The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah

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A failure to focus on the practical operation of tort law—especially as it intersects with insurance—is a feature of too much contemporary tort scholarship. It was in mid-century that Fleming James of Yale hauled tort law from its isolation into a recognition that it is not only undergirded but dominated by insurance, with its concomitant concern for paying accident victims and spreading losses.¹ Even appellate courts in the old pre-James days recoiled from mentioning insurance, mirroring trial judges who shielded jurors from such sullied considerations.² But despite James’s breakthrough, thoughtful jurisprudences like Ernest Weinrib³ and Stephen Perry,⁴ along with younger scholars writing extensively in tort law, including Heidi Li Feldman,⁵ Linda Ross Meyer,⁶ Steven P. Croley and Jon D. Henson,⁷ fail in our view to focus sufficiently, if at all, on tort law’s unsatisfactory performance as an insurance mechanism with all its fortuity, delays, and transaction costs. This is not to deny the difficulty of reconciling tort law’s moral underpinnings with the amoral actuarial base of insurance. But that difficulty is all the more reason for tort scholars to deal

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2. See, e.g., Bowman Biscuit Co. v. Hines, 251 S.W.2d 153 (Tex. 1952) (reference to insurance deleted on rehearing).
with it.8

On the other hand, two recent pieces by eminent tort scholars on both sides of the Atlantic do indeed concern themselves with insurance to a greater or lesser extent, but with exactly opposite—and, in our view, equally unsatisfactory—results.

Professor Gary Schwartz of the UCLA Law School, in his piece entitled *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, is so discouraged by tort law's failure as a compensatory insurance device that he explicitly abandons compensation for personal injury as a legitimate, independent goal of tort law in favor of the goals of justice and efficiency.9 Patrick Atiyah, the retired professor of English Law at Oxford University, takes the opposite tack: He is so discouraged by tort law's failure as a compensatory insurance device that he urges abandonment of tort law altogether in favor of focusing only on compensation from other forms of social and private insurance when personal injury arises from incidents other than auto accidents.10 Thus, under his proposal, non-tort social and private insurance supersedes the goals of justice and efficiency which Schwartz deems exclusively worthy of consideration. Quite a contrast.

In this piece we suggest a halfway house between these two extremes posed by Schwartz and Atiyah.

As background consider the following: Two classes of proposed theoretical justifications undergird the tort system—those based in utilitarianism and those based upon individual moral rights.12 Utilitarian justifications focus on how tort law can be used as a tool to further an independent social or public policy goal. A prominent example of utilitarian justifications is deterrence. According to law and economics' deterrence theory, tort law's goal is to reduce the number and severity of accidents by imposing the threat of liability on potential tortfeasors.13

Commentators often refer to the second category, vindicating individual moral rights, as "corrective justice". The theories under this heading are not based on their effects or consequences, as are utilitarian arguments; instead, these theories assert that an act or a framework is right or wrong

8. See infra note 86 (discussing the formidable issue of redistribution of income and citing various commentaries concerning the failure of tort scholars to reconcile tort law with same).


10. See id. at 1818. As will be seen, Schwartz's treatment of compensation purports to be positive (rather than normative). But Schwartz creates an elaborate theory of tort law that reduces compensation to only a footnote. See infra text accompanying note 58. Thus, it appears to us that Schwartz's dismissal of compensation is normative as well.


12. See Perry, supra note 4, at 449.

"in itself". Corrective justice scholars view tort law as a way of achieving justice between the parties.

Utilitarian scholars and corrective justice scholars rarely acknowledge the value of opposing theories and frequently deride them. Ernest Weinrib, a proponent of corrective justice, argues the very structure of a tort suit eliminates deterrence and compensation as rationales for the tort system. Another advocate of corrective justice, Richard Wright, believes economics-based theories have no value in explaining tort law. On the other hand, utilitarian scholars such as Richard Posner and George Priest have argued with respect to tort law that corrective justice is irrelevant and unimportant.

In this atmosphere of mutual disrespect between utilitarian and corrective justice scholars, Gary Schwartz attempts to reconcile the two systems of thought. In *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice* ("Mixed Theories of Tort Law"), Professor Schwartz argues that the tort system incorporates elements of both corrective justice and the utilitarian theory of deterrence. Relying on an analogy to criminal law, Professor Schwartz advocates a "mixed" theory of tort law in which some aspects of the tort system are supported by corrective justice and other aspects are founded upon deterrence. In this creative and thought-provoking article, Schwartz castigates the myopia of those who focus exclusively on corrective justice or deterrence. However, as we shall see, Schwartz peremptorily dismisses compensation as an independent element of tort law (he goes along, though, as do many of the scholars he discusses, with compensation as instrumental in advancing the goals of deterrence or corrective justice).

