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THE DEATH OF CAUSATION: MASS PRODUCTS TORTS' INCOMPLETE INCORPORATION OF SOCIAL WELFARE PRINCIPLES

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Legal actions against the manufacturers of disease-causing products, such as cigarettes and asbestos insulation, have redefined the landscape of tort liability during the past generation. These actions bedevil courts, because any particular victim often is unable to identify the manufacturer whose product caused her harm. Increasingly, but

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See KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN SOCIETY 3 (1989) ("'This abstraction called the Law' . . . is 'a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been!'" (quoting OLIVER WENDELL HOLMES, JR., THE SPEECHES OF OLIVER WENDELL HOLMES 17 (1891))).

inconsistently, courts allow victims to recover without proof of individualized causation.

This Article argues that instrumental approaches seek to turn mass products tort law into the equivalent of a social welfare program, not unlike workers' compensation or Social Security. As with any such program, the accident compensation system must include compensation entitlement boundaries, specifying which victims are entitled to receive benefits, and liability boundaries, delineating which parties are assessed to provide the necessary funds. Individual causation, together with a requirement of tortious conduct by the injurer, previously played both roles in the common law. When workers' compensation laws did away with those requirements, they substituted statutorily defined compensation entitlement and liability boundaries.

This Article finds that Fleming James, Jr., Guido Calabresi, and other scholars undermined the individual causation requirement in the common law of torts to advance a social welfare ("instrumentalist") vision that they saw exemplified in workers' compensation. Yet when courts transferred recovery without proof of individual causation to the common law, they left behind the legislated boundary requirements present in workers' compensation.

This Article concludes that any compensation system handling mass products torts must develop a structure of compensation entitlement and liability boundaries that coherently replaces individual causation. So far, courts have failed in this endeavor, probably because the task exceeds their institutional competencies.

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I. INTRODUCTION

The specter of death haunts the oldest and most fundamental principle of tort liability: the requirement that the victim prove that a particular injurer caused her harm in order to recover.[1] A fatal virus already infects the signature torts of our time—actions brought by states, municipalities, and other collective entities against manufacturers of tobacco products, lead pigment, and prescription drugs. Only six years ago, the largest settlement of a

1. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 188 (Mass. 1982) ("Identification of the party responsible for causing injury to another is a longstanding prerequisite to a successful negligence action."); Richard L. Abel, *A Critique of Torts,* 37 UCLA L. REV. 785, 811 (1990) ("[E]very tort system . . . must determine whether a particular defendant caused a particular plaintiff's injury."); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare,* 114 HARV. L. REV. 961, 1101 (2001) ("[T]here is a reluctance on fairness grounds to impose liability when it cannot be proved that a particular injurer caused harm to a particular victim.").

legal action in history resulted from claims of states against tobacco manufacturers for damages resulting from tobacco-related illness, even though states had no means to prove that any identified manufacturer's product caused any given victim's cancer or emphysema.[2] In February 2006, a Rhode Island jury held lead pigment manufacturers liable, potentially for billions of dollars, without proof that any specific manufacturer's product caused any particular victim's childhood lead poisoning or property damage.[3] The daughters of mothers who took diethylstilbestrol ("DES"), later cancer victims, were unable to prove which manufacturer's product their mothers consumed, but in some states, they recovered on a market share liability basis.[4] So far, however, these cases remain the exceptions: most victims of latent diseases resulting from fungible products fail to recover because of the traditional tort law requirement that a particular victim must prove that a specific injurer caused her harm.[5]

The equities in favor of the victim often are compelling. In the case of latent diseases that occur years or even decades after the exposure to the product, it is usually impossible for the victim to identify the manufacturer whose products caused her harm. The court may find that the defendant acted tortiously when producing fungible products and that the victim suffers from a harm caused by *some* manufacturer's product. Still, unless the victim can link the two by showing individual causation, traditional tort law offers no recourse.

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2. *See* McClendon v. Georgia Dep't of Cmty. Health, 261 F.3d 1252, 1254-55 (11th Cir. 2001) (outlining terms of the "Master Settlement Agreement" between the tobacco industry and forty-six states).

3. *See* State v. Lead Indus. Ass'n, No. 99-5226, 2004 R.I. Super. LEXIS 191, at *7-8 (Super. Ct. Nov. 9, 2004) (rejecting defendants' argument that the state was obligated to prove that the manufacturers "are the proximate cause of the particular injury(ies) complained of"); Charles Forelle, *Rhode Island Wins Lead-Paint Suit*, WALL ST. J., Feb. 23, 2006, at D7 (reporting jury verdict); Jack Perry, *Arguments on Punitive Damages Continue in Lead-Paint Case,* PROVIDENCE J., http://www.beloblog.com/cgi-bin/mt/mt-search.cgi?IncludeBlogs=48&search=lead-paint (Feb. 28, 2006, 09:00 EST) (reporting that the cost of abatement could be billons of dollars). Last year, the Wisconsin Supreme Court held that an individual lead-poisoned child's action against the manufacturers of lead-based paint could proceed to trial on a "risk contribution" theory of causation, even though the plaintiff could not identify the manufacturers whose products caused his diseases. *See* Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 527 (Wis. 2005).

4. *E.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 937-38 (Cal. 1980).

5. *See, e.g.*, Claytor v. Owens-Corning Fiberglas Corp., 662 A.2d 1374, 1382 (D.C. App. 1995) ("[A] defendant cannot be held liable unless the defendant has in fact caused the plaintiff's harm . . . ."); Payton v. Abbott Labs, 437 N.E.2d 171, 188-89 (Mass. 1982) (declining to adopt market share liability).

Since the 1980s, some courts have invented new doctrines and creatively applied older ones that have enabled victims of diseases caused by fungible products to recover without proof that the harm was caused by a particular manufacturer. The concept of market share liability is perhaps most widely recognized, but courts also have interpreted traditional doctrines, such as alternative liability, in expansive ways.[6] Yet the results for mass tort victims within the tort system are inconsistent, defying principled differentiation. Some courts bend traditional doctrines to allow victims to recover;[7] others do not.[8]

The unsettled nature of the fundamental aspects of tort law governing causation in these cases flows naturally from the history of the challenge to the individual causation requirement, a challenge pioneered by several giants of twentieth century tort theory. Judge Guido Calabresi, formerly Professor and Dean of the Yale Law School, has explicitly attacked the traditional notion that a victim can recover only from the particular tortfeasor that injured her:

> For centuries society has seemed to accept the notion that justice required a one-to-one relationship between the party that injures and the party that is injured . . . . There is, of course, no logical necessity for linking our treatment of victims, individually or as a group, to our treatment of injurers, individually or as a group.[9]

The California Supreme Court's lodestar opinion, *Sindell v. Abbott Laboratories*,[10] enabled DES daughter/victims to recover on a market share liability basis without proof of individualized causation. It relied heavily upon the reasoning of a concurring

6. *See infra* notes 212-27 and accompanying text.

7. *E.g.*, Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1206 (Cal. 1997) (enabling victims to recover without proof that any particular manufacturer's product actually contributed to harm under the "concurrent proximate legal causation" doctrine); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 167 (Mich. 1984) (allowing plaintiff to survive summary judgment in DES case on alternative liability basis); Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 188 (N.Y. 1982) (allowing DES victims to recover on "concert of action" theory without proof of explicit agreement among defendant manufacturers).

8. *E.g.*, *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 622 n.42 (S.D.N.Y. 2001) (limiting alternative liability to cases involving, inter alia, a small number of tortfeasors, all of whom were before the court); McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 262 (Ill. 1999) (rejecting concert of action theory claims without proof of explicit agreement among manufacturers).

9. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 297 (1970).

10. 607 P.2d 924, 937-38 (Cal. 1980).

opinion[11] written nearly four decades earlier by a then young Justice Roger Traynor, later Chief Justice of the California Supreme Court. Traynor is acknowledged to be among the most influential judges in the history of American tort law.[12]

The willingness of Calabresi and the California Supreme Court to forego the individual causation requirement originates in their instrumentalist[13] conception of the tort system's goals. Calabresi and other liberal instrumentalists believe that the principal goals of tort law are loss distribution (to distribute the costs of accidents among a broader segment of society)[14] and loss minimization (to reduce accident costs in the future).[15]

This Article, in turn, traces the origins of instrumentalism to the adoption of workers' compensation legislation during the first decades of the twentieth-century and even earlier in Europe. The favorable response to workers' compensation principles among legal scholars, particularly Fleming James, Jr., persuaded courts to adopt instrumental approaches in American tort law during the 1960s.[16] In his recent book, John Fabian Witt concludes that the controversial nature of workers' compensation at the time of its adoption was attributable not only to the absence of a requirement of fault in order to recover, but also to the absence of any

11. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

12. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 180-210 (1980).

13. The instrumental theory of tort law posits that the tort system pursues policy objectives derived from the needs of society external to the legal system, such as wealth maximization, accident prevention, or the distribution of losses. Perhaps the two best-known proponents of the instrumental view are Guido Calabresi, *see, e.g.*, CALABRESI, *supra* note 9, and Richard A. Posner, *see, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (6th ed. 2003); Richard A. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29 (1972) [hereinafter Posner, *A Theory of Negligence*].

14. *See, e.g.*, *Escola*, 150 P.2d at 441 (Traynor, J., concurring) (justifying strict products liability, in part, on the grounds of loss distribution); CALABRESI, *supra* note 9, at 27-28, 39.

15. *See, e.g.*, *Escola*, 150 P.2d at 441 (Traynor, J., concurring) (justifying strict products liability, in part, on the basis that the manufacturer is in the best position to prevent injuries); CALABRESI, *supra* note 9, at 27-28, 68. In contrast, the instrumentalism of Posner and other free market instrumentalists focuses on wealth maximization. *See* Posner, *A Theory of Negligence, supra* note 13, at 29.

16. For example, instrumentalism led to the adoption of strict products liability. *See generally* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 125-32 (1995); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. LEGAL STUD. 461, 462, 505, 517 (1985).

requirement that the employer was the "cause" of the harm, in any meaningful, commonsense understanding of the word.[17] Like Calabresi decades later, James and his peers sometimes advocated that victims should be able to recover compensation from injurers without proof of an individualized causal connection.[18]

When Calabresi and James argued that the common law tort system should adopt the principle that a victim is entitled to recovery without proof of individual causation, however, they left behind another component of the workers' compensation system inextricably intertwined with the absence of a causation requirement. Any system that enables a victim of harm to recover compensation, including either the common law tort system or a government benefits program, inherently must determine both how it will spend its money and how it will raise its money. The former task requires it to establish boundaries that circumscribe the conditions under which a claimant may recover, *compensation entitlement boundaries.* Correlatively, any compensation program also inherently includes boundary requirements that define who has an obligation to contribute to the compensation pool from which eligible claimants may recover, *liability boundaries.*

Under the common law of torts, the tortious nature of the defendant's conduct and causation, operating together, provided both the compensation entitlement boundary (from the claimant's perspective) and liability boundary (from the injurer's perspective). During the nineteenth and twentieth centuries, the raging debate in tort law was whether or not fault was required for tortiousness.[19] In the twenty-first century, the dominant contentious issue will be the role of causation. As Judith Jarvis Thomson observed in 1987, "Fault went first. . . . Now cause is going."[20]

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17. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 168-69 (2004).

18. *See* NOLAN & URSIN, *supra* note 16, at 126.

19. *Compare, e.g.*, OLIVER W. HOLMES, THE COMMON LAW 77-78 (Mark DeWolfe Howe ed., 1963) (1881) (arguing that injurer should pay for victim's loss only when at fault), *and* Posner, *A Theory of Negligence, supra* note 13, at 32-34, *with* CALABRESI, *supra* note 9, at 317-18 (concluding that fault system is a failure and should be replaced). *See also* Jeremiah Smith, *Sequel to Workmen's Compensation Acts,* 27 HARV. L. REV. 235, 363 (1914) (predicting "that the incongruities" between the no-fault principles of the workers' compensation statutes and the predominantly fault requirements of the common law "will not be permitted to continue permanently without protest").

20. Judith Jarvis Thomson, *The Decline of Cause,* 76 GEO. L.J. 137, 137 (1987). While instrumentalists argue for the elimination or weakening of the traditional causation requirement, corrective justice theorists have argued, often on philosophical grounds, that courts should continue to respect the traditional individual causation requirement. *E.g.*, ERNEST J. WEINRIB, THE

Unlike traditional tort law, the principles governing workers' compensation do not require the claimant to prove causation in any meaningful sense. In place of causation, which serves in the common law as both the compensation entitlement boundary and the liability boundary, statutory and regulatory provisions define who is entitled to recover and who is required to pay. But Calabresi, James, and others who justified the absence of an individual causation requirement in tort law on the basis of instrumental principles derived from workers' compensation ignored the critical role played by these statutorily defined compensation and liability boundaries.

A few courts have begun to create the framework for determining liability boundaries and compensation entitlement boundaries in the absence of a requirement of individual causation in the context of mass products torts. The distribution of liability among manufacturers in a market share liability regime, even if a causal connection between a particular victim and a specific manufacturer cannot be shown, is one example of a judicial attempt to define a liability boundary. So far, these attempts most often have proved to be beyond the institutional competence of the courts and the appropriate bounds of the judicial function.

This Article traces the source of contemporary difficulties with efforts to allow recovery for a victim who cannot show that the party she seeks to hold legally responsible was the cause of her harm. In doing so, it exposes the soft underbelly of current causation doctrine, which is still dominated by the traditional individual causation requirement but riddled with exceptions that yield neither a coherent body of causation principles governing the law of mass products torts nor a plausible alternative.

Because of the important role played by workers' compensation principles in the contemporary debate over the role of causation in modern tort law, Part II begins with an analysis of the predecessors of American workers' compensation systems, the late-nineteenth century programs in Germany and England. Examination of the European systems clarifies what is sometimes obscured by legal commentary on the American counterpart. Since the enactment of workers' compensation legislation, legal scholars typically have described workers' compensation as an "alternative compensation system" and as a model for similar no-fault compensation systems in

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IDEA OF PRIVATE LAW 142-44 (1995). *See generally* Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts,* 62 WASH. & LEE L. REV. 873, 876-77 (2005) (characterizing recent controversy over the individual causation requirement as a conflict between the instrumentalist and corrective justice theories of torts).

other factual contexts.[21] This Article suggests that when legislation establishing the first workers' compensation systems was adopted, these programs generally were not seen primarily as alternative compensation systems. Rather, workers' compensation was considered a social welfare program[22] designed to meet the needs of the worker and his family resulting from workplace accidents, one significant cause of poverty among many. In Germany and England, workers' compensation legislation was merely one component of legislative packages attacking multiple sources of poverty, including sickness, disability caused by factors other than workplace accidents, and old age. Comparable social welfare systems were not enacted in the United States until the New Deal of the 1930s and the Great Society of the 1960s; in fact, the United States still has not enacted some aspects of the European-style package.

The German and English systems did not require proof of causation; instead, eligibility for compensation was a consequence of the injured worker's ability to show that his injury fell within specified statutory provisions. Most pertinent for our purposes, the English Workmen's Compensation Act enabled a victim of occupational diseases to recover from his last employer where he had been exposed to certain substances, even if the claimant could not prove that his illness was, in fact, caused by occupational exposure at that or any specific place of employment.

Part III documents how workers' compensation legislation in the United States was modeled explicitly on the German and English systems. It also describes how statutory and regulatory provisions, not individual causation, set the compensation entitlement and liability boundaries in the American workers' compensation systems. Sometimes the victim recovers workers' compensation benefits without proof that her harm is caused by the employer. Instead, a third party, the worker herself, or a freakish "act of God" causes the harm.

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21. *See* NOLAN & URSIN, *supra* note 16, at 30-37 (describing the work of Leon Green during the 1920s); *see also infra* notes 117-32 and accompanying text.

22. "Social insurance" programs, such as workers' compensation, are one of two basic types of "social welfare" programs; the other type consists of "public assistance" or "welfare" programs. Eligibility for benefits under a social insurance system requires that the beneficiary have "earned" an entitlement to benefits through working and contributing premiums or by being a family member of a worker who has. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA ix-x, 238-39 (1986). In short, social insurance is contributory in nature, while public assistance or welfare is based solely on need. Using this dichotomy, workers' compensation would be categorized as an example of the social insurance variety of social welfare programs. *Id.* at 191-95.

