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Anita Bernstein

Brooklyn Law School, anita.bernstein@brooklaw.edu

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THE 2x2 MATRIX OF TORT REFORM'S DISTRIBUTIONS

Anita Bernstein*

INTRODUCTION

From having lived, all persons know that predictability and unpredictability each enhance our human existence and also oppress us.

We depend on predictability. Individuals and entities made up of human beings—a wide category that includes institutions, businesses, and societies—cannot flourish without schedules, routines, itineraries, habits, ground rules, inferences derived from premises, and protocols of engineering and design. Predictability makes trust and hope possible: human life without it would be an abyss of terror, despair, and starvation. We would die if it disappeared.

Unpredictability, for its part, complements predictability. It lifts our spirits, assuages our boredom, imparts wisdom, and (hand in hand with predictability) generates economic profit. It is present in every thrill we will ever live to feel.

The dichotomous contrast of these two abstract nouns does some of the work of a related yet distinct juxtaposition: security and freedom. Governments (especially in wealthy industrialized nations) often purport to pursue both of those ends, undertaking to offer citizens both security in the form of baseline entitlements and freedom through opportunities to attain more than mere shelter.¹ Freedom and security constitute “the design and end of government,” wrote the Founding Father and pamphleteer Thomas Paine in *Common Sense*.² An interrelation between the terms emerges through understanding “freedom

* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. I acknowledge with thanks the stellar research assistance of Tyler Korff and very helpful comments from several colleagues, including Gary Minda, Ted Janger, Bill Araiza, David Reiss, Adam Kobler, Lawrence Solan, and Ursula Bentele. This Article received support from the Brooklyn faculty research program and the Clifford team at the DePaul University College of Law, which Professor Stephan Landsman has led to splendid achievements over many years.

1. The Universal Declaration of Human Rights, for example, extols both security and freedom. UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 1, 3 (Dec. 10, 1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949).

2. THOMAS PAINE, COMMON SENSE 5 (Stanley Appelbaum & Ronald Herder eds., Dover Publ'ns 1997) (1776).

as *security* from restraint . . . and security as *freedom* from interference.”³

Like predictability and unpredictability, security and freedom are desirable and urgently needed, but only in correct measures because each has a dark side: security entails constraint, and freedom to act can interfere with the interests of others.⁴ Too much security (or constraint) stifles while too little frightens. Too much freedom equals danger; too little and we are chafed.⁵ John Stuart Mill wrote about the tension: “[L]iberty is often granted where it should be withheld, as well as withheld where it should be granted”⁶ Understood as protection against the depredations of other people, constraint leads to security and is thus legitimate when imposed by the state. Immanuel Kant, a philosopher preoccupied with freedom, felt it necessary (in the name of “strict justice”) to accept “the possibility of external coercion that is compatible with the freedom of everyone in accordance with universal laws.”⁷ In recognition of this clash, writings in many fields and disciplines within American law report efforts to strike a balance between the two ends.⁸

3. Henry H. Foster, Jr., *The Relation and Correlation of Freedom and Security*, 58 W. VA. L. REV. 325, 327 (1956).

4. See Jan Narveson, *Equality vs. Liberty: Advantage, Liberty*, in LIBERTY AND EQUALITY 33 (Ellen Frankel Paul et al. eds., 1985).

5. Scott Adams of “Dilbert” fame took up the question on his blog:

Lately I’ve been wondering if freedom is a zero sum game. In other words, for one person to get more freedom, someone else has to lose the same amount, but usually in a different way.

I predict that you just reflexively rejected that concept, but your stubbornness [sic] won’t stop me from unfolding the idea a bit more. To that end, only examples can help.

Example one: In order for me to be free to walk down the sidewalk, other people must be prohibited from driving on them [sic].

Scott Adams, *Freedom Is a Zero Sum Game*, SCOTT ADAMS BLOG (Dec. 14, 2009), http://www.dilbert.com/blog/entry/freedom_is_a_zero_sum_game/. For a more nuanced treatment of this point, see Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191 (2003) (arguing that security and freedom do not always struggle against each other in a zero-sum relation and that the notion of balancing one against the other erroneously implies precision about their relative quantity).

6. JOHN STUART MILL, ON LIBERTY 187 (5th ed. 1874).

7. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 31–32 (John Ladd trans., Hackett Publ’g Co. 2d ed. 1999) (1798). John Rawls, building on Kant, expressed the balance between security and freedom in what he called his first principle of justice: “[E]ach person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.” JOHN RAWLS, A THEORY OF JUSTICE 53 (rev. ed. 1999).

8. See, e.g., JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE 147 (2004) (surveying constitutional law on surveillance); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 155 (2002) (commenting on human rights); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603, 606 (2000) (commenting on international trade law); Andrew Phang, *Commercial Certainty, Mistake, Unconscio-*

Observers of American tort rules have found the same inclination in tort doctrine:⁹ as writers have noted, tort law advances—and also mediates between—freedom and security.¹⁰ Whenever “a person’s choices involve harm to others, interfering with the ability of those other persons to exercise their own wills free from outside interference,” writes David Owen, tort law “has an important role to play in defining and enforcing the boundaries between personal freedom of action and personal security from harm.”¹¹ Gregory Keating draws on the work of John Rawls to describe this dialectic in terms of social contract theory. Accident law, Keating explains, resolves “problems of interpersonal risk imposition” by imposing what he calls “canons of reasonableness.”¹² These canons, applied *ex post*, limit the prerogative of an individual to impose risks on another person—driving too fast to reach her destination, for example—in fulfillment of her own wishes and life plans. In his jurisprudential writing on accident law, Richard Wright examines the Aristotelian categories of distributive justice and interactive justice, suggesting that they correspond respectively to freedom and security: Distributive justice allots resources to an individual so that she will have “an equal or sufficient opportunity to fully realize her humanity as a self-legislating moral being,” and “[i]nteractive justice defines the scope of a person’s *negative freedom*,” which is “the security of her person and existing stock of resources in interactions with others.”¹³

This Article, which generalizes about broad-scale distributive effects that have followed past revisions to accident law in the United States and will accompany any reforms installed in the future,¹⁴ di-

nability and Implied Terms, 1 J. OBLIGATIONS & REMEDIES 21, 26 (2002) (commenting on commercial law).

9. Throughout this Article—and consistent with a pattern in Clifford-sponsored scholarship in this journal—reference to torts, tort doctrine, and tort liability will generally have in mind personal injury torts rather than torts involving harms to finances or physical property.

10. See Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 73 (1942) (noting “the two basic interests of individuals—the interest in security and the interest in freedom of action”). For an update on the point, see Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 736 n.5 (2002) (gathering citations to works by Jules L. Coleman, John C.P. Goldberg and Benjamin C. Zipursky, Stephen G. Gilles, and Gregory C. Keating).

11. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 719–20 (1992).

12. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 323–24 (1996).

13. Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 165–66 (2002); see also Richard W. Wright, *Right, Justice and Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 167–68 (David G. Owen ed., 1995).

14. Here I continue work pursued in Anita Bernstein, *Distributive Justice Through Tort (and Why Sociolegal Scholars Should Care)*, 35 LAW & SOC. INQUIRY 1099 (2010). This Article uses “tort reform” consistent with the vernacular meaning—new liability-constricting rules—but the

vides advocates of changes to tort rules into two groups: pro-plaintiff and pro-defendant. I have acknowledged that the dichotomy is crude.¹⁵ It may displease writers who have argued for new doctrines while situating themselves outside any partisan division.¹⁶ Some partisans have suggested that although a reductive label might suit their opponents, it certainly misdescribes them.¹⁷ Contemporary discussions about tort reform, however, will usually situate participants in either the *pro* or *contra* camp. The yes-or-no question dividing the two stances—whether liability for personal injury in the United States is too great and whether it needs to be curbed—sets up a line clear and meaningful enough to be useful, if reductive.

From here I consider how the two camps pursue security and freedom for themselves by advocating particular changes to American tort law. Because the cohorts oppose each other in a binary and need support beyond their own membership, they find it expedient to cloak their wishes in more neutral-sounding rhetoric. Both sides have invoked predictability and unpredictability, the theme of this year's Clifford Symposium. They do not equate security with predictability and unpredictability with freedom; the words are overlapping rather than synonymous.¹⁸

The combination of two cohorts (plaintiff and defendant) and two contrasting nouns (unpredictability and predictability) that the two cohorts pursue yields a double binary, and from there a 2x2 matrix. This type of display has been useful to the literature on several binary

phrase in the title includes new liability-expanding rules, see *infra* Part II, as well. For an early usage of "tort reform" to mean pro-plaintiff change, see Dian Dickson Ogilvie, Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence*, 21 UCLA L. REV. 1566 (1974).

15. See Anita Bernstein, *Teaching Torts: Rivalry as Pedagogy*, 18 TORTS L.J. 187, 196 (2010); see also Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1093 (2005) (arguing that successful deployments of the Due Process Clause to challenge tort rules have rendered obsolete the old "dynamic of pro-plaintiff expansion" versus "pro-defendant contraction"). Hewing to the old-school divide, this Article makes few references to Fourteenth Amendment torts jurisprudence.

16. I have in mind scholars like Stephen Sugarman, Geoffrey Palmer, and Jeffrey O'Connell.

17. For example, some tort reformers label themselves and their ideas as "common sense" rather than tort reform. See Note, "Common Sense" Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1769–70 (1996). And the best-known group of plaintiffs'-side activists changed its familiar name, the Association of Trial Lawyers of America, to the more statesmanlike American Association for Justice.

