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# COMMENTARY

## GOALS, MEANS, AND PROBLEMS FOR MODERN TORT LAW: A REPLY TO PROFESSOR PRIEST

ROBERT F. BLOMQUIST\*

### I. INTRODUCTION

Recently in these pages, Professor George Priest fashioned a provocative article that he called *Modern Tort Law and its Reform*.<sup>1</sup> It was an article of remarkable ambition for it contained both an attack on several time-honored "presuppositions of modern tort law,"<sup>2</sup> in addition to an argument for his "vision"<sup>3</sup> of a "unified"<sup>4</sup> theory of American tort law. Indeed, tort reform is an issue that has received intensive scrutiny in recent times by scholars, state legislatures, Congress, and study commissions.<sup>5</sup> For Pro-

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1. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U.L. REV. 1 (1987).

2. *Id.* at 6.

3. *Id.* at 36.

4. *Id.* at 6.

5. See, e.g., Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845 (1987); Symposium: *Alternative Compensation Schemes and Tort Theory*, 73 CALIF. L. REV. 548 (1985); Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603 (1985); Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

For articles focusing on mass toxic tort issues, see, e.g., Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985); Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985); Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475 (1984); Rosenberg, *The Causal Connection in Mass Tort Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); *Special Project: An Analysis of the Legal, Social and Political Issues Raised by the Asbestos Litigation*, 36 VAND. L. REV. 573 (1983); and Trouberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177 (1983).

The best known recent study on tort reform is *American Bar Association, Report of the Action Commission to Improve the Tort Liability System* (1987). See *id.* at 46-51 for citation to other study reports on tort reform. For state statutory reform proposals, see *Selected State*

fessor Priest, the issue of tort reform has dominated his writings during the last few years.<sup>6</sup>

The foundation for Priest's plea that "modern tort law must be vastly reorganized, but in a manner much different than the weak and limited efforts of recent tort reform legislation"<sup>7</sup> is his view that the purpose of modern American tort law should be limited to a single goal: "reduc[ti]on of] the accident rate as much as is practicable. . . ."<sup>8</sup> In this regard Priest contends that the "provi[sion of] a sensible and coherent system of compensation insurance for those unfortunate individuals who suffer product- or service-related accidents"<sup>9</sup> has been a secondary goal of tort law since 1960. But, in his view, "[t]he time has come to reject the insurance function of tort law and to focus the law on the important goal of accident prevention."<sup>10</sup>

Professor Priest attempts to support his vision by asserting three parallel arguments. First, he contends that the historical record indicates that the courts and scholars have been preoccupied during the last three decades with the ends of accident reduction and compensation insurance. This preoccupation has been to the virtual exclusion of other goals such as corrective justice or retribution.<sup>11</sup> Second, and in his view, "a stronger reason than the historical" rationale is the normative judgment that "[a]ccident reduction and insurance are the *only* important economic effects a legal rule can

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*Legislative Action Re: Affordability and Availability of Liability Insurance*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 4, 1986). For a history of congressional consideration of a preemptive federal tort reform statute, see D. KOPPELMAN, *FEDERAL PRODUCT LIABILITY REFORM* (1987). For previous tort reform measures undertaken in reaction to the perceived "medical malpractice insurance crisis" of the 1970s, see generally Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417; Comment, *Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L. REV. 655 (1976).

6. See, e.g., Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Priest, *Compensation for Personal Injury in the United States*, in INTERNATIONAL COLLOQUIUM ON COMPENSATION FOR PERSONAL INJURY (J. Hellner ed. 1987); Priest, *Modern Products Liability Law and Its Influence on the Accident Rate*, in BROOKINGS INSTITUTION CIVIL LIABILITY PROJECT (Litan & Winston eds. 1987); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Priest, *Law and Economics and Law Reform: A Comment on Barth's Cancer Compensation Proposal*, 13 J. LEGAL STUD. 587 (1984); Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982); Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

7. Priest, *supra* note 1, at 6.

8. *Id.* at 5. See also *id.* at 22.

9. *Id.* at 5.

10. *Id.* at 38.

11. *Id.* at 8-9.

have.”<sup>12</sup> Priest advances this point despite “some increasing attention in modern decisions to employing [tort] liability rules” for other economic purposes such as “[1] affect[ing] the level of injurer activity by internalizing costs [or] . . . [2] establish[ing] incentives for safety-related innovation.”<sup>13</sup> According to Professor Priest, these latter economic objectives are both “highly speculative” and “overwhelmed by the more easily demonstrated and empirically more substantial effects on the accident rate and on insurance.”<sup>14</sup> Third, Priest’s sanguine assessment of the efficiency of private first-party insurance in the United States,<sup>15</sup> joined with an appraisal of American tort law as “the least advanced, most costly and least effective insurance regime of the world,”<sup>16</sup> justifies restricting the scope of tort liability to the monolithic goal of accident prevention.

From this ideological foundation of narrow ends for modern tort law, Priest goes on to criticize its means. In this respect, he notes that “the implementation of the goals, rather than the goals themselves, generates the problems of modern tort law.”<sup>17</sup> Specifically, his analysis assumes that the real problems of recent tort jurisprudence “stem from two sources.”<sup>18</sup> The first source of problems is a “poor fit” between the goals of modern tort law and “the formal law through which these goals were expressed,”<sup>19</sup> exemplified by the strict liability approach of section 402A of the *Restatement (Second) of Torts*,<sup>20</sup> and causation rules in toxic tort cases.<sup>21</sup> The second source of problems are faulty “empirical presuppositions” underlying the goals of accident reduction and compensation insurance — “[t]hat the corporate provider is always in a better position than the consumer both to prevent injury and to provide insurance for injuries that cannot be prevented.”<sup>22</sup> As a consequence of these perceived shortcomings, Professor Priest concludes that “modern law is much less effective than it might be in

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12. *Id.* at 9 (original emphasis). See also *infra* notes 46-49 and accompanying text.

13. Priest, *supra* note 1, at 9 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18, 19 (1975), and G. PRIEST, *INTERNALIZING COSTS* (1987) (unpublished manuscript), on the issue of cost internalization, and *Beshada v. Johns Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), on the issue of safety-related innovation).

14. *Id.* (citing Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and The Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985)).

15. *Id.* at 37.

16. *Id.* at 38.

17. *Id.* at 10.

18. *Id.*

19. *Id.* (footnote omitted).

20. See *id.* at 23-33 where Priest addresses standards of product liability law under three subheadings: (1) a standard for manufacturing defects; (2) a standard for issues of product design; and (3) the manufacturer’s duty to warn.

21. *Id.* at 33-36.