In this connection, we find Professor Schwartz's analysis, although laudable, incomplete. We applaud and adopt Professor Schwartz's theory that the tort system can be, and is, founded upon multiple rationales. However, we would extend the mixed theory of tort law beyond deterrence and corrective justice to include compensation. We argue compensation is not only a plausible goal of the tort system, it is a desirable—and indeed an essential—goal. On the other hand, Professor Atiyah argues that the tort

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14. The distinction between utilitarianism and individual moral rights, or Kantianism, is familiar from the subject of Ethics. See James Rachels, The Elements of Moral Philosophy chs. 7-10 passim (1986).
15. See Schwartz, supra note 9, at 1801 (describing one of the "two major camps of tort scholars" as viewing tort law "as a way of achieving corrective justice between the parties").
16. See Weinrib, supra note 3, at 36-41.
19. See Schwartz, supra note 9, at 1801.
goal abandoned by Schwartz is the only goal worthy of preservation. He advocates a system exclusively dedicated to the goal of compensation. We argue this is a myopic approach which unnecessarily eliminates whatever benefits can be provided by corrective justice and deterrence.

In Part I of this Article, we present Professor Schwartz’s Mixed Theories of Tort Law, including his (brief) argument for excluding compensation from his mixed theory analysis. In Part II, we turn to Professor Atiyah’s theory. Finally, in Part III, we present our own mixed theory proposal for tort law: “early offers,” which (arguably at least) reconciles the opposite theories of Schwartz and Atiyah.

I. SCHWARTZ’S MIXED THEORY ANALYSIS

A. The Analogy to Criminal Law

Schwartz begins Mixed Theories of Tort Law by describing the history of tort law’s deterrence and corrective justice theories.20 The theories have interesting parallels. Both theories were founded in the early 1970s.21 Both theories originally had two principal proponents. The leading scholars then espousing a corrective justice point of view were George Fletcher and Richard Epstein.22 Guido Calabresi and Richard Posner were the primary advocates of tort law’s deterrence theory.23 At the time of their introduction, both theories aroused much interest.

However, the parallels between the theories only reinforced the theories’ differences. Each scholarly camp expressed little sympathy—indeed outright hostility—towards the other.24 Schwartz offers several explanations for this mutual disfavor. First, he presents explanations concerning scholars’ intellectual commitment to the merits of their ideas and positions. Under this category, Schwartz highlights both the structural objection raised by Ernest Weinrib and Jules Coleman,25 and the association between deterrence reasoning and the efficiency objective, an objective non-economists perceive as cold and amoral in the positions it takes and the analyses it pursues.26 Additionally, the standard methodology of the economist is to analyze the efficiency properties of a problem, and then classify all other elements as merely raising issues of wealth distribution; this tends to suppress the very possibility of corrective justice.27

20. See id. at 1802-11.
21. See id. at 1802-03.
22. See id. at 1802.
23. See id. at 1803.
24. See id. at 1806-11.
25. See supra text accompanying note 16; see also infra text accompanying notes 33-44 (discussion by Schwartz on diffusion of the structural objection).
26. See Schwartz, supra note 9, at 1809.
27. See id.
Further explanations "relate to scholarly style and the lay of the scholarly land."\textsuperscript{28} The law and economics movement generated enormous excitement in the early 1970s; that excitement would have been considerably reduced if it had to be modified to recognize the independent relevance of corrective justice.\textsuperscript{29} Therefore, economics (deterrence) scholars treated corrective justice theories with little or no respect. This attitude caused corrective justice scholars to respond in kind. Finally, the fact that the two principal corrective justice scholars disagreed not only on final positions, but even on the relevant frame of reference, made it possible for deterrence scholars to regard corrective justice approaches as suffering from a basic lack of discipline.\textsuperscript{30}

Having (1) presented the history of deterrence and corrective justice theories, (2) acknowledged the hostility between them, and (3) attempted to explain that hostility, Schwartz turns to his argument that the two theories can and should complement one another. In this vein, Schwartz invokes an analogy to criminal law.\textsuperscript{31} There are two foundational theories of criminal law as well as tort law. In criminal law, the theories are deterrence and retributive justice.\textsuperscript{32} Schwartz relates a brief history of each theory and explains that, although scholars may emphasize one theory or the other, both theories are accorded respect. Schwartz presents several criminal law theories incorporating both deterrence and retributive justice.

The lesson Schwartz offers is obvious. Both tort and criminal law contain a utilitarian and an individual moral rights justificatory premise. If, in criminal law, both theories are respected and mixed theories are accepted, should not tort law entail the same?

B. The Structural Objection

Having piqued the readers' interest with the analogy to criminal law in the plausibility of a mixed theory of tort law, Schwartz begins his analysis of such a theory for tort law. At the outset, Schwartz addresses a structural objection of Weinrib and Coleman.\textsuperscript{33} If their structural objection is sound, a mixed theory of tort law is impossible and only corrective justice remains as a goal of tort law.