18. "Freedom" and "unpredictability," for example, are far from synonyms of each other, even though descriptors like "free spirit" and "free-wheeling" connote a disinclination to behave in a predictable manner. Predictability and unpredictability each can generate—and can also undermine—both security and freedom.

sets of wishes and results that the law influences.¹⁹ My central point, amenable to a 2x2 layout, is that advocates of changes to tort doctrine and procedure on both sides have invoked predictability and unpredictability to attain the freedom and security they want.²⁰ Observers of their efforts who lack a direct stake in their proposals—including legislators, judges, and the public—should remember that these references to predictability and unpredictability are instruments rather than ends in themselves.²¹

Let us put plaintiff- and defendant-favoring stances on one axis and unpredictability/predictability on the other. Figure 1 starts with four stances vis-à-vis tort liability in the bounded spaces of the matrix. Despite the longstanding linkage of contemporary tort reform with the quest for more predictability, it turns out that both sides of this battle pursue both more and less of this quality within a liability regime:

19. See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 5, 10 (1994) (offering an overview of game theory in legal scholarship and explaining matrices and bimatrices); see also Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 *YALE J. INT'L L.* 61, 65 (1999) (arguing that several 2x2 matrices, not just the Prisoner's Dilemma, inform analysis of international cooperation in the securities markets); Phil, *The Best 2x2 Matrix of All Time?*, TRANSCEND STRATEGY BLOG (Mar. 15, 2010), <http://www.transcendstrategy.com/?p=773> (quoting management guru Stephen Covey: "Important questions always get reduced to two options."). For a warning in the context of another 2x2 matrix about treating defendants and plaintiffs as symmetrically situated, see Lee Anne Fennell, *Property and Half-Torts*, 116 *YALE L.J.* 1400, 1415–17 (2007) (noting that plaintiffs can engage in self-help to mitigate the harms of permitting a risky activity, but defendants cannot engage in self-help to mitigate the harms of banning it).

20. Which is not to say that desires about predictability are or should be limited to advocates. Deborah Hensler has observed that if predictability in tort adjudication utterly disintegrates, then the public suffers, because deterrence becomes impossible. See *So Sue Me: Tort Reform* (Hoover Institution television broadcast Nov. 16, 2000), transcript available at <http://www.hoover.org/multimedia/uk/3376311.html> ("Why should we care about unpredictability? The reason the general public should care about unpredictability is that if the system is perceived by . . . potential wrong-doers . . . to be unpredictable then the decision-makers in those companies will stop paying attention to the liability system." (quoting Deborah Hensler)).

21. Guided by Justice Souter's opinion for the Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), in this Article I exempt punitive damage reform from discussions of predictability and unpredictability within tort reform. Unpredictability in punitive damage awards may indeed be "in tension with the function of [these] awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another," *id.* at 502, and thus unacceptable for non-instrumentalist reasons.

FIGURE 1: EXAMPLES OF APPROACHES AND ATTITUDES TOWARD TORT LIABILITY

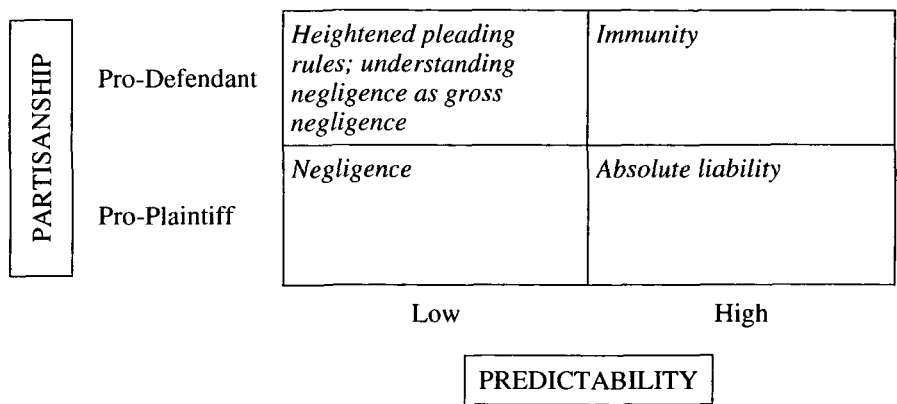
PARTISANSHIP	Pro-Defendant	<i>Varied tort reform initiatives at the state and federal level, addressed toward legislatures and the public, which achieve varying degrees of acceptance</i>	<i>Belief that the less liability the better</i>
	Pro-Plaintiff	<i>Formation of new causes of action</i>	<i>Opposition to particular immunities, limited-duty rules, and other rules of law that take issues away from the fact-finder and put tort adjudication more homogenously in the hands of juries</i>
		Low	High
		PREDICTABILITY	

The upper right quadrant takes pro-defendant tort reformers most literally at their word: the cohort wants predictability in the form of no-liability rules. The upper left quadrant, however, notes that the cohort abandons its devotion to predictability when it can obtain episodic instances of favorable doctrine instead. State-by-state efforts necessarily diminish predictability, at least in the short and medium term. The lower rows of the matrix argue that pro-plaintiff changes to tort liability rules can enhance predictability as well as diminish it.

Another illustration of the same point emerges from posing a hypothetical question to both camps: “With respect to your interests, what is the ideal doctrine of liability?”²² By hypothesis, the plaintiff wants tort claims to succeed while the defendant side wants them to fail, suggesting that the sectors will vote for absolute liability and immunity, respectively. Absolute liability and immunity may both be seen as high-predictability desiderata. They both, of course, are incompatible with each other. In the face of resistance from the other camp, each side has its low-predictability goal to pursue:

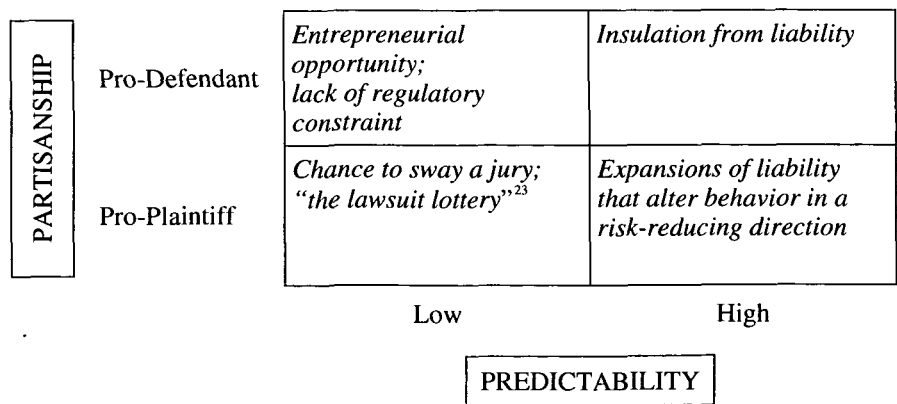
22. I thank Ted Janger for suggesting this iteration of the matrix.

FIGURE 2: PREFERRED IDEAL-TYPE REGIME FOR ACCIDENT LIABILITY



For yet another take on the point, one can use the 2x2 matrix to lay out larger quests of both cohorts in the partisanship axis. Activists identified with both the pro-plaintiff and the pro-defendant sides have sought changes to the law of torts that make the groups’ encounters with civil justice both more and less predictable for themselves. Figure 3 mentions four desires that the cohorts hold, two by the plaintiffs’ side and two by the defendants’ side. Half of them seek more predictability and half seek less:

FIGURE 3: TORT UNPREDICTABILITY AND PREDICTABILITY AS PLAINTIFFS AND DEFENDANTS DESIRE THEM



23. JEFFREY O’CONNELL, THE LAWSUIT LOTTERY (1979). For my thoughts on this phrase, see Bernstein, *supra* note 10, at 736 (“Those of us who like to describe American negligence law as a ‘lottery’ may have a better-than-typical understanding of the low ratio of winners to losers that the system creates.”).

Iterations of the matrix warn onlookers not to take partisan calls for more predictability at face value. Proponents desire something else at least some of the time; they must, because they have also manifested a taste for unpredictability. What these advocates really seek when they press for predictability, I contend in this Article, is more security for themselves in the form of curbing the prerogatives and opportunities of actors who hold interests contrary to their own. At the same time, they want freedom. I intend no disparagement of this agenda: as far as I know, it is normal and universal. All human beings crave shelter from adverse contingencies. They hope to constrain those who would vex them. The security they want includes being spared cost internalization, or what would to them come across as maintaining their freedom of action. With respect to their own behavior, they have no use for predictability.

It follows—or at least I shall argue—that neither side in this battleground will confine its activism to seeking predictability as such. Rhetoric notwithstanding, what the tort reform movement now pursues is *security and freedom for its membership*; and its predecessors in rule-revision, the tort expansionists who wrote new law in the mid-twentieth century, also wanted security and freedom, albeit for different recipients: consumers and other potential plaintiffs rather than business interests. With this discussion, I hope to pry predictability out of the hands of one cohort. It does not belong only to the defense side. Separated from its partisan usage, predictability becomes more interesting and more informative.

The three Parts of this Article follow a structure of thesis followed by antithesis followed by synthesis.²⁴ Part II examines tort liability as a source of security and freedom for persons vulnerable to injury, the group from which plaintiffs are drawn.²⁵ Like all persons, this cohort desires both predictability and unpredictability; the tort liability regime gives them some of both. Part III undertakes a complementary analysis of the security, freedom, predictability, and unpredictability constituents of the matrix, with reference to American tort reform as undertaken beginning in the late 1970s,²⁶ to match the discussion of

24. For recent examples of this structure as used to analyze legal doctrine, see generally Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895 (2010) (reviewing the academic literature on “broken windows,” a law enforcement device); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 367 (2010) (contrasting the thesis of liability with the antithesis of restriction in civil procedure).