Part IV outlines how the lessons of the workers' compensation experience during the early twentieth century became the basis for instrumentalism, the most influential theory of tort law during the last quarter of the century. When James, Calabresi, and other scholars borrowed instrumentalist principles from workers' compensation, they provided the jurisprudential justification for the retreat from the requirement of individual causation in the common law.

Part V describes the unsatisfactory state of the current law of causation applied to those cases in which the victim of admittedly tortious harm cannot identify the injurer who in fact caused her harm. A minority of courts allows victims of latent diseases resulting from exposure to mass products, such as cigarettes, asbestos products, and DES, to recover without proof of individual causation. These courts, however, generally have failed to address the need within the tort system for coherent compensation, entitlement, and liability boundaries as alternatives to the traditional boundaries provided by the individual causation requirement. In those few instances when courts have addressed this issue, they most often have failed. The results suggest that the determination of such boundaries often tests the institutional competencies of the judiciary and exceeds the appropriate bounds of the judicial function as traditionally understood.

II. ACCIDENT COMPENSATION ENTERS THE SOCIAL WELFARE SYSTEM: WORKERS' COMPENSATION IN NINETEENTH-CENTURY EUROPE

In order to assess the wisdom of transferring the notion that a victim should be able to recover compensation without proof that the liable party caused his harm from the workers' compensation system to the common law tort system, I first turn to a history of the predecessors of workers' compensation systems in the United States—social welfare systems in Germany and the United Kingdom during the late nineteenth century. Looking back one more generation and across the Atlantic helps to reveal the true nature of the workers' compensation system and explain why, even if the absence of the individual causation requirement is justified within the workers' compensation system, it may be problematic when operating within the common law tort system.

A. The European Origins of American Workers' Compensation Principles

Early workers' compensation statutes in the United States were consciously patterned after similar statutes that had been enacted

previously in European countries,[23] particularly those adopted in Germany in 1884[24] and the United Kingdom in 1897.[25] In 1891, the United States Commissioner of Labor commissioned John Graham Brooks to conduct a study of the compulsory insurance systems in place in Germany because of their importance to "the material, social, intellectual, and moral prosperity of laboring men and women . . . ."[26] The Wainwright Commission,[27] a commission appointed by the New York state legislature in 1909 whose recommendations ultimately led to the adoption of New York's first workers' compensation statute,[28] reported:

> The condition of the German workingman in the social scale has relatively improved; and more, this system has become established as an essential part of the German nation and its social policy in the same quarter of a century that has seen the

23. *See, e.g.*, LEE K. FRANKEL & MILES M. DAWSON, WORKINGMEN'S INSURANCE IN EUROPE (1910) (studying systems in several European countries, including Germany and Great Britain); NEW YORK STATE BUREAU OF LABOR STATISTICS, SEVENTEENTH ANNUAL REPORT FOR THE YEAR 1899, at 731-1162 [hereinafter N.Y. BUREAU OF LABOR STATISTICS REPORT]; REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS, FIRST REPORT, 166-81 (Appendix VIII) (March 19, 1910) [hereinafter WAINWRIGHT COMMISSION REPORT] (surveying systems in a number of European countries in a report recommending workers' compensation legislation). The commission is often referred to as the "Wainwright Commission," *e.g.*, Ives v. S. Buffalo Ry., 94 N.E. 431, 436 (N.Y. 1911), because it was chaired by New York State Senator J. Mayhew Wainwright. WAINWRIGHT COMMISSION REPORT, *supra*, at 1.

24. An Act for Insurance Against Accidents, July 6, 1884, *translated and reprinted in* F.W. Taussig, *Workmen's Insurance in Germany,* 2 Q. J. ECON. 111 app. at 121-28 (1887).

25. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37 § 1 (Eng.).

26. U.S. BUREAU OF LABOR, FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR, COMPULSORY INSURANCE IN GERMANY 9 (1893) [hereinafter U.S. COMMISSIONER OF LABOR'S REPORT] (prepared by John Graham Brooks under the direction of Carroll M. Wright, Commissioner of Labor). Similarly, the National Association of Manufacturers, *see* FERD C. SCHWEDTMAN & JAMES A. EMERY, ACCIDENT PREVENTION AND RELIEF: AN INVESTIGATION OF THE SUBJECT IN EUROPE WITH SPECIAL ATTENTION TO ENGLAND AND GERMANY (1911), and the Russell Sage Foundation, *see* FRANKEL & DAWSON, *supra* note 23, sent experts to Europe to report on the success of the then-recent German and British social reform legislation. The New York Bureau of Labor Statistics also studied the European systems. *See* N.Y. BUREAU OF LABOR STATISTICS REPORT, *supra* note 23, at 731-1162.

27. WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 166-81.

28. Workmen's Compensation Law, Act of June 25, 1910, ch. 674, 1910 N.Y. Laws 1945 (cited in *Ives*, 94 N.E. at 433-35 (declaring act unconstitutional on state due process grounds)).

> greatest commercial and industrial growth and prosperity that Germany has ever known.[29]

Edward Cummings, a professor of political economics at Harvard, perhaps better known as the father of e.e. cummings,[30] observed in 1898 that "the vast and pregnant systems of compulsory insurance inaugurated by Germany and Austria have challenged the attention of the world . . . . The impetus of the movement has reached the United States . . . ."[31]

Proponents of workers' compensation legislation in the United States believed that the European model of social insurance for workplace accidents addressed the policy objective that instrumentalists later would label loss distribution. A report submitted by the New York Bureau of Labor Statistics to the state legislature in 1900 asked:

> Here are thousands of accidents happening to workmen every year and involving illness, stoppage of work and financial loss. Is it for the welfare of society, the best interests of the community, that the individual wage-earners should bear the financial burdens with the aid of relatives, friends and in many cases the public charities; or that they should be assumed by the consumer as a part of the necessary cost of his goods . . . ?[32]

Testimony before the Wainwright Commission revealed the terrible consequences of industrial accidents for families.[33] To individual families, these losses were catastrophic. Employers, on the other hand, could purchase insurance and pay for the losses by raising the prices of the goods or services they produced.

Those who studied European social welfare reform and advocated the adoption of workers' compensation and similar measures in the United States, perhaps more surprisingly for the times, also accurately justified workers' compensation on loss minimization grounds.[34] Brooks, in his study of the German

29. WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 38.

30. *See* CHRISTOPHER SAWYER-LAUÇANNO, E.E. CUMMINGS: A BIOGRAPHY 1, 3, 11 (2004).

31. Edward Cummings, *Workingmen's Insurance*, 6 J. POL. ECON. 556, 556 (1898) (book review).

32. N.Y. BUREAU OF LABOR STATISTICS REPORT, *supra* note 23, at 1145. The Wainwright Commission noted, "Though the workman cannot shift this accident burden upon the cost of the product or upon the trade, the employers can through their power to fix the selling price of the product . . . ." WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 7.

33. WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 28.

34. *See* DONALD N. DEWES ET AL, EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY 424 (1996) (showing superior loss minimization

accidental insurance system noted, "One reason why the whole responsibility was thrown upon the employers was the belief that they would find it for [sic] their direct interest to seek and discover measures of prevention."[35] Similarly, Frankel and Dawson observed that under the German accidental insurance legislation,[36] the government, employers, and those managing compensation funds were all "constantly engaged in inculcating and enforcing the need of safety devices of all sorts and making regulations to reduce the probability of accident."[37]

Part II.B describes the origins of workers' compensation in Germany during the 1880s. Part II.C similarly evaluates the enactment of the 1897 Workmen's Compensation Act in England. In both instances, workers' compensation was only a component of a much broader social welfare system. Reformers in both countries focused on the social welfare aspects of workers' compensation, not its role as an "alternative compensation system." Most importantly, neither system required that the employer be found to be the "cause" of the worker's harm in order to be held financially responsible for his compensation.

B. The Comprehensive Scope and Objectives of Late Nineteenth-Century German Social Insurance Legislation

The similarities in the structure and operation of the 1884 German workers' compensation act[38] and early workers' compensation legislation in the United States leave no doubt that the former provided the model for the latter. The nineteenth-century German system functioned in a manner strikingly similar to the systems adopted a generation later in the United States.[39]

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effects of workmen's compensation when contrasted with the common law).

35. U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 95.

36. *See* FRANKEL & DAWSON, *supra* note 23, at 110.

37. *Id*.; *see also* WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 173; Taussig, *supra* note 24, at 111.

38. An Act for Insurance Against Accidents, July 6, 1884, *translated and reprinted in* Taussig, *supra* note 24, at 121; *see also* WILLIAM HARBUTT DAWSON, BISMARCK AND STATE SOCIALISM: AN EXPOSITION OF THE SOCIAL AND ECONOMIC LEGISLATION OF GERMANY SINCE 1870, at 119-23 (Howard Fertig, Inc. 1973) (1890) (explaining operation of act).

39. Under the 1884 act, after thirteen weeks of disability, an injured worker was entitled to compensation for medical expenses and partial income replacement. *See* An Act for Insurance Against Accidents, § 5, July 6, 1884, *translated and reprinted in* Taussig, *supra* note 24, at 121. The statutorily provided income replacement was equivalent to two-thirds of the worker's wages for complete disability, with proportionately lesser amounts for partial disabilities. *See* B.W. Wells, *Compulsory Insurance of Workmen in Germany,* 6 POL. SCI. Q. 43, 50 (1891). The disability compensation system was

German Chancellor Otto Von Bismarck, whose achievements as a social reformer have been eclipsed by his role in developing the militaristic culture often blamed for German aggression during the first half of the twentieth century,[40] introduced workplace accident insurance as one component of comprehensive social welfare legislation. When Emperor Wilhelm first presented the workers' compensation legislation developed by Bismarck to the Reichstag, he stressed its social welfare objective: "We consider it Our Imperial duty to . . . [further] the welfare of the working people."[41]

It is difficult, more than a century later, to ascertain with any degree of certainty what motivated Bismarck and other proponents of the legislation, most notably powerful German industrialists. What is clear, however, is that their original goals were different from those that often have influenced proponents of "alternative compensation systems" in post-workers' compensation America. The traditional view has been that Bismarck sought to address the underlying grievances that stirred the revolutionary impulses of German workers in the mid-nineteenth century by passing social reform legislation;[42] at the same time, he invoked what he saw as the benevolent traditions of both his nation and his religion.[43] When

administered by employers' trade associations, *see* An Act for Insurance Against Accidents, §§ 9-34, July 6, 1884, *translated and reprinted in* Taussig, *supra* note 24, at 123-28, and paid for with contributions from each employer determined according to the relative risk of the nature of the workers' activities. *Id.* § 28, *translated and reprinted in* Taussig, *supra* note 24, at 126-27. Any employer covered by the act was obligated to participate in the insurance pool. Absent under the German accident insurance system was any requirement that, in order to recover, a worker must prove either that any particular party was at fault or even that any particular party "caused" the accident.

40. THE AGE OF BISMARCK: DOCUMENTS AND INTERPRETATIONS 145 (Theodore S. Hamerow ed., 1973).

41. Emperor Wilhelm, Message to the Reichstag (Nov. 17, 1881), *quoted in* FRANKEL & DAWSON, *supra* note 23, at 94.

42. *See* U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 27-29.

43. Dawson argues that "Bismarck's social policy [was] largely prompted by religious motives." DAWSON, *supra* note 38, at 24. Dawson also attributes motives arising from nationalistic impulses to Bismarck: "It is the duty of the State to see that the social organism is preserved in a healthy condition. This can only be possible when all classes of society act upon the principles of mutual obligation, mutual dependence, and mutual help." *Id.* Bismarck's social reform legislative efforts also furthered traditional paternalistic values, with their origins in feudal times, that authorities were obligated to provide for the material needs of workers. *See* GERHARD A. RITTER, SOCIAL WELFARE IN GERMANY AND BRITAIN: ORIGINS AND DEVELOPMENT 17 (Kim Traynor trans., Berg Publishers Ltd. 1986) (1983); *see also* FRANKEL & DAWSON, *supra* note 23, at 91 ("Very early the Prussian laws recognized the obligation of the master to care for his servant during disability."). Brooks also commented:

> [C]ompulsory state insurance . . . may also be said to stand in direct

Bismarck initially presented his social welfare legislation to the Reichstag, he referenced recently enacted repressive measures against socialists, but argued, "A remedy cannot alone be sought in the repression of socialist excesses; there must be simultaneously the positive advancement of the welfare of the working classes."[44] In the same address, he suggested, "[W]e do not want to feed poor people with figures of speech, but with something solid."[45] When Brooks surveyed the German accident insurance system, he concluded that such insurance was "obviously ethical and falling so into touch with the new feeling of social obligation . . . ."[46]

What is striking in the accounts of the enactment of the 1884 accident insurance law is the absence of discussion of the new system as either a replacement for German workers' rights under the traditional German litigation system or as a form of liability relief for German employers. Indeed, like the earliest of American workers' compensation laws, the accident insurance law did not truly replace the preexisting German liability laws, because the injured worker retained the option to sue in tort.[47] Brooks concluded that the primary purposes behind the legislation did not include liability relief,[48] one of the goals frequently associated with

> and unbroken line with the economic traditions of the Prussian monarchy. Frederick the Great claimed to be especially the king of the poor, and also claimed the right to use the state in any way he saw fit for their protection and uplifting. . . . The state is in its very nature the guardian of the weaker classes.

U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 25-26.

44. Otto Von Bismarck, Speech from the Throne to the Reichstag Announcing a Bill Establishing Accident Insurance (1881), *quoted in* THE AGE OF BISMARCK, *supra* note 40, at 255.

45. Otto Von Bismarck, Speech from the Throne to the Reichstag Announcing a Bill Establishing Accident Insurance (1881), *in* DOCUMENTS OF GERMAN HISTORY 247 (Louis L. Snyder ed., 1958).

46. U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 288.

47. RITTER, *supra* note 43, at 38.

48. U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 81. A recent student note argues that Bismarck lacked any "moral benevolence" toward the injured and less fortunate in Germany society. John M. Kleeberg, Note, *From Strict Liability to Workers' Compensation: The Prussian Railroad Law, the German Liability Act, and the Introduction of Bismarck's Accident Insurance in Germany, 1838-1884*, 36 N.Y.U. J. INT'L L. & POL. 53, 55, 108 (2004). Kleeburg argues that the German accident insurance system was enacted to protect German industrialists from "an avalanche of litigation." *Id.* at 55. Two factors call Kleeburg's conclusion into question. First, contemporaneous observers found that it had been extremely difficult for a German worker to recover in the legal system against the employer prior to the enactment of the 1884 accident insurance act. *See* RITTER, *supra* note 43, at 36-37. S*ee also* DAWSON, *supra* note 38, at 93-94. Second, many proponents already had comparatively generous employee benefit programs in place. These industrialists viewed

alternative compensation schemes.

The German workers' compensation statute upon which subsequent American statutes were modeled was part of a comprehensive social insurance legislative agenda. In 1890, W.H. Dawson, an English historian specializing in contemporaneous German history, described this package as a response to the inadequacy of Germany's localized structures that previously handled the needs of the poor and the sick.[49] The Reichstag first enacted health insurance for workers in 1883,[50] a year prior to the enactment of accident insurance. A pension system for the elderly and the disabled was passed only five years later.[51] The accident insurance bill and the sickness insurance bill initially were introduced together.[52] According to Dawson, "The measures were combined because one was the natural complement of the other."[53] Indeed, the accident insurance system was designed to operate seamlessly with other components of the German social welfare system.[54] For example, during the first thirteen weeks of a worker's disability, the German sickness insurance act required the local "communal sick association" to pay both the worker's medical expenses and lost income before the worker became entitled to benefits under the accident insurance act.[55] Dawson describes the

obligatory accident insurance as a means of reducing their competitive cost disadvantage with other employers who did not offer such generous programs. Their aspirations to continue these generous benefit programs without being competitively disadvantaged, however, obviously reflected motivations other than just reducing their costs resulting from workplace accidents, because it was within their power simply to eliminate or reduce employee benefits.

