

Institutional Aspects of Tort Reform

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It is no secret that tort law performs all of its primary functions poorly.¹ Moreover, the situation, if anything, is getting worse. Courts and administrative agencies are encountering increased difficulty in attempting to implement present compensation systems.² The one major change in substantive tort law that has gained general acceptance by both courts and legislatures—comparative negligence—holds little promise for promoting a more effective tort system.³ Indeed, this “reform” may well increase still further the extraordinarily high transaction costs of the present system.⁴

In the meantime, notwithstanding the scores of proposals for tort

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1. Tort laws' primary functions are acknowledged to be the deterrence of torts and compensation of tort victims. Modern tort law, however, performs neither of these functions adequately. Its deterrent effect is weak and uneven at best. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 135-97 (1970); Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980). Its compensation system is seriously inadequate. It only sometimes compensates, often undercompensates, and rarely provides timely compensation. See James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70, 78-79 (1952); O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. L. REV. 589, 590-91 (1982). Moreover, the present tort law system is extraordinarily expensive to administer. See INTERAGENCY TASK FORCE ON PROD. LIAB., FINAL REPORT, at VII-16 to -20, -64 to -65 (1978); O'Connell, *supra*, at 590-91.

2. Consider, for instance, the halting judicial attempts to deal with toxic and environmental torts. See, e.g., *Copart Indus. v. Consol. Edison Co.*, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977) (analyzing pollution case in traditional language of trespass and negligence); see also Baxter & Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1 (1972); Breimer, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974); Dams, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975). Note also the inability of workers' compensation agencies to provide adequate compensation under obsolete statutes. See *By-Passing Worker Compensation: New Exceptions to Exclusivity*, NAT'L L.J., Mar. 22, 1982, at 34, col. 1; Comment, *Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule*, 33 HAST. L.J. 263 (1981). Note also the inability of workers' compensation agencies to provide adequate compensation under obsolete statutes,

3. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 123-24 (2d ed. 1977).

4. For a list of the difficult new issues that have been added to tort litigation by the adoption of comparative negligence, see R. EPSTEIN, C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 498-501 (2d ed. 1984).

reform, neither legislatures nor courts seem willing to initiate or encourage fundamental change. Workers' compensation systems appeared to provide a model for more general reform of tort law from the early part of the twentieth century until the last decade,⁵ but they have fallen into disrepute because compensation schedules have become obsolete in most jurisdictions.⁶ The movement to adopt general social insurance schemes, which began in New Zealand and once threatened to sweep the globe, came to a halt before it could reach even neighboring Australia.⁷ No new state has enacted an automobile no-fault statute since 1975, and the states that passed such statutes included "compromise" features that detracted greatly from the potential efficacy of a compensation system divorced from the troublesome concept of fault.⁸ Commentators have suggested many variations on these approaches to tort reform, but their proposals have attracted little interest from courts and legislatures.

The major factors that have stymied efforts at tort reform are the lack of consensus concerning the substance of reforms⁹ and the existence of powerful vested interests opposing change. No consensus is likely to develop because neither potential accident victims nor society at large has an effective voice in the lawmaking process.¹⁰ Two groups that have much greater ability to affect that process—trial lawyers and insurance companies—perceive significant advantages in the present system and oppose most reforms vigorously.¹¹ Any attempt to reform tort law must recognize and deal with these obstacles.

Under the circumstances, an analysis of alternative institutional approaches to achieving tort reform is overdue. In this Article, I will consider which combination of legislative, judicial, and administrative action holds the greatest potential for creation and implementation of a more efficient and effective tort system. This inquiry is timely because two of the most respected tort law scholars—Guido Calabresi and Jeffrey O'Connell—recently have turned their attentions to the matter of appropriate institutional roles in law reform.¹² I will borrow and at times criti-

5. See J. CHELIUS, *WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION* 44-45 (1977); see also Note, *Sequel to Workmen's Compensation*, 27 HARV. L. REV. 235 (1913).

6. See Davidson, *Workers' Compensation in California—Outdated, but Still the Best*, 56 CAL. ST. B.J. 324 (1981).

7. See Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977).

8. O'Connell, *supra* note 1, at 595-96.

9. Compare G. CALABRESI, *supra* note 1, with Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

10. See O'Connell, *supra* note 1, at 627-31.

11. *Id.*

12. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); O'Connell, *A "Neo*

cize certain of their ideas in this institutional overview of tort reform.

I

LEGISLATURES AS INITIATORS OF TORT REFORM

Theoretically, legislative bodies are the preferred institution to initiate reform of any area of the law. Legislative policy decisions are generally thought to be constitutionally and politically legitimate. Moreover, legislatures can accomplish comprehensive reform through a single statutory enactment. Unfortunately, modern legislatures have developed powerful inertial forces that render them impotent to make comprehensive changes in the law that will adversely affect vested interests. Congress has demonstrated a notorious inability to enact legislation that definitively resolves a controversial policy issue.¹³

Students of the legislative process differ in their explanations of legislative inertia. Commentators who are sympathetic to the plight of legislators attribute the legislature's inertia principally to matters beyond its control. In particular, they point to (1) an agenda packed with a wide range of complicated issues, each of which requires a major commitment of scarce legislative time and resources, (2) lack of sufficient expertise to resolve difficult questions, and (3) inherent inability to foresee, and to respond to, many of the problems that will arise in the future under a new legal regime.¹⁴ More cynical observers claim that Congress chooses not to make hard policy decisions for political reasons. They argue that legislators usually alienate more constituencies than they befriend when they provide definitive answers to controversial questions. They further claim that legislators maximize their chances of reelection by devoting large amounts of time and energy to constituent service, which leaves little time for consideration of major legislative initiatives.¹⁵ The most strident proponents of both schools press their causal theories as exclusive competing explanations of legislative inertia.¹⁶ However, each

No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898 (1985) [hereinafter cited as O'Connell, *Neo No-Fault*]; O'Connell, *supra* note 1, at 595-96, 627-31.

13. See R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 285-304 (1973); J. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1980); T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 129-46, 297-99 (1969); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1196-99 (1981); Wright, *Beyond Discretionary Justice* (Book Review) 81 YALE L.J. 575, 582-87 (1972) (reviewing K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969)); see also *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672-85 (1980) (Rehnquist, J., concurring).

14. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695 (1975); see also Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 720 (1969).

15. See M. FIORINA, *CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 47-60 (1977); W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966).

16. Compare Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982), with Davis, *supra* note 14.

school provides an incomplete list of the causes of legislative inertia.¹⁷ Regardless of how one explains legislative inertia, it is a substantial limitation on the viability of the legislature as a source of tort reform.

