts, it is a mistake to suppose that what passes for Ordinary Observing on the part of jurors and judges is really just a form of economic analysis. Whether Ordinary Observing is the best

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[64] Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 358 (Ct. App. 1981).

[65] *Id.*

[66] *Id.*

[67] *Id.* This award was reduced by the trial judge to $3.5 million.

[68] *Id.* at 391, 399.

[69] The actual facts are somewhat more complicated and are not important for present purposes. The interested reader may consult Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1015-35 (1991).

[70] Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 358 (Ct. App. 1981).

[71] Schwartz, *supra* note 69, at 1036-38.

way to make tort doctrine or not, it does in fact exist.

II. THE TORTS REVOLUTION

Courts in leading jurisdictions like California and New Jersey have transformed tort law over the past thirty-odd years. It would be simplistic to suggest that a change from Ordinary Observing to Scientific Policymaking is the sole motivating factor behind the new tort rules. Since lay juries seem to have become ever more sympathetic to plaintiffs, it may be argued that the Ordinary Observing approach to torts itself underwent a transformation. Furthermore, the activist impulses of the 1960s stressed by Schwartz surely played a part in the growth of tort liability. Even so, I would argue that Schwartz's explanation for the torts revolution does not dig deeply enough for root causes. The allure of Scientific Policymaking was a powerful force behind the new 1960s legal culture Schwartz describes.

A. TRADITIONAL TORT LAW AND THE ORDINARY OBSERVER

Before the recent expansions of liability, tort duties were defined largely in terms of physical invasion of the victim's person or possessions. The burden of proof was (and generally remains) on the plaintiff to establish not only negligence but also causal connection between the defendant's negligence and the harm. Without physical invasion, emotional or economic harm ordinarily did not suffice.[72] The traditional rule is that no one owes a duty to act affirmatively to aid others.[73] The duty, rather, is only to avoid doing them harm. The duty to avoid causing harm to others varies in different contexts. Doctors and other professionals are not held to the standard of "reasonable care." Rather, their duty is defined by the standards of the profession.[74] Even outside the professional

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[72] *See, e.g.*, Byrd v. English, 43 S.E. 419 (Ga. 1903) (barring claim for contractual economic harm); Spade v. Lynn & B.R.R., 47 N.E. 88 (Mass. 1897) (barring claim for emotional harm caused by mere negligence), *overruled by* Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Mitchell v. Rochester R. Co., 45 N.E. 354 (N.Y. 1896) (barring claim for emotional harm and plaintiff's subsequent miscarriage resulting from defendant's negligent operation of horse carriage), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio Ct. App. 1946) (barring claim for economic harm caused by explosion on defendant's premises).

[73] *See, e.g.*, Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901) (holding that physician has no duty to respond to emergency call).

[74] *See, e.g.*, Stepakoff v. Kantar, 473 N.E.2d 1131 (Mass. 1985) (holding that psychiatrist

context, customary practice is relevant, though not dispositive, evidence of due care.[75] The duty owed by land occupiers differs depending on whether the entrant is a business invitee, a licensee, or a trespasser.[76] In design defect litigation, products are tested against the ordinary consumer's expectations.[77]

Whatever the merits of these rules in terms of social policy, they fit the layperson's understanding of the role of tort law in society. They reflect the dominance, in an earlier era, of the perspective of the Ordinary Observer in the making of tort law. For the Observer, the task of adjudication is not to begin with a theory about what the law should do and then apply the theory to derive the appropriate outcome for a given case. Instead, it is to identify and implement through legal rules the attitudes and beliefs of the well-socialized layperson. The first step in selecting appropriate rules is to identify "the expectations generated by dominant social institutions."[78] One asks what a foreigner or a child needs to be taught about a given legal topic in order to function successfully in society.[79] For example, Ackerman maintains that the layperson conceives of property as a "thing" over which he exercises dominion.[80] One of Ackerman's achievements was to show how takings law, which seems incoherent to the Scientific Policymaker, can be rationalized in terms of lay attitudes. In a similar vein, H.L.A. Hart and Tony Honoré devote a long and densely argued book to elaborating the concept of causation in terms of the ordinary use of language.[81]

This comment on Schwartz is not the place for an extended discussion of tort law from the perspective of the Ordinary Observer. Rather than making an argument that traditional tort law follows

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owed duty of care in accordance with skill of average practicing psychiatrist).

[75] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

[76] *See, e.g.*, Paubel v. Hitz, 96 S.W.2d 369, 373 (Mo. 1936) (holding that landowner had duty to warn invitee).

[77] *See, e.g.*, Heaton v. Ford Motor Co., 435 P.2d 806, 808 (Or. 1967) (defining "unreasonably dangerous" by reference to ordinary consumer's contemplation).

[78] ACKERMAN, *supra* note 10, at 95 (emphasis omitted).

[79] *Id.* at 97.

[80] *Id.* at 113-67. For criticisms of Ackerman's account of Ordinary Observing, see Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1560-91 (1982); Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635 (1978) (reviewing BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977)).