22. *Id.* at 10. According to Priest: “[T]hese presuppositions impair the ability of modern law to effectively reduce the accident rate and to provide for injury compensation.” *Id.* See also Priest, *The Current Insurance Crisis and Modern Tort Law*, *supra* note 6.

creating incentives to reduce the injury rate" while it has also "disrupted liability insurance markets and has led to a reduction in the total level of accident insurance available in the society."<sup>23</sup>

By probing the intellectual underpinnings of American tort law, *Modern Tort Law and its Reform* contributes in several respects to a better understanding of the logic and limits of tort theory during the last three decades. First, Professor Priest properly advocates — albeit from a flawed perspective<sup>24</sup> — analyzing modern tort doctrine in an instrumentalist manner. Thus, he appears to agree with the general observation of Professor Robert Summers that laws should be conceptualized and evaluated as "essentially a set of means to be used in the service of social goals (which, in turn, derive from conventional wants and interests)."<sup>25</sup> Indeed, an instrumentalist approach — properly understood — is more likely to yield relevant insights about the desirability of a particular legal precept than the purposeless findings of analytical positivists or historical jurists who assume that legal rules are merely self-justifying or evolutionary by their very nature.<sup>26</sup> Second, Priest deserves praise for giving attention to the "relatively neglected topic" of "means-goal relations"<sup>27</sup> by beginning the process of rethinking the nature of tort law's goals and goal structures. While his analysis — as discussed below<sup>28</sup> — is impeded by a misunderstanding of the complex nature of worthy goals for tort law, it provides interesting new hypotheses about the potentialities of insurance markets, and the accountability of consumers for preventing accidents.<sup>29</sup> Third, Professor Priest is right in criticizing the "crazyquilt" characteristic of recent tort reform

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23. Priest, *supra* note 1, at 10.

24. See *infra* notes 37-57 and 67-71 and accompanying text.

25. R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 61 (1982) (citation omitted).

26. *Id.*

27. *Id.*

28. See *infra* notes 51-57 and accompanying text.

29. Professor Priest does not devote enough attention, however, to systemic weaknesses of the insurance industry. To the contrary, Priest is a strong advocate of the efficiency and desirability of insurance companies in managing societal risk. See Priest, *The Current Insurance Crisis and Modern Tort Law*, *supra* note 6. But other commentators have suggested that serious systemic problems prevail in modern insurance markets. See sources cited *infra* notes 86-91. See also REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM, *supra* note 5, at 7-10 (recommending, *inter alia*, further study of whether the insurance industry's system of rating premiums should be regulated; whether mandatory limitations on cancellation and non-renewal of insurance policies are warranted under some circumstances; whether there should be federal regulation of some or all aspects of insurance markets; whether the antitrust exemption for insurance companies should be repealed or modified; and, whether there should be legal requirements that information and data about the insurance industry and its experience be available to the public beyond what is now available from insurance companies and public sources of information).

measures.<sup>30</sup> Indeed, if fundamental change is really warranted in liability and damage rules, it would be more appropriate for lawmakers to effect comprehensive, consistent, and balanced reform rather than to engage in piecemeal tinkering. Finally, Priest's notion of the "teaching and informing opportunity" for tort law<sup>31</sup> presents intriguing implications for future legal reform, while at the same time remaining consistent with one of the most important moral purposes of the law in general.<sup>32</sup>

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30. Priest, *supra* note 1, at 4.

31. *Id.* at 12.

32. The educational function of law is masterfully discussed in the chapter *Learning Under Law* in S. BUCHANAN, *SO REASON CAN RULE: REFLECTIONS ON LAW AND POLITICS* (1982). According to Professor Buchanan, the rule of law and self-government is inextricably linked with education of the citizenry and, therefore, with public virtue. His comments about the teaching function of the common law and American constitutional law are particularly instructive:

The peculiar genius of this body of law [the common law] and the story of its development over several centuries of vital human experience and learning has often enough been described and celebrated. Lay judges sitting by the side of the road were under an oak tree to hear, judge, and advise on their neighbor's feuds and causes, then calling juries to extend and refine their intelligences; early opinions being cited as precedents for judging new cases; such opinions being tested and probed as much as the parties in conflict; the whole community remembering and anticipating judgment by peers as its members go about their daily business — we forget this fabric of our lives when, as we say, we avoid tangling with the law.

*Id.* at 22.

The oldest and most popular jurisprudence has said that law is a rule or command of reason promulgated by an authority for the common good. A parody on this is: a law is a command by the more powerful to coerce the weaker. American jurisprudence is famous for a more pragmatic view, that laws are rules agreed to by the people to further their social purposes. No doubt, each of these implies a recognizable theory and a method of education. But there is another dictum, that laws are questions asked by God, history, nature, or society to be answered by man individually and collectively. This formulation penetrates to the heart of human freedom. It says that no law, not even divine law, cancels out human freedom; the answer can be yes or no, or something else. It also tacitly warns of the consequences of the answer. But primarily it forces the human being to think about ends, or purposes. Law therefore provides a kind of complete Socratic teaching and learning, so that under self-government men can teach themselves, if they will learn to make good, questioning laws.

*Id.* at 35-36.

It would seem that the American Constitution was written to keep the controversy [about the purposes of government] alive; that is, to allow readings that will justify those who wish minimal government and also those who wish a maximal government, or even a government within which both readings are combined to continue the theoretical and practical debate by checks and balances. The Constitution and the laws that are made pursuant to it keep a dialogue of questions and answers going. Government, for us, is a continuous dialectic about the means and ends of common life.

*Id.* at 37.

*Query:* If we were, as Professor Priest urges us, to cause "[t]he insurance function . . . [to] be excised from tort law altogether," Priest, *The Current Insurance Crisis and Modern Tort Law*, *supra* note 6, at 1588-89, with a single-minded focus on accident reduction, what would this

In spite of its positive attributes, Priest's vision of modern tort law is clouded. Part II of this piece describes, in a general way, the misinformed and incomplete aspects of his accident prevention model that tend to neglect or underplay the rich diversity and complicated interaction of the ends and means of American tort law. Part III will then illustrate the weaknesses of Priest's approach by discussing its deficiencies as applied to one of the most troublesome policy issues facing our society today: injuries suffered by human beings from exposure to hazardous substances.

## II. ANALYTICAL SHORTCOMINGS OF PRIEST'S VISION

First, a major shortcoming at the threshold of Priest's conception of modern tort law is the "limits of the efficiency criterion"<sup>33</sup> associated with his purely economic analysis of tort law. Despite an attempt to distance his approach from past economic analyses of tort law<sup>34</sup> by asserting that accident prevention should be the exclusive concern of modern tort law, he makes a quintessential assumption that economic efficiency, or effectiveness,<sup>35</sup> should be of paramount social concern in all contexts. But, as noted by Professor G. Edward White in a similar critique of other economic tort theorists:

The question raised by [economic theories of tort law] is whether any perspective that assumes such a uniformity of thought and conduct among the human participants in the tort system is not flawed at the outset. Even if efficiency is to be a paramount social goal, problems remain. I take it that [economic tort theorists] would [not] suggest that persons choosing to be inefficient should invariably be punished for the choice: there would concededly be times when efficiency considerations would yield to other values. But since [a purely economic] ap-

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truncated tort law teach us about the social responsibility of American business? What would this truncated tort law teach us about the inherent worth of human life and correlative issues like human suffering, loss of companionship, and mental distress?