49. DAWSON, *supra* note 38, at 123.

50. An Act for Insurance Against Sickness, approved June 15, 1883, *translated and reprinted in* U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 63-77; *see also id.* at 263-65; FRANKEL & DAWSON, *supra* note 23, at 232; An Act for Insurance Against Sickness, June 15, 1883, *translated and reprinted in* Taussig, *supra* note 24, at 112.

51. An Act for Insurance Against Old Age and Invalidity, approved June 22, 1889, *translated and reprinted in* U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 164-204; *see also id.* at 270-75.

52. DAWSON, *supra* note 38, at 115.

53. *Id*. In 1884, Bismarck said, "When the Accident Insurance Bill has become law, it will be our duty to seek to establish, upon a similar basis of organisation, satisfactory provision for workpeople who through age or incapacity have become unable to earn their livelihood." *Id.* at 117.

54. *See* FRANKEL & DAWSON, *supra* note 23, at 96-98. W.H. Dawson described the two acts as "co-dependent, accident insurance being supplementary to sickness insurance . . . ." DAWSON, *supra* note 38, at 119.

55. An Act for Insurance Against Accidents, § 6, July 6, 1884, *translated and reprinted in* Taussig, *supra* note 24, at 113. The bulk of the funding for the communal sick associations came from employees' withheld wages (two-thirds) and an employers' contribution (one-third). Wells, *supra* note 39, at 45. The

1889 law insuring against old age and disability as no "afterthought," but instead as "the first part of the complete plan of insurance foreshadowed by Bismarck over a decade [earlier]."[56]

Any issue regarding the cause of an injury under the accident compensation act was limited to whether the injury arose from workplace activities.[57] Even this determination was not particularly consequential, since, if the injury did not arise in the workplace, after 1887 at least, the victim nevertheless often would still be entitled to a pension.[58] In either event, the victim was compensated; causation was not a decisive factor.

The German Act of Insurance Against Accidents of 1884 was an important model for the later enactment of workers' compensation legislation in the United States. Two aspects of the German experience will bear upon my analysis of the twentieth-century weakening of the causation requirement in American common law. First, the German accident insurance legislation was only part of much broader social welfare legislation in Germany during the same period. The Wainwright Commission Report recognized that Germany had established "a comprehensive system of obligatory insurance against the consequences of sickness, accident and old age."[59] Second, as with claimants in later American workers' compensation systems, a worker's entitlement to compensation under the German plan was dependent upon the worker's injury falling within the specified statutory guidelines, not proof that the employer was, in any meaningful sense of the word, the "cause" of the employee's injury or disease.

C. The English Workmen's Compensation Act of 1897 and Subsequent Amendments

The most openly acknowledged model for the earliest workers' compensation acts enacted in the United States was England's

federal imperial government also contributed partial funding for the communal sick associations. Taussig, *supra* note 24, at 111. Contemporaneous German health insurance, therefore, included characteristics of both a social insurance system and a welfare or public assistance system.

56. DAWSON, *supra* note 38, at 123. Again, funding for old age and "invalidity" pensions was provided by the employer, the employee, and the government. An Act for Insurance Against Sickness, § 19, approved June 15, 1883, *translated and reprinted in* U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 63-77.

57. An Act for Insurance Against Sickness, § 19, approved June 15, 1883, *translated and reprinted in* U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 63-77.

58. *Id.*

59. WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 171. *See also* Taussig, *supra* note 24, at 111.

Workmen's Compensation Act of 1897.[60] The English act, however, was clearly inspired by the German experience,[61] as were other British social welfare measures enacted during the first two decades of the twentieth century. English leaders lauded the comprehensive nature of the German social welfare system. In 1908, a young Winston Churchill recommended that the British "thrust a big slice of Bismarckianism over the whole underside of our industrial system."[62]

Like German social insurance, the programs in the United Kingdom focused broadly on "improving the lot of the poor, the elderly, the weak and destitute."[63] Over a period of decades that fell on either side of the enactment of the first workmen's compensation statutes in the United States, Parliament enacted a series of social welfare reform measures that included unemployment insurance,[64] health insurance,[65] and pensions for the elderly.[66] Death or injury to

60. An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment, 1897, 60 & 61 Vict., c. 37 (Eng.) [hereinafter English Workmen's Compensation Act of 1897], *amended by* An Act to Consolidate and amend the Law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment, 1906, 6 Edw. 7, c. 58 (Eng.) [hereinafter 1906 Amendments to Workmen's Compensation Act]. The English statute, for example, is mentioned in *Ives v. S. Buffalo Ry.*, 94 N.E. 431, 436, 448 (N.Y. 1911) (invalidating the initial New York workmen's compensation statute on state due process grounds).

61. *See* SCHWEDTMAN & EMERY, *supra* note 26, at 169.

62. 2 RANDOLPH S. CHURCHILL, WINSTON S. CHURCHILL: COMPANION, 1907-1911, at 863 (1969). That same year, David Lloyd George, Chancellor of the Exchequer and later Prime Minister, visited Germany to observe the German social insurance system first-hand and reported, "I never realised before . . . on what a gigantic scale the German pension scheme is conducted. Nor had I any idea how successfully it works . . . . It touches the great mass of the German people in well-nigh every walk of life." THE DAILY NEWS, Aug. 27, 1908, *quoted in* RITTER, *supra* note 43, at 161.

63. RITTER, *supra* note 43, at 132. Similarly, Brooks reported that "the evils with which the English advocates of insurance hope to deal are definite—the actual facts of pauperism." U.S. COMMISSIONER OF LABOR'S REPORT, *supra* note 26, at 333.

64. National Insurance Act, 1911, 1 & 2 Geo. 5, c. 55, pt. II (Eng.); RITTER, *supra* note 43, at 162-63.

65. National Insurance Act, 1911, *supra* note 64, pt. I; RITTER, *supra* note 43, at 164-65; *see also* FRANKEL & DAWSON, *supra* note 23, at 169-83 (discussing sickness insurance in Great Britian before the 1911 Act).

66. Old Age Pensions Act, 1908, 8 Edw. 7, c. 40 (Eng.); RITTER, *supra* note 43, at 152-55; *see also* FRANKEL & DAWSON, *supra* note 23, at 313-15; DEREK FRASER, THE EVOLUTION OF THE BRITISH WELFARE STATE: A HISTORY OF SOCIAL POLICY SINCE THE INDUSTRIAL REVOLUTION 141-43 (1973) (explaining that old age pensions were funded by taxes).

workers was found to be a major source of hardship to families.[67] As in Germany, the English Workmen's Compensation Act was a piece of a much broader series of social reform measures designed to address urban poverty, a byproduct of the industrial age.

The enactment of the Workmen's Compensation Act and other British social welfare reform measures was the result of reform efforts that had begun in the last decades of the nineteenth century. A lengthy economic depression, lasting from 1873 through 1896, exposed the inability of traditional charitable organizations and existing English poor laws to address the scope of urban poverty.[68] The enfranchisement of working-class voters during roughly the same period made social welfare an important political issue.[69] As in Germany, the growing popularity of socialism caused the traditional political parties to support social reform to maintain political control.[70] Probably only the interruption of the Boer War prevented the enactment in the 1890s of social welfare legislation other than the Workmen's Compensation Act and caused the delay in adopting more comprehensive social welfare legislation until the period of 1905 through 1914.[71] By 1909, however, the Old Age Pensions Bill[72] came into operation and paved the way for the later legislation, which provided income supplements as a matter of entitlement in a wide variety of situations. The pre-World War I beginnings of the British social welfare state culminated in the enactment of the National Insurance Act of 1911, providing insurance coverage for workers suffering from sickness or unemployment.[73]

The English workmen's compensation system rejected any requirement that the employer be the cause, in any meaningful sense, of the worker's harm. Compensation under the 1897 Act required that the employee's physical injury result from an accident "arising out of and in the course of employment,"[74] the same language typically used in later workers' compensation statutes in American states. The 1906 amendments extended compensation to occupational diseases, allowing recovery of compensation benefits

67. *See* KEITH LAYBOURN, THE EVOLUTION OF BRITISH SOCIAL POLICY AND THE WELFARE STATE 1880-1993, at 145 (1995).

68. *See* FRASER, *supra* note 66, 123-26.

69. *Id.* at 128; LAYBOURN, *supra* note 67, at 146.

70. In the 1880s, leaders of the socialist Fabian Society advocated that all citizens should be entitled to guaranteed minimum living standards beyond the bare essentials. *See* RITTER, *supra* note 43, at 143-44.

71. *See* FRASER, *supra* note 66, at 141-43.

72. *See* LAYBOURN, *supra* note 67, at 167.

73. *Id.* at 170-73; *see* FRASER, *supra* note 66, at 160-61.

74. English Workmen's Compensation Act of 1897, *supra* note 60, § 1(1). *See also* N.Y. BUREAU OF LABOR STATISTICS REPORT, *supra* note 23, at 663-67 (explaining provisions of the Act).

from "the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due."[75] A schedule appended to the legislation listed various diseases and provided that a worker could recover compensation if he suffered from a certain disease corresponding to various identified occupational tasks.[76] The statutes thus explicitly outlined the requirements for eligibility for compensation, particularly for occupational diseases, without a requirement of proof of causation in any particular case.[77]

Frankel and Dawson, in their 1910 report to American policymakers, concluded, "In all countries of Europe, the beginnings are readily discernible of a movement toward a complete and connected system under which workingmen will be insured against all contingencies where support from wages is lost or interrupted by any cause other than voluntary cessation of labor."[78] Not until much later did the United States adopt such a comprehensive social safety net providing workers and other citizens with compensation for lost income and medical expenses, sickness, disability, and old age that Germany and the United Kingdom adopted at approximately the same time as workers' compensation.

It is no wonder that those of us in the United States, with this experience and with our predilection to view any social welfare program as a political anathema,[79] have found it difficult to understand workers' compensation as a social welfare system. While in Europe workers' compensation is part of a coordinated whole, here it stands much more alone. American policy-makers, scholars, and lawyers describe workers' compensation as something other than a social welfare program. Instead, it is characterized as an "alternative compensation system"—an accurate description, but one that is incomplete.[80] This imperfect American understanding of the nature of workers' compensation creates tensions and dilemmas

75. 1906 Amendments to Workmen's Compensation Act, *supra* note 60, § 8(1)(c).

76. *Id.* sched. 3.

77. The amount of compensation for total or partial disability was fifty percent of the worker's average weekly wages for the preceding twelve months, with a maximum of a pound per week, *id.* sched. 1, § (1)(b), which is about one-half of the prevailing wage for a factory worker, BOARD OF TRADE (LABOUR DEPARTMENT), TENTH ABSTRACT OF LABOUR STATISTICS OF THE UNITED KINGDOM, 1902-1904, at 41-42 (1905).

78. FRANKEL & DAWSON, *supra* note 23, at 395.

79. *See* David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law,* 79 N.Y.U. L. REV. 1271, 1395 (2004).

80. *See* Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 634 (2005).

when scholars and judges seek to transplant lessons from it into the other principal American accident compensation system, namely the common law tort system, without adequately considering the differences between the two systems.

III. WORKERS' COMPENSATION: RECOVERY WITHOUT PROOF OF CAUSATION

The instrumental objective of loss distribution was a primary goal leading to the enactment of workers' compensation legislation in American states during the first decades of the twentieth century. Early sponsors of workers' compensation legislation justified its enactment using language virtually identical to that used by the courts decades later when they first adopted strict products liability principles and relaxed causation requirements in mass products tort cases.[81] The Wainwright Commission's report, relied upon by the New York General Assembly when it enacted New York's first workers' compensation law, for example, stressed that "workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore, the burden of serious accidents falls on the workmen least able to bear it . . . ."[82] The solution, opined the Commission, was to "compel[] the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community."[83] Similarly, in 1908 the Russell Sage Foundation, "[r]ealizing that the subject of insurance for workingmen was one of great importance and that it was a pressing one in the United States,"[84] commissioned a study of European workers' insurance systems. The authors began their study by stating, "In virtually all civilized countries," the principle of employer's liability had been expanded "to include the idea that part or all of the aggregate loss or damage caused by industrial accidents should become part of the cost of the product to be paid for by the consumer,"[85] even in the absence of the employer's negligence.

Traditionally, the advent of workers' compensation has been regarded as controversial because it imposed liability on the employer without proof of fault.[86] Witt's recently published book,[87]

81. *See infra* notes 157-59 and accompanying text.

82. WAINWRIGHT COMMISSION REPORT, *supra* note 23, at 68.

83. *Id.*

84. FRANKEL & DAWSON, *supra* note 23, at v.

85. *Id.* at 3.

86. *See, e.g.*, N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917) (rejecting employer's challenge that workers' compensation statute violated due process because, in part, it allowed recovery without a showing of fault); Ives v. S. Buffalo Ry., 94 N.E. 431, 436 (N.Y. 1911) ("[T]he employer is responsible to the

however, persuasively argues that what made workers' compensation controversial at the time of its inception was that it "allocated liability not so much without regard to fault as without regard to causation."[88]

According to Witt, the way in which judges understand causation has changed during the past century.[89] Today we consider the requirement of cause-in-fact to be satisfied merely by a showing that the injurer's acts were a necessary antecedent of the harm.[90] Witt asserts that judges in the early decades of the twentieth century understood legal causation differently. Those judges, according to Witt, interpreted causation in a "common sense" manner closely linked to fault, so that "[a] person acting properly within the boundaries of his own liberty could not be said to be the legal cause of an injury to third parties."[91] For a court to find that the injurer's acts were a "cause" of the worker's injury, the injurer's act must have broken the chain of causation of what otherwise would have occurred.[92] Witt therefore concludes that those judges who held the first workers' compensation statutes unconstitutional—such as Judge William E. Werner in the leading case of *Ives v. South Buffalo Railway Co.*[93]—did so not only because workmen's compensation statutes imposed liability without fault, but also because they believed that the statutes awarded compensation without a finding of causation as they understood it.[94]

Workers' compensation statutes, as a substitute for cause-in-fact, require only that the claimant prove that the harm must "arise out of" and "in the course of" the injured worker's employment as a prerequisite for compensation.[95] In any workplace accident, some aspect of the employer's conduct is inherently, in a technical sense, a cause in fact of the worker's injury; in other words, the harm would not have occurred unless the employer employed the worker. Workers' compensation claimants frequently recover benefits under

employé . . . whether the employer is at fault or not . . . .").

87. WITT, *supra* note 17.

88. *Id.* at 168.

89. *Id.* at 174.

90. *See* FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 20.2, at 91 (2d ed. 1986).

91. WITT, *supra* note 17, at 168.

92. *Id.* at 169 (citing H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 29-35 (2d ed. 1985)).

93. 94 N.E. 431 (N.Y. 1911).

94. WITT, *supra* note 17, at 168.

95. 820 ILL. COMP. STAT. ANN. 305/2 (2004). *See generally* John Dwight Ingram, *The Meaning of "Arising Out Of" Employment in Illinois Workers' Compensation Law,* 29 J. MARSHALL L. REV. 153 (1995) (explaining the "arising out of" requirement of workers' compensation law).

the "arising out of" test, in situations in which most people, as a matter of common sense, would conclude that the employer was not a cause of the employee's injury. For example, according to statistics from the time of enactment of the original workers' compensation statutes in Germany, the fault or negligence of the injured employee alone was regarded as *the* cause of the accident in 24.43% of the accidents and the fault of a third-party was regarded as *the* cause of another 2.75% of the accidents.[96] Yet, under workers' compensation principles, the employer was held liable for these injuries as long as the injuries occurred during the course of employment.[97] Witt suggests that the limitation of benefits under workers' compensation statutes to one-half or two-thirds of a worker's lost wages originally was understood as an attempt to achieve a "rough justice"—a trade-off for the fact that workers caused some of their own injuries.[98]

More recently, courts have found the "arising out of" threshold to be satisfied when an employee driving an automobile is suddenly seized with a coughing spell because of an asthmatic condition, blacks out, and drives into a ditch;[99] when a tornado strikes a tractor-trailer, throwing its driver, the employee, from the rig;[100] and when an employee is struck by lightning while talking with a customer on the phone during a thunderstorm.[101] In actions such as these, it is unlikely that even today's common law courts would find that the employer's conduct had been a cause-in-fact of the victim's injury.