25. See *infra* notes 30–43 and accompanying text.

26. I simplify American tort history by situating expansion of tort liability in the middle of the twentieth century with contraction arriving a couple of decades later. On what these time periods represent, see generally STEPHANIE MENCIMER, *BLOCKING THE COURTHOUSE DOOR: HOW*

tort liability in Part II.²⁷ Committed to reversing the expansions of liability for accidents that had taken hold in the middle of the twentieth century, tort reform offers an antithesis to the liability thesis.

Readers familiar with the tort reform debate will recognize the references to predictability and unpredictability in this context because the reform movement has deemed these abstractions so central to its cause.²⁸ Part III refuses to hew to tort-reform rhetoric about the perils of unpredictability, however. Its 2x2 discussion widens the base that the tort reform movement has used. Part IV, the final substantive part of this Article, brings together the two opposing sets of contentions about security, freedom, predictability, and unpredictability into a synthesis that invites other reform proposals into consideration.²⁹ I discuss three of them: health insurance, administrative regulation, and workers' compensation.

II. SECURITY AND FREEDOM THROUGH EXPANDED LIABILITY FOR ACCIDENTAL HARM

A. *Seeking Unpredictability*

Before the expansion of liability that took off in the middle of the twentieth century in the United States, tort law enforced predictability through doctrines that limited defendants' responsibility for accidents.³⁰ Privity, for example, insulated product manufacturers from liability to remote purchasers and bystanders. Immunities protected charities and family members from having to pay for the harm that their carelessness caused. Medical negligence claims, no matter how compelling, could not reach a jury without plaintiff-favoring testimony from a physician in the community.

THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE 13 (2006) (identifying defense-focused tort reform as originating not in the late 1970s but in a 1950s "PR campaign"); Rachel M. Janutis, *The Struggle over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943 (2006) (arguing that arguments about both expansion and retraction of tort liability were well developed in the Progressive era, which began in the late nineteenth century). The chronology followed in this Article—expansion efforts first, narrowing second—is historically accurate enough. *See id.* at 960–68 (reviewing Progressive-era debates); *see also* John Fabian Witt, *Lessons from History: State Constitutions, American Tort Law, and the Medical Malpractice Crisis* 31–43 (Pew Project report 2004) (discussing instances of resistance to progressive tort legislation in the early twentieth century).

27. *See infra* notes 44–77 and accompanying text.

28. *See infra* Part III.A.

29. *See infra* notes 78–143 and accompanying text.

30. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 25–26 (2002) (referring to "[t]he [l]aissez [f]aire [n]egligence [e]ra" of 1825 to 1944).

Some doctrines functioned (and continue to function) to keep defendant-favoring predictability dominant or probable, rather than install it absolutely. Requiring a plaintiff to prove fault—the nineteenth-century judicial maneuver announced in *Brown v. Kendall*³¹—impeded the prosecution of a tort claim but did not stop it. Juries enjoyed some flexibility to side with plaintiffs on questions of proximate cause and to reject immunizing defenses like assumption of risk and contributory negligence.³² The stance against redress for harm that was only economic or emotional also had its fissures. In general, however, broad rules covering duty, breach, proximate cause, and defenses made liability exposure more predictable for persons and entities whose work or business operations, along with their wealth, made them attractive defendants. What Morton Horwitz famously described as a subsidy to industry delivered in the form of doctrinal change³³ went well beyond allowing heedless actors to keep their cash. Favorable rules enhanced the predictability of not only the actuarial fact of having to pay out judgments in the future but also businesses' stores of publicity. Doctrine gave them a tighter grip on publicity, reputation, and the privacy (or secrecy) of their records.

Lawyers, judges, and scholars who worked to undo defense-favoring doctrines at the same time undid predictability. They did not attack predictability as an ill; instead they diminished it incidentally to their goal of enlarging redress for injured persons. Consider the changes in one state, California, the jurisdiction that “led the way in carving out new categories of plaintiff recovery in nearly every corner of tort law.”³⁴ Tort revision in this jurisdiction included more generous damages rules, expansions of existing compensatory damages provisions, retreats from older no-duty precepts, increased responsibility for misbehaviors of third parties, extensions of proximate cause, and easier ways to hold co-defendants responsible for injury. Disparate labels like these all have unpredictability in common: courts and juries gained new powers to favor plaintiffs, but these institutional actors could also choose not to exercise their prerogative.

One view attributed to the tort reform movement—an aversion to juries because, *inter alia*, juries make tort outcomes “either wholly un-

31. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

32. See generally Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

33. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 99–100 (1977).

34. Rustad & Koenig, *supra* note 30, at 45.

predictable or else predictably pro-plaintiff”³⁵—summarizes what pro-plaintiff activists wanted and achieved during the expansionary era. Rewriting doctrine in this direction made results “predictably pro-plaintiff” in the aggregate. Individual plaintiffs gained the opportunity of unpredictability: They received better odds of winning, but they could also lose.

B. At the Same Time, Seeking Predictability

Mid-century expansionists who pursued the unpredictable chance to gain more redress for plaintiffs also wanted predictability in the form of new doctrinal categories. They did not present themselves as bandits roving to grab money or gamblers who liked the odds in the great jury casino. Elsewhere, describing a portion of their successes, I have presented these efforts as historically most likely to succeed when they appeared conservative, incrementalist, or emergent from existing common law rules rather than innovative.³⁶

Judge-made expansions of tort remedies usually took care to invoke precedents. Even decisions that went boldly where no American court had gone before—for example *Rowland v. Christian*, which merged the three common law classifications of land visitors;³⁷ *Procanik v. Cillo*, which found a cause of action for wrongful life;³⁸ and *Sindell v. Abbott Laboratories*, which declared market share liability³⁹—labored to present their holdings as consistent with an evolving expansion. Expansionist case law tells readers not to be surprised by the decision of the court. The outcome, according to each judicial author, was predictable.

For injured plaintiffs and their counsel, tort shifts that have the effect of making compensation available to injured people seem consistent with predictability. They do not equate liability with runaway juries and other tropes that call tort-claiming unpredictable. To them, a chance to be heard and compensated is predictable, whereas anti-plaintiff doctrines like limited-duty rules, statutes of limitation, and all-or-nothing plaintiff’s-conduct defenses are unpredictable—bizarrely formalist, that is, or artificial. The reality of their own injury and what they deem the responsibility of the defendant to pay for this

35. Stephen D. Sugarman, *United States Tort Reform Wars*, 25 U. NEW S. WALES L.J. 849, 849 (2002) (suggesting also that “unpredictability actually helps to keep management on its toes”).

36. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1565 (1997).

37. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

38. *Procanik v. Cillo*, 478 A.2d 755, 757 (N.J. 1984).

39. *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980).

harm suffice, in their opinion, to justify an entry of judgment in their favor. Withholding redress would be unpredictable to them.

Making policy in a more disinterested fashion, tort expansionists in the middle of the twentieth century took note of the virtues that predictability offered.⁴⁰ In the 1956 edition of their torts treatise, Fowler Harper and Fleming James defended liability as a source of insurance by arguing that it eased the consequences of “ruinous loss” and “great financial shock.”⁴¹ Roger Traynor offered a predictability rationale for strict products liability when he declared that case outcomes should not rest on the vagaries of compliance vel non with Sales Act notice rules, a condition that varies flukishly from plaintiff to plaintiff.⁴² Although today they tend to cede ownership of the predictability goal to their opponents, pro-plaintiff activists occasionally pick up the predictability cue.⁴³

III. SECURITY AND FREEDOM THROUGH TORT REFORM INITIATIVES ON BEHALF OF DEFENDANTS

Seeking both shelter and prerogatives for business, the tort reform movement has denounced liability for accidents as ruinously unpredictable. Yet just as the expansionist efforts noted in the last Part pursued both unpredictability and predictability, this constituency has desires with respect to predictability that are varied rather than unitary. Here, reversing the order of presentation in Part II, we may start with calls for more predictability and then look at the taste for less of it.

A. Praising Predictability

Predictability has long occupied the heart of tort reform initiatives.⁴⁴ The American Tort Reform Association (ATRA) puts the

40. Here I briefly summarize a review of sources that I explored years ago at greater length. See Anita Bernstein, *A Model of Products Liability Reform*, 27 VAL. U. L. REV. 637, 646–47 (1993).

41. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 763 n.7 (1956).

42. Bernstein, *supra* note 40, at 646 (citing *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963)).

43. For example, in 2003, a coalition of more than a hundred public interest organizations proposed to make the supply of insurance more predictable by funding “a standby public insurer” that could provide coverage during bottom periods of insurance investment-and-risk-writing cycles. Sarah Norland, *Seeking Shelter from Rising Malpractice Costs*, J. HEALTHCARE FIN. MGMT, Nov. 2003, at 58, 63, available at <http://www.allbusiness.com/health-care-social-assistance/688079-1.html>.

44. See Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 805 (2006) (claiming that defense-side tort reformers “wax endlessly about unpredictability”).

word in the center of its slogan: “Bringing Greater Fairness, Predictability and Efficiency to the Civil Justice System.”⁴⁵ ATRA denounces unpredictability in the form of “[m]eritless cases settled because defendants fear the outcome of an emotion-filled jury trial or a lawless court.”⁴⁶ In an amicus brief that defended a statutory cap on damages, one Southern governor described his state back in the bad old pre-reform days as a “judicial hellhole” where unpredictability had run wild.⁴⁷ Nonpartisan academic commentary on the tort reform movement identifies the stated quest for more predictability as foundational.⁴⁸ Like the constraints on liability that expansionists had attacked in decades past, the constraints that contemporary tort reformers have pursued alter predictability to varying degrees.