[81] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

laymen's attitudes about who should pay for accidents or a methodology for determining how the Ordinary Observer would approach a particular case, I merely assert that much of pre-1960s tort law can be understood as the product of Ordinary Observing and then offer a few illustrations to suggest the plausibility of the premise. At least before the torts revolution and the impact it may have had on the perceptions of the well-socialized layperson,[82] the ordinary person's expectations as to accident law were: (1) that reasonable care is not determined by algebraic calculations but by the mores of the community; (2) that liability for accidents depends upon physical invasion; (3) that individualism outranks concern for others in determining the scope of legal duties; (4) that action is preferable to passivity and hence the presumption should be against liability in the absence of a good reason to the contrary. Much of traditional tort law can be explained in terms of these widely held values.

1. Reasonable care is not determined by algebraic calculations but by the mores of the community. As discussed in Part I, the judgment of laymen as to what risks are unreasonable may differ significantly from the utilitarian calculus favored by some Scientific Policymakers. Traditional tort law assigns ordinary people a large and direct role in making these determinations, for they make up the jury whose task it is to decide whether the defendant was negligent. Laymen's attitudes are also reflected in a number of the jury instructions given in negligence cases, like the special standard of care for children and persons with physical disabilities, and the refusal to extend special treatment to groups like the maladroit and the mentally disabled, for whom the ordinary person has less sympathy.[83]

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[82] The point here is that changes in the law may lead to changes in the social expectations of the well-socialized layperson. *See* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1761 n.54 (1988) (noting that "doctrine shapes as well as responds to ordinary perceptions"); Krier & Schwartz, *supra* note 12, at 1315 (asserting that "[t]he law influences emerging social practices and values at the same time it reflects existing ones"). I think it is too soon to tell whether the changes in tort doctrine have fundamentally altered the layperson's view of tort liability.

[83] *Compare* Williamson v. Garland, 402 S.W.2d 80 (Ky. 1966) (allowing relaxed standard of care for child plaintiffs), *with* Wright v. Tate, 156 S.E.2d 562 (Va. 1967) (refusing to adopt a special standard for plaintiffs with mental disabilities). *See generally* PROSSER AND KEETON ON TORTS, *supra* note 75, § 32, at 175-82 (endorsing relaxed standards of care for children and those physically and mentally impaired).

2. Liability for accidents depends upon physical invasion. Friction among the multitude of individuals pursuing their interests is a fact of daily life in American society. The layperson knows that others routinely upset his peace of mind—whether by changing lanes abruptly in front of him, stealing his girlfriend, or telling jokes at his expense—and does the same to them. He may spend a good part of his working life finding ways to profit at the expense of others, knowing that they have similar plans for him, without a thought that he or they may be doing anything socially unacceptable. Only physical invasion of person or property crosses the line between what is permissible petty cruelty, rudeness, or grasping for advantage, and what is not. The traditional rules barring recovery for purely emotional or economic harm, in the absence of physical injury, reflect these widely-held social expectations.

3. Individualism outranks concern for others in determining the scope of legal duties. Like it or not, a central feature of American society is the emphasis it places upon individualism.[84] The self-reliant and ambitious are highly praised, while the weak and helpless are pitied at best, and often enough ignored or scorned. These attitudes are deeply embedded in our cultural heritage and will not soon disappear. They are of primary significance to the Ordinary Observer as she goes about the task of making tort rules. One implication of the individualistic tenor of daily life in America is that a person is considered responsible only for herself and not for the well-being of others. While she is expected to refrain from harming others, she has no obligation to help persons in distress. Charity on their behalf is laudable but strictly voluntary. This attitude lies behind the common-law rule refusing to hold someone liable in tort for failing to come to the aid of another, even when the rescue can be effected at little cost to the defendant.[85]

4. Action is preferable to passivity. American culture, with its emphasis on individual accomplishment, favors action over passivity. This preference helps explain why negligence rather than strict liability has been the liability rule of choice for most courts in

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[84] *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICA 27-28, 32-33, 84, 142 (1985) (noting role of individualism in American culture).

[85] *See* Osterlind v. Hill, 160 N.E. 301 (Mass. 1928) (holding that expert swimmer had no duty to rescue drowning person).

most circumstances.[86] It also helps account for the traditional rule placing the burden of proof on the plaintiff to demonstrate why the loss should not remain where it fell. Both of these rules seem to rest on the premise that action is presumptively good. Even when some harm results from the actor's activity, the injured person should, under traditional tort law, bear the loss unless he can prove the actor's fault.

Under traditional tort rules, land owners and occupiers receive special treatment. They are liable for negligence when the injured person is a business invitee,[87] but not when the plaintiff is someone who is merely permitted on the land (a licensee). When the plaintiff is a mere trespasser, the landowner owes only a duty to not willfully do him injury.[88] These rules are consistent with the individualistic tenor of the layperson's expectations regarding accident law, and with Ackerman's analysis of the layperson's conception of property as "thing", over which the owner exercises virtually absolute control,[89] including the right to keep others off of it. The trespasser, having no right to the property, cannot complain of injuries he suffers while using it. The licensee, permitted to be there but serving no financial interest of the landowner, is entitled to be told of hidden dangers of which the landowner knows, but no more.