As to their structural objection, Weinrib and Coleman believe corrective justice inheres in the very structure of a tort suit and that structure eliminates deterrence (and compensation) as a rationale for the tort

\textsuperscript{28} Id. at 1810.
\textsuperscript{29} See id.
\textsuperscript{30} See id. Schwartz wryly notes that Jules Coleman, addressing an audience of torts professors, recently stated that there are "five [scholars] who believe in corrective justice and eighteen different analyses of what corrective justice is; and I am responsible for about ten of them, because I've changed my mind so many times." Id. at 1811 n.77.
\textsuperscript{31} See id. at 1811-15.
\textsuperscript{32} See id. at 1811.
\textsuperscript{33} See id. at 1815-19.
system.\textsuperscript{34} Schwartz succinctly summarizes the Weinrib/Coleman position:

Their position points to and analyzes several structural features. First, tort liability is imposed not on every defendant who operates tortiously, but only on those defendants whose tortious conduct turns out to produce harm; this complies with the logic of corrective justice yet departs from the logic of deterrence. Also, the extent of the defendant's liability is not the expected value of the risk the defendant creates but rather the amount of the harm suffered by the injured plaintiff; this makes good sense from a corrective justice perspective yet no sense from an economic perspective. Third, the tort suit is brought by the accident victim. This makes perfect sense from a corrective justice perspective, yet it can be justified in economic terms only insofar as it gives the victim an incentive to bring the lawsuit that will eventually serve the ends of deterrence; because the role of private attorney general could be assigned to parties other than the victim, the victim's status as the tort plaintiff hence becomes non-essential, contingent. Fourth, the tort suit imposes liability on the party whose tortuous conduct has "caused" the plaintiff's injury. While the causation requirement entirely fits a corrective justice theory, for economic purposes it is deficient because the focus of liability should be on the best risk avoider, who may or may not be the actual accident cause.\textsuperscript{35}

Schwartz asserts the Weinrib/Coleman structural argument has an affirmative and a negative claim: "The affirmative claim is that corrective justice inheres in the very structure of a tort action; the negative claim is that this structure rules out deterrence as a meaningful tort law objective."\textsuperscript{36} Schwartz agrees with the affirmative claim; he states that the structure of tort law seems so rooted in corrective justice that any attempt to exclude a corrective justice rationale would be unsatisfactory. However, Schwartz argues the Weinrib/Coleman position vastly overstates the extent to which the structure of tort law excludes deterrence as a foundation of tort law.

Schwartz grants that tort law imposes liability only on those negligent actors whose conduct produces injury, and the amount of liability corresponds to the particular injury rather than the value of the expected risk. But Schwartz argues that for economic purposes what matters is not the burden of liability \textit{ex post} but rather the prospect of liability \textit{ex ante}. To the extent the potential tortfeasor can anticipate bearing liability for any injuries his tortious conduct foreseeably can produce, this prospect can

\textsuperscript{34} See \textit{id.} at 1815.
\textsuperscript{35} \textit{Id.} at 1815-16.
\textsuperscript{36} \textit{Id.} at 1816.
foster deterrence of tortious behavior. Furthermore, by allowing claims only when injury results from tortious behavior, the tort system sharply reduces its cost.

Schwartz concedes tort law's causation requirement makes many economic theorists uncomfortable. The core of the problem is that the actual causation test basically calls for an after-the-fact analysis, while the perspective of the deterrence scholar is necessarily prospective. Furthermore, he concedes the causation requirement occasionally produces results which are economically unwise. Nevertheless, Schwartz argues, "in the vast majority of routine tort situations, the actual causation test produces results that are roughly acceptable for deterrence purposes."

Finally, Schwartz agrees that affording plaintiffs a right to compensation gives them an incentive to bring the suit that in turn serves the purpose of deterring injurers and, to this extent, the standing of the victim can be called external and contingent for deterrence purposes. But, Schwartz argues, in a manner not considered by Weinrib and Coleman, the standing of the victim plays a much larger role in economic analysis than just the foregoing. In many cases the plaintiff's conduct combines with the defendant's conduct to create the plaintiff's injury. By giving victims tort claims but then conditioning those claims on defenses such as contributory or comparative negligence and assumption of risk, tort law can be understood in economic terms as supplying economic incentives to injurers and injured alike. Therefore, Schwartz argues, tort law's deterrence rationale can be adequately defended against the Weinrib/Coleman structural argument. A mixed theory of tort law, though admittedly theoretically messy, is thus nevertheless viable.

C. An Inductive Analysis: Six Tort Doctrines

Having dispelled the structural objection, Schwartz approaches a mixed theory inductively by examining individual doctrines "to ascertain whether they can be interpreted in terms of justice, deterrence, or some combination of the two." Schwartz analyzes the negligence standard, strict liability, vicarious liability, causation, liability of landowners to trespassers, and the measure of damages for wrongful death.

Although most of the details of Schwartz's analysis are not relevant to

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37. See id. at 1816-17.  
38. See id. at 1817.  
39. See id.  
40. See id. at 1817 n.123.  
41. See id. at 1817.  
42. Id.  
43. See id. at 1817-18.  
44. See id. at 1818.  
45. Id. at 1819.  
46. See id. at 1819-23.
the thesis of this paper, several of Schwartz’s comments are pertinent. Schwartz concedes that both theories cannot support all doctrines. After arguing that the negligence standard and strict liability are supported by both deterrence and corrective justice, he states: “What has been emphasized so far are doctrines that can be equally supported by deterrence and fairness reasoning. Other doctrines whose support does not seem so broad-based can now be identified.” For example, he cites the vicarious liability of an employer for the negligent acts of his employee, which is supported by deterrence but not corrective justice.