Perhaps the most striking illustration of legislative inability to initiate tort reform comes from Professor O'Connell, the nation's leading advocate of legislative tort reform. O'Connell has proposed many legislative reforms,¹⁸ and has testified in support of statutory tort reform before every state legislature in the country.

O'Connell initially preferred legislative tort reform. He cited the constitutional and political legitimacy of legislative policy decisions and the legislative capacity to accomplish revolutionary and comprehensive reform.¹⁹ However, O'Connell has nearly abandoned his longstanding effort to achieve tort reform through legislative action. In the past few years, he has addressed his arguments to the more traditional audience for legal scholarship—the courts.²⁰ He recognizes candidly that his more recent judicial proposals are less complete and more speculative than his earlier statutory proposals.²¹ In O'Connell's words, however, "[t]he problem with my proposed statute is just that—it entails passing a statute."²² O'Connell has turned to the courts for solutions to the problems of tort law not because they are institutionally superior to legislatures as vehicles for reform, but because twenty years of testifying before legislative bodies has proved disappointing.

O'Connell described in some detail his frustrating experience with his proposed no-fault auto liability legislation at a symposium given in 1983 at Tulane University School of Law.²³ The first major problem he encountered was getting the attention of the legislature. Legislative agendas are extremely crowded, so legislators simply do not have ample time to devote to understanding the nature of the problems associated with the tort system. The second problem O'Connell encountered was resistance to legislative reform from trial lawyers with a vested interest in the present high-transaction-cost system. The final problem was the natural tendency of legislators to compromise when confronted with well-presented conflicting arguments and inadequate time to evaluate them.

17. Pierce & Shapiro, *supra* note 13, at 1196-99; see also R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* (forthcoming 1985).

18. See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).

19. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 825-26 (1973).

20. E.g., O'Connell, *supra* note 1.

21. *Id.* at 631.

22. O'Connell, *Neo No-Fault*, *supra* note 12, at 905.

23. J. O'Connell, Remarks at the Eason Weinman Center for the Study of Comparative Law Symposium on Tort Law (1983); see also O'Connell, *supra* note 1, at 627-31; O'Connell, *Neo No-Fault*, *supra* note 12, at 905-06.

Thus, when a legislature was willing to act at all, it produced a poor legislative product. Legislatures invariably preserved common law fault-based tort claims in important classes of cases, thereby substantially diluting the potential benefits of the no-fault auto liability system.²⁴ These three problems combined to reduce dramatically the likelihood of effective legislative action.

Ironically, O'Connell's frustration with legislatures increased over time as a result of enactment of compromise no-fault statutes in some jurisdictions. At the beginning of his efforts to promote legislative reform, he could document his arguments with solid empirical data. The figures demonstrated that his proposed new system would yield benefits to everyone affected by the tort system except trial lawyers, who are the primary beneficiaries of the high transaction costs associated with a fault-based regime.²⁵ As time went on, however, the data generated by the compromise no-fault statutes passed in some jurisdictions began to confuse the issue. Opponents of reform increasingly were able to refer to data that showed that passage of no-fault legislation had produced little or no benefit to the public.²⁶ These data were predictable and entirely consistent with O'Connell's evidence. They were generated under an entirely different system of compensation that combined the most expensive feature of no-fault liability, generous automatic benefits for victims of routine accidents, with the most expensive features of fault-based liability, the enormous damage awards and high transaction costs which result from serious accidents.²⁷ Still, for a legislature with a crowded agenda that is asked to take action that displeases a powerful constituency, the data were enough to forestall serious consideration of any similarly labeled reform.

The data purporting to show that no-fault legislation produces no public benefits became more persuasive over time. This effect was produced by the phenomenon Dean Calabresi refers to as legislative obsolescence.²⁸ The compromise no-fault statutes passed in many jurisdictions included damage thresholds above which the accident victim's common law cause of action based on fault was preserved. Initially, these thresholds were intended to leave only a relatively small class of accidents involving extraordinary amounts of damages within the prior legal

24. See O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23 (1977).

25. See UNITED STATES DEP'T OF TRANSP., AUTOMOBILE INSURANCE AND COMPENSATION STUDY (1970).

26. See AMERICAN BAR ASS'N, AUTOMOBILE NO-FAULT INSURANCE: A STUDY BY THE SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION 22-39 (1978).

27. See O'Connell & Beck, *An Update on the Surveys of the Operation of No-Fault Auto Laws*, 1979 INS. L.J. 129.

28. G. CALABRESI, *supra* note 12, at 2.

regime. Over time, however, damage claims began to exceed the statutory thresholds more often, permitting recourse to a common-law tort action in an ever-larger proportion of cases. As a result, the putatively no-fault regimes adopted in some jurisdictions evolved into traditional fault-based systems with an underlay of no-fault payments for minor accidents. These smaller claims probably would not have been the subject of litigation prior to the legislative "reform."²⁹

The history of O'Connell's frustrating attempts to enact no-fault auto liability statutes illustrates the problems inherent in relying upon legislatures to initiate tort reform. Any attempt at legislative reform will meet with crowded agendas, opposition from powerful vested interests, and the dangers of compromise legislation. If these problems are overcome to the extent that statutory reform initially produces marginal benefits, those benefits may well be short-lived because of statutory obsolescence.

II COURTS

A. Courts as Initiators of Tort Reform

The other traditional source of tort reform is the courts. For over a century the courts dominated the process of reformation of the law through gradual change in common law principles. Since much of the present tort system remains a product of the common law, courts retain some power to initiate tort reforms without raising serious questions of legitimacy and separation of powers. Courts have the institutional capacity to initiate and implement some potentially promising reforms.

For instance, O'Connell has proposed that courts give effect to a new type of insurance policy or product warranty that includes a preaccident guarantee of a compensatory postaccident settlement offer.³⁰ Such a reform requires no legislative action; its implementation depends only upon the willingness of insurance companies, product manufacturers, and providers of services to enter into new types of contractual relations, and upon judicial recognition and enforcement of such contracts. O'Connell expects that large numbers of private party defendants will find his proposed insurance policy an attractive option, and that plaintiffs' lawyers will react positively to the resulting settlement offers. If that is so, his proposal has the potential to mitigate the problems of tardy and extremely uneven compensation and high transaction costs. This promising judicial reform, however, is not nearly as satisfactory as a compre-

29. O'Connell & Beck, *supra* note 27, at 136-40.

30. O'Connell, *Neo No-Fault*, *supra* note 12.

hensive legislative reform of tort law would be. Its beneficial effects are more speculative, and its potential scope is more narrow.