B. THE TRIUMPH OF UTILITARIAN POLICYMAKING

As Schwartz demonstrates, each of these barriers to recovery was eroded or abolished in the push toward greater protection for injury victims.[90] What brought about this massive shift in the scope of tort liability? Schwartz attributes it to a combination of features in the political and legal culture of the 1960s.[91] The example of the Warren Court emboldened state courts to reform obsolete com-

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[86] *See* Brown v. Collins, 53 N.H. 442, 450-52 (1873) (applying negligence standard); Losee v. Buchanan, 51 N.Y. 476, 491 (1873) (finding no liability absent proof of negligence); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 77-129 (1881) (arguing that liability results from conduct different from that of a prudent man).

[87] *E.g.*, Younce v. Ferguson, 724 P.2d 991, 996 (Wash. 1986).

[88] Schofield v. Merrill, 435 N.E.2d 339, 344 (Mass. 1982).

[89] The owner's absolute control is subject to the constraint that he not use it to harm others. ACKERMAN, *supra* note 10, at 98.

[90] Schwartz, *supra* note 1, at 605-06; *see also* Rabin, *supra* note 2, at 3-31 (tracing changes in medical malpractice, products liability, mass tort, and the duty concept).

[91] Schwartz, *supra* note 1, at 609-20.

mon-law rules.[92] The Kennedy presidency brought fresh faces into government, a sense that government should try to solve social problems, and hence a "new norm of policy-making activism" at all levels of government.[93] Why did progressive and activist courts conclude that expanded tort liability was good public policy? According to Schwartz, the reason is that they sought to make the torts process achieve more effectively the goals of fairness and deterrence furthered by the negligence principle. Demolishing the old limits on liability would accomplish this aim.[94]

Schwartz's account is a fine description of events. But it leaves out a critical factor motivating the torts revolution, probably because he takes it for granted. The underlying dynamic producing these changes was the shift from Ordinary Observing to Scientific Policymaking as the starting point from which tort rules are made.[95] Contemporary tort scholars have wholly abandoned the perspective of the Ordinary Observer. In this they are hardly alone. The flight from the method of the Ordinary Observer in tort and other fields is a consequence of the decline of law as an autonomous discipline. Influenced by one or another political program, enamored of other disciplines like economics or philosophy, convinced that the old solutions arrived at by traditional methods were not good enough, bored with the old ways, and impressed by the prestige and authority of more scientific modes of inquiry, leading scholars, judges, and lawyers in virtually every field have embraced the methodology of the Scientific Policymaker.[96]

For their part, torts scholars now flatly reject a critical premise of Ordinary Observing—the proposition that tort law is or should be a body of rules generated by identifying the expectations of the well-socialized layperson and by resolving new problems by reasoning from analogy to the solutions for old ones. They hold that law is a way of achieving a purpose that exists outside of and prior to

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[92] *Id.* at 609-10.

[93] *Id.* at 610-12.

[94] *Id.* at 617-18.

[95] *Cf.* STEINER, *supra* note 28, at 9 ("What this common law change does express is . . . a trend in liberal thought from the vision and ideology of a more individualistic society stressing a facilitative state framework for private activity to the vision and ideology of a more managerial, redistributive, and welfare state.").

[96] *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761, 766-77 (1987) (summarizing demise of traditional legal thought).

the law itself. Instead of observing the attitudes and practices of laymen and the expectations they generate about legal responsibility as the starting point for adjudicating disputes, the Scientific Policymaker *begins* his analysis of legal issues with a small set of goals in mind. For him, the work of lawmaking consists of striving to realize those aims through the elaboration of legal doctrine. There will, of course, be sharp differences among Policymakers as to the right aims to pursue. The broad division Ackerman identifies, between utilitarian and Kantian theories, aptly describes the nature of the current debate among tort theorists. What they have in common, and what distinguishes them from the Ordinary Observer, is their methodological premise—that law serves some normative end.

The interesting questions for Scientific Policymakers are determining what that purpose should be, and how to go about implementing it through doctrine. The debate between Kantians and utilitarians illustrates the first of these issues: Should maximizing social welfare be the sole consideration, or is it better to make the pursuit of that goal subject to the constraint that no person may be sacrificed for the good of the group? The choice between negligence and strict liability, which preoccupies so many torts scholars, may, depending on the terms in which it is put, be an example of the first or the second. Two scholars may agree (or at least assume for the sake of argument) that utility is better served by negligence and rights are better respected by strict liability, in which case the debate over negligence versus strict liability is essentially an argument over goals. Alternatively, the two may agree that utility is the goal and quarrel over whether negligence or strict liability better achieves it.

The premise that one or another normative theory ought to control the elaboration of tort rules has become so widely embraced by tort scholars and modern appellate courts[97] that no one ever feels the need to defend it. But not all Policymaking theories have had equal success in the courts. So far as the impact of ideas upon doctrine is concerned, utilitarianism is the driving force behind most of the expansions of liability chronicled by Schwartz.

The developments of the post-War years reflect two utilitarian

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[97] *See* Gary T. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 764 (1985).

themes.[98] One is represented by the Hand Formula and by Calabresi's argument for strict liability. It holds that liability rules should be designed so as to give actors incentives to take cost-justified safety measures. Individuals, acting rationally in their self interest, will respond to incentives created by the legal rules. They will take precautions that would save more than they cost and omit precautions that would cost more than they are worth.[99] Ideally, resources will be allocated to their most productive uses and society as a whole will be better off.