The workers' compensation system thus allows the injured worker to receive benefits without satisfying any requirement of proof of a causal connection between a particular injurer and a particular victim comparable to that traditionally required by the

96. N.Y. BUREAU OF LABOR STATISTICS REPORT, *supra* note 23, at 788, 906-07 tbl.55.

97. The injured employee frequently is able to both recover workers' compensation benefits because the injury occurred in the course of employment and also successfully sue a third party whose tortious harm caused the injury. *E.g.*, McPherson v. Cleveland Punch & Shear Co., 816 F.2d 249, 250 (6th Cir. 1987) (involving worker who recovered in tort action against punch-press manufacturer after he received workers' compensation benefits).

98. WITT, *supra* note 17, at 138.

99. Tapp v. Tapp, 236 S.W.2d 977, 978 (Tenn. 1951) (holding that reasonable doubt whether an injury arises from employment should be resolved in favor of employee).

100. Campbell 66 Express, Inc. v. Indus. Comm'n, 415 N.E.2d 1043, 1044 (Ill. 1980) (holding that injury resulting from an "act of God" may arise out of employment).

101. Beecher Wholesale Greenhouse, Inc. v. Indus. Comm'n, 524 N.E.2d 750, 755 (Ill. App. Ct. 1988) (affirming administrative award).

common law of torts. As Witt describes it:

> The inquiry under the compensation statues was . . . not who in any individual work-accident case had caused the injury in question, but rather who—employers or employees—was best described as responsible for the aggregate toll of casualties in a given industry. . . . Causation would, in a sense, be determined by legislative fiat for compensation cases as a whole on the theory that employers were best described as the cause of the injury in the majority of the cases; the individualized causation inquiry of tort law would be replaced by an inquiry into the status of the parties accompanied by an unrebuttable [sic] presumption of employer causation based on statistical tendencies.[102]

The legislative allocation of liability for workplace accidents thus depended upon a class-wide assessment of public policy, not any determination of causation in individual cases. For the first time, "Who caused the harm?" was an irrelevant inquiry in an American accident compensation system.

IV. THE INCOMPLETE TRANSFER OF SOCIAL WELFARE ("INSTRUMENTAL") PRINCIPLES TO THE COMMON LAW

As shown in Parts II-III, the identity of the injurer that caused the victim's harm is not germane to the issue of eligibility for compensation under workers' compensation statutes. Statutory and regulatory provisions instead provide the boundaries for determining which victims should be compensated and which employers should pay. This social welfare paradigm was constructed in an entirely different manner from the traditional tort system with its requirement that a particular victim must prove that a specific injurer caused her harm. Yet the notion that a victim can recover without proving individual causation migrated during the twentieth century from workers' compensation programs to the common law of torts, at least in that important subset of tort liability involving compensation for latent diseases resulting from exposure to mass products.[103]

This Part traces how legal scholars and judges during the mid-twentieth century engineered the transfer of liability without individual causation from its origins in workers' compensation law to the common law of torts. However, what these scholars and judges left behind in this borrowing of principles were the

102. WITT, *supra* note 17, at 173.

103. *See* Gifford, *supra* note 80, at 620-27 (describing how the explosion of claims resulting from exposure to mass products has fundamentally altered the landscape of tort liability since 1970).

statutorily-defined *compensation entitlement boundaries* present in the workers' compensation system. Workers' compensation systems required claimants to show that they fell within specific statutory provisions in order to be eligible for benefits. The instrumentalist scholars and judges, who eliminated the individual causation requirement in the common law, also ignored other statutory provisions that defined *liability boundaries* by specifying which employers or manufacturers would be required to insure against accidents or be taxed in order to contribute to the compensation pool from which victims would draw their benefits.

Part IV.A traces the lineage of the retreat of the individual causation requirement by examining the scholarship of Fleming James, Jr., and other scholars who described workers' compensation as more of an "alternative compensation system" than as a social welfare program. James relentlessly pursued the goal of distributing losses suffered by accident victims to a wider base, regardless of whether this objective was achieved through the enactment of a comprehensive social insurance, implementation of more focused alternative compensation programs, or expansion of liability within the common law. He believed that the absence of an individualized causal connection should not preclude compensation.

Part IV.B chronicles the handful of alternative compensation programs other than workers' compensation that were enacted during the twentieth century and how many of these programs enabled the victim to recover without proof of individual causation. Part IV.C focuses on the work of Guido Calabresi, who openly advocated liability within the common law tort system without a requirement of individual causation. Finally, Part IV.D describes *Sindell v. Abbott Laboratories,*[104] the 1980 California Supreme Court opinion establishing market share liability, as the culmination of the efforts of Calabresi and his predecessors to allow common law liability without proof of individual causation.

A. The Loss Distribution Agenda of Fleming James, Jr.

The intellectual roots of liability based on instrumental grounds and the retreat of the requirement of individual causation in common law torts lie in the work of scholars who wrote in the fifty years following the adoption of workers' compensation. These scholars, notably Fleming James, Jr., sought the expansion of the loss distribution objective inherent in workers' compensation legislation into broader arenas. Initially, James and others argued for legislatively enacted social welfare systems, similar to those

104. 607 P.2d 924 (Cal. 1980).

already in place in many European countries.[105] When both Congress and state legislatures failed to adopt broad-based social welfare systems, however, these reformers turned their attention to transplanting the objectives of loss distribution and loss minimization into the common law tort system through enterprise liability.[106]

Shortly after the enactment of the first workers' compensation statutes, Jeremiah Smith prophesied that the instrumental liability concepts inherent in workers' compensation would spread throughout American compensation law.[107] Smith foresaw that recovery under no-fault or social insurance systems might not be limited to harm *caused* by a particular party:

> [T]here may be an attempt to bring about State Insurance, not confined to harm suffered by hired laborers. It may extend to an "outsider," who suffers harm from the non-culpable conduct of persons carrying on a business in which he is not a participant . . . .
>
> . . . .
>
> It may include damage wholly due to a natural cause, such as a stroke of lightning.[108]

In the decades following the enactment of workers' compensation, scholars led by Leon Green, and later James, argued that accident compensation should be handled either by a social insurance system covering all accidents and illnesses or by targeted no-fault compensation plans providing compensation for injuries sustained in specifically defined factual contexts other than the workplace. James viewed workers' compensation as the first example of social welfare legislation in the United States, and as a close cousin of later legislation that went beyond addressing financial need caused by workplace accidents, such as New Deal programs "protecting individuals from the consequences of pecuniary loss through such vicissitudes of life as . . . old age,

105. *See supra* notes 47-58, 60-67 and accompanying text.

106. "Enterprise liability," a variant of the theories of the tort system now known as instrumental liability, argues that business enterprises should be held liable for the harms that they have caused on the grounds of loss minimization and loss distribution. *See* NOLAN & URSIN, *supra* note 16, at 3-4 (describing the enterprise liability theory).

107. *See* Smith, *supra* note 19, at 363 (explaining the tendency for extension of the theories embodied by the Workmen's Compensation Acts to other areas of law).

108. *Id*. at 363-64.

sickness, and unemployment."[109] His principal goal was to distribute losses beyond the individuals or families experiencing financial hardship in the first place. In the best of all possible worlds, James favored a broad-based social insurance system to deal with the losses caused by all accidents.[110] If this was not possible, he advocated compensation plans similar to workers' compensation that would allocate the costs of accidents to the enterprise that caused the accidents.[111] Finally, if it were not feasible to adopt even such targeted accident compensation plans, he argued for expansion of liability within the common law.[112]

Regardless of the venue, James's focus always remained on the idea of loss distribution. In his view, the goal of accident compensation systems was "to assure accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it."[113] James recognized that in the modern era, with the advent of liability insurance, "tort liability no longer merely *shifts* a loss from one individual to another but it tends to *distribute* the loss according to the principles of insurance, and the person nominally liable is often only a conduit through whom this process of distribution starts to flow."[114] In short, inherent within James's vision of accident compensation was his rejection not only of fault as a requirement of liability, but also of any requirement of individual causation. He explicitly stated that "[c]lassically, the basic notions behind tort liability included . . . . [that] [p]ayment was an individual matter. With increasing accumulations of capital and the coming of liability insurance, however, something of the philosophy of social insurance has crept into the thinking about tort liability . . . ."[115]

Even before James, L.W. Feezer, another early proponent of

109. Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies,* 27 N.Y.U. L. REV. 537, 537 (1952).

110. Fleming James, Jr., *Contribution Among Joint Tortfeasors*: *A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1157 (1941) ("The full blessings of distribution can best be attained by comprehensive social insurance . . . .").

111. James, *Social Insurance and Tort Liability, supra* note 109, at 538.

112. *See, e.g.,* Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549, 554-56 (1948) [hereinafter James, *Accident Liability Reconsidered*] (suggesting abrogation of various immunities, at least in motor vehicle accidents); Fleming James, Jr., *Products Liability* (pt. 2), 34 TEX. L. REV. 192, 214-15 (1956) [hereinafter James, *Products Liability*) (advocating strict product liability within the common law). *See generally* Priest, *supra* note 16, at 475-76 (discussing James's support of absolute liability for accident losses).

113. James, *Accident Liability Reconsidered*, *supra* note 112, at 550.

114. *Id*. at 551.

115. James, *supra* note 109, at 539-40.

comprehensive no-fault programs, recognized "[t]hat this whole approach to the problem is quite the antithesis of the individualism which characterized the law in the Eighteenth and Nineteenth Centuries . . . . This would indeed be a socialized, as contrasted with individualized, justice."[116]

B. Rejection of the Individual Causation Requirement in Targeted Alternative Compensation Systems

As early as the 1920s, Leon Green advocated the expansion of no-fault compensation plans beyond workers' compensation and recommended such plans for several categories of accidents, including automobile accidents,[117] railway crossing accidents,[118] and accidental injuries to children trespassing on the premises of industrial landowners.[119] In 1932, a distinguished committee proposed the so-called "Columbia Plan,"[120] an automobile no-fault plan that closely resembled plans enacted in many American jurisdictions during the 1970s and the early 1980s.[121] As with workers' compensation, the Columbia Plan required drivers to purchase liability insurance or pay into a state fund that would compensate victims of traffic accidents, even if injured by an uninsured motorist.[122]

Scholars writing about accident compensation systems during the era beginning with the enactment of workers' compensation legislation and ending with the *Sindell* decision sometimes recognized that alternative accident compensation plans, such as automobile no-fault, were one form of social welfare legislation. Frank Grad, for example, saw automobile no-fault as filling one of the gaps left in the social welfare net created by the combination of workers' compensation, unemployment benefits, and retirement benefits.[123]

The Columbia Plan did not lead American states to enact

116. L.W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases,* 78 U. PA. L. REV. 805, 813-14 (1930).

117. Leon Green, *The Duty Problem in Negligence Cases: II,* 29 COLUM. L. REV. 255, 277-79 (1929). *See generally* NOLAN & URSIN, *supra* note 16, at 30-37 (describing the work of Leon Green during the 1920s).

118. Green, *supra* note 117, at 275-76.

119. *Id.* at 272-74.

120. NOLAN & URSIN, *supra* note 16, at 38-43; Frank P. Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 317-20 (1950).

121. *See* HARPER ET AL., *supra* note 90, § 13.8, at 164 (reporting that twenty-four states and the District of Columbia had adopted automobile no-fault legislation).

122. Grad, *supra* note 120, at 318.

123. *Id.* at 325.

automobile no-fault plans until the 1970s; by the early 1980s, however, twenty-four states had adopted some version of automobile no-fault.[124] Also during the 1970s, Jeffrey O'Connell began to promote the extension of no-fault or similar approaches to other accident arenas,[125] but with very limited success.[126] No-fault compensation plans ultimately were adopted legislatively in isolated contexts,[127] such as the handling of claims brought by victims of black lung disease,[128] birth-related neurological injuries,[129] the swine flu vaccine,[130] and childhood vaccines.[131] Again, in varying circumstances, these plans enabled a victim to collect damages from a fund without requiring the victim to prove that any individual injurer caused his injury. For example, under the Black Lung Act, most often the last employer of the claimant must compensate the claimant for his injuries, even when it cannot be shown that exposure to coal dust during the victim's last employment is a likely cause of his disease.[132]

C. Calabresi and the Weakening of the Individual Causation Requirement Within the Common Law

The failure to extend the principles of instrumental liability beyond workers' compensation through the legislative enactment of no-fault plans, except eventually automobile no-fault and the other isolated compensation systems previously described, led scholarly advocates of instrumental liability to shift their attention to the judicial arena by the mid-twentieth century.[133] James and his peers

124. HARPER, JAMES & GRAY, *supra* note 90, § 13.8, at 164.

125. *E.g.*, JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975); Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals,* 59 VA. L. REV. 749 (1973).

126. *See* NOLAN & URSIN, *supra* note 16, at 67 (describing how O'Connell's enterprise liability proposals made little headway in the 1970s and 1980s).

127. *See generally* Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699 (2005).

128. Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2000). *See also* Robert L. Ramsey & Robert S. Habermann, *The Federal Black Lung Program—The View From the Top,* 87 W. VA. L. REV. 575 (1985) (discussing claim process under the Act).

129. FLA. STAT. ANN. §§ 766.301-.316 (2005); Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000-.2-5021 (2002 & Supp. 2004). *See also* Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53, 55 (1998) (reporting on no fault plans "as a leading alternative to today's liability systems for medically caused injuries").

130. Swine Flu Act, 42 U.S.C. § 247b(j)(1) (1976) (repealed 1981).

131. 42 U.S.C. §§ 300aa-1 to -33 (2000).

132. 20 C.F.R. §§ 725.494-.495 (2000).

133. *See* NOLAN & URSIN, *supra* note 16, at 9, 67, 84-88.

became aware of judicial decisions by Justice Roger Traynor of the Supreme Court of California and other judges that had begun to move the common law of products liability toward strict liability premised upon the principles of enterprise liability, namely that businesses should be held liable because they were best able to minimize and distribute losses.[134] In 1956, James suggested that the judicial system might be the institutional vehicle for moving toward a products liability regime that accomplished the goal of enterprise liability.[135] By the mid-1960s, at least in the area of products liability, enterprise liability had leaped from legislatively enacted compensation plans, such as workers' compensation, to the common law of torts.

Our tracing of the retreat from the requirement of individual causation within the tort system now returns to its principal scholarly advocate during recent decades, Guido Calabresi, a protégé of James.[136] In *The Costs of Accidents*, Calabresi married the loss-distribution goals of his mentor with an economic analysis of tort law. In doing so, he departed from James's almost exclusive focus on loss distribution[137] and from James's skepticism about the ability of tort law to deter accident costs.[138] Instead, Calabresi identified what he called "primary accident cost avoidance"—namely, loss minimization—as one of the key objectives of the tort system, along with loss distribution.[139]

Calabresi wrote that the requirement that a particular plaintiff prove that a particular defendant caused its harm was "far from being the essential, almost categorical imperative it is sometimes described to be . . . ."[140] He realized that achieving the goals of loss

134. Fleming James, Jr., *Accident Liability: Some Wartime Developments,* 55 YALE L.J. 365, 400 (1945) ("[S]ystem of liability based on fault is being modified by the courts so as constantly to extend the bases of recovery for accident victims.").

135. James, *Products Liability, supra* note 112, at 227-28 (describing a retreat from common law restrictions in products liability).

136. *See* Oscar S. Gray, *Introduction of Guido Calabresi*, 64 MD. L. REV. 734, 734 (2005).

137. *See* James, *supra* note 110, at 1157.

138. James, *Accident Liability Reconsidered, supra* note 112, at 569 ("As for that branch of the law which is concerned with civil damages or their equivalent, it is doubtful whether it contributes very much to accident prevention."); Fleming James, Jr., *Tort Law in Midstream*: *Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 331 (1959) ("[T]he pressure of civil liability yields little if anything in terms of accident prevention if exerted directly against individuals.").