Courts are substantially limited in the nature of the reforms they can initiate. Courts cannot in a single step replace a comprehensive compensation system like tort law, which has evolved through more than a century of incremental changes in the common law, with a new comprehensive legal regime.³¹ Courts can use common law reasoning as the basis for a particular rule change. Occasionally, courts even engage in revolutionary change by substituting one basic principle for another. The now universal substitution of "defect" for "negligence" in products liability law,³² and the Florida Supreme Court's replacement of contributory fault with comparative fault³³ are good examples of revolutionary changes initiated by courts. When courts initiate revolutionary change, however, they must have available a new principle that offers the prospect of superior results through judicial application. They must also accept that many of the specific rules that flow from the newly announced principle will evolve only gradually through a decade or more of incremental common-law decisionmaking.³⁴ Revolutionary change, which is entirely consistent with common-law decisionmaking, should not be confused with comprehensive change.

The institutional limitations of courts make it highly unlikely that they will ever be the source of the kind of comprehensive tort reform proposed by most critics of tort law. To cite just one significant impediment, the common law requires a finding of fault as a prerequisite for recovery in most tort cases. Many scholars link this basic principle to the poor performance of tort law.³⁵ However, it is hard to imagine a

31. G. CALABRESI, *supra* note 12, at 74-79.

32. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). See generally D. NOEL & J. PHILLIPS, *PRODUCT LIABILITY* 28-38 (1980).

33. *Hoffman v. Jones*, 280 So. 2d 431, 434-38 (Fla. 1973).

34. See G. CALABRESI, *supra* note 12, at 72-79.

35. The requirement that fault be litigated has been often criticized. See, e.g., J. O'CONNELL, *ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975); Calabresi, *Views and Overviews*, in *CRISIS IN CAR INSURANCE* 240 (R. Keeton, J. O'Connell & J. McCord eds. 1968). But see Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

Fault is difficult and expensive to litigate. Judicial resolution of the critical fault issue is unpredictable in many cases. The required finding of fault and lack of fault account, in large measure, for the frequent characterization of the tort system as a lottery. See, e.g., Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). An accident victim, typically in desperate need of some measure of immediate compensation, must make a painful choice between two unpalatable options. First, the victim may choose to litigate the claim to its conclusion. Under this option, the victim has a reasonable prospect of a substantial recovery, perhaps even a grand recovery. The victim may not recover at all, however, if the court makes adverse findings on one of the fault issues. Moreover, the victim frequently has no source of compensation for the months, or even years, required to litigate the case. The accident victim who cannot afford the risk and delay inherent in this option must instead accept a less than compensatory offer of settlement.

court's eliminating the requirement of fault in large classes of tort litigation. It would have to replace fault with another workable principle. In several important contexts, causation alone is not a viable substitute for fault, given the myriad other rules of tort law.³⁶ In order to fashion a viable new tort system, a court would have to identify a new principle of liability and announce that principle simultaneously with changes in virtually all other principles and rules of tort law. Courts do not have the institutional capacity to initiate reform in this manner.

Most commentators identify increased statutorification³⁷ of tort law as an independent and significant limit on judicial reform.³⁸ Statutorification has taken place in every legal system in the world over the past few decades. Calabresi has argued persuasively that this trend will continue, because it is rooted in fixed characteristics of judicial and legislative institutions and in the increasing complexity of modern society.³⁹

Under traditional legal analysis, this extensive legislative involvement in a field would be an additional barrier to major judicial initiatives. The standard argument begins with the generally accepted premise that courts have no power to modify statutes except on constitutional grounds. It proceeds to the somewhat more debatable proposition that courts should refrain from changing areas of the law that the legislature is actively considering modifying.⁴⁰ Acceptance of the generally accepted premise would preclude judicial reform of important aspects of tort law, such as inadequate workers' compensation schedules and low damage thresholds in no-fault auto liability statutes. Acceptance of the more debatable proposition would foreclose judicial modification of almost all tort rules.

Calabresi proposes an entirely new judicial approach to statutorifi-

36. See O'Connell, *supra* note 1, at 595-96; see also Pierce, *supra* note 1 at 1304-06; Schwartz, *Professor O'Connell's No-Fault Plan for Products and Services: Have New Problems Been Substituted for Old?*, 70 NW. U. L. REV. 639 (1976).

37. Statutorification of tort law began decades ago with passage of wrongful death and workers' compensation statutes and the enactment of the Federal Employers' Liability Act. See generally M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 684-747 (3d ed. 1983). It has expanded in recent years with enactment of comparative negligence statutes in a majority of jurisdictions and passage of one or more statutes modifying common law tort rules in every state. See generally W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 610-16 (1982). This trend is certain to continue; the next step may even be enactment of a federal law governing all product liability cases. See Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602 (1983).

38. See generally *Comments on Maki v. Freik—Comparative v. Contributory Negligence: Should the Court or the Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

39. See G. CALABRESI, *supra* note 12, at 72-79.

40. Compare *Maki v. Freik*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968) (refusing to require substitution of comparative negligence for contributory negligence on the basis that the legislature was the appropriate institution to require such a change), with *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (requiring substitution of comparative negligence for contributory negligence despite the legislature's failure to require such a change).

cation under which judicial initiation of reform would remain a viable option even in areas where statutes have completely supplanted common-law rules.⁴¹ Under his proposal, if a court found a statutory provision obsolete, it would have three options: (1) it could immediately substitute new rules for the rules in the statute; (2) it could void the rules in the statute and begin the process of gradually creating new rules based on a new principle announced at the time of voiding; or (3) it could void the statutory provisions without substituting any new rules or principles, thereby forcing the legislature or, in some cases, an agency to create new rules.⁴² With this power, courts would be a potential source of tort reform even with respect to obsolete statutory rules. Calabresi identifies woefully inadequate compensation schedules in workers' compensation laws as an example of statutory provisions that a court should void.⁴³ Damage threshold provisions in auto no-fault statutes would also be good candidates for judicial nullification. They are obsolete in the sense that they have reallocated, over time, almost all litigation involving accidents from the no-fault system back to the fault system.

Calabresi supports his proposal with a sequence of arguments. He begins with the observation that the common law reasoning process allowed courts to change the law slowly in order to reflect long term shifts in majority sentiments.⁴⁴ In the modern era, this process of judicial change has been greatly limited by the dominance of statutes.⁴⁵ Because it is easier to enact a law than to amend or repeal a law, many statutes no longer serve current needs or represent current majoritarian views.⁴⁶ As a result, Calabresi argues that the inexorable process of statutorification threatens to freeze legal regimes into a pattern of obsolete statutory rules that may only have attracted the support of a transitory majority on a given day. Sunset laws⁴⁷ are not a good response to the problem of statutory obsolescence because some statutes become obsolete in a matter of months while others continue to serve societal needs and to reflect majority views for decades.⁴⁸

Calabresi claims that courts already are actively involved in the process of updating obsolete laws through the use of three techniques: (1)

41. G. CALABRESI, *supra* note 12 (arguing that courts should be willing to make a change in a law that the legislature is simultaneously considering changing).