33. T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW 42 (1985). See generally Rooney, *Environmental Economics*, 1 U.C.L.A. J. OF ENVIRTL. LAW AND POL'Y 47, 63 (1980); E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* 40 (1973).

34. See Priest, *supra* note 1, at 22-23.

35. Professor Priest goes on to note that "[m]odern tort law would be *more effective* if courts were to focus more rigorously on exactly what can and cannot be achieved in terms of accident reduction." *Id.* at 22 (emphasis provided). It is hard to see any conceptual difference between Priest's disclaimer of the "efficiency norm" on the one hand, *id.*, and his concern for tort law being "more effective," on the other hand. *Id.* In fact, the definition of "effective" ("[h]aving the intended or expected effect; serving the purpose") and "efficient" ("[h]aving a direct effect; causative; acting or producing effectively with a minimum of waste, expense, or unnecessary effect") are synonymous. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 416 (1969).

proach [does not] provid[e] any criteria for determining when efficiency should yield to other values, one is supposed to assume that a decision for efficiency has presumptively been made. But if one is concerned about the validity of that decision itself or about how comprehensively an efficiency standard should be applied, or whether economic models adequately characterized the bulk of tort cases . . . [economic] theories provide no help.<sup>36</sup>

Thus, even if Priest's monolithic theory is assumed to have a degree of internal consistency, it still fails to appreciate the vital distinction between social goals and social values. As noted by Professor Summers: "[t]he realization of a legal goal may or may not fulfill a value; that is, the realization of a goal may itself be either good or bad."<sup>37</sup>

Second, and closely related to the first point, Professor Priest is misinformed about the limited number of goals that should be served by tort law in a modern and diverse society. As a consequence of his narrow view that accident prevention is the *only* worthwhile goal of modern tort jurisprudence, Priest comes to unsupportable conclusions about the suitability of several legal rules. Priest's error is not uncommon since "most people do considerably simplify making . . . choices by looking at only one face of a policy issue."<sup>38</sup> The source of his particular error is a uni-dimensional focus on economic efficiency to the exclusion of other values. A more enlightened — albeit complex — approach should recognize that "there will be no simple, singular goal for a rule or other legal precept. The goals figuring in a given form of law are multiple and may be classified along a continuum of ascending generality."<sup>39</sup>

Despite his major thesis that tort law should be limited to one overarching goal, Priest acknowledges that tort law might reflect a multiplicity of goals. This acknowledgment is revealed by Priest's discussion of decisions that have posited economic rationales of injurer incapacitation and safety-related technology inducement<sup>40</sup> as appropriate goals. His glib characterization of these competing goals as "easily put aside" because of their "highly

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36. G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 223 (1980) (criticizing certain efficiency theories of tort law suggested by Richard Posner and Guido Calabresi). See Posner, *Strict Liability — A Comment*, 2 J. LEG. STUD. 205 (1973); *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972). See also Calabresi & Hirschoff, *Toward a Test For Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

37. R. SUMMERS, *supra* note 25, at 63.

38. S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* 27 (1987).

39. R. SUMMERS, *supra* note 25, at 65. See also D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* 23-36 (1970) (public policy decisions involve a multiplicity of values, instability and fluidity of values, conflicts among values, combinations of values, and social disagreement on values).

40. Priest, *supra* note 1, at 9.



speculative” and insubstantial empirical basis<sup>41</sup> is, at least partially, contradicted by a later ambiguous statement that “[p]erhaps at some later point in the refinement of a novel tort law regime, effects on activity levels and safety research and innovation may become relevant.”<sup>42</sup> This proviso to his ostensibly “unified” theory<sup>43</sup> raises more questions than it answers. What conditions would Priest place on a “later . . . refinement” of his monolithic theory? By what criteria would he judge whether or not the incorporation of additional economic goals would be “relevant”? Would it be feasible or desirable for courts and legislatures to later incorporate these ends into a coherent approach? What threshold of empirical confidence would he deem necessary to consider an expansion of his model?

Similarly, Professor Priest confuses his thesis in analyzing other potential non-economic goals of tort law: “the moral concerns of corrective justice and retribution.”<sup>44</sup> The first source of this confusion is his historical argument that “modern tort law, both as conceived by its founders in the 1960s and as elaborated over succeeding years, has ignored [these] moral concerns . . . entirely.”<sup>45</sup> Is it his contention that most post-war jurists and theorists reject moral purposes for tort law? Or does he mean to say that while some courts and thinkers have been concerned about moral goals they are, nevertheless, outside of the mainstream and, therefore, should be ignored?

A second source of confusion in Professor Priest’s comparison of moral goals and economic goals is his normative argument — said to be “a stronger reason than [his] historical argument”<sup>46</sup> — that “[a]ccident reduction and insurance are the *only* important economic effects a legal rule can have.”<sup>47</sup> Presumably, this statement derives from his previous paragraph’s cryptic pronouncement that while “accident reduction and compensation of the injured are *totally instrumental* in nature,” the moral concerns of corrective justice and retribution are “non-instrumental goals.”<sup>48</sup> In support of this sweeping distinction Priest argues as follows:

A legal rule can influence investments in loss prevention up to the point that such investments are cost-effective. Where dam-

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41. *Id.*

42. *Id.*

43. *Id.* at 6.

44. *Id.* at 9.

45. *Id.* But Priest equivocates on his textual statement in a footnote that acknowledges “the importance of the legal heritage of corrective justice as it has influenced the forms of modern law,” *id.* n.38, in reference to his discussion of products liability law and causation law.

46. *Id.* at 9.

47. *Id.* (original emphasis).