139. CALABRESI, *supra* note 9, at 68.

140. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,* 43 U. CHI. L. REV. 69, 85 (1975). Among those who view the tort system as pursuing instrumental goals, Calabresi's views concerning the

minimization and loss distribution did not require a one-on-one relationship between the injurer and the victim. Like American proponents of workers' compensation who praised its German precursors,[141] Calabresi believed that the tort system should both "discourage activities that are 'accident prone'"[142] and distribute the costs of accidents in a manner that inflicts "less pain" than if the accident costs were borne solely by the original victims.[143]

Calabresi argued that the need to impose liability on the injurer in order to discourage harm-producing activity did not require that the financial penalty extracted from the injurer be transferred to the particular injurer's victim.[144] It was not necessary that any particular victim receive compensation from the party that in fact injured her; her compensation might come from any party capable of distributing her accident losses as broadly as possible without impairing the goal of loss minimization.[145] Calabresi thus broke the linkage between loss minimization (often referred to as "deterrence") and loss distribution (closely related to the traditional concept of "compensation") that has been regarded as inherent in tort law. Further, he realized that the amount that the injurer should pay in order to discourage harm-producing activity is not necessarily equivalent to the injured party's compensation needs.[146]

While Calabresi did not recommend any particular accident compensation system,[147] he was critical of the social insurance programs and no-fault compensation plans advocated by James and many other scholars of James's era. No-fault compensation systems, according to Calabresi, typically fail to hold the injurer liable for the full extent of harms caused by its conduct, thus undermining the

individual causation requirement are widely shared. Richard A. Posner and William M. Landes, whose approaches to the tort system are very different than Calabresi's, for example, conclude that "causation in the law is an inarticulate groping for economically sound solutions . . . ." William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach,* 12 J. LEGAL STUD. 109, 131 (1983).

141. *See supra* notes 23-37 and accompanying text.

142. CALABRESI, *supra* note 9*,* at 68.

143. *Id.* at 39. The most important way of accomplishing this objective is to distribute the losses resulting from an accident broadly across many people. Calabresi also argues in favor of the "deep pocket" notion: that the costs of accidents will cause less pain and disutility if paid for by people who will suffer less "social and economic dislocations as a result of bearing them, usually thought to be the wealthy." *Id.* at 40.

144. *See id.* at 302-06.

145. *Id.* at 52-54.

146. *See id.* at 302-05.

147. *See id.* at 37.

goal of accident prevention.[148] Often these systems require the injurer to pay only the economic costs of the harm, leaving the victim without compensation for non-economic losses such as pain and suffering.[149] Further, no-fault compensation systems and social insurance systems frequently are subsidized, in whole or in part, by government funding. Funding such systems with general tax revenues instead of imposing the costs on the injurers, according to Calabresi, fails to impose liability on injurers for the full costs of the accidents they cause, thereby subsidizing harmful conduct.[150]

Calabresi thus articulated both of the foundational premises necessary for the assault upon the requirement of individual causation *within the common law tort system.* First, building upon the workers' compensation experience and the scholarship of James, Calabresi explicitly rejected the idea that an accident compensation system should require that a particular victim must prove that her harm is linked to the acts of a particular injurer in order to recover.[151] Second, when Calabresi coupled this premise with his critiques of social insurance systems and no-fault plans, he posed an open invitation to the courts to allow liability without any requirement of individual causation, thereby leaping the boundary separating legislatively enacted social welfare programs from the common law tort system.[152]

148. *Id.* at 64-67.

149. *Id.* at 8.

150. *Id.* at 7, 311.

151. *Id.* at 22.

152. It is revealing that Calabresi, the leading scholar suggesting the abrogation of the individual causation requirement in the torts system during recent decades, was a student of James and for several decades has taught Torts using the unique casebook originally co-edited by James and Harry Shulman. *See* HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS (1942). The first opinion presented to students in the Shulman and James casebook is not even a torts case; instead it is the classic 1911 opinion of *Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911) (striking down New York's first attempt to enact a workers' compensation statute on due process grounds). The remainder of the casebook serves as a vehicle for evaluating the common law of torts against the instrumental objectives gleaned from studying *Ives.* As such, the casebook induces students to question not only the appropriateness of fault as a requirement for liability, but also the requirement of proof of individual causation. George Priest has described the Shulman and James casebook as "an extraordinarily clever organ of propaganda." Priest, *supra* note 16, at 499. Obviously, as one of the current co-editors of the casebook, I strongly disagree with Priest's characterization. Priest is certainly correct, however, that the theory within the original Shulman and James casebook played an important role in influencing tort law during the last half of the twentieth century. *See* Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law,* 68 BROOK. L. REV. 1031, 1033, 1035-36 (2003).

D. Sindell v. Abbott Laboratories*: Compensation Without Proof of Individual Causation Reaches the Common Law*

Fifteen years after Calabresi first suggested the loosening of the individual causation requirement in torts, the California Supreme Court dramatically embraced recovery without individual causation in *Sindell v. Abbott Laboratories*.[153] The plaintiff sued on behalf of herself and other similarly situated women suffering from cancerous and pre-cancerous growths that she alleged resulted from their mothers' consumption, more than a decade earlier, of DES, a synthetic compound of estrogen designed to prevent miscarriages.[154] Plaintiff admittedly was unable to identify which pharmaceutical manufacturer produced the specific DES consumed by her mother because the products, manufactured by scores of drug companies, were of identical chemical composition.[155] The trial court dismissed the complaint, but the California Supreme Court reversed and held each manufacturer liable for the proportion of the plaintiff's judgment that corresponded with its share of the relevant market of the sales of DES, unless it proved that it could not have made the specific product that caused the plaintiff's harm.[156] Justice Mosk justified the holding, in part, on the basis of a loss minimization objective: "The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety."[157] The court's opinion also addressed the goal of loss distribution:

> From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[158]

Note how the language of this 1980 California Supreme Court opinion echoes the objectives of loss distribution and loss minimization in words very similar to those used during the last decade of the nineteenth century and the first decade of the

153. 607 P.2d 924 (Cal. 1980).
154. *Id.* at 925.
155. *Id.* at 926.
156. *Id.* at 937.
157. *Id.* at 936.
158. *Id.* (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944)).

twentieth century by American admirers of Germany's accident insurance system.[159]

It can be argued that the decision in *Sindell* merely shifted the burden of persuasion to the manufacturers to prove that their products were not, in fact, the ones causing the plaintiff's illness. Later in the 1980s, however, the New York Court of Appeals went even further, holding that even if a particular manufacturer of DES that could prove that its products could not have been among those that caused the harm to the particular victim, it should nevertheless be held liable.[160] The court conceded "the lack of a logical link between liability and causation in a single case."[161]

The use of the market share liability concept to address the inability of the victim to identify the specific DES manufacturer whose product caused her harm was first suggested in a student comment written by Naomi Sheiner in the *Fordham Law Review*[162] that justified such liability largely on the basis of the loss minimization and loss distribution.[163] As the previously quoted language from the *Sindell* opinion shows, the court also relied heavily on then Associate Justice Roger Traynor's seminal concurring opinion in *Escola v. Coca Cola Bottling Co.*,[164] which espoused loss distribution and loss minimization as the guiding forces behind the notion that manufacturers should be held strictly liable in products cases.[165] The extent to which Calabresi's writings directly influenced the California Supreme Court's opinion in *Sindell* or other opinions that circumvent any requirement of individual causation probably never can be traced. Yet it is clear

159. *See supra* notes 32-33 (loss distribution), 34-37 (loss minimization).

160. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989).

161. *Id.* at 1078 n.3.

162. *See* Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability,* 46 FORDHAM L. REV. 963 (1978); *see also* Sindell v. Abbott Labs., 607 P.2d 924, 934-35 (Cal. 1980).

163. Sheiner, *supra* note 162, at 1003-05; *Sindell*, 607 P.2d at 936.

164. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

165. Traynor's opinion is perhaps the classic explication of enterprise liability. In *Escola*, Traynor wrote:

> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Id. at 440-41.

that the *Sindell* court's perspective on the nature of tort law, as well as that of other courts ignoring the individual causation requirement, is driven by the same instrumentalist conception of tort law that Calabresi articulated.

The history presented in this Article demonstrates that the origins of compensation without proof that a victim's harm resulted from the acts of a particular injurer lie in legislatively enacted social welfare programs, including workers' compensation. James, Calabresi, and other heirs to legal realism succeeded in shifting the perspective from which workers' compensation was viewed. The original proponents of workers' compensation conceptualized it primarily as one component of a social welfare program. Today, legal scholars and judges view workers' compensation through the lenses ground by James and Calabresi and characterize it as an accident compensation system functioning as an alternative to common law torts, largely without reference to the broader social welfare system. By changing the perspective through which workers' compensation was viewed, James and Calabresi expanded the influence of pro-compensation principles derived from workers' compensation within a common law tort system that previously had denied compensation in the absence of causation or even, when individual causation could be proved, in the absence of fault.

Generally lost in the translation from social welfare programs to the tort system, however, is any requirement that claimants must fall within legislatively or administratively determined compensation entitlement boundaries. When contemporary judges and scholars suggest that the principles of loss distribution and loss minimization borrowed from the world of workers' compensation—including notions of collective liability—should be grafted onto the common law, they usually ignore the boundary-establishing functions heretofore played by causation within the tort system. This same function is performed by other components—namely statutory and administrative provisions establishing which victims can recover and which employers must contribute—in the workers' compensation system.

V. COMPARATIVE LEGISLATIVE SUCCESS IN ESTABLISHING COMPENSATION ENTITLEMENT AND LIABILITY BOUNDARIES

Before turning to an evaluation of the common law tort system's performance in developing compensation entitlement and liability boundaries to govern mass products torts in Part VI, this Part briefly considers the operation of comparable boundaries established by legislatures and legislatively created administrative agencies in social welfare programs.

The issue of which party caused the victim's harm is irrelevant

to the determination of the victim's entitlement to receive compensation under social welfare programs. Consider, for example, the process of establishing eligibility for retirement benefits under the Social Security program.[166] The claimant provides proof that she meets the eligibility criteria established by statute or regulation, including age, citizenship, and contribution of earnings to the Social Security system for the requisite period of time. The standards are clearly defined so that the process of determining whether they are satisfied usually is an administrative one.[167] The process for establishing an entitlement to state medical assistance funds[168] or Medicare funds for the elderly[169] is similar. Other than age or income eligibility,[170] the only frequently contested issue is likely to be whether or not the precise medical services in question are "covered" by the regulations governing the program.[171] Finally, the determination of whether a claimant is entitled to Social Security disability benefits may be somewhat less axiomatic.[172] The claimant and government may contest vigorously whether the claimant's impairment is one that satisfies the statutory criterion that "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work . . . [but also cannot] engage in any other kind of substantial gainful work which exists in the national economy."[173]

In each of these government entitlement programs, however,

166. To be fully eligible for benefits, a retired beneficiary must establish that she is sixty-two years of age and that she has paid premiums for the requisite period of time during her working lifetime. 42 U.S.C. § 402(a) (2000). *See also* 42 U.S.C. § 405 (2000); NAT'L ORG. OF SOC. SEC. CLAIMANTS' REPRESENTATIVES, SOCIAL SECURITY PRACTICE GUIDE § 2.01 (2006).

167. There is, of course, an appeals process. *See* 20 C.F.R. §§ 404.930, 404.967 (2004); *see also* 42 U.S.C. § 405(b), (g)-(h) (2000).

168. *See* 42 U.S.C. § 1396a(a)(10) (2000).

169. *See id*. § 426.

170. *See id*. § 1395ff(a).

171. *E.g.*, Wood v. Thompson, 246 F.3d 1026, 1035-36 (7th Cir. 2001) (upholding denial of Medicare coverage for dental surgery); Wilkins v. Sullivan, 889 F.2d 135, 141 (7th Cir. 1989) (holding that decedent was not entitled to Medicare benefits for cost of bilateral carotid body resection).

172. *See* 42 U.S.C. § 1382c (2000). The Social Security Administration defines a disability as the inability to perform any substantial gainful activity because of a "physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." *Id.* § 1382c(a)(3)(A).

173. *Id.* § 1382c(a)(3)(B). In 22.9% of these cases, this determination ultimately is resolved through a contested hearing before an administrative law judge. SOC. SEC. ADVISORY BD., DISABILITY DECISION MAKING: DATA AND MATERIALS 86 chart 67 (2001), *available at* http://www.ssab.gov/Publications/Disability/ChartbookB.pdf.

the identity of the injurer and the nature or details of the cause of the condition entitling the claimant to benefits are irrelevant to the question of eligibility or compensation entitlement. It is obviously frivolous or meaningless to ask who caused a Social Security claimant's old age. No government employee involved in the process of determining eligibility for medical assistance payments inquires as to who caused the claimant's sickness, even if the disease is one that almost certainly was communicated from another human, say influenza or pneumonia. If an injured party is seeking Social Security disability benefits, the focus is on whether the claimant's current physical condition renders him unable to work, not on who may have caused his injury. There is, in short, no determination of causation in most government social welfare programs.[174]

On the other side of the ledger, the liability boundaries depend on the legislatively enacted and generally clearly defined provisions of the tax code. "Causation" of disability, old age, or medical need is irrelevant to the liability boundary (determining who pays), just as it is irrelevant to the compensation entitlement boundary (determining who recovers and how much).

Workers' compensation, the social welfare system from which James, Calabresi, and others derived the underlying principles of loss distribution and perhaps even loss minimization, is no exception. Under workers' compensation and other statutorily enacted compensation systems, the determination of which victims can seek and receive compensation is specified by legislatively or administratively adopted provisions.[175] The compensation entitlement boundary separating the victims who can recover from those who cannot is determined by whether the victim's harm falls within the statutory or administrative definition of a "compensable event."[176] Similarly, the enacting statute, or administrative

174. The provisions of the 1996 Contract with America Advancement Act create an exception for disabled individuals with a mental illness/substance abuse dual diagnosis who now must prove that any substance abuse is not a material cause of the alleged disability. *See* Mazin A. Sbaiti, Note, *Administrative Oversight? Towards a Meaningful "Materiality" Determination Process for Dual-Diagnosis Claimants Seeking Disability Benefits Under Titles II & XVI of the Social Security Act,* 35 COLUM. HUM. RTS. L. REV. 415, 415-17 (2004).

175. *E.g.*, 77 PA. STAT. ANN. § 411(1) (2002) (providing compensation for injuries "arising in the course of his employment and related thereto"); UTAH CODE ANN. § 34A-2-401 (2005) (providing compensation for employees injured "by accident arising out of and in the course of the employee's employment").

176. *See* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform,* 73 VA. L. REV. 845, 886-87 (1987); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme,* 52 MD. L. REV. 951, 964 (1993).

regulations adopted under the statute, define the liability boundaries, specifying which injurers will be held "liable"—that is, which employers are covered by the workers' compensation system, whether the compensation comes from a state fund or from mandatory insurance, and how each employer is assessed for contributions.[177] As previously described, the victim's entitlement to benefits under workers' compensation is not bounded by a requirement that any particular party caused her injury.[178] Instead, the boundaries of entitlement to compensation are specified by the statutory criteria, usually that the harm was "received in the course of, and [arose] out of, the injured employee's employment."[179] Nor is any potential injurer's liability dependent upon any victim proving that the injurer's act caused the victim's injury in any meaningful sense. In short, statutory provisions carry the load that within the tort system is borne by causation.

Boundary requirements created by statute and regulation, and not causation requirements, again establish compensation entitlements in the wide variety of alternative compensation plans that are modeled on workers' compensation.[180] A victim of black lung disease, for example, recovers from her last employer even if it cannot be shown that her disease resulted from exposure at her last place of employment.[181] On the other side of the ledger, consider the liability boundaries that operate as a part of Florida's legislatively established compensation system for birth-related injuries. Statutory provisions provide that Florida hospitals and physicians are assessed annually according to the following formula to fund a compensation pool:

> All annual assessments shall be made on the basis of net direct premiums written for the business activity which forms the basis for each such entity's inclusion as a funding source for the plan in the state during the prior year ending

177. *E.g.*, OHIO REV. CODE ANN. § 4123.01(B) (Supp. 2006) (defining covered employers). In most states, statutes require covered employers to either carry mandatory insurance or to meet specific requirements for self-insurance. S*ee generally* Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 185-205 (1994) (discussing general costs and requirements of both insurance systems). However, Ohio operates its own state insurance fund. § 4123.35(A) (2001) (providing that covered employers must pay annual premiums to the state insurance fund in amounts "determined by the classifications, rules, and rates made and published by the administrator").