Additionally, Schwartz concedes some doctrines are not fully supported by either deterrence or corrective justice. Speaking for example of the measure of recovery in wrongful death actions, Schwartz states:

Hence wrongful death liability is seriously deficient from an economic [or deterrence] perspective.

. . . . The point is not that existing wrongful death practices are ideal from a corrective justice perspective [either]. Rather such a perspective shows why [these] practices are at least satisfactory and appropriate[, despite all the foregoing].

Schwartz’s concessions indicate several characteristics of his mixed theory. First, he clearly does not argue all tort doctrines must be supported by each tort rationale. Second, he is willing to accept imperfect performance of tort rationales from tort doctrines.

D. Conceptualizing a Mixed Theory

Schwartz goes on to attempt to conceptualize two categories of mixed theories of tort law: those applicable to all tort law and those applicable only to specific tort doctrines. He begins by analyzing mixed theories applicable to tort law as a whole. First, he examines a mixed theory “that tort law imposes or assigns liability for proper deterrence reasons—unless this result is not compatible with the criterion of corrective justice.” Schwartz explains this theory would be supported by, or consistent with, all six tort doctrine examples chronicled in his article. Next, Schwartz analyzes “a converse theory that would regard corrective justice as the criterion guiding liability rule choices, subject to the constraint that these choices be compatible with proper deterrence policy.” He states this mixed theory might be able to accommodate tort doctrines which the first

47. Id. at 1821.
48. See id. at 1821-22.
49. Id. at 1823.
50. See id. at 1824-26.
51. Id. at 1824.
52. See id. at 1825. See also supra text accompanying notes 45-49.
53. Schwartz, supra note 9, at 1825.
theory could not. On the other hand, the corrective justice-oriented mixed
tory could not explain the tort system’s rules on causation, landowner
liability to trespassers, and wrongful death practices. Schwartz concedes it
may be difficult to develop a mixed theory that can account for all of tort
law and he does not attempt to do so in his Article.54

Next, Schwartz discusses partial mixed theories, i.e., employing mul-
tiple rationales to justify a single tort doctrine. Schwartz argues that com-
bining rationales in support of a tort doctrine makes the doctrine more
valuable under traditional cost-benefit analysis: “The ability, then, to af-
firmatively deploy two rationales rather than one in defense of certain por-
tions of the tort system may well play a crucial role in the evaluation of
those portions’ overall value.”55

This examination lead to his discussion of the interrelatedness of deter-
rence and corrective justice.56 Schwartz argues the two camps of scholars
have failed to appreciate the unity of purpose shared by deterrence and
corrective justice. To the extent the deterrent function of tort law is suc-
cessful in preventing accidents, it minimizes the injustice corrective justice
scholars address. After all, it is preferable to avoid injury altogether than
correct it after the fact. Furthermore, Schwartz argues, deterrence scholars
need to acknowledge that despite the liability threat, many parties do, after
all, behave negligently and inflict injuries. Moreover, in considering those
victims’ situations, deterrence scholars should take into account Posner’s
evaluation that because squandering of resources is bad, “‘a judgment of
negligence has inescapable overtones of moral disapproval . . . .
[I]ndignation has its roots in inefficiency.’”57 Posner’s comment identifies
an after-the-fact attitude; therefore, the support it provides for negligence
liability does not lie in \textit{ex ante} incentives.

In this Article, as in Schwartz’s, there is no attempt to develop a mixed
theory applicable to tort law as a whole. Nor do we attempt to develop a
series of partial mixed theories covering multiple tort doctrines. Our focus
is a narrow one. To the extent scholars attempt to create mixed theories of
tort law, they should focus not only on deterrence and corrective justice but
on compensation in more than just its instrumental role in helping to im-
plement the other two. To that end, we now examine Schwartz’s argu-
ments against including compensation as the third separate and fundamen-
tal rationale for tort law.

54. \textit{See id.} at 1826.
55. \textit{Id.} at 1827.
57. \textit{Id.} at 1827 (alteration in original) (quoting Richard A. Posner, \textit{A Theory of Negligence}, I J.
LEGAL STUD. 29, 33 (1972)).
E. Excluding Compensation

Schwartz's argument that compensation in itself is not a viable goal of tort law is relegated to a footnote, and is reproduced below in its pertinent entirety:

[The] negligence standard makes no sense if loss-spreading is assumed to be a primary goal of the law: only a small fraction of all injuries whose losses might be advantageously spread are caused by the negligence of any third party (or any product defect). Furthermore, the tort system's insistence on proof of elements such as negligence and defect assures that the tort system will deliver compensation only after substantial delays and considerable contention. These features seem inconsistent with any loss distribution rationale for tort law. 58

Thus, Schwartz offers two reasons compensation cannot be a real goal of tort law. First, the negligence standard is inconsistent with compensation, he argues, because by its very terms it prevents many accident victims from recovering compensation. Second, the delays and disputes caused by the negligence standard are also inconsistent with compensation. Any system aiming at compensating people for losses would do so swiftly in order to assist in paying for urgent needs brought on by the losses. Yet the tort system, because it forces claimants to prove uncertain elements such as liability and damages (especially in the case of noneconomic losses), forces claimants to wait a considerable amount of time prior to recovery, if any. Therefore, the tort system cannot really be seen as aiming to compensate victims.