48. *Id.* at 8-9 (emphasis provided).

age measures are compensatory, however, there is a very definite ceiling to the preventive investments that any provider will make. Beyond that point, legal liability serves only to provide insurance for losses that cannot be practicably prevented. Thus, even if a court were to define a legal rule on corrective justice or retributive grounds, the *effect* of the rule on the parties subject to it would only be to encourage greater investments in accident reduction or in insurance, or both. The only important economic effects that any legal policy can have are effects on the accident rate and on the level of insurance provided for losses that are not practicably preventable.<sup>49</sup>

But Priest's normative reasoning that accident reduction and insurance efficiency are the only important goals served by tort law is unpersuasive in several respects: (1) it fails to define the core concepts "cost effective" and "practicably preventable," and therefore is totally relativistic; (2) it is circular in nature since the argument assumes, without justification, that "instrumental" goals are identical to "economic" goals; and (3) it ignores the disabling function that law may serve in particularly egregious situations of corporate misconduct.<sup>50</sup> While accident prevention and insurance effectiveness are undeniably significant, the goals figuring into tort law are multiple and not easily classified along a "continuum of ascending generality."<sup>51</sup> Without attempting to undertake a complete cataloging or ranking at this time, other tort theorists have recognized the following goals as being worthy of careful consideration by decisionmakers in determining liability for tortious injury and determining the appropriate level of damages: (a) upholding current ideas of fairness by scrutinizing, to the extent possible, the defendant's "acts, motives, and state of mind";<sup>52</sup> (b) facilitating administrative convenience of the courts, in affording redress of wrongs;<sup>53</sup> (c) distributing the loss on the party better able to bear it by "pass[ing] it along and distribut[ing] it in smaller portions among a larger group" through such

49. *Id.* at 9 (original emphasis).

50. Indeed tort law can serve an important complementary function to criminal law for corporate misconduct. An example of the disabling function of tort law includes removal of key industrial decisionmakers from the marketplace as a result of the collateral impact of a court judgment on shareholder's confidence in management's ability. Another example of this function is redistribution of corporate assets into public interest litigation projects focused on removal of unsafe products from the marketplace. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWENS, *PROSSER AND KEETON ON THE LAW OF TORTS* 7-15 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*]. See also F. COLLEN, W. MAAKESTAD & G. CAVENDAR, *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* 309-53 (1987) (discussing punitive legal sanctions against lawless corporations).

51. R. SUMMERS, *supra* note 25, at 64.

52. *PROSSER AND KEETON*, *supra* note 50, at 21.

53. *Id.* at 23-24.

means as "rates, prices, taxes or insurance";<sup>54</sup> (d) providing an admonitory incentive to similarly situated defendants to prevent the occurrence of physical or property harm through vigilance and foresight when "the producer and the consumer do not have equal information about the risks of a given product";<sup>55</sup> (e) vindicating a plaintiff for a wrong when compensation is not entirely satisfactory in situations where irreparable injury has occurred;<sup>56</sup> and (f) channeling individual retaliation and violent emotion away from self-help remedies for a perceived wrong into peaceful, socially acceptable channels of dispute resolution.<sup>57</sup>

Third, Professor Priest's vision of modern tort law is flawed in his expectation that judges and juries will be able to magically decide tort cases by asking one deceptively "simple," talismanic, question: "Is it possible to identify any specific cost-effective action that either the injurer or victim could have taken which would have prevented the accident?"<sup>58</sup> Indeed, if post-hoc evaluation of the *actual* cause and effect relationship often proves to be an arcane task for judges and juries, Priest's call for a determination of hypothetical cause and effect (i.e., what "*would* have prevented the accident") verges on the metaphysical. Moreover, in the real world of corporate decisionmaking that often evolves over decades and entails complex interactions among numerous policy actors and product configurations, it would be impossible to reduce these complexities to a simple litmus test without depriving tort plaintiffs of any chance of prevailing on the merits. Priest's call

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54. *Id.* at 24-25.

55. G. WHITE, *supra* note 36, at 218. See also PROSSER AND KEETON, *supra* note 50, at 25-26.

56. G. WHITE, *supra* note 36, at 237.

57. *Id.* For other summaries of the broad social goals traditionally served by tort law, see generally Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951); J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 1-2 (2d ed. 1985); P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 16-25 (1983).

[P]ublic tort law [involved when suing the government] implicates five primary social goals or constraints: to deter wrongdoing, to encourage vigorous decisionmaking by officials, to compensate victims of official misconduct, to exemplify society's moral principles, and to achieve institutional competence and legitimacy. Each remedy affects each of these, as well as the balance between them, somewhat differently; each also taps judicial energies in distinct ways. This implies, then, a sixth goal: to achieve the optimal mix of these other preeminent values.

*Id.* at 16. See also Smith, *The Critics and "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987) (dispute resolution should be viewed as the objective of tort law, whereas compensation, deterrence, or punishment are merely means to achieve the primary end); Rabin, *Some Reflections on The Process of Tort Reform*, 20 SAN DIEGO L. REV. (forthcoming) (tort law has always reflected a wide array of divergent goals).

For expansive discussions of the philosophy of social goals, see generally GOALS FOR MANKIND: A REPORT TO THE CLUB OF ROME ON THE NEW HORIZONS OF GLOBAL COMMUNITY (E. Laszlo ed. 1977); G. FEINBERG, THE PROMETHEUS PROJECT: MANKIND'S SEARCH FOR LONG-RANGE GOALS (1969).

58. Priest, *supra* note 1, at 20-21.

for such a litmus test assumes that a judge or a jury should be in a position to answer questions of accident prevention to a degree of scientific certainty that is rarely seen in modern tort litigation. As noted in an analogous context by an attorney involved in a recent celebrated toxic tort case, juries have traditionally expressed community norms by focusing on probabilities, not absolute certainties:

[Tort plaintiffs should not be required] to prove to a scientific certainty, causation. Scientists have a different theory of causation, it's much closer to the criminal liability standard "beyond any reasonable doubt." Our job is to establish causation "at a moment in time." At this moment in time, we ask the jury, take the available information in front of you and answer the question: What caused these injuries? That's a "more probable than not" standard, 51 percent is what's required. And . . . those kinds of judgments that scientists make are fine when the scientists are in their own sphere. When we are in the legal realm, where we need answers, you can't tell the people of the country, . . . "we don't know to a scientific certainty beyond all reasonable doubt exactly what did this, and another 50 years worth of exposures will produce enough bodies for us to be certain." That's not an answer. The law is more humane than that, and the law says we've got to answer the question now.<sup>59</sup>

Fourth, Priest's conception of modern tort law suffers from numerous abstractions that fail to explain *how* the monolithic goal of accident prevention could be achieved through specific legal precepts.<sup>60</sup> As mentioned above, he has neglected to define or explain in any significant detail what is meant by "practicably preventable" and "cost-effective"; therefore, it is difficult to understand how a fact finder would be able to apply his accident prevention standard in concrete cases. Another significant definitional void in his approach is the specific meaning of the terms "accident prevention" and "accident reduction."<sup>61</sup> For example, while Priest suggests that the proper approach in a product liability case is for a jury to "clearly focu[s] attention on the specific changes in production or design that would have prevented the injury,"<sup>62</sup> he does not discuss the type of evidence that would be relevant to such determination. More importantly, he additionally fails

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59. *Toxic Trials* (P.B.S. television broadcast, February 25, 1986, statement of Tony Roisman at 24, discussing proof problems for victims of Woburn, Massachusetts groundwater contamination) (transcript on file with author).