178. *See supra* notes 95-102 and accompanying text.

179. OHIO REV. CODE ANN. § 4123.01(C) (2001).

180. *See supra* notes 117-32 and accompanying text.

181. *See supra* note 132 and accompanying text.

> December 31, as reported to the Office of Insurance Regulation, and shall be in the proportion that the net direct premiums written by each carrier on account of the business activity forming the basis for its inclusion in the plan bears to the aggregate net direct premiums for all such business activity written in this state by all such entities.[182]

The level of detail provided in this statute, while almost certainly over-inclusive or under-inclusive (and probably both) in terms of determining causation in any scientific or purely factual sense, works reasonably well for determining who must contribute to a compensation pool. Yet courts traditionally have been uncomfortable devising similar specific boundaries of compensation or liability, presumably because of their concerns about either their appropriate judicial roles or their institutional competency to devise such boundaries.

VI. THE UNSATISFACTORY STATE OF LIABILITY AND COMPENSATION ENTITLEMENT BOUNDARIES WITHIN THE LAW OF MASS PRODUCTS TORTS

Individual causation traditionally played the role of establishing both compensation entitlement and liability boundaries within the common law of torts. The victim of a latent disease caused by products that are fungible or nearly so, such as smoking-related cancer, asbestosis, or childhood lead poisoning, often cannot prove individual causation. Yet such victims recover more frequently, but inconsistently, in common law tort actions.

Some victims of mass products torts recover compensation when they sue in tort, and some manufacturers pay. Most such victims, however, do not recover, and many manufacturers do not pay. Thus, the tort system already and inherently includes both *liability boundaries* (defining which manufacturers pay) and *compensation entitlement boundaries* (defining which victims recover). This Part analyzes how the tort system currently establishes liability and compensation entitlement boundaries and evaluates the performance of common law courts in doing so.

The picture is not a pretty one. Trial courts that address the issue in innovative ways, more often than not, are reversed by appellate courts concerned about the due process rights of manufacturers, the appropriate limits of the judicial function, and the institutional competencies of the judiciary. Seeking to avoid reversal, trial judges ground their decisions that functionally create liability and compensation entitlement boundaries in traditional tort doctrines, but often must distort these doctrines beyond recognition

182. FLA. STAT. ANN. § 766.314(5)(c)(2) (2005).

in order to award compensation to deserving victims. Meanwhile, other courts refuse to find liability without proof of individual causation. In most cases, courts fail to understand or appreciate the importance of explicitly analyzing how compensation entitlement boundaries and liability boundaries affect recovery in the tort system.

The analysis concludes with troubling questions. Is it possible for courts to establish compensation entitlement and liability boundaries, detached from notions of causation, given the differing institutional competencies of courts, on one hand, and legislative and administrative bodies, on the other hand? Is it appropriate for courts to do so given our understanding of the limits of the judicial function?

Part VI.A analyzes judicially created doctrines for determining liability boundaries in mass products torts cases. Part B considers judicially created compensation entitlement boundaries. In most cases, compensation entitlement boundaries pose no problem for the common law. Any individual victim who is able to establish that her harm was caused by one or more defendants is entitled to recover, regardless of whether she satisfies the traditional individual causation requirement or any of the more novel doctrines determining liability boundaries considered in Part VI.A. Compensation entitlement boundaries, however, are more complex when the victim's compensation is pursued through a collective action, such as those creatively pioneered by particularly innovative judges (sometimes disparagingly referred to as "activist judges") in consolidated actions and class actions, or those in *parens patriae* state actions seeking "recoupment" or recovery of medical assistance benefits paid by the state to victims of tobacco-related or other product-caused diseases. Part VI.B analyzes compensation entitlement boundaries when the plaintiff is such a collective entity.

A. Common Law Liability Boundaries Other than Individual Causation

This Part analyzes judicially created liability boundaries other than individual causation, including market share liability, expanded interpretations of traditional tort doctrines such as alternative liability, and liability resulting from concerted action among tortfeasors.

1. Market Share Liability and Its Cousin, Risk Contribution Liability

Sindell and its progeny represent the most thoughtful and serious attempts by courts so far to determine liability boundaries governing when a party engaged in tortious activities may be held

financially responsible even though the victim cannot establish that her harm was caused by the conduct of any particular manufacturer. Market share liability has proven to be very popular with scholars,[183] and probably most first-semester torts students today study the concept.[184] On the heels of the *Sindell* opinion, however, the courts quickly began to limit market share liability as a substitute for individual causation. Almost all courts have rejected the expansion of market share liability beyond DES cases,[185] and probably more than half of all jurisdictions reject it even in the DES context.[186]

Judicial rejection of market share liability often results from the recognition that courts are not able to accurately determine the market shares of the various defendant-manufacturers. For example, in *Skipworth v. Lead Industries Ass'n,*[187] the Pennsylvania Supreme Court contrasted the feasibility of allocating market shares in the DES situation with the practical impossibility of doing so when the defendants were manufacturers of lead pigment contained in lead-based paint, which caused the victim's childhood lead poisoning.[188] In *Sindell,* determination of the relevant market shares was confined to the nine-month period during which the victim's mother was pregnant, because the DES could have been produced only during the time interval immediately preceding the child's in utero exposure.[189] In *Skipworth,* in contrast, paint

183. *E.g.*, HARPER ET AL., *supra* note 90, § 20.2, at 107 (describing "developments along the lines of *Sindell*" as "well warranted"); *see also* Claire Finkelstein, *Is Risk a Harm?,* 151 U. PA. L. REV. 963, 980-81 (2003) (discussing implications of market share liability based on *Sindell*); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the* DES *Cases,* 68 VA. L. REV. 713, 717 (1982) (discussing implication of *Sindell).*

184. Virtually all first-year torts casebooks include one or more market share liability opinions. *See, e.g.*, MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 378-91 (7th ed. 2001) (including *Hymowitz)*; VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 287-92 (11th ed. 2005) (including *Sindell*); HARRY SHULMAN ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 311-23 (4th ed. 2003) (including *Sindell* and *Skipworth*).

185. *E.g.*, Shackil v. Lederle Labs., 561 A.2d 511, 529 (N.J. 1989) (rejecting market share liability for DPT vaccine); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 702 (Ohio 1987) (rejecting market share liability for asbestos products generally). *Contra* Wheeler v. Raybestos-Manhattan, 11 Cal. Rptr. 2d 109, 113 (Ct. App. 1992) (permitting proof of market share liability for asbestos brake pads); Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 567 (Wis. 2005) (accepting market share liability for lead pigment).

186. *E.g.*, Griffin v. Tenneco Resins, Inc., 648 F. Supp. 964, 967 (W.D.N.C. 1986); Payton v. Abbott Labs, 437 N.E.2d 171, 190 (Mass. 1982).

187. 690 A.2d 169 (Pa. 1997).

188. *Id.* at 173.

189. *Id.*

containing lead pigment produced by various manufacturers was applied to the house where the victim lived on many occasions between 1870 and 1977.[190] For all intents and purposes, it was impossible to determine both the various years during which the house was painted and the respective market shares of the various manufacturers during those times.[191] Further, the chemical composition of the DES produced by various manufacturers was identical, prescribed by the Food and Drug Administration, while the chemical composition of various lead pigments, as well as their "bioavailability," that is, their propensity to be internalized by the body and absorbed into the bloodstream, differed from one product to another.[192] Hence, even if the market shares of the product-sales of various lead pigment manufacturers could be determined for each of the relevant years when paint was applied, almost assuredly an impossible task, these market shares would not accurately reflect the respective degrees of risk posed by each manufacturer's products.

Most fungible products that cause latent diseases or other harms years after product exposure share the relevant characteristics of lead pigment and not the relatively unique characteristics of DES. Courts seldom are able to isolate the time when the product-causing harm was distributed to a period as well defined as the roughly nine-month period in DES cases,[193] and rarely do such products share identical chemical compositions.[194]

Other problems overwhelm the real world operation of market share liability.[195] The fungible nature of products coupled with what is often the passage of decades between the time of the manufacture of the product and the time when the disease or other harm occurs often make it impossible to determine market shares. Manufacturers of a significant portion of the harm-producing products go out of business or become insolvent, particularly in situations such as those of asbestos manufacturers where past liability judgments already have exceeded insurance limits.

Market share liability has been a principled attempt by courts to assess liability among defendants in a manner that accurately reflects the degree of risk caused by each manufacturer's distribution of a harm-producing product, but it is an approach that

190. *Id.* at 170-71.
191. *Id.* at 173
192. *Id.*
193. *See id.*
194. *See id.*
195. *See* Gifford, *supra* note 80, at 660-62 (analyzing why market share liability will not accurately assess liability against the activity causing the harm, much less a specific manufacturer).

almost always fails. Courts adopting market share liability have not said that causation itself, conceived of in a broader sense than the individual victim/individual manufacturer link, is irrelevant to liability.[196] Market share liability remains an attempt to hold each manufacturer liable, in an aggregate sense, for the amount of harm caused by its products within the relevant market (whatever that may be), even if the harm caused by a specific manufacturer cannot be linked to a particular victim.[197] No court has acknowledged that it is functionally imposing a targeted tax on manufacturers, unrelated to the fundamental tort concept of causation, and then using the proceeds of the tax as a social welfare spending measure to alleviate the financial needs of those with a related product-caused disease. The inability to assess market shares accurately is thus fatal to any principled justification for market share liability imposed by the courts.[198]

The Wisconsin Supreme Court's opinion in *Thomas ex rel. Gramling v. Mallett*[199] broke new ground in 2005 when it applied a variant of market share liability, which it has termed "risk contribution theory," in essentially the same factual context as was present in *Skipworth.* In *Thomas*, the court allowed a childhood lead poisoning victim's action against manufacturers of lead pigment to proceed to trial on a risk contribution theory, despite the plaintiff's inability to identify the specific manufacturers of the product that caused his illness.[200] The *Thomas* opinion pioneers new ground in tort causation by dramatically expanding the boundaries of market share liability beyond DES cases. It eliminates any requirement of chemical identity among the various manufacturers'

196. *See* Sindell v. Abbot Labs., 607 P.2d 924, 937 (Cal. 1980).

197. *Skipworth,* 690 A.2d at 173.

198. *See, e.g.*, Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183, 191 (S.D. Ga. 1982) (rejecting market share liability in asbestos cases because "[a] market that is composed of an amalgam of asbestos products might also yield market shares that are not accurate indications of the potential exposure to disease created by a particular product").

199. 701 N.W.2d 523, 527 (Wis. 2005). On October 20, 2005, I testified before a joint hearing of the Wisconsin legislature's judiciary committees on behalf of the Wisconsin Coalition for Civil Justice in favor of a bill that would undo some of the consequences of the *Mallet* opinion.

200. As would be expected, the court justified its adoption of a market share-like approach on instrumental grounds, primarily loss distribution. It recognized that, compared to the plaintiff, the defendant-manufacturers were "in a better position to absorb the cost of the injury." *Id.* at 558. The court went on to explain that manufacturers "can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business." *Id.* The court also relied on both a loss-minimization rationale, i.e., "deterring knowingly wrongful conduct that causes harm," and corrective justice principles. *Id.* at 559 n.44.

products and does not even aspire to accurately determine the manufacturers' respective market shares. The Wisconsin Supreme Court held "that chemical identity is not required"[201] to satisfy the requirement of fungibility necessary to employ market share or risk contribution theory. According to the court, "Fungibility . . . is not a term that is capable of being defined with categorical precision."[202] Instead, fungibility requires some unspecified combination of three factors: whether the product is (1) functionally interchangeable;[203] (2) physically indistinguishable;[204] or (3) "identically defective."[205] Ultimately, according to the court, the resolution of the fact issue of whether a product is fungible should be left to the jury.[206] By detaching the notion of fungibility from chemical identity, the Wisconsin Supreme Court dramatically expanded the possible scope of application of market share liability.

The Supreme Court also designed a process for determining the various manufacturers' liability boundaries that differs from that employed by other courts that have accepted market share liability. Under the Wisconsin variant of risk contribution liability, when the jury assigns each manufacturer its percentage of financial responsibility for the judgment, it considers not only the manufacturer's market share, but also factors bearing upon the manufacturer's relative degree of fault and the level of egregiousness of its conduct.[207] In fact, when the Wisconsin Supreme

201. *Id.* at 560.

202. *Id.* at 561; *see also* Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products,* 52 UCLA L. REV. 151, 168 (2004) (arguing for an understanding of fungibility depending on "uniformity of risk").

203. For example, according to the court, various chemical compounds of white lead carbonate, though not chemically identical, are functionally interchangeable because they "were lead pigments . . . [that] provided the hiding power of the paint." *Thomas*, 701 N.W.2d at 561. There are, it should be noted, a wide variety of "functionally interchangeable" paint pigments that do not contain lead, including lithopone, titanium dioxide, latex, water-based and alkyd resin. *Id.* at 535 n.13.

204. Physical indistinguishability "is significant because it is . . . why a product may pose identification problems." *Id.* at 560.

205. Here, the court opines that the lack of an identical chemical formula does not mean that each manufacturer's product does not pose the same amount of risk as another manufacturer's product. *Id.* at 560-61. "It is the common denominator . . . that matters." *Id.* at 562.

206. *Id.* at 560 n.47 ("[W]e do not resolve factual disputes.").

207. In an earlier opinion first adopting risk-contribution liability, the Wisconsin Supreme Court outlined how each defendant's share of liability was to be determined:

> In assigning a percentage of liability to each defendant, the jury may consider factors which include, but are not limited to, the following:

Court first adopted risk contribution theory in a DES case in 1984, it did so largely because it appreciated the difficulties in accurately determining market shares, even in DES cases.[208]

Risk contribution analysis, however, is even more problematic than market share liability as an approach for ascertaining liability boundaries. First, one of the factors used to assess each manufacturer's share of financial responsibility is its market share, which the Wisconsin Supreme Court acknowledges is impossible to determine accurately.[209] In determining each defendant's market share in a lead pigment case such as *Thomas*, for example, the jury would be required to consider the following factors, among others, in an interdependent fashion: the timing of the various producers' entry, exit, and sometimes reentry into the relevant market; what percentage of the plaintiff's exposure to lead pigment occurred at each of three houses where he lived; which years each of those houses were painted and each manufacturer's share of the market during that time period; and the possibility that lead pigments produced by various manufacturers were absorbed into the victim's body at different rates (a fact disputed between the parties). Once the jury determines the market share for each manufacturer, these

> whether the drug company conducted tests on DES for safety and efficacy in use for pregnancies; to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; whether the company had a small or large market share in the relevant area; whether the company took the lead or merely followed the lead of others in producing or marketing DES; whether the company issued warnings about the dangers of DES; whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and whether the company took any affirmative steps to reduce the risk of injury to the public.

Collins v. Eli Lilly Co., 342 N.W.2d 37, 53 (Wis. 1984) (adopting risk-contribution theory in Wisconsin for the first time in an action against DES manufacturers).

208. The Wisconsin Supreme Court recognized the difficulty of determining market shares in *Collins*:

> The primary factor which prevents us from following *Sindell* is the practical difficulty of defining and proving market share. . . . There are several reasons for this: The DES market apparently was quite fluid, with companies entering and leaving the market over the years; some companies no longer exist and some that still exist may not have relevant records; and apparently there are no accurate nationwide records pertaining to the overall production and marketing of DES. We view defining the market and apportioning market share as a near impossible task if it is to be done fairly and accurately in order to approximate the probability that a defendant caused the plaintiff's injuries.

Id. at 48.

209. *Id.* at 48-49, 53.

determinations would need to be weighed alongside factors bearing on the level of egregiousness of each manufacturer's conduct—for example, its knowledge of the dangers of the product or its negligence in this regard, whether it tested its product for safety, and whether it took the lead or merely followed the example of other manufacturers in producing or marketing the product.[210] It is difficult to see how combining "apples and oranges"—the percentage of market share and the level of egregiousness of each defendant's conduct—in any way makes the jury's calculation more manageable.