The other influential utilitarian notion is that, after an accident has taken place, we can minimize the harm it does by spreading the loss it inflicts over a large group of people rather than leaving it all on the victim. The reasoning behind this proposition is that the disutility from a loss increases at an ever increasing rate, as the person who feels it is deprived of things and experiences that are more and more valuable to him. A small loss deprives him of resources he would have spent on some trivial pleasure, while a large one takes his house and clothes and food. In order to minimize the total hurt done by an accident, it is better for many persons to bear small losses than for one person to bear a large one. The sum of the disutility felt by the group will be less than the massive hurt experienced by any one person who must shoulder it all.[100]

Starting from these premises, it is easy to explain many of the expansions of liability that Schwartz catalogs in his 1981 article.[101] Loss distribution indiscriminately favors expanding liability, for most defendants are either large enterprises or have insurance, and therefore can spread losses. While cost-benefit analysis is less sweeping in its implications, it has no use for many of the traditional distinctions. Emotional and economic harms are no different in principle from physical harms, so the traditional requirement of physical injury should be abandoned.[102] From the point of view of

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[98] *See* George L. Priest, *Modern Tort Law and its Reform*, 22 VAL. U.L. REV. 1, 5 (1987) (recognizing accident reduction and compensation as two goals of modern tort law).

[99] *See* CALABRESI, *supra* note 28, at 68-94 (arguing that market forces should determine level of cost-justified safety measures).

[100] *See id.* at 39-67 (arguing that accident costs are least burdensome when spread broadly among individuals).

[101] Schwartz, *supra* note 5, at 964-69.

[102] *See, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980) (recognizing cause of action for negligent infliction of emotional harm); J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979) (allowing damages for negligent interference with economic advantage).

giving safety incentives, there is no sharp line between action and inaction either, and so the rule against affirmative duties must be dropped,[103] or else rationalized in economic terms and modified accordingly.[104] The common law's preference for action, which favors negligence over strict liability, no longer withstands scrutiny. If passivity is cost-justified, then it should be favored.[105] Hence, the traditional preference for negligence over strict liability loses some of its force. Likewise, when incentive creation becomes the dominant concern, the traditional rule assigning the burden of proof to the plaintiff is also drawn in question. If the needs of incentive-creation demand it, the burden of proof can be shifted to defendants.[106] A respectable argument can be made for abandoning traditional principles of causation altogether, in favor of "liability for the creation of (unreasonable) risk independent of present injury."[107] Landowners should focus on the cost of precautions versus their benefits, and the status of the victim is relevant only to the calculus. It should never be an absolute bar to liability.[108]

A case can be made that the most important doctrinal development of the sixties and seventies was not the transformation of the traditional common law, which proceeded only incrementally and fitfully, but the creation of a whole new body of products liability law. Here courts bent on reform did not have to trouble themselves with the difficulties posed by either precedent or deeply embedded principles. There was no need to overturn an earlier body of law made from the perspective of the Ordinary Observer, for the priv-

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[103] *See* Rabin, *supra* note 2, at 28 (explaining erosion of rule against affirmative duties); *cf.* Soldano v. O'Daniels, 190 Cal. Rptr. 310, 317 (Ct. App. 1983) (holding restaurant liable for refusing to allow someone to make emergency call to the police).

[104] *See* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 119-27 (1978) [hereinafter Landes & Posner, *Law and Altruism*] (arguing that affirmative duty rule is inefficient).

[105] *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980) (arguing that strict liability encourages more efficient levels of activity).

[106] *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 936-38 (Cal.) (placing burden on manufacture to prove that its product did not injure consumer), *cert. denied*, 449 U.S. 912 (1980); Haft v. Lone Palm Hotel, 478 P.2d 465, 467 (Cal. 1970) (shifting burden of proof on causation to defendants).

[107] Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 781 (1985).

[108] *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (rejecting traditional status rules for landowner liability).

ity bar had stunted the growth of law on liability for defective products.[109] Once it was removed,[110] reformers could write on a clean slate, and they built products doctrine with the two utilitarian goals as its cornerstones.[111] Loss spreading and cost-benefit analysis permeate contemporary products law. Without surveying the whole field, a few significant examples may be noted. Strict liability replaced negligence, at least for manufacturing defects, because it spreads losses better, is cheaper to administer, and gives incentives for safety as well as, if not better than, negligence.[112] In the belief that warnings are virtually costless and contribute to safety, courts required ever more elaborate information about product hazards.[113] The most popular test for design defect is an explicit cost benefit test, in which the jury is directed to weigh the risks of the product's design against its utility.[114] In contrast, Schwartz rejects the "consumer expectations" test for design defect, with its undertones of the layman's expectations, for being overly intuitive and insufficiently scientific.[115]

None of this is to say that scholars and judges have reached any consensus regarding the rules of products liability. As in other areas of tort doctrine, they continue to disagree among themselves

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[109] *See* William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1099-1115 (1960) (analyzing attacks on privity prerequisite of claims).

[110] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 99-102 (N.J. 1960) (allowing breach of warranty claim against manufacturer with whom victim was not in privity). *See generally* William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 791-800 (1966) (detailing removal of privity requirement in products liability).

[111] *See* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 682-85 (1980) (examining the goals of products liability law).