The best kind of predictability for a defendant is immunity.⁴⁹ Here the biggest contemporary tort reform success has been the federal ban on lawsuits against handgun manufacturers for injuries attributable to criminal violence.⁵⁰ Almost as successful, the Personal Responsibility in Food Consumption Act, written to ban claims against sellers of fast food for harms related to obesity,⁵¹ won passage in the House of Representatives.⁵² As federal legislation, this bill appears dead at the moment, but about half the states have banned this negligence claim in

45. AMERICAN TORT REFORM ASSOCIATION, <http://www.atra.org/> (last visited Feb. 7, 2011).

46. AMERICAN TORT REFORM ASSOCIATION: AT A GLANCE, <http://www.atra.org/about> (last visited Feb. 11, 2011) (quoting ATRA president Sherman Joyce). On the “emotion-filled jury trial” as potentially favorable to defendants as well as plaintiffs, see Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J.L. & POL’Y 295, 297–98 (2009).

47. See Brief for Governor Haley Barbour as Amicus Curiae Supporting Cross-Appellee, *Double Quick Inc. v. Lymas*, 2010 Miss. LEXIS 489 (Sept. 23, 2010) (No. 2008-CA-01713), available at <http://www.governorbarbour.com/news/2009/dec/DQbrief.pdf>. According to Governor Barbour, unpredictability applied not only to jury awards but to litigants’ connections to Mississippi itself. *Id.* The state’s version of long-arm jurisdiction permits filings against defendants that do not do business in Mississippi. See MENCIMER, *supra* note 26, at 118–19. Tort-reform critic Stephanie Mencimer has noted the origins of this quirky statutory rule of personal jurisdiction: after television actors from the Bonanza show refused to perform at the Mississippi State Fair in 1964 when they learned the audience would be whites only, the legislature changed the long-arm statute so that the performance contract could be enforced in Mississippi. *Id.*

48. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 239 (2d ed. 2002); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 776 (1995) (noting that tort reformers have focused on noneconomic damages like pain and suffering because these awards are “subjective, unpredictable, and substantial”).

49. See *supra* Figure 2.

50. See Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903 (2006); 18 U.S.C. §§ 922, 924 (2006)).

51. See Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005).

52. Joan R. Rothenberg, *In Search of the Silver Bullet: Regulatory Models to Address Childhood Obesity*, 65 FOOD & DRUG L.J. 185, 206 (2010).

their courts.⁵³ State courts have cooperated; no plaintiff has gained a judgment of damages for excessive fast-food consumption.⁵⁴ The doctrine of preemption also advances the immunity version of predictability.⁵⁵

Many state-level reforms have won passage with the help of predictability rationales; at a minimum, these reforms have in common the trait of constraining jury prerogative, a condition that the tort reform movement associates with unpredictability.⁵⁶ Caps on damages, so cherished by the just-mentioned governor of Mississippi, enhance predictability by pressing a range of adverse outcomes that juries might have priced divergently into a relatively narrow dollar metric. The abolition of joint liability reassures well-heeled tortfeasors that their liability exposure will be limited to the relatively predictable share of responsibility that fact-finders will ascribe to them. Pretrial screening panels bring uniformity to the docket. Statutes of limitation and repose add predictability at a temporal level.

Tort reformers have focused on categories of products and services that they deem vulnerable to the unpredictable ravages of liability. Vaccines, contraceptives, and obstetrics have filled a large tort-reform literature for decades.⁵⁷ More recent writings continue to link liabil-

53. *Id.*

54. Accordingly, a section in a law review note captioned "Can Litigation Work to Fight Obesity? Limited Empirical Evidence For and Against Obesity Litigation" takes the defeat of individual plaintiffs' claims as very likely, if not certain, and then considers whether litigation as macro-strategy can improve this particular social condition. Ashley B. Antler, Note, *The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of Pelman v. McDonald's Corp.*, 15 CARDOZO J.L. & GENDER 275, 295-98 (2009).

55. See Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1119 (1996) (describing "preemption as an immunity from responsibility"); see also *infra* Part IV.B (discussing administrative regulation in terms of how strongly it functions to stop tort claims).

56. See *supra* note 35 and accompanying text; see also Sixteenth Annual Clifford Symposium, *The Limits of Predictability and the Value of Uncertainty*, available at <http://www.law.depaul.edu/clifford/> [hereinafter Clifford Symposium]. For elaboration by writers not associated with either side of the tort reform movement, see, for example, Lee Harris, *Tort Reform as Carrot-and-Stick*, 46 HARV. J. ON LEGIS. 163, 201 (2009) (noting the difficulty of pricing insurance to cover future jury awards, which are hard to predict); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 288 (2009) (reviewing studies and claims about awards of punitive damages).

57. See *Brown v. Superior Court of S.F.*, 751 P.2d 470, 479 (Cal. 1988) (linking expansive tort liability with reduction in the supply of vaccines); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 140, 230 (1988) (protesting that "tort law has made vaccination at best a profitless activity"); *id.* at 140 (linking liability to the withdrawal of contraceptives from the market); *id.* at 162 (stating that "[o]bstetricians and gynecologists have retreated too"); Randall R. Bovbjerg, *Problems and Solutions in Medical Malpractice: Comments on Chapters Six and Seven*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 274, 274 (Peter W. Huber & Robert E. Litan eds., 1991) (evaluating the effect

ity, unpredictability, and the loss of social goods that enhance public health.⁵⁸ As summed up concisely by a leading authority on pharmaceutical liability, the stakes that tort reformers emphasize are first, “innovation,” and second, “patient access” to health-fostering technologies.⁵⁹ Predictability in the form of reduced liability exposure, according to this view, enhances a valuable supply.

B. Praising Unpredictability

Tort reformers reliably denounce the unpredictable results of jury-oriented adjudication and even more reliably reach for the odd, quirky horror story (rather than quantitative data) to support their generalizations about liability.⁶⁰ Professor Benjamin Barton has found it “interesting just how much of the tort reform argument is built on anecdote” given that unpredictability is “one of the tort reformers’ most persuasive arguments against our current system.”⁶¹ Tort reformers seem drawn to the freshness and startle-value of stories. They tell tales about spilled coffee and a CAT scan that allegedly took away psychic powers much more often than, for example, they report a longitudinal decline in the supply of services or products.

of medical malpractice liability on the supply of medical care); Louis Lasagna, *The Chilling Effect of Product Liability on New Drug Development*, in *THE LIABILITY MAZE*, *supra*, at 334, 337 (decrying “the unpredictability of litigation,” which threatens “financial catastrophe for the manufacturer”).

58. See James B. Currier, *Too Sick, Too Soon?: The Causation Burden Under the National Vaccine Injury Compensation Program Following De Bazan v. Secretary of Health & Human Services*, 19 FED. CIR. B.J. 229, 233 (2009); James M. Wood et al., *Product Liability Protection for Stem Cell Research and Therapies – A Proposal*, 18 HEALTH LAW., Oct. 2005, at 1, 13 (advocating the creation of a compensation scheme, preempting tort liability, for injuries ascribed to stem cell interventions); Angela Marino, Note, *The Cost of a Countermeasure: The Expansive Liability Protection of the Public Readiness and Emergency Preparedness Act of 2005*, 20 U. FLA. J.L. & PUB. POL’Y 199, 202 (2009) (“[P]roducts liability lawsuits against pharmaceutical manufacturers have historically created inconsistent, threatening legal precedents.”).

59. Lars Noah, *Platitudes About “Product Stewardship” in Torts: Continuing Drug Research and Education*, 15 MICH. TELECOMM. & TECH. L. REV. 359, 359 (2009).

60. See MENCIMER, *supra* note 26, at 11–32 (reviewing the most repeated anecdotes in a chapter called “Too Good to Check: Media Myths about the Civil Justice System”); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 725–34 (1998) (summarizing “legends” and their uses).

61. Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 276 n.44 (2006). Tort reformers do use some data in their advocacy. For example, Paul Rubin, an economist allied with the movement, has linked the constricting of liability with some safety effects. See PAUL H. RUBIN, *TORT REFORM BY CONTRACT* 58–71 (1993); Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221, 235 (2007). A study highlighted by the American Tort Reform Association found a correlation between limits on the size of medical malpractice awards and the supply of physicians. AMERICAN TORT REFORM ASSOCIATION: HOW TORT REFORM WORKS, http://www.atra.org/wrap/files.cgi/7964_how-works.html (last visited Feb. 6, 2011).

Predictably, courts that review outlandish claims will deny recovery;⁶² but anecdotes make an effective point about the uses of bizarre assertions. Even if plaintiffs' accusations will ultimately fail, their existence reveals a problem. A reputable economic actor offering a product or service ought not to face pleadings like these. Professor Barton concedes that persons who populate juries might fall for "sob stories."⁶³ The anecdote method of transferring wealth in unpredictable spurts has indeed paid off for a few plaintiffs. Barton speculates that tort reformers have been seduced by the triumphs of unpredictability on the other side of the caption and so have embraced unpredictability for themselves.⁶⁴

Another tendentious use of unpredictability in tort reform rhetoric is enthusiasm for innovation, a good thing said to be hobbled by liability.⁶⁵ According to this position, contraceptives, vaccines, and small airplanes in particular now take inferior and limited forms because liability risks are discouraging innovative would-be suppliers from bringing new products to the market.⁶⁶ In an influential early article, Peter Huber noted a heuristic that functions to discourage innovation: judges and jurors regard old, familiar things and technologies as safe, whereas novelty and unfamiliarity connote peril to them.⁶⁷ Not only is innovation inherently unpredictable, but the relation between liability and innovation also defies prediction, as Professor Barton shows in his study of one particular category:

Tort reformers tell a very simple playground design story. Kids loved seesaws and the traditional playground. Despite the children, evil plaintiffs' lawyers and nanny-staters have stripped playgrounds of their equipment and have diluted and wimpified the national identity. I want to tell the opposite story: The old playgrounds were

62. See MENCIMER, *supra* note 26, at 139–40 (describing judicial responses to frivolous contentions by plaintiffs); Jeff L. Lewin, *Calabresi's Revenge? Junk Science in the Work of Peter Huber*, 21 HOFSTRA L. REV. 183, 190 (1992) (noting that trial and appellate judges generally overturn outrageous plaintiffs' verdicts).