60. See generally R. SUMMERS, *supra* note 25, at 72-73 (the importance of "means-goal complexes" in the law and that an "abstract goal, standing alone, is not very meaningful").

61. Priest uses "accident prevention" in various contexts, see, e.g., Priest, *supra* note 1, at 10-13, and the term "accident reduction" in other contexts. *Id.* at 5-9.

62. *Id.* at 23.

to discuss the relative weight the fact finder should place on the probative proof. Several questions arise as a result of Priest's lack of discussion in these areas, such as, should better safety records of other manufacturers using a different product design for a product similar to the one in dispute be utilized to assess specific product changes that would have led to accident reduction or accident prevention? Should the safety records of other manufacturers be considered if they were affected by variables such as substantially different geographic distribution, time of use, use of products by different age groups, or other variables? If these variables caused a court to exclude comparison safety records for similar products from evidence, should a jury base its decision on expert testimony of "the specific changes in production or design that would have prevented the injury"? Would an expert opinion on such an issue be too speculative for admission into evidence?<sup>63</sup>

Thus, in reviewing the various means suggested by Professor Priest in manufacturing defect cases ("Were there alternative methods of production that would have practicably prevented the injury?");<sup>64</sup> product design cases ("Could the manufacturer have practicably adopted some alternative design or production method that would have prevented the accident?");<sup>65</sup> and manufacturer's duty to warn cases ("exactly which warnings ['about product dangers manufacturers could practicably obtain and impart' that] would have been effective for [a particular] consumer product us[e]" in preventing an accident?),<sup>66</sup> one is left with the impression that such vague, ambitious and inductive criteria for decisions would be totally unworkable in real life cases.

Fifth, Professor Priest makes the erroneous assumption that the goals of tort law should always include some desired behavioral change: fewer accidents and optimally functioning insurance markets. But as pointed out by Professor Summers, a behavioral model of law "applies to some, but by no means to all, of the goals of law."<sup>67</sup>

For example, the immediate goals of many legal rules are to

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63. "[S]ubjectivity of the [expert] witness interpretive standard can be fatal to the admissibility of her testimony." E. IMWINKELREID, *THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE* 214 (1982) (citing *State v. Frazier*, 252 S.E.2d 39, 48 (W. Va. 1979)) (interpretive subjectivity bars admission of expert opinions based upon "mere possibility"). See also *McCORMICK ON EVIDENCE* (E. Cleary 3d ed. 1984): "[E]xpert opinion need not be admitted if the court believes that an opinion based upon particular facts cannot be grounded upon those facts." *Id.*, citing *Huguley v. State*, 39 Ala. App. 104, 96 So. 2d 315 (1957), cert. denied, 266 Ala. 697, 96 So. 2d 319 (speed deduced from impact); *Flores v. Barlow*, 354 S.W.2d 173 (Tex. Ct. App. 1962) (speed deduced from damaged condition of vehicles).

64. Priest, *supra* note 1, at 25.

65. *Id.* at 30.

66. *Id.* at 31-33.

67. R. SUMMERS, *supra* note 25, at 66-67.

arrange for the payment of money or the provision of goods or services to beneficiaries of public programs. Even the ultimate goals of such rules may involve not behavioral change but the nurturing of health and well-being, or the provision of museums, concerts, and the like. The immediate goals of still another type of law are simply to grant liberties — for example, the liberty to dissent or to worship — without encouraging or discouraging any particular form of such behavior. Of course, *other* precepts may take as their goal the deterrence of (or provision of compensation for) interference with such liberties.

Another familiar kind of law aims largely to preserve or foster desired social attitudes, such as feelings of loyalty, allegiance, patriotism, and tolerance. Such attitudes may, but need not, show themselves in behavioral changes.<sup>68</sup>

The immediate goal of many tort rules is to provide an alternative channel of full and complete redress for people who have been personally injured or who have suffered property damage, without encouraging or discouraging other remedies such as recovery of collateral first-party insurance benefits, employer-provided contractual disability payments, or assistance from relatives. A plausible intermediate goal of tort law is to foster positive social attitudes toward the courts and the judicial process by upholding such outcome-independent process values as public openness, process peacefulness, humaneness, and respect for individual dignity, procedural fairness, and civic friendship.<sup>69</sup>

Moreover, as also pointed out by Summers:

The behavioral directive model of legal means does not apply to most forms of law which are designed to excuse from, invalidate, cancel, diminish, or qualify obligations. Consider, for example, a law that diminishes responsibility for a homicide committed when the killer is provoked and flies into a rage. Such a law is not a behavioral directive to citizens on the "front line" of daily interaction. Rather, it is both a concession to human frailty and an acknowledgement of diminished culpability. And it is, as such, addressed to legal officials.

Furthermore, the directive model does not felicitously apply in those many situations in which judges and other officials are

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68. *Id.* at 67.

69. For a discussion and synthesis of outcome-independent legal values, see Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. \_\_\_\_ (1987) (forthcoming).

called upon after the fact to "clean up a mess." . . . Judges may then *conceive their main task* to be that of deciding (partly in light of prior law) the dispute on its merits after the fact — not that of guiding the future behavior of those or other parties. In so deciding, judges almost invariably take into account legal rules, principles, maxims, and substantive reasons scattered through a line of prior authority. These considerations will frequently not be reducible, directly or indirectly, to categorical behavioral injunctions, general or specific. . . .

In addition, much law that is behaviorally directive is only *contingently* so. Such law directs steps — the steps required to make a contract or a valid will, for example. This law is directive only insofar as individuals *choose* to avail themselves of the benefits of contracting, making a will, or the like.<sup>70</sup>

Thus, tort precepts such as comparative negligence, presumptions of consumer ignorance about the workings of a particular product, and the burden shifting dimension of the *res ipsa loquitur* rule, for example, are not necessarily behaviorally directive but, rather, reasonable concessions to human frailty and legal recognition of diminished responsibility. Likewise, in situations where the resumption of production of a particular product is unlikely, for example, the manufacturing by a pharmaceutical company of DES or the manufacturing by an industrial product firm of asbestos tiles, guiding the future behavior of those or other parties is less important than deciding the dispute after the fact. Finally, since imperfect information about court tort judgments and jury verdicts would still exist, regardless of "rigorous" attention by the law to changing the behavior of providers of goods and services, some providers would likely not choose to respond to subtle judgments or suggested accident prevention measures reflected in these decisions.

In light of these non-behavioral considerations about the workings of tort law, the Priest approach seems too artificial and mechanistic to correspond with the complex needs of the tort system as it has grown and evolved over the years.