[112] *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (noting that manufacturer is generally more prepared to meet consequences of defective products); Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975) (expressing Calabresi's view of how fault system and strict liability relate to goals of minimizing accident and accident prevention costs); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (addressing expansion of scope of strict liability in tort).

[113] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 293-94 (1990) (noting that "[j]udges can, and often do, wait to intervene until more substantial risk-utility data are before them").

[114] *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978) (discussing factors relevant to such an analysis).

[115] Schwartz, *supra* note 1, at 625 n.113; *see also* Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 475-81 (1979) (emphasizing difficulty in ascertaining ordinary purchaser's expectations).

over such issues as whether utilitarian or Kantian principles should have primacy, and whether consumer sovereignty or heavy state regulation is the better way to maximize welfare.[116] The point is that, on all sides, the terms of the debate today are strictly those of Scientific Policymaking.

III. AGAINST THE NEW REGIME

If Scientific Policymaking has triumphed, then what accounts for the recent halt in the growth of tort liability? Professor Schwartz attributes it to four factors: the completion of the reform agenda, a growing perception of the social costs of broad liability, the rise of a conservative critique in the legal literature, and the appointment of more conservative judges in the 1980s.[117] While all of these developments help to explain the recent retrenchments, they may not get to the heart of the matter. In my view, Professor Schwartz misses a more fundamental objection to the expansion of tort liability. An avowed Policymaker in his approach to tort issues, Schwartz cannot bring himself to see that Scientific Policymaking is open to serious criticisms.

Neither academics nor judges phrase their criticisms of modern tort developments as unhappiness with Scientific Policymaking itself. The perspective of the Ordinary Observer lost credibility among serious torts scholars long ago. Today scholarship is rarely considered serious unless it is Scientific, so we are unlikely to encounter any questioning of the basic premises of contemporary tort from within the academy. Courts and legislatures cutting back on expansive liability rules do not read Bruce Ackerman, or at least do not phrase their objections to broad liability in the terminology he invented for his book. Even so, their unwillingness to proceed any further with the reformers' program may have its roots in an unarticulated dissatisfaction with the premises of the reform movement. Changes in judicial personnel and in scholarly criticism, greater sensitivity to costs, and a sense that the reform agenda is complete may be subsidiary to this fundamental shift in attitudes, and in some ways reflections of it.

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[116] *See, e.g.*, Symposium, *Critical Issues in Tort Reform: A Search for Principles*, 14 J. LEGAL STUD. 459 (1985) [hereinafter Symposium, *Critical Issues in Tort Reform*] (addressing broader principles appropriate for reanalysis and improvement of modern tort law).

[117] *See* Schwartz, *supra* note 1, at 683-99.

So what is wrong with Scientific Policymaking as a method for common-law adjudication? Some objections relate specifically to the utilitarian theory that has so heavily influenced doctrinal developments in tort over the past forty years. The loss distribution prong of the utilitarian approach to tort is not a workable principle around which to organize tort rules, for *any* rule limiting recovery will in some measure fail to accomplish the goal of loss spreading. Loss distribution is instead an argument for abolishing tort altogether in favor of a statutory compensation scheme for all victims of catastrophic events, whether caused by accidents, illness, natural disasters, or whatever.[118]

In addition to the chronic instability this policy introduces into tort doctrine, tort litigation is an especially expensive way to achieve loss spreading. Resources that otherwise could be used to compensate for injuries instead are spent on lawyers, expert witnesses, and other litigation costs.[119] Furthermore, for reasons elaborated elsewhere and too complicated to explain in this Comment, liability insurance is, by nature, an unwieldy tool for spreading losses due to accidents.[120] Consequently, "[t]ort law is an extremely perverse method of providing compensation insurance to consumers."[121] Schwartz notes the growing perception of the costs associated with expanded liability.[122] Many of these costs are the result of using the tort system to perform an insurance function for which it is ill-suited.[123]

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[118] *See, e.g.*, Wights v. Staff Jennings, Inc., 405 P.2d 624, 628-29 (Or. 1965) (discussing recovery scheme similar to that employed in worker's compensation). *See generally* James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 787-92 (1981) (summarizing New Zealand accident victim compensation system).

[119] *See* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 40 (1989) (discussing extravagant administrative costs of personal injury recovery system); Michael J. Trebilcock, *Comment on Epstein*, 14 J. LEGAL STUD. 675 (1985) ("[I]n the present liability system . . . victims apparently receive only between 20 and 30 percent of all resources entering the system. This compares with payouts for most forms of market insurance of between 80 and 90 percent of revenues received.") (citation omitted).

[120] *See* Priest, *Modern Tort Law*, *supra* note 6, at 14-20 (reconsidering accident compensation insurance); *see also* Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985) (addressing the insurance function of products liability law); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (discussing modern tort law's expansion of corporate liability exposure and concurrent insurance premium increases).

[121] Priest, *Modern Tort Law*, *supra* note 6, at 20.

[122] Schwartz, *supra* note 1, at 689-91.