63. Barton, *supra* note 61, at 276 n.44.

64. "Years of struggling against the current tort system seem to have subconsciously imprinted the system itself on the critics," writes Barton, apropos of anecdotal rather than data fueling the tort reform movement. *Id.* "By analogy, consider George Foreman's transformation from an angry, glowering heavyweight before fighting Muhammad Ali, to the almost goofy personality that emerged years later. It was as if Ali beat his own personality into Foreman." *Id.*

65. See HUBER, *supra* note 57, at 155; MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 649 (1990); Barton, *supra* note 61, at 269 & n.18 (citing writings by tort reformers); Noah, *supra* note 59, at 359; Kara Sissell, *Study Tallies Tort Litigation's Effect on Innovation*, CHEM. WEEK, Apr. 4, 2007, at 43.

66. See *supra* notes 55–56 and accompanying text.

67. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 278 (1985).

unfun deathtraps that have been thankfully replaced by immensely more amusing and safer playgrounds.⁶⁸

In other words, playground innovation thrived under the constraint of liability, and so the tort reform contention about liability as chafing is refuted by experience literally on the ground. But if liability does limit innovation, as tort reformers have contended, and therefore is a bad thing, then tort reformers who would constrain liability for the sake of protecting innovation cannot be devoted to predictability. To innovate is to create the unpredictable. Creating something predictable may make other contributions, but it is not an innovation.

Another enthusiasm for unpredictability found in the tort reform movement is an enthusiasm for markets in products and services. The tort reform complaint that liability has disadvantaged American product sellers in international competition⁶⁹ rests on a premise that success in this venue is desirable; tort reformers never recommend that sellers cut their losses by withdrawing from competitive markets. A study undertaken for the U.S. Chamber of Commerce investigated how “the threat of lawsuits” impedes small business, a sector cherished for its power to build national wealth.⁷⁰ Like innovation, all market economies (at least the ones that deliver goods beyond a basic subsistence level) necessarily deal in the unpredictable. Profits, price shifts, new financial instruments, the pursuit of diversified investment portfolios, and almost every other mainstay of modern markets would not exist if unpredictability did not exist.⁷¹

68. Barton, *supra* note 61, at 290.

69. See, e.g., A REPORT FROM THE PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1–3 (1991) (reporting views on tort reform of the first Bush Administration); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 180 (1989).

70. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, SMALL BUSINESSES: HOW THE THREAT OF LAWSUITS IMPACTS THEIR OPERATIONS (2007), available at http://www.instituteforlegalreform.com/component/tilr_issues/29.html.

71. Consider, for example, the centrality of unpredictability and predictability in proposals to reform sectors of the American national economy. Shortly before his death, the noted deregulator Alfred Kahn, who brought price competition to American civil aviation, ridiculed the regime he had displaced for the predictable prices and customer service it imposed on the airline industry, a guarantee of profits for which consumers had to pay. Alfred E. Kahn, *Airline Competition Has Rewards*, ITHACA J., Mar. 18, 2010, at 13A. See also Ray Waldron, Op-Ed., *Bush Social Security Plan Isn’t Sound*, ST. CLOUD TIMES, Mar. 31, 2005, at 7B (observing that unpredictability is both “[t]he upside” and “the downside” of a proposal to privatize Social Security); Laura Meckler, *Bill Clinton Says He Should Have Tried to Regulate Derivatives*, WASH. WIRE (Apr. 18, 2010, 2:24 PM), <http://blogs.wsj.com/washwire/2010/04/18/bill-clinton-says-he-should-have-tried-to-regulate-derivatives/> (recalling advice given to the President that complex financial instruments need not be regulated because of predictability: only a small number of Wall Street

One think tank that pursues tort reform with wit and gusto has declared that tort liability for personal injury “erodes the risk-taking and personal responsibility essential to our free society.”⁷² This claim extols uncertain outcomes (which “risk-taking” always entails) as healthy for consumers, sellers, and the public. Liability, which the tort reform movement has long lambasted as a source of dangerous unpredictability,⁷³ is also attacked for imposing rigid predictability on people who want to be free.

C. Predictability and Unpredictability for the Two Sectors

The tort reform movement that gained strength at the end of the twentieth century sheds light on the pro-plaintiff reforms of preceding decades, as summarized in Part II. More overtly than the pro-plaintiff expansion of tort remedies, pro-defendant tort reformers made rhetorical use of predictability. Their movement linked unpredictability with actuarial chaos that in turn will reliably threaten the supply of social goods. Predictability in this perspective becomes a cure: when businesses and professionals (especially physicians) know just what a liability regime can and cannot do to them, they regain their lost confidence and re-engage with consumers. The unpredictability of tort liability harmed the quality of life for everyone, tort reformers argued; reining in doctrine would enhance welfare.

Substituting partisan security and freedom for predictability and unpredictability in this summary, we can alter the formulation slightly in a direction that makes this description more accurate. Pro-defendant reformers deplore the threat to their security and freedom that liability poses. Personal injury claims can not only bankrupt a business; they also can make life unpleasant for its managers, shift public opinion about an entire sector in a negative direction, and stir up enough outrage to generate new statutes and regulations. Trimming liability

professionals buy them, the advice went, and all these buyers are too sophisticated to need protection).

72. CENTER FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE, <http://www.manhattan-institute.org/html/clp.htm> (last visited Feb. 7, 2011). A few sentences later comes an expression of ambivalence about at least one kind of money-making effort:

The Center for Legal Policy is committed to chronicling how trial attorneys in the United States collectively behave just like the biggest of businesses: generating cash from traditional profit centers (like asbestos), exploring potential growth markets (like suits against lead paint manufacturers), and developing new products (like suits against the fast-food industry).

I elaborate on this odd distaste for entrepreneurial hustle expressed by defenders of business interests in Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27 (2004).

73. See *supra* Part III.A.

liberates the defendant cohort; these individuals and entities can pursue their goals with less worry.

I have already noted the inversion of this security-and-freedom paradigm for the opposing cohort.⁷⁴ Tort liability shelters the plaintiff camp from risks attributable to tortious conduct. As seen by the pro-plaintiff group, liability fosters safety by encouraging defendants and would-be defendants to reduce risks and then forcing them to provide compensation when these risks materialize.⁷⁵ Individuals become freer in the sense that they need not retreat as much from engagement with goods and services that could hurt them.⁷⁶

“Your security is my lack of freedom and my freedom is your lack of security,”⁷⁷ the cohorts say to each other, in effect, when they purport to install the ideal of predictability and constrain the deplored unpredictability. A zero-sum impasse results. Policymakers must consider alternatives to predictability and unpredictability in these rhetorical forms that advocates have favored, substituting attention to what people really want from a liability system—security and freedom—at a supra-partisan plane.

IV. ALTERNATIVE ROUTES TO SECURITY AND FREEDOM FOR TORT REFORMERS

The “supra-partisan plane” calls for a modification to our 2x2 matrix. Part II considered predictability and unpredictability in tort reform from the vantage point of plaintiffs; Part III considered them from the vantage point of defendants, showing how unpredictability arguments helped to sell tort reform to state legislatures, state judges, the general public, and, to a lesser extent, Congress.⁷⁸ Unpredictability has been a useful partisan instrument to only one of the two camps. Although predictability rhetoric could be deployed to benefit the plaintiff group, this camp has not lately availed itself of such an application.⁷⁹ References to unpredictability in the last several decades

74. See *supra* Part II.

75. This reasoning informed the pro-plaintiff reformism of Justice Roger Traynor when he sat on the California Supreme Court. See George Priest, *Economics of Civil Justice Reform Proposals*, 9 KAN. J.L. & PUB. POL’Y 401, 405 (2000) (observing that in *Escola v. Coca Cola Bottling Co.* and *Greenman v. Yuba Power Products Co.*, Traynor sought to impose a safety-and-insurance scheme on product manufacturers).

76. See Fennell, *supra* note 19, at 1415–17.

77. On whether security and freedom are zero-sum goods, see *supra* notes 4–5 and accompanying text.

78. See *supra* Part III.B.

79. See Bernstein, *supra* note 40, at 646 (reporting a relatively rare example of predictability used by the pro-plaintiff camp).

have been used to take away gains from the plaintiff side that accreted in the mid-twentieth century. The plaintiff cohort has forfeited some of the predictability that comes from enlarged liability.

Once the partisan goals are understood as security and freedom, with predictability just a means to these ends, the supra-partisan version of the matrix can remove predictability from the axis and substitute what the two cohorts want: security and freedom for themselves. Concerns about predictability may remain, but they can be included under security; security for persons includes a degree of predictability with respect to the behavior of other people.

With the matrix modified, the next question for policymakers becomes what uses to make of it, and here predictability as tort reformers have invoked the concept—that is, predictability with respect to the potentially disruptive behaviors of persons who claim they were injured—is pertinent. Any legal system that has recognized the value of predictability for one camp in a binary struggle must admit that the other cohort also values this quality. Forfeiting the security that had been rooted in liability is, from the plaintiffs' point of view, a loss.⁸⁰ A balance has been altered. In general, unless a group that forfeited security had started out with too much of it, that group now has a claim in distributive justice to gain more security, through alternative reforms, that would adjust for what it lost.⁸¹ How much more may be debated. But at a minimum, policymakers concerned about predictability/security ought to extend this good to more than one cohort.