42. *Id.* at 147-61.

43. *Id.* at 143.

44. *Id.* at 3-4.

45. *Id.* at 5-6.

46. *Id.* at 6.

47. Sunset laws are statutes that expire automatically at the end of a given period of years. Their purpose is to force the legislature to reconsider the need for a statute at regular intervals. See Behn, *The False Dawn of the Sunset Laws*, 49 PUB. INTEREST 103 (1977).

48. G. CALABRESI, *supra* note 12, at 59-62.

dishonestly finding statutes unconstitutional,⁴⁹ (2) dishonestly applying jurisdictional doctrines and the doctrines of void-for-vagueness and nondelegation,⁵⁰ and (3) dishonestly interpreting statutes.⁵¹ He argues that use of these techniques to respond to the problem of obsolete statutes causes serious damage to the legal system in five ways: (1) it forces courts to distort legal doctrines that have important independent purposes, (2) it detracts from the credibility of honest constitutional litigation and statutory interpretation, (3) it distracts courts from the factors that should dominate the process of deciding whether a statutory provision is obsolete, (4) it sends confusing and inaccurate messages to legislatures, and (5) in the case of dishonestly finding unconstitutionality, it does not respect legislative supremacy over nonconstitutional policy decisions.⁵²

Calabresi recognizes that his proposal will be viewed by many as a radical antimajoritarian reallocation of power to the judiciary. He anticipates this reaction with several arguments. First, he says, courts are already exercising the same power in a dishonest and harmful manner.⁵³ Second, courts can use traditional, conservative common law reasoning to determine when a statutory provision has become obsolete by comparing it with the general legal topography.⁵⁴ Third, his proposal respects legislative supremacy because all it does is react to legislative inertia at the same time that it invites the legislature to act.⁵⁵ The legislature can always exercise its ultimate power by enacting a new statute or by reenacting the statute the court erroneously found to be obsolete.

I have serious reservations about the potential of Calabresi's proposal to legitimize an expanded judicial role in the process of tort reform. Even if courts were to adopt his proposal, the impact on tort reform would not be great. Calabresi views his proposal as a response not to the need for law reform, but rather to the somewhat different problem of statutory obsolescence. The two problems overlap in tort law, since the present ineffective operation of the tort system is linked to some extent to obsolete statutory provisions. Statutory obsolescence is not at the heart of the ineffectiveness of the present tort system, however. It may well be, as Calabresi maintains, that it is more difficult to amend or to repeal a statute than to enact one. As O'Connell's experience with legislative tort reform demonstrates, however, there are problems with the legislative

49. *Id.* at 8-15.

50. *Id.* at 16-30.

51. *Id.* at 31-43.

52. *Id.* at 8-43.

53. *Id.* at 82-83.

54. *Id.* at 95-109.

55. *Id.* at 95-101, 121.

process more basic than those unique to statutory amendment.⁵⁶

My second reservation concerning Calabresi's proposal is more fundamental. I find unpersuasive his careful and well-argued attempt to provide an anticipatory response to criticisms that his proposal is antimajoritarian.⁵⁷ Calabresi recognizes that legislative inertia is a powerful force,⁵⁸ and that its reallocation by the judiciary may be outcome determinative.⁵⁹ Nonetheless, he underestimates the significance of reallocation of legislative inertia. Legislative inertia has a more powerful effect on the outcome of the legislative process than any other possible factor except perhaps a headline story reporting a major disaster or scandal related to the area of legislative consideration. In a very real sense, legitimizing judicial reallocation of legislative inertia from a position chosen by a prior legislature to a position selected by a court is antimajoritarian and is inconsistent with legislative supremacy. I am about as comfortable with this suggested addition to the judicial/legislative dialogue as I would be with a proposal that the judiciary contrive a headline story in order to affect the outcome of a major legislative controversy. Courts may at times have interjected themselves into the legislative process through this practice and through the methods Calabresi described.⁶⁰ However, the recognized impropriety of both types of judicial conduct acts as an essential check on the tendency of courts to become active participants in the legislative process.⁶¹

I am also much more troubled than Calabresi by the separation of powers implications were the judiciary to assume an active role in the legislative process.⁶² Calabresi seems to propose very much the type of judicial/legislative interaction that the framers of the constitution rejected explicitly.⁶³ The judiciary has no constituency; it should have no role in policymaking outside the confines of constitutional litigation.⁶⁴

Calabresi argues that courts have the capacity to identify obsolete

56. See text accompanying notes 20-29; see also Pierce & Shapiro, *supra* note 13, at 1195-1209.

57. G. CALABRESI, *supra* note 12, at 91-112.

58. *Id.* at 122-23.

59. *Id.* at 169.

60. G. CALABRESI, *supra* note 12, at 8-43.

61. Calabresi admits that forcing judges to be dishonest when they void obsolete statutes acts as a check on such judicial conduct. *Id.* at 173.

62. *Id.* at 91-101.

63. James Madison aggressively supported creation of a "revisionary council," composed of the President and several members of the Supreme Court, that would facilitate dialogue between the judicial and legislative branches of government. His proposal was rejected by the Framers on three occasions. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 71, 80, 298 (M. Farrand ed. 1911).

64. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2793 (1984) (6-0 decision) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

laws with a tolerable number of mistakes.⁶⁵ In other words, in most cases the legislature would agree with the court's holding of obsolescence if it could only overcome its institutional inertia enough to address the issue. Courts can identify obsolete laws, Calabresi maintains, by determining whether a statutory provision continues to be consistent with the general legal topography, an analytical process he analogizes to traditional common-law reasoning.⁶⁶

I doubt that courts can identify the general legal topography with sufficient accuracy to make the kind of consistency determinations Calabresi imagines. Perhaps in the era of common law dominance the legal topography was sufficiently smooth to permit ready judicial recognition of ugly ruts and hillocks. If so, that situation ended with statutorification. Legislatures simultaneously regulate⁶⁷ and deregulate⁶⁸, add⁶⁹ and delete⁷⁰ procedural safeguards, and protect⁷¹ and gouge⁷² consumers. Perhaps in twenty years an able historian will be able to make sense in a principled manner of the myriad legislative decisions made in a single year and will be able to isolate those left over from prior years that were not consistent with the dominant majoritarian views of the time. I have little confidence in the ability of any contemporary judge to make these determinations.