### III. THE SHORTCOMINGS APPLIED — THE CASE OF HAZARDOUS SUBSTANCE VICTIMS

The shortcomings of Professor Priest's "reject[ion of] the insurance function of tort law" and his preoccupation with the "goal of accident prevention"<sup>71</sup> are poignantly demonstrated in the application of his ideas to

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70. R. SUMMERS, *supra* note 25, at 68-69 (emphasis in original).

71. Priest, *supra* note 1, at 38.

victims of occupational and environmental exposure to hazardous substances<sup>72</sup> — what many generically refer to as “toxic torts.”

### A The Insurance Problem

For several reasons, Priest's insurance analysis proves deficient in explaining the plight of hazardous substance victims and protecting their need for full compensation for injuries suffered. First, given the “fundamentally different” nature of toxic waste injuries<sup>73</sup> as compared to “the individualized, immediate wrongs for which, and through which, tort law developed,”<sup>74</sup> it is highly unlikely that potential victims could rationally seek, or insurance companies could rationally craft, appropriate first-party coverage against such risks. These differences include “the ambiguous etiology of many diseases associated with exposure to toxic substances and the long latency periods between exposure and manifestation of injury.”<sup>75</sup>

Second, even assuming that with accumulated experience and data<sup>76</sup>

72. It is customary to differentiate between exposure to hazardous substances while at work and exposure to hazardous substances in a non-work setting. Generic damages posed to workers due to occupational hazards include contact with chemical agents (particulates, gases, vapors and liquids), physical agents (noise, temperature extremes and radiation), and mechanical agents (equipment defects). Pier, Cowles, Key & Nothstein, *Recognition and Evaluation of Hazards*, in TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES 15-26 (G. Nothstein ed. 1984). “In addition, the general public is exposed to dangers from contamination of the environment outside the workplace. These dangers . . . include biological agents, air pollution, water pollution, and hazardous waste.” *Id.* at 26. See generally *id.* at 26-39.

73. *Developments in the Law of Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1603 (1986) (citing Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 575 (1983)).

74. *Id.*

75. *Id.* (citation omitted).

76. The Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), will aid in the development of detailed health assessments for individuals exposed to the nation's worst hazardous waste sites. In § 110 of SARA, Congress substantially amended § 104(i) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982) mandating comprehensive health studies at Superfund sites by the federal Agency for Toxic Substances and Disease Registry (ATSDR). ATSDR's new responsibilities involve four key activities:

First, ATSDR must prepare, within six months, a list of at least 100 hazardous substances that are commonly found at NPL [National Priority List] sites and that pose the most significant potential threat to human health. Within 24 months, the list is to be revised and expanded by the addition of at least 100 more substances.

Second, the agency is required to prepare “toxicological profiles” for each of these substances at a rate of no fewer than 25 per year. Such profiles are to include an analysis of all available toxicological and epidemiological evaluations for a hazardous substance to ascertain levels of human exposure that may trigger adverse health effects and, where appropriate, an identification of toxicological testing needed to identify levels of exposure that may cause health concerns.



insurance companies could rationally develop risk pools of individuals prone to incur environmentally or occupationally induced diseases, given the complicated nature of treating these diseases and the associated high costs of proper medical care and disability expenses, it is unlikely that private insurers would be willing to offer adequate first-party insurance contracts without requiring high premiums, high deductibles, or stringent co-insurance provisions. While workers in high risk industries — such as chemical manufacturing or waste disposal enterprises — would be better able to obtain first-party coverage through employer-provided policies than isolated individuals seeking insurance for the risk of incurring disabilities from random environmental exposures (such as liver and kidney disease from drinking contaminated groundwater or leukemia from exposure to fugitive emissions from a chemical factory), it would be problematic whether all employers would voluntarily agree to provide adequate coverage for their workers. Priest readily acknowledges that workers and individuals should have a “private obligation to obtain [first-party] insurance”<sup>77</sup> in these circumstances — presumably regardless of cost or unavailability.

Third, whatever private first-party insurance arrangements that could be made would not provide a full measure of compensation for losses suffered by employees exposed to hazardous substances in the workplace or by individuals exposed to toxic materials in the environment. As Priest concedes, first-party insurance does not provide for losses from pain and suffering<sup>78</sup> which are typically substantial in toxic tort cases.<sup>79</sup> Likewise, as al-

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Third, for substances for inadequate data bases, ATSDR, in cooperation with the director of the National Toxicology Program, [will initiate a program of research designed to determine the health effects of such substances]. . . .

Finally, and perhaps most importantly, the amendments require ATSDR to perform health assessments for each facility on the NPL. “Health assessments” are broadly defined to include analysis of the existence of potential pathways of human exposure, the size and potential susceptibility of the community within the likely pathways, and a comparison of exposure to recommended exposure or tolerance limits. The purpose of the assessment is to help determine whether action should be taken to reduce human exposure to hazardous substances at the facility and to determine whether additional testing or health surveillance is required.

D. HAYES & C. MACKERRON, *SUPERFUND II: A NEW MANDATE — A BNA SPECIAL REPORT* 83 (1987) (citations omitted). While this new program of health assessment is noble and worthwhile, it appears that accumulation of a reliable body of health assessment data will take decades of study and analysis. Moreover, even when a reliable database is developed, it will be problematic for first-party insurers to be able to identify risk pools of individuals (i.e., those who are likely to suffer adverse health effects from exposure to hazardous substances) since health data would tend to be retrospective, as opposed to prospective, in nature. Moreover, insurance companies would have great difficulty in ascertaining whether particular individuals were being exposed to or had been exposed to environmentally harmful substances at the time they applied for first-party insurance coverage.

77. Priest, *supra* note 1, at 37.

78. *Id.* at 16.

79. See, e.g., *Norwood v. Lazarus*, 634 S.W.2d 584 (Mo. Ct. App. 1982) (jury verdict

luded to above, individuals suffering from disabilities incurred by exposure to occupational or environmental hazardous substances typically face a long and complicated period of recovery with the prospect of frequent hospitalization, costly medical care, and permanent disability. Privately obtained first-party insurance contracts, through deductibles and co-insurance, would tend to shift much of these costs onto the victims.

Fourth, Priest's insurance analysis overlooks the systemic deficiencies of existing public insurance and social welfare programs — arrangements that he contends would provide a "supplemen[t]" to first-party insurance.<sup>80</sup> Contrary to his implication, in public programs such as the Social Security Disability Insurance Program (SSDI), state workers' compensation programs, Medicare and Medicaid, and veterans' benefits, compensation for injuries from hazardous substances "are addressed only obliquely"<sup>81</sup> and several barriers for recovery from such public programs often exist for victims of hazardous substance exposure.<sup>82</sup>

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of \$9,350 in favor of child who was injured by ingesting lead-based paint on defendant landlord's premises upheld with no finding of bias or prejudice and awarding damages for pain and suffering); *Texas Construction Service Co. v. Allen*, 635 S.W.2d 810 (Tex. App. 1982) (jury verdict of \$500,000, including pain and suffering damages, to a worker for injuries sustained to his eyes when lime sprayed from defendant company's truck was held to be not excessive).