Concerning the risk of accidental physical injury that individuals face, the three security-enhancing measures that have received the most attention in current American discourses are first, universal health insurance untethered to the employment relationship; second, safety regulation by administrative agencies (in contrast to regulation done indirectly through tort liability); and third, changes to workers' compensation aimed at enhancing redress for employment-related physical harm.⁸² I broach these proposals for the sake of discussion,

80. See John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1027 (2005) (arguing that the defendant cohort had no entitlement to the gains it won by tort reform, because earlier pro-plaintiff shifts in doctrine had repaired "two centuries of law favorable" to elite interests).

81. On distributive justice as justifying and explaining tort liability rules, see TSACHI KERENPAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 84 (2007). Welfare-based arguments might support the same alternative reforms, although the rationale for their installation would not take the form of a partisan claim by a cohort.

82. The order follows the quantity of space that each proposal has occupied in public discussion. The second is the most law-focused of the three and it takes up the most room within legal scholarship.

not to advocate them. Tort reforms of the past that profited business interests do not necessarily establish entitlement to any of these measures as a fix or offset for plaintiffs. The three possibilities discussed below do, however, warrant consideration within a liability system that lately has been reforming to augment security-through-predictability for only one half of a partisan divide.

A. *Health Insurance Untethered to Employment*

Legislation enacted in early 2010 and scheduled at the time to go into effect incrementally over the next four years extended health insurance coverage to millions of Americans who had lacked it.⁸³ The expansions installed some distance between employment and health insurance.⁸⁴ More people became eligible for Medicaid, for example, and “exchanges,” or government-supervised markets, were announced as a way for other persons to buy health insurance policies.⁸⁵ New prohibitions on discrimination against applicants with pre-existing medical conditions function, *ceteris parabus*, to make it easier for persons with employer-furnished health insurance to leave their jobs.

Left mostly undisturbed in the 2010 reforms, however, was a venerable American link. To a larger extent than any other nation, the United States has established both health insurance coverage and the partial payment of health insurance premiums as employment practices. World War II-era wage controls set the link in place. By exempting fringe benefits from the wage category, employers were encouraged to compensate workers with this insurance as a way to retain their labor.⁸⁶ Today, American tax law continues to underwrite this benefit by making premium payments a deductible expense for

83. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.). For a year-by-year sequence of provisions to take effect in the future, see *Landmark Legislation Historic Health Bill Passes Reform Timeline: When Changes Take Effect*, HOUSTON CHRON., Mar. 22, 2010, at A1.

84. This expansion continued a trend. See Daniel Gross, *The Private Option*, SLATE (Sept. 10, 2009, 4:34 PM), <http://www.slate.com/id/2227984/> (reporting Census data showing that “health insurance became less tethered to work” in 2008; the percentage of people covered by employment-based health insurance fell by almost one percentage point from 2007 and the percentage of full-time and part-time workers who received health insurance through their jobs fell).

85. See Peter Grier, *Health Care Reform Bill 101: How Long Will Reform Take?*, CHRISTIAN SCI. MONITOR, Mar. 20, 2010, at 6 (describing expansion of Medicaid). Utah has one of these exchanges in effect, though at the time of this writing it is still fledgling. See UTAH HEALTH EXCHANGE, www.exchange.utah.gov (last visited Feb. 7, 2011).

86. Bruce Shutan, *Starting from Scratch*, EMP. BENEFIT NEWS, Nov. 2009, at 38, 38.

employers and exempting work-furnished health insurance from employees' taxable income.⁸⁷

The result is unfortunate, as economists and other commentators from across the political spectrum have agreed.⁸⁸ In the 2008 presidential election, the Republican nominee, John McCain, included in his platform a plank to remove the tax subsidy for employer-furnished health insurance.⁸⁹ A noted Democrat has also favored untethering: "Think of employer-provided health care as a kind of back-door, \$126 billion-a-year health insurance system," wrote Robert Reich, the former Secretary of Labor.⁹⁰ "But what a bizarre system it is. First, you're not eligible for it when you and your family are likely to need it the most"⁹¹ In 2009, the Business Roundtable, an organization comprised of CEOs devoted to pursuing pro-business policies, published a reiteration of the familiar complaint that employer-furnished health care imposes a burden on American industry that is unfair because international competitor businesses do not share it.⁹²

Although the three proposals surveyed in this Part focus on security rather than freedom, separating health insurance from employment is noteworthy in that it would foster both, assuming that health insurance would be furnished by some other means after being untethered from work. The platform of candidate John McCain, mentioned above, offered uncoupling in the form of a tax credit for individuals to purchase insurance on their own in place of the government-subsidized group health insurance benefit that many receive through work.⁹³ This suggestion, which would have done little to advance "security," went nowhere, and post-2008 discussions of health care reform have taken for granted the necessity of a government subsidy in order to expand coverage. With this understanding in place, security

87. See *id.*; Dayna Bowen Matthew, *The "Race Card" and Reforming American Health Insurance*, 14 CONN. INS. L.J. 435, 437 (2008).

88. See David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 23 (2001) ("Employment-based health insurance is the Rodney Dangerfield of health policy: it gets no respect from anyone.").

89. Kevin Sack & Michael Cooper, *McCain Health Plan Could Mean Higher Tax*, N.Y. TIMES, May 1, 2008, at A22.

90. Robert B. Reich, *Why We Should De-Couple Health Care from Employment*, COMMONDREAMS.ORG (Nov. 18, 2005), <http://www.commondreams.org/views05/1118-27.htm>.

91. *Id.*

92. Business Roundtable, *Health Care Value Comparability Study* (2009), available at <http://www.businessroundtable.org/sites/default/files/BRT%20exec%20sum%20FINAL%20FOR%20PRINT.pdf> [hereinafter Business Roundtable]. On the familiarity of the complaint, see *supra* note 69 and accompanying text.

93. See Linda J. Blumberg & John Holahan, *An Analysis of the McCain Health Care Proposal*, URBAN INSTITUTE HEALTH POLICY CENTER (Sept. 22, 2008), http://www.urban.org/UploadedPDF/411755_mccain_health_proposal.pdf.

and freedom increase when governments intervene to disconnect health insurance from employment. Again, the 2x2 matrix is instructive:

FIGURE 4: FURNISHING HEALTH INSURANCE SEPARATE FROM THE EMPLOYMENT RELATIONSHIP

PARTISANSHIP	Pro-Defendant	<i>Lower per-employee payroll costs mean wider opportunities to spend revenue</i>	<i>Less need for injured people to find a solvent defendant to pay their medical bills should reduce liability exposure, à la Japan and Western Europe</i>
	Pro-Plaintiff	<i>Employment at will, so to speak: no need to cling to an undesirable job</i>	<i>Confidence that medical expenses will be covered regardless of (unpredictable) circumstances</i>
		Freedom	Security
FREEDOM AND SECURITY			

Filling in the squares of the matrix helps to answer a basic question about health care reform: Why have tort reform leaders, especially ones in the Business Roundtable category of corporate CEOs, generally declined to express any desire for universal health insurance? Surely it would be advantageous for repeat-player defendants to install a scheme in which injured people would get their medical bills covered without resorting to litigation. The partisanship axis dividing the players into two cohorts sheds light on the mystery by noting that the pro-defendant camp would not wish to furnish the pro-plaintiff camp with more security and freedom.⁹⁴ The pro-plaintiff “freedom” box on the matrix, which mentions the freedom of a discontented

94. See Adams, *supra* note 5 and accompanying text. Dr. David Himmelstein, co-founder of Physicians for a National Health Program, participated in a forum sponsored by the Business Roundtable where a moderator asked the audience, consisting mostly of representatives of big business, which approach to health care reform they favored. Russell Mokhiber, *The Top 10 Enemies of Single-Payer*, COUNTERPUNCH (Apr. 16, 2009), <http://www.counterpunch.org/mokhiber04162009.html>. The majority raised their hands for government-sponsored single payer. *Id.* Asked to explain the discrepancy, Himmelstein mused, “In private, they support single payer, but they’re also thinking—if you can take away someone else’s business—the insurance companies’ business—you can take away mine. Also, if workers go on strike, I want them to lose their health insurance.” *Id.*

worker to quit her job without worrying about her health insurance, identifies a state of affairs that might displease the employer cohort.⁹⁵

Consistent with this hypothesis, when an alliance of employers gave its own ideas for reform at the end of its report about unfeasibly high insurance costs, it set out to write a recommendation that “builds upon the employer-based health insurance system.”⁹⁶ Why choose to build upon something so ruinously expensive to oneself? Similarly, the Campaign for Responsible Health Reform, an initiative of the U.S. Chamber of Commerce, has described itself as “a grassroots campaign to educate businesses and citizens about the need for meaningful and affordable health reform *that protects employer-sponsored health insurance*”; the initiative also purports to “show[] what’s at risk with government-run health care and other dangerous proposals.”⁹⁷ Neither measure from the business sector gives reasons for this apparent dislike of a reform idea that would enhance security and freedom for this constituency. Partisanship as delineated in our 2x2 matrix—including the perception of one’s security and freedom as binary and zero-sum—offers an explanation of the stance.

B. Administrative Regulation

Of the three suggestions presented in this Part, strengthening regulation⁹⁸ in order to take over some of the work that liability now handles has received the most attention from legal scholars and judges.⁹⁹

95. The principal-agent problem, though not so named, is noticed by Jonathan Gruber, *A Shot in the Arm*, WASH. MONTHLY, May–June 2009, at A14, available at <http://www.washingtonmonthly.com/features/2009/0905.gruber.html> (“[T]he workers [employers] retain through job lock are those who value insurance the most, not necessarily those who are the best long-term fit for the company.”).