I will use one example of the potential application of Calabresi's proposal to illustrate both of my reservations. Assume that a state enacts an automobile no-fault statute with a specific monetary threshold of damages above which the plaintiff is entitled to maintain a common law action based on negligence. The legislative history of the act indicates that the legislature intended the threshold to allocate the vast majority of auto collision cases to the no-fault system, but over time the threshold no longer has that effect. The statutory threshold is challenged as obsolete. The court's task, then, is to determine whether the low-damage threshold is consistent with that topography.

Calabresi suggests that a court can make this consistency determination by analyzing more recent legislative actions, judicial decisions, and

65. G. CALABRESI, *supra* note 12, at 107-12.

66. *Id.* at 95-101, 107-09.

67. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 (1977).

68. *See, e.g.*, Airline Deregulation Act of 1978, 92 Stat. 1705 (1978).

69. *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975)(adding many procedural safeguards to FTC rulemakings).

70. *See, e.g.*, Animal and Plant Quarantine Amendments, 92 Stat. 1061 (1978) (repealing notice requirements relating to plant and animal quarantines).

71. *See, e.g.*, Fair Debt Collection Practices Act, 91 Stat. 874 (1977).

72. *See, e.g.*, Health Research and Health Services Amendments of 1976, 90 Stat. 401 (1976) (section 501(a) prohibited the Secretary of HEW from establishing maximum limits on the potency of vitamins or minerals).

scholarly writings.⁷³ Applying this method to our example, we see that scholars generally condemn low damage thresholds that defeat the whole purpose of no-fault laws and harm all segments of the public except certain lawyers.⁷⁴ Based on this evidence and the evidence that the threshold no longer serves the purpose identified by the legislature when it passed the statute, a court might be tempted to declare the provision obsolete.

However other evidence of the general legal topography indicates that such a holding of obsolescence would amount to nothing more than wishful thinking. There is no clear trend in modern judicial opinions to eliminate fault as a criterion for recovery. Indeed, courts have stretched a variety of doctrines to enable accident victims to pursue fault-based remedies when they appear to be eligible only for statutory no-fault recovery.⁷⁵ Nor does evidence of recent legislative action in this area support the claim of obsolescence. Legislatures have stopped enacting no-fault laws,⁷⁶ and at least two jurisdictions have repealed their no-fault statutes.⁷⁷ A court could actually muster a great deal of evidence to support a holding that the no-fault statute itself is inconsistent with the general legal topography. Under the circumstances, if a court were to declare the statute obsolete it would be a blatant antimajoritarian usurpation of legislative power.

Calabresi might object that I have selected a statutory provision that is a poor candidate for a holding of obsolescence. If this is the case, I must return to my first reservation.⁷⁸ Even if courts were to adopt Calabresi's approach to statutorification, they would not be a promising source of comprehensive tort reform. Statutorification is a significant obstacle to judicial initiation of tort reform, but statutory obsolescence accounts for only a small fraction of the characteristics of the tort system that render it both ineffective and inefficient. Very few tort statutes are candidates for a judicial finding of obsolescence.⁷⁹ Therefore judicial nullification of all such statutory provisions would not produce an effective new tort compensation system.

73. G. CALABRESI, *supra* note 12, at 146-61.

74. *See, e.g.,* O'Connell & Beck, *supra* note 27.

75. *See* Comment, *supra* note 2.

76. O'Connell, *supra* note 1, at 595.

77. 1979 Nev. Stats. ch. 660, § 9; 1984 Pa. Laws act 11.

78. *See supra* text accompanying notes 55-56.

79. A survey of the tort compensation statutes of Connecticut yielded only one good candidate for application of Calabresi's proposed judicial technique. Sacks & Kurlantzick, Book Review, 33 J. LEG. EDUC. 727, 729-30 (1983) (reviewing G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)).

B. Courts as Implementers of a Reformed Tort System

The worth of judicial initiation of tort reform depends largely on judicial ability not only to create but also to implement a reformed tort system. This is another major limitation on courts as a source of tort reform. Courts are good at resolving disputes between individuals based on specific facts. They are ill-suited, however, to make decisions based on complicated aggregates of data. It is unrealistic to expect courts to shift the focus of their causal inquiry from specific cause to functional cause, or to identify the functional cause or causes of an accident in an efficient and effective manner. If tort law is to serve the goal of general deterrence, cigarette manufacturers should bear most of the cost of lung cancer, dischargers of toxic wastes should pay a significant share of the cost of stomach cancer, and manufacturers of motorcycles whose design allows them to go unseen in traffic should absorb most of the cost of motorcycle accidents.⁸⁰ Courts are not likely to make such changes.⁸¹

Courts are also limited by their need to assign damages that represent both the victim's compensation and the costs assessed to the faulty party. The factors that should govern the determination of adequate compensation differ from the factors that should determine the costs to be internalized to the activity that caused the accident. The following three examples illustrate this judicial limitation.

The first example is the controversial collateral source rule. If compensation of accident victims is the goal, courts should deduct payments from collateral sources in calculating damages.⁸² By contrast, if general deterrence through accident cost internalization is the goal, all accident costs should be assessed against the activities which cause the accidents.⁸³

The second example is the method of assigning a value to life through wrongful death damage awards. The average damage award for the wrongful death of a child was less than \$30,000 as of 1972.⁸⁴ This sum seems totally inadequate as the measure of the social cost of an accident that is fatal to a child. Yet it seems excessive if the goal of tort law is to place the victim's dependents in the financial position they would have occupied but for the accident.⁸⁵

The final example is the growing class of tort cases involving proba-

80. See Pierce, *supra* note 1, at 1298, 1303 & n.62.

81. *Id.*

82. O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591.

83. R. POSNER, *supra* note 3, at 152-53.

84. Finkelstein, Pickerel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 887 (1974).

85. *Id.*

bilistic joint causation. At common law, the plaintiff is entitled to full compensation if, but only if, the plaintiff's injury was more probably than not caused by the defendant's fault. This rule produces highly unsatisfactory results in toxic tort cases. Consider the case of a refinery worker who contracts leukemia. The evidence may show a forty-percent probability that the illness was attributable to exposure to benzene in the refinery⁸⁶ and a sixty-percent probability that it was caused by exposure to unknown elements in the general environment. At common law, the victim receives no compensation, and no accident costs are internalized to the refinery. If the probabilities are reversed, the victim receives complete compensation, and all of the costs are assessed against the refinery. An entirely different result, beyond the institutional capacity of a court, would simultaneously further the goals of compensation and general deterrence. In both cases, the victim should receive complete compensation, while the costs of the accident should be internalized to the refinery in proportion to its probabilistic causal relationship to the accident.