Damages for mental and emotional distress are closely akin to pain and suffering damages. Priest's first-party insurance scheme would, likewise, not allow for compensation of mental distress in toxic tort litigation. "[T]oxic tort litigation often involves situations in which there is a greatly increased risk of contracting cancer [and other chronic disabilities] as a result of extended exposure to a toxic substance." Roeca, *Damages*, in *TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES*, *supra* note 72, at 509. Accordingly, Priest's proposal would tend to cut off victims of exposure to hazardous substances from full compensation for mental anguish and anxiety about a possible future disease or condition. *Compare* *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 179 A.2d 401 (1962) (court recognized validity of a damage claim for both the probability of future cancer and for the neurosis based on cancerphobia of a physician who suffered severe burns on his hands from his exposure to ethylene which allegedly had been improperly packaged by the defendant); *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 469 A.2d 655 (Pa. Super. Ct. 1983) (court allowed expert testimony as to plaintiff's chances of contracting cancer from asbestos exposure since testimony was relevant to the computation of damages); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983), 202 N.J. Super. 106, 493 A.2d 1314 (App. Div. 1985), *aff'd in part, modified in part*, 106 N.J. 557, 525 A.2d 287 (1987) (New Jersey residents are entitled to recover damages of \$5,400,000 for injury to quality of life caused by contamination of groundwater with toxic wastes from landfill; residents can also recover for emotional distress; while damages for cancerphobia are not allowed, medical surveillance damages are appropriate).

80. Priest, *supra* note 1, at 20.

81. T. SCHOENBAUM, *supra* note 33, at 606. *See generally id.* at 604-06.

82. For example, as reported in the ELEVENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 225-26 (1980):

An analysis of the data collected by the Department of Labor in 1975 Survey of Closed Workers' Compensation Claims suggests the difficulty of obtaining compensation for a disease resulting from an environmental exposure. Approximately 60 percent of disease cases and 55 percent of heart cases for which compensation was eventually

Fifth, Priest's insurance proposal proves deficient when the issue of compensation for death from exposure to hazardous substances is considered. By way of illustration, under Priest's scheme of things, if parents procured a life insurance policy on the life of their child, they could collect on the face amount of the policy if their child died from leukemia caused by drinking water contaminated by trichlorethylene.<sup>83</sup> If private insurance arrangements were not made, however, the parents would be barred from seeking recompense for the anguish and loss of society on their own behalf, or the lost future income of their child on behalf of the child's estate, unless they could prove that the death "could . . . have been practicably prevented prior to its occurrence."<sup>84</sup> In most cases, therefore, the parents would receive zero compensation on their own behalf or on behalf of their child since few parents obtain life insurance policies on the lives of their children.<sup>85</sup> Moreover, the standard of care to prevent groundwater contamination — judged by the "practicability" benchmark of prior decades when the waste is likely to have entered the groundwater — would tend to insulate the polluter from tort liability.

Finally, Priest's proposal to turn over the risk management component of tort law to the insurance industry without concomitantly providing for stricter regulation of the unsettling "financial dynamics of [the] insurance [industry]"<sup>86</sup> is fundamentally flawed. In this regard, Priest ignores convincing explanations of the financial instability of the insurance industry including the suggestion "that specialty insurers, often in the form of cap-

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granted were contested (a formal or informal hearing was held to resolve issues in the claim). This situation is in marked contrast to accident cases, in which only 10 percent are contested. Causality was the contested issue in 73 percent of occupational disease cases — in only in 21 percent of accident cases.

*Id.*, quoted from T. SCHOENBAUM, *supra* note 33, at 605. For a discussion of the need for administrative compensation schemes for toxic tort victims, see *Developments*, *supra* note 73, at 1631-60. See also P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 281-86 (1987).

83. This hypothetical is drawn from the plight of some of the victims in Woburn, Massachusetts, where within a half-mile radius eight children were diagnosed with leukemia. The leukemia was suspected to have been caused by the presence of discarded industrial solvents like trichloroethylenes and tetrachloroethylenes that leaked into the public drinking water supply. See *Toxic Trials*, *supra* note 59.

84. Priest, *supra* note 1, at 21.

85. See Priest, *The Current Insurance Crises and Modern Tort Law*, *supra* note 6, at 1546-47. In the case of the death of an adult family member from exposure to hazardous substances, it would be intuitively more likely that some form of life insurance protection — either employer provided or individually obtained — would provide recompense for surviving family members. However, unless high benefit levels were selected by the insured, surviving family members would not realize full and complete compensation for the loss of the decedent's companionship and lost earnings.

86. Huber, *Injury Litigation and Liability Insurance Dynamics*, 238 *SCIENCE* 31, 35 (1987).

tive companies owned by nonprofit associations, are prone to rush unwisely into the market during the upswing of the [insurance] cycle, depressing price below true cost by underestimating future payouts or overestimating future investment earnings";<sup>87</sup> indications "that the forecasting methods used by insurance rating bureaus may help to sustain the [fluctuating] cycles";<sup>88</sup> the problem of "newcomers to the insurance business with fewer sunk costs and less shareholder equity . . . periodically depress[ing] prices below cost because they are more willing to gamble against the risk of their own default";<sup>89</sup> and the problems of "insurance companies [being] prone to make large but essentially random errors in forecasting future losses, which then trigger sharp adjustments because of the financial inertia inherent in the insurance process."<sup>90</sup> Moreover, Priest does not consider the overarching tendency of insurance companies to exhibit "herd psychology" — occasioned by their current ability to "share a considerable amount of rate and loss information" while enjoying "certain exemptions from antitrust supervision."<sup>91</sup> Thus, without addressing these serious flaws in the functioning of the insurance industry under current regulatory law, Priest's proposal is premised on incomplete analysis.

### B. The Tort Liability Problem

For several reasons, Professor Priest's idea of a truncated tort liability system would tend to cut off nearly all victims of hazardous substance exposure from redress by the courts and relegate these victims to whatever first-party insurance or public welfare benefits, if any, that might be available.<sup>92</sup> First, Priest's liability standard — "was there a specific act that could practicably have been taken that would have prevented the accident?"<sup>93</sup> — is the functional equivalent of a drastically restricted, and exclusively available, negligence standard. Second, Priest's liability standard — requiring a hazardous substance victim to prove specific and practicable steps that

87. *Id.* at 34-35 (citing Harrington, *Prices and Profits in the Liability Insurance Market* (paper presented at the Brookings Institution Conference on Legal Liability, Washington, D.C., June 15, 1987)).