[123] *See* Priest, *Modern Tort Law*, *supra* note 6, at 20 (discussing confusion over insurance

It is hardly surprising that courts in recent years have tended to relegate loss spreading to a background role and emphasize the other utilitarian aim of providing incentives to take cost-justified safety measures. But cost-benefit analysis is itself unsatisfactory as a general principle for deciding tort cases. In emphasizing the imposition of incentives to take worthwhile precautions, it systematically undermines individual liberty. The principle that liability is warranted only if the defendant is responsible for the harm, so deeply embedded in the common law of torts, has little force in a body of law whose overriding goal is to prompt actors to take precautions that save more than they cost. There is, for example, in principle no reason not to require individuals to rescue others, even if they bear no blame for the victim's predicament.[124] The trespasser, who commits a deliberate wrong by intruding on the defendant's land, may be entitled to the same level of care as persons lawfully present.[125] The notion that an actor is not liable for the conduct for others carries little or no force under a utilitarian scheme. Thus, a radio station is liable when its promotional campaign induces someone to drive recklessly,[126] a doctor is liable for failing to warn of his patient's homicidal proclivities,[127] the manufacturer of a product may be liable for injuries due to a foreseeable product modification after it has left his control,[128] a gun maker may be liable when a criminal uses a firearm to wound his victim,[129] and providers of liquor are liable when their customers or guests drive carelessly.[130]

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function of tort law).

[124] *Cf.* Landes & Posner, *Law and Altruism*, *supra* note 104, at 119-27 (arguing that imposition of duty would actually be inefficient because it would lead potential rescuers to take costly steps to avoid being in position where duty would be triggered); Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEG. STUD. 457, 460 (1979) (suggesting that duty to rescue may be justified on quasi-consensual grounds).

[125] *See, e.g.*, Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976) (holding landowner liable for burns received by a child whose intrusion on landowner's property was reasonably foreseeable).

[126] Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975).

[127] Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976).

[128] *E.g.*, Soler v. Castmaster, 484 A.2d 1225 (N.J. 1984).

[129] Kelley v. R.G. Indus., 497 A.2d 1143 (Md. 1985). Other courts have rejected this theory of recovery. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 686-87 (5th ed. 1990) (describing *Kelley v. R.G. Industries, Inc.* as a "notable exception to the hostility toward liability for generic products").

[130] *See* EPSTEIN, *supra* note 129, at 229-31 (discussing cases involving dram statutes).

Many readers schooled in the ways of policy analysis will find this Scientific Policymaking approach to liability altogether proper. From the layman's point of view, however, it unduly compromises individual liberty in the service of the general welfare. By diminishing the role of personal responsibility in tort law and imposing obligations to take precautions against what *others* may do, it discourages self reliance and facilitates the growth of government in distributing privileges and obligations. Utilitarianism does not inevitably have these consequences. But our experience with the expansion of tort suggests that the insistent demand for safety incentives will, in practice, dominate the cost-benefit calculation, while competing arguments based on the value of maintaining a personal domain free from governmental demands seem to carry little weight. Theory aside, the tangible costs of accidents and safety measures will loom large in real-world utilitarian analysis, and intangible concerns about the erosion of liberty and personal responsibility, though important in the layman's understanding of liability for accidental harm, will be relegated to the background.[131]

These objections to the utilitarian theory of torts do not necessarily condemn other "Policymaking" approaches. Yet there is good reason to be skeptical of any effort to impose a Policymaking framework upon the common law, whatever the content of the theory may be. Adjudication is the least democratic way of bringing about law reform. Legislators, governors, and presidents who want to make fundamental changes in the legal system generally must do so in ways that are highly visible and open to challenge. They must be willing to debate opponents and risk the voters' disapproval when they stand for reelection. When attitudes change, the policies that previous generations have enacted into law can be modified with new legislation.

By contrast, many citizens, lawyers, and judges share the belief that the courts are and should be constrained by caselaw, statutes, and constitutions. Their role is to interpret and apply settled rules and principles, making law incrementally, by drawing on the whole body of law that came before them.[132] If this is a correct under-

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[131] *Cf.* Gillette & Krier, *supra* note 63, at 1081-85 (stating that expert risk assessors tend to focus on costs and benefits that can easily be measured, to detriment of those that cannot).

[132] *See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE 225-75 (1986) (discussing integrity in

standing of the role of courts in society, then the legitimacy of judicial action depends on the judges' fidelity to settled principles. It is wholly unacceptable for courts to choose a Comprehensive View that comports with the judges' sense of good policy and then systematically uproot the settled law and remake it in the image of the policy.[133]

Perhaps courts do habitually import their personal views into the task of adjudication. All the same, believers may be pardoned for thinking otherwise, for judges typically act and write as though they were merely applying settled law or drawing inferences from well established principles. There is little public debate about most judicial decisions and few judges run for office on a political platform. Supposing courts really are nakedly political beneath their genteel facade, it would be odd indeed to treat their hypocrisy as a *justification* for activism on behalf of their favorite Comprehensive Views. The gap between what they say and what they do would once again raise the issue of legitimacy.[134]

Besides the courts' lack of political accountability, there are other reasons to resist Scientific Policymaking as the primary methodology of common-law adjudication. The fundamental premise of Scientific Policymaking is that better law can be made by starting with a coherent, thematic program focusing on a small number of goals than by a more eclectic approach starting from the premise that legal rules should respect the sensibilities and ex-

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law); Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463 (1962) (examining problem of maintaining both creativity and continuity in law of torts and proposing greater reliance upon "candidly creative judicial decisions").