Risk contribution liability thus fails to offer discernable and fair liability boundaries. When the legislature enacts a new taxation program, such as one taxing harmful products, the legislature and the administering agency specify with great certainty and specificity how the share of each financially responsible party is to be calculated. Compare the often-detailed nature of federal tax regulations with the vague list of apples and oranges provided by the Wisconsin Supreme Court that are to be weighed by the jury in some unspecified manner. Admittedly, juries often make decisions based upon imprecise, unclear, and conflicting evidence. Generally, however, when the decision is one of assessing liability, an elemental and simply stated issue lies at the heart of the deliberations: who caused the harm? Yet this question does not drive Wisconsin's risk contribution analysis where even the court appears to recognize that the question is unanswerable.

2. Liability for Risk Creation: Expansive Interpretations of Alternative Liability and Concurrent Causation Resulting in Indivisible Harm

Some courts have expansively interpreted traditional tort doctrines, such as alternative liability and concurrent causation resulting in indivisible harm, in order to hold parties that *may* have been the ones that injured the victim jointly and severally liable. The net effect of these creative interpretations of historically limited doctrines is to ignore the individual causation question and to hold all potential injurers liable even if it is logically impossible, at least in some cases, for all of them in fact to be causally connected to the victim's injury. Under these doctrines, the operative liability boundary principle is that any party contributing to the *risk of harm* is held liable.[211]

210. *Id.* at 53.

211. *See generally* Finkelstein, *supra* note 183 (arguing broadly that a victim should be able to recover for exposure to risk of harm, even if she cannot prove that the acts of any particular wrongdoer caused her harm).

a. *Alternative Liability.* A number of courts have applied the concept of alternative liability expansively to hold defendant-manufacturers liable even when it cannot be shown which manufacturer's product harmed the plaintiff.[212] This concept originally arose in the classic case of *Summers v. Tice*,[213] in which a hunter was injured when shot in the eye by one of his two quail-hunting companions. The victim was able to prove that both defendants had fired negligently, but he could not establish which defendant's shot was in fact the cause of his substantial injuries.[214] The California Supreme Court held that because both defendants had acted negligently toward the plaintiff, although each acted independently, the burden shifted to each of them to prove that his negligent act was not the cause of the plaintiff's injury.[215] Unless this burden was met, the defendants would be held jointly and severally liable.[216] In short, under alternative liability, the plaintiff need not prove with particularity the identity of the injuring party in order to recover. In the absence of rebuttal, the defendants are held liable collectively.

Most courts reject the application of alternative liability to situations in which there are more than a handful of defendants that might have manufactured the product that caused a plaintiff's injuries.[217] In cases with a large number of potential injurers, the courts reason, there would be too many "false positives"—manufacturers that would be held liable even though most of them in fact could not have been the cause of a specific victim's harm.[218]

212. *E.g.*, Menne v. Celotex Corp., 861 F.2d 1453, 1465-66 (10th Cir. 1988) (shifting burden to defendant manufacturers to prove absence of cause in fact); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 174 (Mich. 1984) (same); *see also In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 819-20, 827 (E.D.N.Y. 1984) (finding a version of alternative liability to be a viable claim against manufacturers of Agent Orange in an opinion approving settlement of class action), *aff'd* 818 F.2d 145 (2d Cir. 1987).

213. 199 P.2d 1 (Cal. 1948).

214. *Id.* at 2.

215. *Id.* at 4; s*ee also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28(b) (Proposed Final Draft No. 1, 2005) ("When the plaintiff sues all of multiple actors and proves that each engaged in tortious conduct that exposed the plaintiff to a risk of physical harm and that the tortious conduct of one or more of them caused the plaintiff's harm but the plaintiff cannot reasonably be expected to prove which actor caused the harm, the burden of proof . . . on factual causation is shifted to the defendants.").

216. *Summers,* 199 P.2d at 5.

217. *E.g.*, *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 622 n.42 (S.D.N.Y. 2001) (limiting alternative liability to cases involving a small number of tortfeasors, all of whom are before the court); Sindell v. Abbott Labs., 607 P.2d 924, 930-31 (Cal. 1980) (same).

218. *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d at

Some courts also limit the application of alternative liability by requiring that all possible manufacturers be named as defendants in the plaintiff's action.[219] In many cases, there is little realistic probability that the manufacturer will have better information than does the victim regarding the identity of the manufacturer that produced the specific product causing the victim's harm. Although often justified on a burden-shifting procedural ground,[220] alternative liability functionally imposes liability on manufacturers when neither party has evidence regarding causation.

The liability boundary established by the common law of alternative liability is that a possible injurer may be held liable when (1) the defendants engaged in tortious risk-producing activity; (2) there are a small number of possible injurers responsible in fact for the harm; (3) all possible injurers are before the court; (4) the victim lacks proof of the identity of the injurer; and (5) the defendants at least arguably have greater access to facts regarding the identity of the injurer. Because alternative liability applies only in these very limited circumstances, it adds little to the common law of liability boundaries.

b. *The Expansion of the "Concurrent Causation Resulting in Indivisible Harm" Doctrine.* Under the common law, independent tortfeasors whose acts concurrently contributed to the plaintiff's harm were held jointly and severally liable.[221] The standard interpretation of this doctrine requires the plaintiff to prove that each defendant causally contributed to her harm. In the context of mass products torts, however, some courts have applied concurrent causation in a manner that holds defendants jointly and severally liable without proof that a specific defendant contributed to an

622 n.42.

219. *E.g.*, Smith v. Cutter Biological, Inc., 823 P.2d 717, 725 (Haw. 1991) (requiring joinder of "all responsible parties"); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 697 (Ohio 1987) (stating that where there were over 165 asbestos manufacturers, "the only way to make sure that the guilty defendant was before the court would be to sue all asbestos companies"). Other courts, however, require only that the plaintiff "make a genuine attempt to locate and identify the tortfeasors responsible for the individual injury." Abel v. Eli Lilly & Co., 343 N.W.2d 164, 173 (Mich. 1984).

220. *E.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 342-43 n.267 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28(b) (Proposed Final Draft No. 1, 2005).

221. *See, e.g.*, Walt Disney World Co. v. Wood, 515 So. 2d 198, 199, 202 (Fla. 1987) (upholding joint and several liability where defendants acting independently caused indivisible injury).

individual victim's harm.[222] In *Rutherford v. Owens-Illinois, Inc.,*[223] for example, the California Supreme Court held that plaintiffs, in an action seeking recovery for asbestos-related diseases, "need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy."[224] It was enough, said the court, that the defendant's products contributed "to the aggregate *dose* of asbestos . . . inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth."[225] This statement by the *Rutherford* court establishes the liability boundary. Because the defendant-manufacturers[226] were unable to show that their products were not the actual cause of plaintiff's cancer—just as the victim[227] was unable to show that the defendant's products were the actual cause—the effect of this holding, similar to an expansive interpretation of alternative liability, is to hold manufacturers jointly and severally liable. But also like alternative liability, the liability boundary created is relevant only in very limited circumstances, when the victim can prove that she was exposed to a product manufactured by each defendant.

3. Liability Boundaries when Manufacturers Act Collectively

a. *Civil Conspiracy and Concert of Action.* Courts also hold manufacturers jointly and severally liable when it can be proved that the manufacturers engaged in a civil conspiracy or acted in concert of action, often in an effort to avoid disclosing the risks caused by exposure to their products or to conceal such risks.[228] In

222. *E.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094, 1096 (5th Cir. 1973) (asbestos products); Purcell v. Asbestos Corp., 959 P.2d 89, 95 (Or. Ct. App. 1998) (holding that where exposure to the asbestos products of multiple manufacturers each increased the risk of mesothelioma, a jury could find causation for each manufacturer).

223. 941 P.2d 1203 (Cal. 1997).

224. *Id.* at 1206.

225. *Id.* at 1219.

226. Defendants were nineteen manufacturers or distributors of asbestos. Owens-Illinois was the only defendant on appeal. *Id.* at 1207.

227. Original plaintiff was Charles Rutherford. After his death, "the complaint was amended to allege a wrongful death action brought by his wife Thelma Rutherford, and their daughter, Cheryl Rutherford Thomas." *Id.*

228. *E.g.*, *In re* Related Asbestos Cases, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) (allowing plaintiffs to proceed on concert of action theory); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 176 (Mich. 1984) (finding that plaintiffs made sufficient allegations to support their concert of action claim); Bichler v. Eli

such cases, any particular victim is not required to prove that any specific manufacturer produced the product that actually caused her harm. Liability on concert of action grounds obviously is justified when there is an explicit agreement among manufacturers to engage in tortious conduct.[229] The liability boundary in that situation is whether or not a party has agreed to such tortious conduct. The individual causation requirement is preserved because the victim has proven that each defendant agreed to the tortious activity and should be considered an injurer in its own right.

More questionable, however, are a minority of decisions that have allowed victims to recover merely by showing that manufacturers engaged in "consciously parallel conduct."[230] In *Bichler v. Eli Lilly & Co.,* the New York Court of Appeals upheld the jury's finding of concert of action based upon the DES manufacturers' "consciously parallel behavior" in marketing DES without adequate testing.[231] Later decisions by the same court[232] and most other courts,[233] however, held that merely parallel activity by several product manufacturers is insufficient to establish concert of action. As the Illinois Supreme Court observed, "[T]here are many potential innocent explanations for parallel conduct by competitors. These include encountering the same business problems, the same consumer demands, and the same competitive pressures."[234] Indeed, a competitive market often yields parallel conduct even in the absence of tacit agreement. Liability under a concert of action theory supported only by evidence of parallel activity thus provides an excellent example of collective causation without discernable liability boundaries. A manufacturer may find itself liable for a

Lilly & Co., 436 N.E.2d 182, 188-89 (N.Y. 1982) (holding that conduct "consciously parallel" with that of other DES manufacturers was sufficient to find an implied agreement with other manufacturers and hold defendant liable on a concert of action theory).

229. *E.g.*, *Abel*, 343 N.W.2d at 176 (holding that defendants could be liable on a concert of action claim where plaintiffs alleged that the defendants were jointly engaged in negligently manufacturing and promoting DES).

230. *E.g.*, *Bichler*, 436 N.E.2d at 187.

231. *Id.* at 188-89.

232. Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 224 (N.Y. 1992) (finding that "[p]arallel activity . . . without more . . . 'is insufficient to establish the agreement element necessary to maintain a concerted action claim'") (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1074-75 (N.Y. 1989)).

233. *See* Sindell v. Abbott Labs., 607 P.2d 924, 933 (Cal. 1980) (rejecting a concert of action claim where the defendants' parallel or imitative conduct consisted of solely relying upon each others' testing and promotion of DES); s*ee also* McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 262 (Ill. 1999) (rejecting concert of action claim based on parallel activity).

234. *McClure*, 720 N.E.2d at 261-62.

victim's injury merely by distributing its products in a competitive market without proof of any tortious activity on its part that causally connects the manufacturer to a particular victim.

b. *Industry-Wide Liability.* In a handful of cases, courts have held defendant-manufacturers jointly and severally liable on a theory of industry-wide liability, even when a specific victim of product-caused harm is unable to show which defendant manufactured the product causing her harm. In *Hall v. E.I. Du Pont De Nemours & Co.,*[235] Judge Jack Weinstein found that the defendant-manufacturers' cooperation in a trade association safety program and their adoption of common safety features that he found to be inadequate were enough to justify joint and several liability. Judge Weinstein referred to this basis of liability as "enterprise liability," but later courts generally have used the term "industry-wide liability,"[236] presumably in an attempt to avoid confusion with the use of the term "enterprise liability" to describe the idea that business enterprises should be held liable for the harms they have caused on the grounds of loss minimization and loss distribution.[237]

In the absence of an agreement by manufacturers establishing concert of action, industry-wide liability constitutes collective liability without adequate liability boundaries. Judicial recognition of the open-ended nature of collective causation resulting from the industry-wide liability theory probably accounts for its almost universal rejection by courts in recent decades.[238]

B. Common Law Compensation Entitlement Boundaries

The most basic and least problematic compensation entitlement boundary in mass products torts is that any victim able to prove that her harm resulted from the tortious conduct of a defendant is entitled to recover. The victim may establish causation either by proving individual causation or by satisfying the requirements of any of the collective causation doctrines recognized by the common law and discussed in Part VI.B.1-3.

In recent decades, courts also sometimes have allowed victims to proceed on a collective basis. Class actions, consolidated actions, and *parens patriae* actions filed by states or municipalities all seek

235. 345 F. Supp. 353 (E.D.N.Y. 1972).

236. *See*, *e.g.*, *Sindell,* 607 P.2d at 934.

237. *See* NOLAN & URSIN, *supra* note 16, at 3-4.

238. *E.g.*, Schwartzbauer v. Lead Indus. Ass'n*,* 794 F. Supp. 142, 145-46 (E.D. Pa. 1992); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017 (D.S.C. 1981); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 245-46 (Mo. 1984). The *Ryan* court described the concept as "repugnant to the most basic tenets of tort law." *Ryan*, 514 F. Supp. at 1017.

compensation for multiple victims. The collective nature of these forms of litigation requires that courts consider how they will define which individual victims are entitled to share in the compensation proceeds resulting from successful litigation. Courts have struggled with very limited success to create what we now can recognize as compensation entitlement boundaries. I will consider separately the issues posed by compensation entitlement boundaries in class actions, consolidated cases, and state or municipal *parens patriae* actions.

1. Class Actions

In past decades, class action certification promised to be a vehicle for collectivizing causation in torts. Inherent in the class action certification process was the need to establish compensation entitlement boundaries, that is, to define the members of the certified class. Today, with rare exceptions, courts in mass products torts cases almost always hold that the need for individualized proof of causation, reliance, comparative fault, and damages precludes collective handling.[239] The judicial preference for individual

239. *E.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1230 (9th Cir. 1996) (denying class certification in case against manufacturer of epilepsy drug); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (rejecting class certification in the case of blood transfusions contaminated with HIV). In addition to the denial of class certification, other issues also generally preclude the utilization of class actions in mass products torts. The Supreme Court has placed important restrictions on the ability of counsel for the parties in class actions to reach a "global settlement" that resolves the claims of both those victims who already are experiencing injuries and those who may sustain injuries in the future. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (overturning the certification of a mandatory class under Rule 23(b)(1)(B) in part because of the failure to properly address conflicts of interest within the class); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (overturning the certification of a so-called "opt-out" class because of conflict of interest when plaintiffs' lawyers represented both those with current injuries and those who may sustain injuries in the future as a result of past exposure to product). Without the ability to reach such enforceable settlements, these settlements become substantially less attractive from the perspective of the defendant-manufacturers. More recently, Congress enacted, and President George W. Bush signed into law, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.274.RS, that makes it substantially more difficult for victims of mass torts to prevent defendants from removing class actions from state courts, where certification requirements sometimes are more easily satisfied, to federal courts. *See*, *e.g.*, 28 U.S.C. § 1332 (2000) (granting federal district courts original jurisdiction over a class action in which any member of the class of plaintiffs is a citizen from a different state from any defendant); 28 U.S.C. § 1441(a) (2000) (allowing removal from state courts to federal district court in those cases where district court has original jurisdiction).

causation often plays a key role in decisions holding that the putative class action does not satisfy federal class actions requirements.[240] In *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*,[241] for example, the court found that issues necessary to prove causation, such as whether any particular plaintiff's cancer resulted from smoking and whether she would have refrained from smoking or quit smoking if the defendants had not misrepresented the risks of their products, were individual issues, not common ones, and their importance precluded collective treatment in a class action.

When class certification is denied, the need to develop other aspects of compensation entitlement boundaries—such as how aggregate damages are to be distributed among class members—disappears. In past decades, however, a few innovative judges certified mass products tort cases as class actions and devised compensation entitlement boundaries. Consider, for example, the entitlement boundaries inherent in the compensation plan developed by Judge Robert M. Parker in *Cimino v. Raymark Industries, Inc.*,[242] an unusual attempt to collectivize the handling of a large number of asbestos cases in a manner similar to processes more typically found in the workers' compensation system. After trial of Phase I of the case had determined the issues of product defectiveness, the adequacy of warning, and the appropriateness of punitive damages,[243] Judge Parker's trial plan anticipated that proof that any individual class member had been exposed to asbestos fibers produced by one or more defendants would be enough to satisfy the causation requirement.[244]

Judge Parker then divided the members of the plaintiff class into five disease categories based upon which illnesses the class members allegedly had sustained as a result of the exposure to the

240. The party seeking class certification must prove that the proposed class meets the four requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Further, the class action must satisfy one of the three alternative requirements of subsection 23(b) of the rule. For our purposes, the most relevant of these is the requirement that common issues of law and fact predominate over individual issues. FED. R. CIV. P. 23(b)(3).