It is crucial to note the extent of Schwartz's claim. He argues these two features are inconsistent with any compensation rationale for tort law. In other words, solely because of the inherent limitations of the fault standard and its concomitant delays, he argues compensation plays no independent role in tort law.

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58. Id. at 1818 n.128. We assume Schwartz uses the terms "compensation" and "loss distribution" interchangeably. In his footnote, he purports to simply follow Weinrib and Coleman in this connection, and in the works Schwartz quotes, Weinrib and Coleman thus use the terms. See Jules L. Coleman, Risks and Wrongs 376-82 (1992); Weinrib, supra note 3, at 37-38. We will therefore continue to refer to the concept as compensation. To the extent that almost all tort payments are made from insured or self-insured defendants, one can logically further equate the terms compensation and loss distribution with insurance, all being viewed further as an element of distributive justice. In Gary T. Schwartz, The Ethics and the Economics of Tort Liability Insurance, 75 Cornell L. Rev. 313, 360-64 (1990), Schwartz discusses tort law and compensation in a more extensive and balanced way, while still rejecting "loss spreading as [a justification] . . . for tort law." Id. at 364.
II. ATIYAH’S SINGLE THEORY ANALYSIS

This brings us to Professor Atiyah’s recent monograph, aimed at the general reader, and titled *The Damages Lottery*. In his latest effort, Atiyah is merciless and effective in flaying tort law for its hopeless inadequacies in the very areas that Schwartz hopes to combine and refine—namely, corrective justice and deterrence. Atiyah, mirroring his able writing in the past, points out how little tort law achieves by way of corrective justice given that, among other factors, damages are paid not by wrongdoers but by their insurers, with the costs thereof being further passed on to the general public in the form of higher prices (or taxes in the case of governmental units). This pervasive factor of insurance, Atiyah insists, also undermines achievement of deterrence in that, except for very large institutions, those same insurers rate risks with little if any variation based on an insured’s individual safety performance:

[S]ome people have suggested [that] the insurer may charge higher premiums for those who have [had] bad accident records, so in this way, even insurance does not prevent legal liability from having a deterrent value in the long run. This is an interesting and ingenious suggestion, but detailed research does not bear it out. The subject is quite complicated, but the essential point is that insurers cannot and do not vary premiums very much according to accident record. It is too complex, and too unreliable statistically. You can’t assume that a company which had two or three accidents one year (when the industry average is only one accident per year) is necessarily a badly run company which is likely to have more accidents than the average next year. It may just be a statistical quirk—when you deal in large numbers, as insurers always do, statistical quirks are themselves of quite frequent occurrence, and have to be recognised for what they are.

And to the extent that damage awards may deter they are just as likely to overdeter. Furthermore, the market itself provides plenty of deterrence of unsafe conduct or products from producers of goods and services:

[A]t least in the case of personal injuries, it seems probable that there are already plenty of other reasons why any sensible company or public body will wish to avoid carelessly injuring . . . the public. Quite apart from the sheer inhumanity of deliberately taking risks with life or limb, most companies will find themselves subject to [other] penalties (and the ensuing bad publicity) for

59. Atiyah, supra note 11.
60. See id. at 161.
61. Id. at 163-64.
62. See id. at 164-65.
causing such injuries. . . . [A]ny sensible company knows that accidents cause other financial losses quite apart from legal liability. . . . [N]o well-run company will lightly run the risk of such losses even if they cynically disregard the safety of . . . members of the public. 63

Why, then, Atiyah asks, resort to the tort system that, with its huge fortuities, delays, and transaction costs, makes a mockery of insurance principles—when insurance is designed, after all, to compensate for unmanageable losses with reasonable promptitude, certainty, and efficiency?

Atiyah is so discouraged by the inadequacies of tort law as a compensation device that he would not only abandon compensation as a goal of tort law itself but would largely abandon all personal injury law as well (except for instituting a no-fault scheme for auto accidents). 64 So counter-productive is such tort law in properly achieving any goal—so bloated and distorted is it—that in Atiyah’s view it should be abandoned completely without any replacement: “There is only one really effective solution to this problem [of accident law]. The action for damages for personal injuries should simply be abolished and first-party insurance should be left to the free market.” 65

In other words, Atiyah would simply allow people to rely on whatever social and private insurance is already available to them in dealing with accidents and illness without ever resorting to tort suits. Among other things, this would eliminate what is for Atiyah the unjustifiable distinctions in treatment of the ill and injured who do and do not suffer from tortiously inflicted misfortune. He writes, “[f]or many disabled or handicapped people the effects of their disabilities are precisely the same however they were caused, and it is in one sense pure chance whether they were caused by someone’s fault or not.” 66 In addition, “[t]he care and attention lavished on [tort] plaintiffs . . . can be contrasted with the sort of frugal fare [often] meted out to [others].” 67 For Atiyah, society’s resources are already being stretched too thin for essentials such as health care and education to afford tort liability on top of it all, especially given how little justice or efficiency tort law achieves with all its delays, fortuity, and administrative costs.