[133] Professor Ackerman claims that the Policymaker should not impose his own Comprehensive View, but rather identify and implement the Comprehensive View that has been "adopted by the legal system." *See* ACKERMAN, *supra* note 10, at 11-12, 182, 283 n.46. In a heterogenous legal culture like our own, *id.* at 13, this restraint is more apparent than real, for there will be plenty of material to support a variety of utilitarian, Kantian, and perhaps other Comprehensive Views. *See* Krier & Schwartz, *supra* note 12, at 1301 (stating that "Ackerman offers no solution to the puzzle of exactly what criteria should be used to recognize the prevailing Comprehensive View").

[134] A solution to the problem of judicial accountability would be for courts to abandon their pretenses, give up the claim to legitimacy that goes with the presumption of objectivity, and openly pursue one or another social goal. If a judge believes that Scientific Policymaking is a legitimate methodology for common-law adjudication, she should stand for election or appointment on her political platform, be it Kantian, utilitarian, or whatever. If it is unrealistic to think that any court will ever take this approach (and it is), then the solution to the accountability issue is for judges to stick to legal texts and traditional legal methods and leave Scientific Policymaking to others.

pectations of the ordinary layman. The Ordinary Observer, it is thought, cannot deal with the problems posed by the modern activist state because they are too complex for his methodology.[135] The Ordinary Observer's solutions even to familiar problems are unsatisfactory, because analytically similar problems are treated differently and the resulting body of law is incoherent.[136]

This argument compares the abstract virtues of Policymaking with the real-world deficiencies of Observing. It is not so clear that Scientific Policymaking actually produces the benefits claimed for it. Consider first the asserted superiority of Policymaking in terms of achieving coherence in the law. For the sake of argument, let us assume that the common law of torts is incoherent and that coherence is an important value in this area of the law.[137] It may seem that focusing on a few goals and working out the implications of that focus over the whole range of tort issues would necessarily lead to a more consistent body of rules. But the abstract benefits of Scientific Policymaking may not have much practical impact, as the experience of courts with products liability demonstrates. Courts and scholars that agree on utilitarian premises nonetheless vary sharply on whether to emphasize loss distribution or incentives.[138] Even when they agree that giving proper incentives should be the goal, they disagree on the means to this end.[139] The rise of Kantian theories of liability only adds to the confusion, as scholars debate the choice between two kinds of policymaking.

If Scientific Policymaking remains the dominant mode of analysis of products issues, it is unlikely that these debates will subside. Questions of value, like the choice between rights and utility, will never be settled. Some technical issues will be resolved, but these will likely be replaced by new ones. Ambitious judges seeking to write one or another Scientific Policy into law will find ways to fudge issues on which a wavering judge's vote was needed, spe-

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[135] *See* ACKERMAN, *supra* note 10, at 166 (discussing Ordinary Observer's grasp of constitutional significance of change that has transformed property in twentieth century).

[136] *See id.* at 113 (criticizing "run of opinions" set forth by ordinary judges).

[137] Both of these assumptions are open to challenge. *See* Stephen D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 320-21 (1984).

[138] *Compare* Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988) (emphasizing incentives), *with* CALABRESI, *supra* note 28, at 39-67 (concluding that loss spreading is a worthy, though not overriding, goal).

[139] *See* Symposium, *Critical Issues in Tort Reform*, *supra* note 116.

ciously distinguish prior cases decided under a different policy premise, and ignore arguments for which they have no ready answer. In short they will quickly introduce into the policymaking Eden the sort of arbitrary distinctions, ambiguous reasoning, and fragmented doctrine that common lawyers know so well. Indeed, they already have. No one would argue that tort law today, after the infusion of Scientific ideas, is more coherent than it was forty years ago.

Nor is it so clear that Scientific Policymaking is superior in providing an analytical framework for the resolution of novel questions, instead of the supposed "methodological dead-end"[140] the Ordinary Observer runs into when he encounters a problem outside the experience of the well-socialized layman. One objection to this argument for Policymaking is that it gives too little credit to the flexibility and resiliency of the common law.[141] Traditional common-law methods are hardly systematic, and novel forms of property or accident do pose vexing problems for the Ordinary Observer. Keep in mind, however, that the common law has survived for nine hundred years, somehow managing to cope with change. The difficulties presented by complex products, mass torts, and the like, may not prove to be insurmountable. If all else fails, Ordinary Observers can selectively import Scientific Policymaking in order to deal with particularly intractable issues.[142] While this eclectic approach may not observe the niceties of Professor Ackerman's distinction, it is wholly in keeping with the traditions of the common law. Common-law judges and lawyers have never been reluctant to advance arguments that might help them win, without regard to conceptual clarity.[143]

It remains true that an economist or a Kantian philosopher will have a surer means of arriving at answers than a common-law judge striving to identify and implement dominant social expecta-

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[140] ACKERMAN, supra note 10, at 166.

[141] *See* Keeton, *supra* note 132; *cf.* Gregory S. Alexander, *supra* note 80, at 1560-91 (taking issue with Ackerman's claim that methodology of Ordinary Observer cannot resolve any important property issues).

[142] *See* ACKERMAN, *supra* note 10, at 110-12, 183-84 (suggesting that "lawyers generally attracted to Scientific Policymaking might learn to mark out certain doctrinal areas as appropriate for Ordinary Observation; and vice versa").