The benzene example highlights another institutional limitation of courts. It is extraordinarily expensive and inefficient for hundreds of judges and juries to determine independently the characteristics and sources of the many toxic substances that bear all or part of the causal responsibility for a wide variety of illnesses. In each case, the judge or jury must base its decision on its assessment of the highly technical conflicting testimony of toxicologists. The costs of such a decentralized decisionmaking procedure are staggering. Such a procedure can also be expected to yield erratic results that frequently vary from the prevailing scientific understanding of toxicity.⁸⁷

These institutional characteristics of courts limit their effectiveness in implementing a reformed tort system. They also cast additional doubts on the value of judicial initiation of tort reform. Courts can only reform their own rules; they cannot establish a new set of substantive rules to be implemented by some other institution.

III AGENCIES

A. Agencies as Initiators of Tort Reform

An administrative agency cannot by itself initiate tort reform. An agency has no power except that delegated to it by the legislature. Thus,

86. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 618-620 (1980) (discussing the causal relationship between exposure to benzene and leukemia).

87. See Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1, 22-23, 40-43 (1973); see also Pierce, *supra* note 1, at 1297-98.

we are forced to reconsider the serious obstacles to legislative initiation of tort reform.

It is unrealistic to expect legislatures with crowded agendas to establish a completely reformed tort system by statute.⁸⁸ The obstacles to tort-reform legislation are substantially less formidable, however, if the legislature is asked only to enact a statute that recognizes the need for a new tort system. It could then delegate authority to an agency to institute a new system that furthers the generally accepted goals of tort law.

A legislature could empower an agency to create a comprehensive new tort system by giving the agency two types of substantive authority. These would be exercised in accordance with broad decisional standards. The legislature would need to give the agency (1) the power to assess accident costs to the activities and institutions causally responsible for accidents, and (2) the power to independently compensate accident victims.⁸⁹ The legislature could instruct the agency to exercise these powers so as to further the goals of compensation of accident victims, deterrence of accidents, and minimization of transaction costs. The agency could use the proceeds of its accident cost-assessment function as at least a partial source of funding for its compensation function. The balance of the agency's funding would have to be derived from periodic appropriations from general revenues.

Creating a new tort system through the use of an agency would require two steps. The legislature would have to be convinced to pass the enabling act, and the resulting agency would have to be convinced to use its statutory authority as the basis for constructing an improved tort/compensation system. I do not wish to minimize the problems inherent in either step; each presents a considerable challenge. I am only arguing that comprehensive tort reform is more likely to occur through this two-step process than through legislative or judicial transformation of tort law.

It is much easier to convince a legislature that a serious problem exists than it is to convince that body to solve the problem in a particular way.⁹⁰ The second step requires the overburdened legislators to understand the nature of the problem in considerable detail and to arbitrate the inevitable substantive disputes between important constituencies. Legislators do not have time to engage in this type of activity, and most cannot afford the political cost of making explicit decisions that favor one constituency over another. Legislators feel considerable pressure, however, to "do something" when they are confronted with evidence that a problem exists.

88. See *supra* text accompanying notes 18-29.

89. See *Pierce, supra* note 1, at 1320-21.

90. See *Pierce & Shapiro, supra* note 13, at 1195-1200.

This combination of legislative incentives explains the extraordinary growth in the authority of administrative agencies over the past several decades. Indeed, bureaucratization of the legal system seems as inevitable as the statutorification described by Calabresi. The path of least resistance for any legislature confronted with a demonstrable problem is to create an agency to resolve it, avoiding the costs in time and political support that must be incurred in any attempt to resolve the problem directly by statute. In the tort-reform context, the legislature would find this option particularly attractive, it could empower the agency to carry out broad goals so universally accepted that no constituency could credibly quarrel with the standards.

Of course, powerful constituencies, including trial lawyers, would oppose a legislative initiative of this type as vigorously as they oppose other tort-reform proposals. They would have considerably less basis for effective opposition, however. Since they would not be able to argue credibly against a specific proposal, their opposition would have to be premised solely on the basis that tort law does not need reform. Conversely, proponents would need to convince the legislature only that tort law requires reform, without having to deal with the always divisive issue of the specific type of reform required. The latter issue almost invariably produces the legislative stalemates or counterproductive compromises that have so long frustrated O'Connell and other proponents of legislative tort reform.⁹¹

If the critical first step of agency creation were taken, it would create a framework of legal authority within which the agency could establish an entirely new tort system that actually furthers the goals of tort law. Translating this potential into reality would require a series of actions by the agency. Critics such as Calabresi might express strong objections to relying upon an agency as the source of tort law reform. Calabresi has recognized that agencies can and have been used to avoid legislative inertia.⁹² Indeed, he identifies two reasons agencies theoretically are preferable to courts as sources of law reform: (1) agencies can promulgate regulations that are both comprehensive and detailed,⁹³ and (2) use of agencies indicates clear recognition of legislative supremacy.⁹⁴ Calabresi argues, however, that agencies have been a "dismal disappointment" as sources of legal renovation.⁹⁵

Calabresi claims agencies do not renovate legal regimes often

91. See *supra* text accompanying notes 18-29.

92. G. CALABRESI, *supra* note 12, at 44-45.

93. *Id.* at 53.

94. *Id.* at 51-52.

95. *Id.* at 45.

enough to permit legal rules to meet changing societal needs.⁹⁶ He further contends the legal renovation they accomplish is not sufficiently legitimate.⁹⁷ He relates the first deficiency to the phenomenon of agency-capture by vested interests. This term can be explained by a related concept frequently referred to as "the iron triangle." This concept refers to a situation in which the agency, a powerful constituency with a vested interest in the status quo at the agency, and a few well-placed legislators beholden to that constituency act together to block all attempts at change.⁹⁸ He relates the second, more fundamental deficiency to his characterization of agencies as less principled than courts and less majoritarian than legislatures.⁹⁹

Each of Calabresi's criticisms of agencies as a potential source of law reform is legitimate and well-documented. My sole contention is that he overstates the case, particularly in the tort law context. If you accept, as Calabresi surely does,¹⁰⁰ the premise that tort law is ineffective and badly in need of reform, the question becomes not which institution is perfectly situated to accomplish that reform, but which institution is best suited to do it. Calabresi agrees with O'Connell that the legislature is the theoretically preferred institution to initiate law reform but he dismisses it as inadequate nevertheless because of its institutional limitations.¹⁰¹ Calabresi then identifies courts as the second-best source of legal renovation.¹⁰² This is my only point of disagreement. Even with all the limitations Calabresi ascribes to agencies, they are far superior to courts for the purpose of tort reform.