88. *Id.* at 35 (citing Venezian, *Ratemaking Methods and Profit Cycles in Property and Liability Insurance*, 52 J. RISK INS. 477 (1985)).

89. *Id.* (citing Munch & Smallwood, *Solvency Resolution in the Property-Liability Insurance Industry: Empirical Evidence*, 11 BELL J. ECON. 261 (1980); and Finsinger & Pauly, *Reserve Levels and Reserve Requirements for Profit-Maximizing Insurance Firms*, in RISK AND CAPITAL (G. Barber & K. Spremann eds. 1983)).

90. *Id.* (citing Harrington, *supra* note 87; Venezian, *supra* note 88; Munch & Smallwood, *supra* note 89; and RISK AND CAPITAL, *supra* note 89).

91. *Id.* See also N.Y. Times, Oct. 4, 1987, § Y, at 13, col. 1. Compare Chi. Trib., Nov. 2, 1987, § 4, at 10, col. 1 (liability insurance softens up; cycle of competition starts to bring policy rates down).

92. See *supra* notes 71-91 and accompanying text.

93. Priest, *supra* note 1, at 21.

would have clearly prevented the harm incurred — would require a showing that is inappropriately rigorous when disposers and generators of toxic substances should reasonably be expected to anticipate general as well as specific risks of harm caused by “products and their wastes in our ‘contemporary complex industrialized society.’”<sup>94</sup> This is true since, “[a]lthough disposers and generators might legitimately be surprised when a specific agent that they have processed is discovered to be a carcinogen [or a substance toxic in some other manner], most disposers and generators have long been *generally* aware that chemical wastes are potentially carcinogenic [or toxic in other respects].”<sup>95</sup>

Third, Professor Priest would exacerbate the already formidable barriers that such victims face in proving that the defendant’s conduct was unreasonable or that the plaintiff’s harm was foreseeable. “Unlike the generators and disposers themselves, neither the victims nor the courts have any special expertise in evaluating the availability and expense of the latest technology. Similarly, neither victims nor courts can accurately judge the cost of options such as ceasing to manufacture products that generate toxic waste or storing the waste at a different location.”<sup>96</sup> If proof of specific and practicable steps that would have clearly prevented the harm incurred by the victim were added to the preexisting difficulties of proof, plaintiffs and their attorneys would likely be intimidated from initiating costly litigation in the face of such Herculean burdens. Indeed, plaintiffs would have to rely almost exclusively on time-consuming surveys of available literature describing practicable and specific accident-prevention measures in a particular industry. In addition, expensive expert opinions on precautions would be required by plaintiffs since proof of these matters would probably be “unattainable through discovery because few of the relevant records or employees [would be] still available”<sup>97</sup> in cases involving industrial practices many years in the past.

Fourth and finally, Priest’s general notion that tort plaintiffs are often in as good or better a position than business defendants to prevent tort accidents is intuitively inapplicable to victims of hazardous substances. In light of the great uncertainties that exist regarding pathways of exposure, dos-

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94. *Developments, supra* note 73, at 1627 (citing *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 449 U.S. 912 (1980)).

95. *Id.* at 1609. *See also* P. BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL*, 16, 79, 89, 106-20, 124-27, 142-44 (1985) (hazards of asbestos use and exposure concealed by asbestos industry); P. Schuck, *supra* note 82, at 21-23 (scientific evidence on dioxin, available for several years, strongly suggested that even at low levels dioxin could be a virulent toxin); S. ENGELMAYER & R. WAGMAN, *LORD’S JUSTICE* (1985) (conspiracy of A.H. Robbins Company in covering up the risks presented by the Dalkon Shield).

96. *Developments, supra* note 73, at 1612.

97. *Id.* (citing Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 964 (1980)).

age, and other matters, victims of hazardous substances are fundamentally different from users of specific and visible products.

#### IV. CONCLUSION

Professor Priest's vision of the future of American tort law is flawed, for it expects too much of first-party private insurance and public welfare programs to provide adequate "pure nontort compensation"<sup>98</sup> while, concomitantly, it posits an unrealistic hope that judges and juries could bring about an optimum level of accident prevention by focusing on what "practicable" measures would have avoided an injury. Priest's theory also expects too little of our common law heritage of tort law where judges have sought to achieve a number of policy goals beyond vindication of individual rights to achieve certain collective purposes such as deterring and punishing socially injurious activity, facilitating an efficient allocation of social resources, seeking social equity, expressing community cohesiveness, and augmenting the government's legislative, regulatory, and wealth-distributing policies.

Professor Priest's approach, as applied to victims of hazardous substance exposure, proves to be particularly harsh since it overlooks market failures of the present insurance system that would lead to inadequate compensation at a fair and reasonable cost. His proposed liability standard would also make it virtually impossible for such victims to sue in tort to achieve a full measure of justice. Moreover, it is noteworthy that Priest's analysis of the intellectual foundations of modern tort law ignores the potential significance of recently enacted environmental statutes that impose expansive liability on purveyors of hazardous substances as a source of analogous authority for imposing stricter tort standards of liability when human beings suffer personal injuries from exposure to these substances.<sup>99</sup>

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98. This phrase is derived from P. SCHUCK, *supra* note 82, at 288. Professor Schuck uses the phrase in his discussion of the inadvisability of relying exclusively on administrative regulation and compensation schemes to address mass toxic tort disasters. In a further comment on this point that is germane to Professor Priest's ideas, Schuck notes:

[T]ort law can sometimes . . . achieve significant deterrence at an acceptable cost.

It would therefore be unwise, as well as politically naive, to abandon tort law altogether in the almost vain hope that pure collective deterrence and pure nontort compensation [through a comprehensive administrative scheme] would somehow solve the existing problem.

*Id.*

99. Examples of federal environmental statutes imposing expansive liability on purveyors of hazardous substances include the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1982) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982). This argument is derived from *Developments*, *supra* note 73, at 1661 ("Courts should recognize that many of the rationales supporting expansive liability in CERCLA cases apply in the same fashion to tort litigation

On balance, therefore, the main ideas expressed in "Modern Tort Law and Its Reform," while interesting and thought-provoking, are unpersuasive and unworkable.

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involving personal injuries caused by leakage of toxic waste"). The seminal article on the use of statutes as judicial source material for development and growth of the common law is Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934), republished in 2 HARV. J. ON LEGIS. 7 (1965). See also Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401, 405-26 (1968); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11-14 (1936) ("I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning"); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207 (1917); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 10-22 (1966).