But if Schwartz is myopic in imagining that only efficiency and corrective justice matter in tort law, Atiyah is equally myopic in thinking they do not matter at all. To allow the doctor who malpractices or the manu-

63. Id. at 163.
64. See id. at 186-89.
66. ATIYAH, supra note 11, at 147.
67. Id. at 71.
facturer who malproduces to escape by law any financial responsibility for those they tortiously injure is indeed to offend elementary considerations of both justice and efficiency (in the sense of internalization of costs), especially given, as Atiyah is at pains to point out, the often inadequate private and social insurance available to those victims. In this connection, Atiyah is realistic in recognizing that the strains on society’s resources by current expenditures preclude mandatory increases in social or private first-party insurance. He eschews any more advocacy of ambitious, highly expensive, separate no-fault schemes for accident victims of the type enacted in New Zealand and shortly thereafter proposed (by a panel which had originally included Professor Atiyah), but not enacted, in Australia. Atiyah’s proposal, which he admits will appear to many “little short of revolutionary,” seems therefore scarcely politically viable at least in the United States, even assuming it makes sense. (Although Atiyah is not writing for an American audience, given, as he points out, the much larger tort costs in the United States, he would likely deem his proposals worthy of consideration here).

III. EARLY OFFERS

It is vital to recognize that both Schwartz and Atiyah make powerful points. Schwartz is right in thinking that the sometimes inconsistent goals of tort law must be imaginatively combined, even if imperfectly. Furthermore, Schwartz is correct to emphasize the problems that the negligence standard causes in compensating injured victims. Atiyah is also right in thinking that tort law fails so miserably to achieve its various goals that drastic change, focusing instead primarily on compensation, is called for.

How to combine their concerns in sensible reform? In the following “early offers” proposal, Professor Atiyah’s ideas are paid obeisance to in a new emphasis on present systems of social and private first party insurance, at the expense of less emphasis on tort law’s underachieved goals of justice and deterrence. And yet justice and deterrence, pursuant to Professor Schwartz’s view, are not abandoned but rather acknowledged as mixed, imperfect goals.

The goal of the early offer proposal is to encourage prompt settlement of tort claims along insurance lines, paying promptly for economic (but not noneconomic) losses as they accrue, along with relatively low transaction

68. See id. at 179-80.
69. See id. at 181-85.
70. See id. at 182-83; see also JEFFREY O’CONNELL & ROGER C. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 695-717 (1975).
71. ATIYAH, supra note 11, at 189.
costs. Its mechanics are relatively simple: A defendant may at its option offer an injured claimant within a defined period (e.g., within 120 days of a personal injury claim) a settlement of periodic payments sufficient to cover a claimant’s wage loss and medical expenses, including rehabilitation plus a claimant’s reasonable attorney’s fee, but without any allowance for pain and suffering. Under one version, collateral sources paid or payable to the claimant are deducted in computing the amount of the early offer. The defendant is not forced to make an offer, and, if no offer is made, normal common-law principles apply. In extending an early offer, however, the defendant triggers strong incentive consequences. If the claimant accepts, that ends the matter. But a claimant who elects not to accept will face a higher burden of proof at trial (by either clear and convincing or even beyond a reasonable doubt, depending on the terms of the legislation adopted), with the defendant judged by a lower standard of care on which liability is predicated (either wanton or intentional misconduct). Litigation, as Professor Atiyah emphasizes, in addition to its costs, is unpredictable and often yields counterintuitive results.

Rather than engage in often frustrating and futile [litigation], with all its difficulties, delays, and costs, the injured and their alleged injurers would often do well to reach a quick settlement covering the victim’s net out-of-pocket losses. But this rarely happens. Just as plaintiffs may sometimes feel they are “clearly” in the right, defendants understandably are opposed to paying for injuries which they dispute are the result of any inadequate products or activities. Some of these cases will ... and perhaps should be, litigated. In the far more common debatable cases, however, where a prompt settlement may appear appropriate in light of the facts or economically rational considering the expected transaction costs of litigation, defendants and plaintiffs are each reluctant to offer an early settlement for only economic losses. This aversion is chiefly due to the fear of sending a signal of weakness that will cause even more recalcitrance from the opposing party.

The availability of damages for pain and suffering, in turn, often induces plaintiffs and their lawyers to inflate damage assess-

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73. The early offers proposal was embodied in S. 1861, 104th Cong. (1996), principally sponsored by Sen. Mitch McConnell (R-KY). For an earlier version, applicable only to federally funded health care providers, see S. 1960, 99th Cong. (1985), reprinted in 131 CONG. REC. S36,870-76 (1985). The earlier version made collateral sources primary. So far the later one has not.