There is ample empirical evidence to support Calabresi's argument that many agencies renovate too infrequently and protect the status quo long after the need for change has become apparent to most outside observers. It does not follow, however, that all agencies are more affected than courts by inertia. Some agencies have been prone to inertia, but this characteristic is far from universal. After all, the Environmental Protection Agency successfully implemented the bubble concept, even though it had to overcome the District of Columbia Circuit's strenuous

96. *Id.* at 46-51.

97. *Id.* at 51-58.

98. *Id.* at 46-51; see, e.g., De Marchi, *Energy Policy Under Nixon: Mainly Putting Out Fires*, in *ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS* 395, 396 (C. Goodwin ed. 1981).

99. G. CALABRESI, *supra* note 12, at 46. A good argument can be made that agencies are more principled than courts. See J. MASHAW, *BUREAUCRATIC JUSTICE* (1983). Even if Calabresi's comparative assessment of agencies is accepted, the inference he draws is questionable. Can it not equally be claimed that agencies are a more legitimate source of statutory renovation than courts because they are more majoritarian than courts and more principled than legislatures?

100. See G. CALABRESI, *supra* note 1.

101. G. CALABRESI, *supra* note 12, at 70-72; O'Connell, *Neo No-Fault*, *supra* note 12, at 905-06.

102. G. CALABRESI, *supra* note 27, at 82-90.

efforts to preserve the status quo.¹⁰³

Apart from inconclusive anecdotal evidence of agency capture,¹⁰⁴ Calabresi bases his first criticism of agencies on the theory of capture and the iron triangle phenomenon.¹⁰⁵ During the past decade, administrative law scholars have identified many of the characteristics of agencies that cause them to be more or less prone to inertia, capture, and the iron triangle. Application of this new learning to a hypothetical tort/compensation agency suggests that such an agency would not be particularly susceptible to capture or to the iron triangle. Moreover, the dramatic changes in the relationship between the President and administrative agencies that have taken place over the past few years make either occurrence less likely. They also support the argument that legal renovation by agencies is far more legitimate than renovation initiated by the courts.

Roger Noll has documented and explained the close correlation between agency capture and the breadth of an agency's responsibilities.¹⁰⁶ When an agency has regulatory control over a single segment of the economy, one or more of the relatively powerful groups that dominate that area almost inevitably gain undue power over the agency's decisionmaking apparatus. This power is normally achieved through the iron triangle effect. Capture is much less likely where an agency's regulatory authority extends across many segments of the economy. An agency with broad authority has so many constituencies that no one group, no matter how powerful, is likely to be able to dominate its decisionmaking process for any sustained period. A tort/compensation agency would be the paradigm of an agency whose authority spans so many constituencies that outside control is highly unlikely.

Each of the past four Presidents has included as part of his agenda for reform of the governmental bureaucracy a mechanism for attaining greater Presidential control over agency decisionmaking.¹⁰⁷ Understandably, the initial efforts were halting and produced little tangible change in agency policy decisions. Gradually, however, the White House has been able to coordinate regulatory policymaking and begin itself to exercise a

103. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

104. "Capture" refers to the tendency of some agencies to favor the industry they are required to regulate by protecting the industry from outside competition and stifling innovation that threatens the status quo in the industry. See Noll, *The Behavior of Regulatory Agencies*, 9 REV. SOC. ECON. 15 (1971).

105. The "iron triangle" refers to the combination of direct beneficiaries of a regulatory program, bureaucrats who run the program, and legislators with oversight responsibility for the program. This combination often develops a shared interest in maintaining the status quo of a program's function. See De Marchi, *supra* note 98, at 425-29.

106. See Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971).

107. See Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

greater proportion of regulatory decisionmaking.¹⁰⁸ The Office of Management and Budget now reviews all major executive-branch agency initiatives and frequently requires agencies to revise major actions.¹⁰⁹ This recent development is shifting the effective locus of power over each regulatory agency from a few well-placed legislators with parochial perspectives to the executive branch. A single constituency with a vested interest in the status quo can capture one or two strategically positioned legislators much more easily than it can capture the President. The White House is susceptible to capture from time to time by representatives of broad ideologies that enjoy popular support, but it is less susceptible to capture by representatives of specific vested interests.

The increased presidential control over agency decisionmaking bolsters my argument that agencies are more legitimate than courts as a source of law reform. Majoritarian control over agency policy decisions admittedly is attenuated, but agencies are nonetheless far more accountable to the electorate than federal judges are.¹¹⁰ The President's increasingly active role in agency policy decisions means that the second-best choice between courts and agencies must be viewed as a choice between the President and judges. I submit that this choice is not even difficult from the standpoint of the constitutional and majoritarian legitimacy of policy decisions.¹¹¹ Moreover, as Calabresi admits, the choice of agencies as the second best source of policy decision is entirely consistent with recognition of legislative supremacy.¹¹² The legislature has only to overcome its own institutional inertia to displace a policy selected by an agency with a policy preferred by the legislature.

Calabresi undoubtedly would counter that my description applies only to executive branch agencies. Both capture and legitimacy are more serious concerns with respect to independent agencies. I have two anticipatory responses. First, the legislature could create a tort/compensation agency in the executive branch, since Congress' criteria for making an agency independent or dependent remain a total mystery. Second, as Peter Strauss and Paul Verkuil have demonstrated, there is less substance to the seldom-analyzed distinction between dependent and independent agencies than the many references to the distinction suggest.¹¹³ The

108. See OFFICE OF THE VICE PRESIDENT, HIGHLIGHTS OF REGULATORY RELIEF ACCOMPLISHMENTS DURING THE REAGAN ADMINISTRATION (1983).

109. *Id.*

110. See Pierce & Shapiro, *supra* note 13, at 1194-95. This thesis will be developed at much greater length in R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 17.

111. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

112. G. CALABRESI, *supra* note 12, at 51.

113. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Verkuil, *Control of Administrative Policymaking by Federal and State Government* (forthcoming in the *Suffolk University Law Review* (1985)).

"independence" of most regulatory agencies is little more than a public-relations gimmick. There are only three branches of government. The President exercises considerable practical and legal control over independent agencies, particularly in their policymaking role. Thus, even independent agencies are more legitimate than courts as a source of policy decisions.

B. Agencies as Implementers of Tort Reform

Agencies are also better suited than courts to implement a reformed tort/compensation system. As Calabresi recognizes, an agency can establish by rule a comprehensive and detailed new legal regime applicable to a field of law in need of reform.¹¹⁴ As a result, implementation of law reform by an agency can be more complete, more rapid, and can provide far better notice to affected individuals than implementation by a court.