96. Business Roundtable, *supra* note 92, at 10. The ideas emphasize employer control: for example, according to the report, “[W]e must encourage all Americans to participate in employer- or community-based prevention, wellness and chronic care programs.” *Id.* at 11. The recommendation of “empowering consumers with more information about good quality health care,” *id.*, does not indicate whether these consumers are employees, dependent family members who are covered under employer-furnished policies, or human resources personnel who buy coverage for a company.

97. CAMPAIGN FOR RESPONSIBLE HEALTH REFORM, <http://www.responsiblehealthreform.com/campaign> (last visited Feb. 7, 2011) (emphasis added).

98. I use “regulation” here as shorthand for rules prepared and enforced by administrative agencies, excluding the big literature on “regulation through litigation.” See generally REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002); Ronald J. Rychlak et al., *Regulation Through Litigation*, 71 MISS. L.J. 613 (2001).

99. See, e.g., Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990); Symposium, *Regulatory Compliance as a Defense to Products Liability*, 88 GEO. L.J. 2049 (2000). A more recent contribution is A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010). In another recent work, Kyle Logue favors a tripartite contrast: (1) tort liability, (2) “command-and-control regulations”

This literature, which speaks of “institutional competence,”¹⁰⁰ pits regulation by administrative agencies against liability as policy alternatives; the two are rival candidates for the same security-and-freedom job. Each can displace the other.¹⁰¹ As approaches to the costs of accidents, regulation and litigation pose stark contrasts: ex ante versus ex post; prevention versus remediation; expert assessment versus lay power; agencies versus courts; the virtue of spelled-out criteria on one hand versus after-the-fact reparative effort on the other.

For this purpose, examples of regulation as an alternative to liability may be classified following a scheme adopted in a model statute that a tort reform group has offered: this scheme employs a continuum showing how thoroughly regulations eliminate tort remedies.¹⁰² The Price–Anderson Act illustrates liability-eliminationist regulation.¹⁰³ This federal statute imposes “absolute displacement” of state tort law for injuries resulting from civilian nuclear power¹⁰⁴ concurrent with intricate safety regulation by a federal agency, the Nuclear Regulatory Commission. At the other end of the displacement spectrum is the rule that compliance with safety statutes alone ordinarily does not

(what I am calling simply “regulation” here), and (3) “Pigovian taxes.” Kyle D. Logue, *Coordinating Sanctions in Tort*, 31 CARDOZO L. REV. 2313 (2010). I pass over his third category, which seems to exist mainly in academic writing; for my purposes it is not different enough from regulation simpliciter.

100. The term is neutral on its face, but in application tends to reference the relative incompetence of courts. See, e.g., Richard Craswell, *Remedies When Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOODE HALL L.J. 209 (1995) (exploring settings where private actors are better suited to understand the terms of a contract); Jeffrey Rudd, *The Evolution of the Legal Process School's “Institutional Competence” Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045, 1051–52 (2006) (arguing that “institutional competence” as applied silences courts, the public, and Congress).

101. This Article, which treats liability as central and regulation as an alternative, inverts the analysis that a regulation scholar would apply to displacement. See, e.g., Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1363–64 (1996) (arguing that tort reform might have merit but would be perilous “if existing environmental statutes are seriously weakened and the U.S. is forced to rely solely on the common law actions of private individuals for environmental protection”).

102. See Victor E. Schwartz et al., *The Impact of Federal & State Safety Regulations on Liability*, THE STATE FACTOR, June 2009, at 1, 1–2 (describing the American Legislative Exchange Council's Model Regulatory Compliance Congruity with Liability Act; this model statute offers states three versions of regulatory-compliance shelter from liability to choose from).

103. See 42 U.S.C. § 2210 (2006).

104. Logue, *supra* note 99, at 2334. Logue includes workers' compensation among his examples of absolute displacement. *Id.* I discuss workers' compensation separately, see *infra* Part IV.C, rather than here because workers' compensation does not relate so closely to workplace safety regulation as does Price–Anderson immunity to Nuclear Regulatory Commission regulation.

constitute a defense to tort liability.¹⁰⁵ In the middle are regulations interpreted by courts to preempt tort liability to varying degrees.

Strong examples of preemption, located near the absolute-displacement end of the spectrum, include compliance with federal labeling law by cigarette sellers, which expressly preempts failure to warn claims by consumers injured by tobacco,¹⁰⁶ and compliance with federal speed limits by railroads, which can immunize the railroads from liability for moving their trains too fast and causing injury.¹⁰⁷ Weaker instances of preemption emerge when different courts disagree about the tort-precluding effects of compliance with a particular federal regulation.¹⁰⁸ Located nearby on the spectrum—nearer to no-displacement than absolute displacement—are regulations where compliance creates a rebuttable presumption against a finding of negligence or product defect.¹⁰⁹

This variety within administrative regulations renders two spaces on our matrix variable depending on the content of the regulation in question. Administrative rules whose compliance immunizes a supplier or service provider from liability generate much security for the defendant cohort and a correspondingly large drop in the freedom of the plaintiff group. Where regulatory compliance does not immunize the regulated industry from liability, the plaintiff group retains or gains more freedom than it would hold under conditions of industry immunity. Regulations whose compliance has no effect on liability—the standard tort rule—maximize plaintiff freedom and, if enforced, greatly increase security for this group:

105. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 16 (Proposed Final Draft No. 1, 2005); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1135–36 (1988).

106. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992).

107. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

108. See Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 690–91 (2009) (reporting decisional law that finds both a presence and an absence of preemption in the Consumer Product Safety Act).

109. See Logue, *supra* note 99, at 2339 n.57 (citing eight state statutes that provide for this rebuttable presumption following compliance with a federal or state standard).

FIGURE 5: STRENGTHENING REGULATION

PARTISANSHIP	Pro-Defendant	<i>Pursuing safety through rules rather than liability may save businesses money, meaning wider opportunities to spend revenue.</i>	<i>Rules lay out more predictable tasks for the regulated industry than does liability. Rules that immunize the regulated industry provide extraordinary security.</i>
	Pro-Plaintiff	<i>Depends on the nature of the regulation: liability-eliminating regulation greatly reduces this group's freedom (to bring tort claims), whereas regulations that do not offer immunity in exchange for compliance have no direct effect on its freedom.</i>	<i>Increased confidence that products and services are safe</i>
		Freedom	Security
FREEDOM AND SECURITY			

Similar to filling in the squares of the health insurance matrix,¹¹⁰ arraying regulation and litigation inside our 2x2 matrix provides a useful reminder of plaintiffs' stake in the discussion. It is no accident that the tort-displacement axis as a device to classify regulations comes from the defense camp:¹¹¹ the displacement perspective inquires into the presence of security and freedom, but only as just one of the two cohorts experiences these goods. Focused on only defendants as decision makers and stakeholders, this stance on regulation is indifferent to the desire for security and freedom that plaintiffs hold.¹¹²

110. See *supra* Figure 4.

111. See *supra* note 79 and accompanying text.

112. See Alan Calnan & Andrew E. Taslitz, *Defusing Bomb-Blast Terrorism: A Legal Survey of Technological and Regulatory Alternatives*, 67 TENN. L. REV. 177, 304 (1999) (noting that while preemption doctrine "attempts to accommodate the regulatory interests of the state and federal governments, it makes no provision for the economic welfare of the victims of exempt products or services"). Consider the following analogy: the traditional categories of trespasser, licensee, and invitee divide visitors to land into three hierarchical categories, based on what the defendant thinks of them. Tort law offers no comparable classifications that invite plaintiffs to divide defendants into groups based on what plaintiffs think of them. As I have elaborated elsewhere, tort liability rules manifest empathy or—in the words of Adam Smith—fellow-feeling for cohorts of plaintiffs and defendants. See Bernstein, *supra* note 46, at 297.

The lower left quadrant of the matrix notes the effect of displacement on freedom for the plaintiff cohort: plaintiffs are freer when they may bring tort claims and less free when they may not. The lower right quadrant appreciates regulation as a source of safety for consumers.¹¹³ In sum, the matrix provides balance for the discussion about liability and regulation by noting the stakes for a cohort that has its own desires for security and freedom. This group will as a general rule want safety rules and tort liability to coexist with neither regime preempting the other. Like the interests of defendants that have dominated discussions about the intersection of regulation and tort liability, the interests of plaintiffs warrant attention.

C. Workers' Compensation

More than a century ago, a durable reform increased predictability and security among the two cohorts of workers and employers—a group that overlaps significantly with this Article's cohorts of plaintiffs and defendants—while taking away some freedom from both. Under what has been described as a Progressive-era “bargain” that mediated between the two groups' interests,¹¹⁴ employers gained the predictability of insurance in contrast to the unpredictability of tort liability; employees gained the predictability of scheduled payments for injuries in contrast to the unpredictability of adjudication. While bestowing these gains, the installation of workers' compensation also took away various prerogatives: the opportunity to apply blame and fault, access to a jury, and the complementary freedoms present in defenses, excuses, impleading, cross-claiming, and other forms of responses to accusations that litigants enjoy in court. For both sides, the freedoms of tort liability take time to exercise; removing those freedoms offered the prospect of payments that were faster and surer than tort judgments, thus benefiting workers, and easier to budget and plan for, thus benefiting employers.

113. On the truism that regulation enhances consumer safety, see Polinsky & Shavell, *supra* note 99, at 1440–41. For a suggestion that linking regulation with safety might be simplistic, see Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 Nw. U. L. REV. COLLOQUY 54, 61–62 (2008) (arguing that patients can be better off under a regime that preempts the tort liability of drug manufacturers because this regime assigns decision-making powers to physicians who can make informed decisions of whether to use the drug).