74. See ATIYAH, supra note 11, at 142-43.
ments and exaggerate their actual injuries.\textsuperscript{75}

In addition, it is only fair to focus also on similarly corrupt improper defenses by defendants who take advantage of all the variables under tort liability by resisting even valid claims. In other words the tort system is plagued not only by exaggerated and frivolous claims but exaggerated and frivolous defenses.\textsuperscript{76}

One acute observer of the legal profession long ago went so far as to declare this enticement has "corrupt[ed] a good fraction of the bar, the medical profession and the citizenry." This phenomenon [of incentives to inflate claims] is recognized as commonplace by those in the front line of the liability regime: insurance adjusters. It has long been an open secret among adjusters that, where liability is determined to be likely, they will often eventually settle claims for some multiple of a claimant's out-of-pocket damages.\textsuperscript{77}

This is not to say that real pain does not often accompany injury, only that determining when and how much pain occurs is exceedingly indeterminate and often even corrupting.\textsuperscript{78}

This pursuit of the economic value of noneconomic loss is, then, another key to a malfunctioning tort system. Although, as indicated, defendants fear that an early and reasonable offer of settlement will be perceived as a sign of weakness, thereby encouraging plaintiffs to reject the offer and seek even larger sums at trial, under the early offer program, a settlement offer would not be viewed as a sign of weakness because it exacts a quid pro quo: In return for promptly offering to pay plaintiff's [net] economic damages, a defendant would afford itself protection in almost every case so covered from the vicissitudes of awards for noneconomic damages in "close-call" cases. The message to plaintiffs is clear: "If you want more than your economic damages, you had better be sure the defendant is not just arguably, but very much at fault."\textsuperscript{79}

Note too that the early offer approach is not by any means overly fa-

\textsuperscript{75} O'Connell & Muio, supra note 72, at 495. See also H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 151-63 (1970) (discussing plaintiffs' incentives to "build" their claims).

\textsuperscript{76} See Michael Horowitz, Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform, 44 Emory L. J. 175, 184-86 (1995); see also Jeffrey O'Connell, Ending Insult to Injury 4-7, 16-18 (1975); Jeffrey O'Connell, The Injury Industry 64-65 (1971).

\textsuperscript{77} O'Connell & Muio, supra note 72, at 496 (quoting Martin Mayer, The Lawyers 269 (1967)). See also Ross, supra note 75, at 136-76 (describing the negotiation of bodily injury claims).


\textsuperscript{79} O'Connell & Muio, supra note 72, at 496.
favorable to those causing injury.80 First, only defendants willing to forego obstructive defenses taking advantage, for example, of the effect of delay on a claimant’s needs for medical expenses and wage loss, will be advantaged by the proposal. Second, defendants making early offers must still pay victims’ net economic losses—which will most often be substantial—thereby significantly “internalizing” the cost of such accidents. The proposal could include a minimum offer of, say, $100,000 or more for serious injuries where actual net economic losses are relatively small. So early offerors are by no means getting a “free ride.” Third, if no offer is made, or if the plaintiff goes to trial and prevails, the plaintiff may recover pain and suffering or even punitive damages. This would mean reserving awards of such noneconomic or exemplary damages to cases in which liability for very wrongful conduct is quite clear or where a recalcitrant defendant unwisely declines to make an early offer. Thus, in such cases the plan serves both goals of corrective justice and efficiency (i.e., full internalization). Even Professor Atiyah is careful to point to the need for redress against “people who are seriously blameworthy.”81

What benefits accrue to each of the parties from the early offer proposal? The plaintiff is more likely to be compensated for net economic losses in a prompt manner. Under this proposal, defendants have obvious incentives to offer early payment of economic losses. From the plaintiff’s perspective, what might seem at first blush the deleterious ability of a defendant to trigger a higher burden of proof and a lower standard of care actually enables the defendant to make a prompt and reasonable offer without fear of signaling weakness. At the same time, truly egregious behavior by a defendant can still proceed to trial. Early offers keep the “close-call” cases out of the “litigation lottery” with all of its adverse effects against which Professor Atiyah has long eloquently inveighed.82

Defendants, then, achieve the ability to avoid litigation, with its potential costs and embarrassment, by offering a reasonable settlement without the fear of appearing weak. Additionally, early offers afford more protection, or at least predictability, to providers of goods and services engaged in often complex and imperfect—but necessary—processes.

In summary, we agree with both Schwartz and Atiyah that the tort system does not compensate in an efficient and fair manner. But we dissent from Schwartz’s view that compensation is not a goal, and from Atiyah’s view that it is the only goal. Instead of dismissing compensation as a separate, independent function of tort law, as does Schwartz, and instead of dismissing much of tort law entirely, as does Atiyah, we conclude that the

80. See id. at 500.
81. Atiyah, supra note 11, at 143.
method used to compensate victims should be improved by a means combining, admittedly imperfectly, all three elements of tort law, building on existing systems of social and private first-party insurance. The early offers proposal is based on a separate compensation rationale: a primary goal is to provide quick compensation for arguably deserving victims' readily determinable economic losses, mirroring (and also supplementing) current systems of private and social insurance on which Atiyah would exclusively rely. Furthermore, early offers also provide a substantial acknowledgment of corrective justice—full tort damages for especially egregious misconduct—surely where corrective justice is most called for. Admittedly, early offers do not themselves include payment for non-pecuniary losses such as pain and suffering and, to the extent pain and suffering is unavailable, the damages are incomplete from a corrective justice standpoint. Recall corrective justice requires the return of the status quo ante. However, under similar circumstances, Schwartz stated that for purposes of corrective justice, the measure of recovery for wrongful death, with its similar incompleteness, was "at least satisfactory and appropriate."\(^3\) Finally, as indicated above, early offers acknowledge tort law's deterrence objective—met, admittedly imperfectly, here too.