[143] *Cf.* STROUD F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 6 (2d ed. 1981) (stating that "[t]he life of the common law has been in the abuse of its elementary ideas.")

tions. But this methodological facility is hardly a decisive consideration in choosing between Scientific Policymaking and Ordinary Observing. Moreover, it comes at a cost. Any general policy choice may sacrifice the whole array of expectations enforced under the traditional common-law regime. It is not self evident that the new regime will on balance be fairer or will produce more utility than the old. The ultimate utilitarian goal of the greatest good for the greatest number may be better pursued by enforcing laymen's expectations than by deliberately following a utilitarian methodology. A layman may think the ensemble of existing arrangements, including the ones that disadvantage him, are fair enough taken as a whole and prefer the situation he is used to over a Kantian scheme whose abstract virtues are superior to the status quo.

My concern here is with the Policymaker's unwarranted faith in rationality. There are irrational elements in human nature, and these are not easily integrated into any form of Scientific Policymaking. Problems that seem to require similar treatment from the standpoint of dispassionate analysis may in fact be viewed quite differently by the people whose lives are affected by them. Thus, they may accept cost-benefit analysis as appropriate when the issue is whether to build a bridge that will likely cost lives, and then reject it out of hand when the question is whether a car company should calculate the costs and benefits of safety precautions versus passengers' lives. An unfairness one has gotten used to may not be so keenly felt; its victims may even prefer it over the reforms recommended by some moral philosopher. No legal rule can long survive unless it is ultimately rooted in the dominant hopes, fears, ideals, and motivations of the society it serves. These are at least as much the product of upbringing and culture as of rational thought about the utilitarian calculus and the demands of the categorical imperative.[144] Since there are more laymen than policymak-

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[144] *Cf.* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1603-04 (1985).

> The variety of human concerns and the endless novelty of political life assure that no final, exhaustive accommodation among these conflicting commitments can ever be attained—except, perhaps, according to the dictates of some abstract theory which, however great its intellectual attractions, is bound to clash "with men's needs and their natures, and with various unforeseeable contingencies."

Id. (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 23 (1975)).

ers, it seems wise to pay attention to lay-sensibilities, however benighted they may be, in choosing a methodology for adjudicating tort cases.

Finally, in evaluating the merits of Scientific Policymaking, it is necessary to distinguish between methodology and politics. I suspect that many champions of Scientific Policymaking, in torts and elsewhere, are not interested so much in promoting Policymaking as a methodology as they are in realizing the substantive ends of their favorite theory. A Kantian's enthusiasm for Policymaking may be considerably less if he knows that the Utilitarians will prevail and root out any remnants of Kantian thought from the law. If this is so, then he cannot truly be counted as a committed partisan of Policymaking as a *methodology*. He is, instead, an advocate for a substantive position that happens to be embodied in a theory.

Stripped of a substantive program, Scientific Policymaking is revealed as a risky and unattractive alternative to Ordinary Observing. The traditional common law typically builds doctrine incrementally, from the bottom up, with the layman's sensibilities at its foundation. In contrast, Scientific Policymaking works from the top down, imposing a theory on existing social arrangements and upsetting settled expectations. It is imprudent, if not reckless, to adopt a methodology for adjudication in which so much depends on the wisdom of those who choose and administer the substantive theory. What is more, the adoption of a particular Comprehensive View is not a one time event. An implication of Scientific Policymaking is that current arrangements are *always* at the mercy of the next group to acquire power, and their notions of an appropriate substantive theory.[145]

CONCLUSION

It is too soon to tell whether the recent judicial and legislative retrenchments result from disillusionment with Scientific Policymaking. In any event, unitary explanations for legal developments are rarely satisfactory. Other factors, notably those that Schwartz catalogues, doubtless play some role in accounting for the cutbacks. The recent developments may reflect nothing more than a pause in the movement toward greater and greater emphasis on

[145] *See* Kronman, *supra* note 144, at 1601-02 (discussing contractarianism and revolutionary change).

the two utilitarian goals of incentive creation and loss spreading. Twenty years from now, the statutory and judicial decisions of the late eighties may be regarded as the last gasp of the old regime. Alternatively, the cutbacks may signal a shift from one kind of Policymaking to another. We may be witnessing the beginnings of a movement away from loss spreading and toward greater emphasis on giving plaintiffs as well as defendants greater incentives for safety—the stirrings of a Kantian approach to tort.

This caveat aside, the preference for Scientific Policymaking over Ordinary Observing deserves critical scrutiny. It is a fundamental premise of contemporary torts scholarship and judicial reform, one that is shared by Gary Schwartz, James Henderson, David Owen, and Ken Simons. Precisely because it is so widely embraced, it receives little attention in the literature. Torts scholars would do well to step back occasionally from their preoccupation with this or that proposal for reform, and consider the possibility that many of the deficiencies of modern tort law result not from failure properly to implement some policy, nor from courts choosing the wrong policy, but from the premise that Scientific Policymaking is the appropriate methodology for courts to use. The durability of any regime depends ultimately on public acceptance. It may be that Ordinary Observing, with its emphasis on identifying and enforcing the expectations of the well-socialized layman, achieves this aim better than the most refined Scientific Policymaker ever could.