241. 204 F.R.D. 150 (S.D. Iowa 2001).

242. 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd in part,* 151 F.3d 297 (5th Cir. 1998).

243. *Cimino*, 751 F. Supp. at 653.

244. *Id*.

asbestos products.[245] After hearing "sample cases" of representative plaintiffs drawn from each disease category on the issues of causation and damages, Judge Parker proposed to award each non-sample member within a given category the average damage verdict of the sample plaintiffs within the same grouping.[246]

The plaintiffs, in other words, were to recover damages according to a compensation schedule similar to those in the workers' compensation system. Using our terminology, Judge Parker's compensation entitlement boundaries were set by the combination of (1) entitling any class member who had been exposed to asbestos products manufactured by the collective defendants to recover compensation and (2) using a schedule that awarded damages according to disease categories to determine the amount of each individual victim's compensation award.

The Court of Appeals, however, frustrated Judge Parker's attempt to define compensation entitlement boundaries within the common law on a basis other than individual causation. The Fifth Circuit held that both substantive principles of tort law and the due process clause required that "causation must be determined as to 'individuals, not groups.'"[247]

The class action mechanism no longer appears to be a viable means of addressing the compensation needs of victims of mass products torts who cannot establish individual causation. Judicial application of class action certification rules deny the collective treatment that might obviate the need to satisfy the individual causation requirement. Even more importantly for our analysis, courts have held that the kinds of "approximations" of causation and damages that Judge Parker pioneered, so prevalent within workers' compensation and other social welfare systems, are a violation of due process when they result from judicial action.

2. Consolidated Actions

Judicial consolidation of cases posing overlapping or similar issues usually is a procedural device for joining many individual actions for determination of one or more issues that otherwise would need to be tried repetitively in individual trials of particular plaintiffs.[248] In a few instances, however, trial courts have attempted, generally unsuccessfully, to use consolidation as a means

245. *Id*.

246. *Id.* at 664-65.

247. *Cimino*, 151 F.3d at 319 (quoting *In re* Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990)).

248. *See* FED. R. CIV. P. 42(a) (providing for consolidation of actions involving a common question of law or facts).

to collectivize causation in mass products torts. In *In re Brooklyn Navy Yard Asbestos Litigation,*[249] for example, the Second Circuit Court of Appeals upheld Judge Jack Weinstein's consolidation for trial on all issues of sixty-four actions brought by victims of asbestos-related disease. The court acknowledged that plaintiffs could not identify the particular manufacturer whose product injured any particular plaintiff.[250] It held, however, that evidence establishing each of the following three facts was sufficient to enable a particular victim to recover without proving that his disease resulted from the exposure to any specific manufacturer's product: (1) each manufacturer's products were used at the shipyard and contributed to the presence of asbestos fibers into the air; (2) each victim had worked at the shipyard and was exposed to the asbestos fibers in the air; and (3) each victim developed an asbestos-related disease.[251]

The second and third conditions operating together constitute a compensation entitlement boundary other than individual causation.[252] Because this boundary was comparatively tightly drawn, i.e., each plaintiff was exposed to defendants' products at a specific site during a specific time period, the holding seems within the institutional capacity and the appropriate role of the courts. Yet most courts probably would back away from such a holding because it does not satisfy an individual causation requirement.[253]

3. Indirect Recovery by Victims Through Parens Patriae *Actions*

Parens Patriae actions brought by states and municipalities against manufacturers of cigarettes,[254] handguns,[255] and lead

249. 971 F.2d 831 (2d Cir. 1992).

250. *Id*. at 837.

251. *Id*.

252. *See* Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1206-07 (Cal. 1997); s*ee also* notes 223-27 and accompanying text.

253. *See, e.g.*, Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993) (finding that the trial court's attempts during the consolidated case "to assure that each case maintained its identity" for the jury was inadequate); Leverance v. PFS Corp., 532 N.W.2d 735, 739-40 (Wis. 1995) (reversing the trial court's judgment in consolidated cases because aggregative process adopted by the trial court was inconsistent with the defendant's right to a jury trial on the issues of causation).

254. *See*, *e.g.*, Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. filed May 23, 1994), *available at* http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.pdf.

255. *E.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002) (reversing dismissal of claims against gun manufacturers). *Contra* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 422 (3d Cir. 2002)

pigment[256] have been the most important challenge to the individual causation requirement during the past decade. In these cases, the government has sought reimbursement or "recoupment" of economic losses sustained by the government itself as a result of the tobacco-related diseases, childhood lead poisoning, or gun violence afflicting its residents—including medical expenses paid to victims by state medical assistance programs.[257] The government acts as a collective plaintiff, bringing claims based upon the law of misrepresentation,[258] public nuisance,[259] unjust enrichment and restitution,[260] or indemnity.[261] These substantive legal theories are not ones that

(affirming dismissal of claims against gun manufacturers).

256. *E.g.*, City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 140 (Ill. App. Ct. 2005) (affirming grant of defendants' motion to dismiss). *Contra* City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 893 (Wis. Ct. App. 2004) (reversing grant of defendant's motion for summary judgment); State v. Lead Indus. Ass'n, No 99-5226, 2001 R.I. Super. LEXIS 37, at *28 (R.I. Super. Ct. Apr. 2, 2001) (denying defendants' motion to dismiss public nuisance claim).

257. *See* Floyd v. Thompson, 227 F.3d 1029, 1037 (7th Cir. 2000) (holding that Medicaid recipients were not entitled to a portion of the proceeds of the Master Settlement Agreement between forty-six states and the tobacco manufacturers).

258. *E.g.*, Complaint, State v. Philip Morris, Inc., No. 400361/97 (N.Y. Sup. Ct. Jan. 27, 1997), *available at* http://www.library.ucsf.edu/tobacco/litigation/ny/nycomplaint.html; *see also* complaints in the tobacco litigation filed by Arizona, Connecticut, Iowa, Kansas, Massachusetts, Michigan, New Jersey, Oklahoma, Texas, Utah, Washington, and West Virginia, *available at* http://www.library.ucsf.edu/tobacco/litigation/states.html.

259. *E.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 422 (3d Cir. 2002) (upholding trial court's dismissal of public nuisance claim); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 108, 123 (Conn. 2001) (dismissing claim on remoteness grounds); *see also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort,* 71 U. CIN. L. REV. 741, 834 (2003) (concluding that public nuisance does not justify liability of mass products manufacturers in *paren patriae* actions). *Contra* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143-44 (Ohio 2002) (reversing dismissal of public nuisance claims against gun manufacturers).

260. *E.g.*, City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 896-97 (Wis. Ct. App. 2004) (reversing grant of defendant's motion for summary judgment on restitution claim); State v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. LEXIS 37, at *48-51 (Super. Ct. Apr. 2, 2001) (denying defendants' motion to dismiss unjust enrichment claim). *Contra* Perry v. Am. Tobacco Co., 324 F.3d 845, 851 (6th Cir. 2003) (affirming dismissal of unjust enrichment claims); Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 937 (3d Cir. 1999) (affirming dismissal of unjust enrichment claims).

261. *E.g.*, *Lead Indus. Ass'n*, 2001 R.I. Super LEXIS at *53 (denying defendants' motion to dismiss indemnity claims). *Contra* Allegheny Gen. Hosp. v. Philip Morris, Inc., 116 F. Supp. 2d 610, 622 (W.D. Pa. 1999) (dismissing indemnity claim); Serv. Employees Int'l Union Health & Welfare Fund v.

require proof of specific causation of a physical harm suffered by any particular citizen. Rather they enable the government to argue that it suffered a wrong in its own right when it reimbursed the expenses resulting from illnesses or other harms caused by the manufacturers' products. Recent opinions arising out of litigation asserting such claims brought by the City of Milwaukee against lead-based paint manufacturers[262] and by the Commonwealth of Rhode Island against lead pigment manufacturers[263] both explicitly reject any requirement the government prove that a specific manufacturer's product caused the harm to any particular victim.

In determining damages in *parens patriae* actions, the government-plaintiff does not establish individual harms caused by specific defendants and then tally the results of such harms to reach an aggregate level of damages. Instead, the collective plaintiff uses statistical sampling evidence, circumventing any requirement of individual causation. In tobacco-related litigation, for instance, the states used expert epidemiologist testimony regarding the percentage of lung disease cases caused by smoking.[264] Further, the states used additional statistical evidence when their claims rested on tobacco manufacturers' misrepresentations regarding the risks of smoking.[265] They obviously were not entitled to recover, on the basis of fraud, reimbursement of medical assistance payments to those residents who would have continued smoking even in the absence of defendants' fraud.[266]

Compensation entitlement boundaries function at two different levels in state *parens patriae* cases. First, the harm alleged is the harm to the state, so it is not necessary for the government-plaintiff to prove harm to any particular victim of disease in order to recover.[267] The individual causation requirement is satisfied insofar as the government is concerned if it proves that defendants' products caused the government economic harm; the state itself

Phillip Morris, Inc., 83 F. Supp. 2d 70, 93 (D.D.C. 1999) (dismissing indemnity claim).

262. City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 893 (Wis. Ct. App. 2004) (agreeing with the city's argument that plaintiff need not "identify the specific lead pigment or paint contained in the houses being abated").

263. State v. Lead Indus. Ass'n, No. 99-5226, 2004 R.I. Super LEXIS 191, at *7-8 (Super. Ct. Nov. 9, 2004) (rejecting defendants' argument that the state was obligated to prove that the manufacturers "are the proximate cause of the particular injury(ies) complained of").

264. Laurens Walker & John Monahan, *Sampling Liability,* 85 VA. L. REV. 329, 337 (1999).

265. *See In re* Simon II Litig., 211 F.R.D. 86, 127-29 (E.D.N.Y. 2002), *rev'd on other grounds,* 407 F.3d 125 (2d Cir. 2005).

266. *Id.*

267. *City of Milwaukee*, 691 N.W.2d at 893.

need not resort to any other compensation entitlement boundaries.

At a second level, the *parens patriae* action serves as a vehicle that enables compensation to flow *indirectly* from the harm-producing manufacturer to the individual victim. A substantial portion of any funds transferred by injurers to the state reimburses medical assistance[268] or Medicare[269] payments previously made by the state to victims of product-related diseases. The statutes and regulations governing medical assistance and Medicare establish the compensation entitlement boundaries for these payments to individual victims. Their recovery is from a social welfare plan, not directly from the litigation system. As previously described, the medical assistance and Medicare compensation entitlement boundaries established by statute or regulation function relatively effectively.[270] Obviously, the successful operation of these compensation entitlement boundaries must be credited to the legislative and administrative branches, not the common law tort system.

VII. CONCLUSIONS

The performance of the common law tort system in addressing harms where victims are unable to prove individual causation has not been impressive. Market share liability has been a huge disappointment because of the judicial incapacity to accurately determine market shares. Some courts interpret alternative liability and concurrent causation doctrines in an expansive manner to allow victims to recover, but these common law doctrines can be stretched only so far beyond their traditional meanings. Judges who use class actions and the consolidation of cases in innovative ways to achieve collective causation have their hands slapped by appellate courts concerned about due process limitations on the nature of the judicial function. *Parens patriae* actions reimburse the medical expenses of some victims, but only those falling below income eligibility guidelines and only by using statutes and regulations specifying compensation entitlement boundaries.

The dismal state of the common law tort system in establishing boundaries for mass products torts litigation other than individual causation is evident, but the solution is less clear. A judiciary as creative and as willing to discard traditional requirements as the *Sindell* court, over time, might be able to develop feasible compensation entitlement and liability boundaries as alternatives to individual causation. In undertaking this daunting task, courts

268. *See* 42 U.S.C. § 1396a(a)(10) (2000).
269. *See* 42 U.S.C. §§ 426, 426-1 (2000).
270. *See supra* notes 166-73 and accompanying text.

should be guided by an explicit recognition of the inherently necessary roles played by such boundaries in any accident compensation system.

Yet, *Sindell* itself and the subsequent fate of market share liability suggest that expecting courts to develop a comprehensive framework for addressing the compensation needs of the victims of product-caused latent diseases may be expecting too much. Given established notions of the judicial function, it appears to be inappropriate for courts to develop liability boundaries that approximate, but are not equivalent to, the amount of harm actually caused by each defendant. Most courts are uncomfortable with judicially established findings delineating which injurers should compensate which victims if such findings do not accurately tally the actual causal connections between individual victims and their injurers. Both liability (from the defendant's perspective) and compensation (from the plaintiff's viewpoint) are regarded as suspect if measured by approximations that may be both over-inclusive and under-inclusive when compared with the objective, but sometimes unknowable, reality. Many find these approximations of damages actually caused by each manufacturer to be beyond the appropriate judicial role, even so far as to be due process violations.[271] But if the instrumental objectives of compensating victims of product-caused latent diseases and minimizing future harmful conduct by manufacturers are not to be ignored, an acceptable process for establishing compensation entitlement and liability boundaries must be created.

The obstacles to the judicial creation of feasible compensation entitlement and liability boundaries governing mass products torts suggest that compensation for such diseases might better be handled by legislatively enacted compensation systems similar to workers' compensation.[272] Since the 1880s, workers' compensation

271. *Cf.* Ives v. S. Buffalo Ry., 94 N.E. 431, 439, 448 (N.Y. 1911) (finding that holding employers liable without a showing of fault constituted a state due process violation). Is there anything more fundamental about a requirement of causation in tort law than there was a requirement of fault at the time of *Ives*? Obviously, the no-fault liability under workers' compensation considered in *Ives* was legislatively enacted, not judicially created. Remember that the decision in *Ives* was functionally overruled only six years later. N.Y. Cent. R.R. v. White, 243 U.S. 188, 193-99, 208 (1917) (recounting the subsequent constitutional history of workers' compensation in New York and upholding its constitutionality under the federal due process clause partly because "[n]o person has a vested interest in any rule of law, entitling him to insist it shall remain unchanged for his benefit.").

272. *See* Jon D. Hanson et al., *Smokers Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers,* 22 S. ILL. U. L.J. 519, 554 (1998); Gifford, *supra* note 80, at 683-95; Rabin, *supra* note 176, at 951-55.

systems and other social welfare programs in Germany, the United Kingdom, and the United States, legislatively enacted and implemented by administrative agencies, have compensated victims of diseases and other harms even in the absence of proof of individualized causation. Statutes and regulations, for example, specify that the last employer exposing a worker to hazardous substances will be financially responsible for her occupational disease.[273] The general acceptance of these legislatively enacted compensation boundaries rests in part on the authority of the legislature derived from its elected status and the legitimacy of its focus on social welfare. We expect legislatures to draw lines. The legitimacy of legislatively drawn compensation entitlement boundaries in workers' compensation and other alternative compensation program does not rest on the ability of the legislature to reconstruct an impossible-to-determine causation sequence.

In suggesting that proof of individualized causation should not be required in mass products torts cases, sympathetic judges and scholars generally have done little more than merely echo the goals of loss distribution and loss minimization, using virtually the same language employed by proponents of workers' compensation legislation in late nineteenth century Germany and in early twentieth century America. Yet those instrumental goals justifying compensation were derived from social welfare legislation enacted by elected legislative bodies that also included compensation entitlement boundaries and liability boundaries, boundaries that today's proponents of eliminating the individual causation requirement in judicial handling of mass products torts ignore.

Even if one shares the instrumental conception of the tort system of James and Calabresi, it still is inherently necessary to articulate a coherent and institutionally appropriate structure for compensation entitlement boundaries and liability boundaries as alternatives to individual causation. Until instrumentalists meet that burden, cases involving diseases caused by exposure to fungible products such as tobacco, asbestos, and lead pigment will continue to bedevil even sympathetic courts.

273. *See supra* notes 75-77 and 132 and accompanying text.