IV. CONCLUSION

Professor Schwartz is to be commended for imaginatively and pragmatically embracing a mixed theory of tort law. The tort system is, as he argues, based on multiple rationales, no one of which can be slavishly or exclusively followed. But compensation should also be a main function of tort law. Compensation—quite apart from its instrumental role in helping to implement deterrence and corrective justice—ought to be considered, as we said earlier, in appraising and fashioning tort law. This was and is certainly the view of many tort scholars past and present cited by Schwartz himself, including Fleming James, Charles Gregory and Albert Ehrenzweig.\(^4\)

One of the values of focusing on compensation as a separate underpinning of tort law is that it causes us to compare tort liability insurance with other forms of insurance such as first party coverage for the loss of life and health. It is this comparison—and tort law's miserable performance thereunder—that drives Professor Atiyah to his radical proposal to abandon tort law entirely and simply rely on such other coverages. In this connection, Schwartz echoes Atiyah in correctly indicting the tort system for delivering compensation too episodically, inefficiently, and slowly compared to the other insurance regimes on which Atiyah would exclusively rely. But in

\(^3\) Schwartz, supra note 9, at 1823.
\(^4\) See id. at 1804.
stead of thereby dismissing, as would Professor Schwartz, concerns about the tort system as a mechanism for paying insurance benefits; or dismissing, as would Professor Atiyah, personal injury tort law in favor of other insuring mechanisms, we propose a new solution. Our plan advocates including compensation as a distinct, independent, but supplemental, admittedly imperfect, element in the revamped tort law mix. Thereby, we argue that tort liability insurance can function much more like the other forms of insurance that Professor Atiyah would rely on, paid reasonably promptly for economic losses as they periodically accrue and without huge transaction costs. At the same time, early offers are designed to compensate injured victims without opening up the floodgates of unworkable fuller liability of providers of goods and services (which Atiyah fears) while still preserving (admittedly, once again, imperfectly) some of tort law’s functions of deterrence and corrective justice, on which Professor Schwartz too exclusively focuses.85

Of course, the proposal for early offers as a remedy for the ills of tort law may not optimally serve tort law’s mixed functions, including a separate one of compensation.86 If that is indeed the case, one hopes that scholars as gifted as Professors Schwartz and Atiyah can propose other solutions that will not, in light of tort law’s inadequacy as a compensation device, either abandon its other goals of deterrence and justice nor, conversely, abandon compensation to focus exclusively on those other goals.

85. For another proposal applicable only to auto accidents, trying to pay (admittedly imperfectly) obeisance to deterrence, corrective justice and compensation, while improving on the fault criterion with all its own faults, see Jeffrey O’Connell et al., The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States, 55 MD. L. REV. 160 (1996), and Jeffrey O’Connell & Christopher J. Robinette, “Choice Auto Insurance”: Do Theories of Justice Require Linkage Between Injurers and the Injured?, 1997 U. ILL. L. REV. 1109 (1997).

86. Schwartz is not alone in being so daunted by compensation that he ignores it, nor is Atiyah in being led astray by where a focus on compensation should lead us in considering tort law’s role in the overall insurance mix. On this point, James J. Heckman provides some commentary:

Neoclassical economics’ separation of efficiency and equity creates a void that often leads to neglect of the distribution/redistribution question entirely. This analytical separation may amount to a conservative bias or a blind spot in neoclassical theory because it encourages concentration on the piece of the analysis that one can be clear about as an economist, rather than the piece that one cannot. The maxim “whereof one does not know thereof should one remain silent” is implicitly followed by most neoclassical economists.

The failure to develop a satisfactory framework within which to analyze redistribution makes law and economics analytically incomplete. In part this is inevitable. A proper account of redistribution would move the discussion well beyond the narrow confines of the law. The least costly redistributions are usually conducted outside of the courts and entail governmental tax and transfer policy at all levels. A fully satisfactory analysis would require a careful accounting of the politics of redistribution and the gap between ideal policies and those that are actually used by governments as they emerge from political compromises. These questions of optimal redistribution are not specific to the law.

James J. Heckman, The Intellectual Roots Of The Law and Economics Movement, 15 LAW & HIST. REV. 327, 332 (1997). For a bitter, if provocative critique of Atiyah, attacking him for getting wrong both the proper mix of tort law and society’s desires for redistributing income, see David Horwath, Towards a Guilt-Free Society, TIMES LITERARY SUPPLEMENT (London), June 5, 1998, at 11 (reviewing Atiyah, supra note 11). It must be noted that Horwath’s attack on Atiyah evinces unrealistic confidence in tort law’s ability to achieve either justice or efficiency.