The power to act by rule gives agencies another major advantage over courts. An agency can resolve many recurring issues in general rulemaking proceedings, the results of which can be applied directly to all adjudications in which the issues arise.¹¹⁵ This procedural flexibility unique to agencies can substantially reduce transaction costs and eliminate many of the features of the present system that cause it to be analogized to a lottery.¹¹⁶

The following three examples illustrate the potential value of agency flexibility in resolving frequently litigated issues through general rulemaking. The first illustration involves DES cases. Many courts across the country are considering the important issue of the carcinogenic potential of DES.¹¹⁷ In each case, parties (and the tribunal itself) must devote considerable resources to an attempt to resolve this issue. Based on prior experience with judicial resolutions of similar issues, one can predict that this process will produce inconsistent results, some of which will be demonstrably wrong.¹¹⁸ It is difficult to conceive of a more inefficient and ineffective method of dealing with a scientific controversy. An agency could resolve the issue in one rulemaking proceeding, with

114. G. CALABRESI, *supra* note 12, at 53.

115. See, e.g., *Heckler v. Campbell*, 103 S. Ct. 1952 (1983).

116. See Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1 (1979).

117. See, e.g., *Payton v. Abbott Laboratories, Inc.*, 386 Mass. 540, 437 N.E.2d 171 (1982); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182 (1982); *Namm v. Charles E. Frost & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (1981); see also R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 4, at 296-309.

118. See sources cited *supra* in note 87.

substantially lower transaction costs and greater confidence in the accuracy of the result. Moreover, the rulemaking process serves traditional common-law values well. Through the use of rulemaking power, agencies can give life to the often hollow judicial incantation that like cases must be treated alike.

The second illustration of the advantages of rulemaking arises in calculating damages. Over the past decade, appellate courts have devoted many hundreds of pages of analysis to the question of how to instruct juries to relate inflation to the time value of money in calculating damages for lost future earnings.¹¹⁹ In many jurisdictions, this extensive judicial treatment of the issue has produced an anomalous situation. The parties are free to present conflicting expert testimony about unanswerable factual issues like what the level of inflation will be five years in the future.¹²⁰ Juries may then "find" a level of future inflation within a wide range of permissible results. An extraordinary level of transaction costs inhere in this method of decentralized resolution of a factual issue that is common to thousands of cases. One glance at a present-value table shows that the irrational variation in findings with respect to these issues also account for a high proportion of the extremely wide variation in tort damage awards. Again, an agency could issue a single rule determining the appropriate discount and inflation rates for all cases in which lost future income is an issue. It would thereby simultaneously reduce the transaction costs of the tort system and increase the consistency of damage awards.

The third illustration of the potential value of agency rulemaking arises in the critical area of determining the cause of accidents. Agencies with a broad perspective on cause are in a much better position than are courts to determine the functional causes of entire classes of accidents.¹²¹ This enhanced capability to determine cause functionally and probabilistically is particularly valuable in addressing the problem of toxic torts.¹²² An agency could use rulemaking procedures to determine, for instance, that forty percent of all leukemia cases are caused by exposure to benzene that has its source in the process of refining and distributing petroleum products.¹²³ It could use this determination as the basis for

119. *E.g.*, *Culver v. Slater Boat Co.*, 688 F.2d 280, 306-07 (5th Cir. 1982); *Doca v. Marina Mercante Nicaraguense*, 634 F.2d 30, 39-40 (2d Cir. 1980); *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 386-87 (2d Cir. 1975); *Beaulieu v. Elliott*, 434 P.2d 665, 670-72 (Alaska 1967).

120. *See, e.g.*, *Culver v. Slater Boat Co.*, 688 F.2d 280, 305-06 (5th Cir. 1982); *Doca v. Marina Mercante Nicaraguense*, 634 F.2d 30, 39-40 (2d Cir. 1980).

121. *See Pierce*, *supra* note 1, at 1322-27.

122. *See P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, TORT & ACCIDENT LAW* 923-53 (1983).

123. For a discussion of an agency's factfinding and rulemaking powers when evaluating probabilities and the limits of those powers, see *Industrial Union Dep't v. American Petroleum Inst.*,

assessing forty percent of the total costs of leukemia against companies that refine and distribute petroleum products. In the absence of more specific data, that cost assessment could be allocated to each firm based on its share of the market. The California Supreme Court took the first constructive step toward such a probabilistic approach to causal issues in *Sindell v. Abbott Laboratories*.¹²⁴ However, the institutional characteristics of courts severely limit the extent to which they can engage in accident cost assessment based on statistical analyses. Even if the courts of other jurisdictions accept the *Sindell* principle,¹²⁵ they are not likely to extend it to the many classes of accidents in which the identifiable causes account for less than fifty percent of the total number of accidents of a particular type.

Agencies have one final advantage. They are not bound by the traditional judicial need to equate plaintiff's compensation with defendant's damages. The flexibility to independently compensate accident victims and assess accident costs would greatly increase the likelihood of implementing a tort system that simultaneously furthers the goals of adequate compensation and optimal deterrence. This flexibility would be particularly valuable to respond to the problem of toxic torts attributable to multiple causes, many of which are unknown. A satisfactory solution to this important class of cases may be beyond the institutional capacity of common law courts.

CONCLUSION

I do not want to overstate the case for relying upon an agency as the principal means of initiating and implementing an effective tort/compensation system. It would be extraordinarily difficult to convince Congress to enact the enabling statute necessary to start the process. The agency then would confront the most challenging task ever undertaken by an administrative body. Given the poor performance of agencies with much more manageable mandates, the agency could well be unequal to the task.

In all candor, the thrust of my argument is a criticism of the status quo. The tort system is expensive and ineffective. Neither courts nor legislatures will make the kinds of comprehensive changes necessary to

448 U.S. 607 (1980) (examining OSHA's powers to limit worker exposure to the carcinogen benzene).

124. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); see Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982).

125. Several courts have already rejected that principle. See, e.g., *Ryan v. Eli Lilly Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (1981).

produce an efficient and effective tort system. Moreover, courts do not have the institutional ability to implement such a system.

On the positive side, I am willing to argue that an administrative-law solution is more likely than a judicial or legislative approach to yield an effective tort system. It is easier to convince a legislature to enact a statute delegating problem-solving power to an agency than it is to convince it to pass a statute that addresses a problem directly. Once an agency has the power to create a new tort system, there are several reasons to be cautiously optimistic concerning the agency's exercise of that power. First, agencies are a more legitimate source of policy decisions than courts. Second, an agency with broad power is not a good candidate for capture. Third, agencies can greatly improve the operation of the tort system through the use of their unique power to make decisions through generic rulemaking procedures.