114. The notion of workers' compensation as a bargain between two sectors is explored in Jason M. Solomon, Note, *Fulfilling the Bargain: How the Science of Ergonomics Can Inform the Laws of Workers' Compensation*, 101 COLUM. L. REV. 1140, 1144–46 (2001). Like other dichotomies in this Article, this “bargain” between employers and workers simplifies a more complex history. See Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation “Reform,”* 50 RUTGERS L. REV. 657, 675–76 (1998).

The quality of the bargain may have been harmed at an early stage, when some state supreme courts struck down workers' compensation schemes as violative of substantive due process rights. These courts agreed with employers that forcing a defendant to pay for injuries without having been adjudicated at fault constituted a taking of property without due process in violation of the federal and state constitutions.¹¹⁵ Most decisional law of the era went the other way,¹¹⁶ but the early setbacks cast a chill: "[T]he very fear of unconstitutionality impelled the legislatures to pass over the ideal type of coverage."¹¹⁷ Legislative timorousness may have weakened these programs from their start.

One treatise summarizes the provisions of a typical contemporary workers' compensation statute. In exchange for the loss of their right to pursue a tort claim, workers injured by accident in the course of employment are entitled to receive "modest but assured benefits,"¹¹⁸ which "include cash-wage benefits, usually around one-half to two-thirds of the employee's average weekly wage, and hospital, medical and rehabilitation expenses."¹¹⁹ Although considerable variation exists among the state statutes, claimants are universally spared the obligation to prove employer fault, and their payments are not reduced or vitiated by their comparative negligence or assumption of risk.

Observers of these programs have published litanies of criticism, much of it deeming workers' compensation inadequate to remedy the physical harms that employees experience on the job. They have proposed legislative modifications that would increase both the amounts paid out per worker and the odds of prevailing on a claim. Back we go to the matrix.¹²⁰ Which enhancements of security and freedom emerge when these changes go into effect?

115. The torts casebook that I used as a student opened with the notorious *Ives v. South Buffalo Railway Co.*, 94 N.E. 431, 448 (N.Y. 1911), which invalidated the nation's first mandatory workers' compensation scheme. See also *Cunningham v. Nw. Improvement Co.*, 119 P. 554, 566 (Mont. 1911) (invalidating mandatory workers' compensation for railroad workers).

116. See Katherine V.W. Stone, *A Fatal Mismatch: Employer-Centric Benefits in a Boundary-less World*, 11 LEWIS & CLARK L. REV. 451, 457 (2007).

117. LARSON'S WORKERS' COMPENSATION LAW § 2.07 (2009).

118. *Id.* § 1.01.

119. *Id.*

120. The binary is complicated here by multiplicity among defendants: the cohort includes both employers enjoying the tort-immunity gain of the bargain on one side and manufacturers of machines used in workplaces, a group that does not share in this immunity and is subject to products-liability claims, on the other. Yet when workers' compensation returns provide ample compensation for injured employees, these injured employees have less incentive to invest in products-liability litigation, suggesting that gains to security and freedom apply to both halves of the defendant cohort.

FIGURE 6: ENHANCING WORKERS' COMPENSATION

PARTISANSHIP	Pro-Defendant	<i>Converting injured workers from litigants to insurance beneficiaries may reduce strife.</i>	<i>Less need for injured people to pay their medical bills using tort litigation should reduce liability exposure, à la Japan and Western Europe.</i>
	Pro-Plaintiff	<i>Chance to pursue riskier employment aware that any future injury will be more adequately paid for</i>	<i>Confidence that medical expenses for workplace injury will be covered despite the unavailability of tort damages</i>
		Freedom	Security
FREEDOM AND SECURITY			

Here the working definition of “enhancing workers’ compensation” means better compensation for injured workers, continuing the notion of a bargain between the two sectors. Ways to make workers better off include state-mandated increases in coverage for particular types of injuries, increased payouts per injury that can be funded in part by state tax revenues (rather than employer-paid premiums), and narrowing the defenses available to employers who dispute coverage. All of these changes would increase security for plaintiff workers.¹²¹ Reforms like these adjust for the loss of tort remedies by giving workers more advantages within this insurance scheme. The original bargain had left workers better off than they now stand.

My provisional endorsement of reform ideas that industry would find costly arises at a difficult time to make such a proposal: as this Article goes to press, a period of severe economic distress continues to afflict the United States.¹²² Industries employing workers in injury-

121. *But see* KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 59–60 (2008) (reviewing data suggesting that increasing the cost of workers’ compensation premiums may depress wages).

122. For a snapshot of the employment side of this depression in place at the time of writing, see U.S. BUREAU OF LABOR STATISTICS, *EMPLOYMENT SITUATION SUMMARY* (2010), available at <http://www.bls.gov/news.release/emp/sit.nr0.htm>. Improvement of the national economy is certainly possible, perhaps even likely. It may render my misgivings obsolete. Economists and sociologists surveying the United States labor market, however, have predicted bleakness for the foreseeable future, especially on the employment front. See CONGRESSIONAL BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2009 TO 2019*, at 3 (2009), available at <http://www.cbo.gov/ftpdocs/99xx/doc9957/01-07-Outlook.pdf>; Katherine Newman & David Pedulla, *Inequality in America and What To Do About It*, *THE NATION*, July 2010, at 17 (reporting predictions by sociologists that young people, the most recent entrants into the workforce,

prone jobs continue the decline that has long plagued this sector.¹²³ With white-collar employment having dwindled as well,¹²⁴ the injury-prone sector grows even more vulnerable because its members have less access to alternative types of jobs. These dire employment conditions might get worse if workers' compensation were to become more costly on a per-employee basis.¹²⁵

In recognition of this difficulty, another iteration of our matrix can clarify the task of making recommendations: How can particular reforms enhance the freedom and security of industry as well as that of workers? We have already noted that workers' compensation, when understood in the context of a wider liability regime, benefits defendants. Compensation by insurance rather than litigation has a plausible connection to reduced labor-and-employment strife, freeing up managerial time and money and allowing these resources to be deployed to be spent in pursuit of the business's interests. This freedom, like other freedoms for defendants surveyed in this Article, can be understood as security in the form of shelter from litigation.¹²⁶ We have also considered the parallel forms of security and freedom for workers.¹²⁷

With workers' compensation understood as a fixture, which reforms would enhance the security and freedom it offers? Behold the matrix again, with all of its boxes left blank for now except the obvious one:

will be especially scarred by their early experiences in a dire labor market); Don Peck, *How a New Jobless Era Will Transform America*, THE ATLANTIC, Mar. 2010, at 42 ("The Great Recession may be over, but this era of high joblessness is probably just beginning.").

123. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996) (documenting the disappearance of robust blue-collar employment). More recently, construction has been hard hit. See Paul Davidson, *Construction Unemployment Still on Rise*, USA TODAY, Feb. 25, 2010, at 3B (reporting in the winter of 2010 that the construction industry was in its worst straits since the Great Depression); *Construction Employment Falls to 14-Year Low in June*, FORCONSTRUCTIONPROS.COM (July 6, 2010, 10:20 AM), <http://www.forconstructionpros.com/online/Construction-News/Construction-Employment-Falls-to-14-Year-Low-in-June/4FCP16825> (reporting an unemployment rate over twenty percent, more than double the average for all workers, in June 2010). Meanwhile, the recession also saw the loss of nearly 2.2 million factory jobs. Davidson, *supra*, at 3B.

124. See U.S. BUREAU OF LABOR STATISTICS, *supra* note 122 (reporting large unemployment levels).

125. See ABRAHAM, *supra* note 121, at 59–60 (warning that workers pay for high workers' compensation costs).

126. See *supra* Figure 6, first row.

127. See *supra* Figure 6, second row.

FIGURE 7: WORKERS' COMPENSATION REFORMS: MOVING BEYOND JUST PAYING OUT MORE?

PARTISANSHIP	Pro-Defendant		
	Pro-Plaintiff		<ul style="list-style-type: none"> ▪ <i>Higher payments per injury</i> ▪ <i>More covered injuries</i> ▪ <i>Fewer defenses</i>
		Freedom	Security
FREEDOM AND SECURITY			

Fidelity to the century-old scheme and to the principle of an imposed "bargain" requires fair and reliable compensation for injured workers. Lawmakers ought to remember the historical promise to these workers: more security gained and access to tort litigation lost. The reform suggestions noted above in the lower right quadrant would keep the old promise in mind by increasing the funds available and the odds of collecting an award; the literature on workers' compensation agrees that such rectification is necessary.

Now, what else? Consider the other quadrants: (1) freedom for plaintiffs, (2) freedom for defendants, and (3) security for defendants. Both scholarly and popular writing on workers' compensation is replete with reform proposals; readers who find the security-and-freedom template pertinent might find it useful to apply as a sorting device. Evaluating reforms in the context of security and freedom for plaintiffs and defendants is a way for non-experts in workers' compensation who come to the subject from a torts background to join, and perhaps contribute to, an urgent discussion about the problem of workplace injury. Consider some current proposals to improve the law, administration, and delivery of workers' compensation.¹²⁸ Several fall into quadrants other than the most familiar one, security for plaintiffs.

1. *Freedom for Plaintiffs*

The most fundamental source of freedom for injured workers would be the reinstatement of tort liability for injury—a partial rather than a

128. I acknowledge with gratitude the help of Tyler Korff on this work of retrieval and synthesis.

total reinstatement, so that workers' compensation as insurance would still exist. As noted above in the context of regulation and litigation, access to courts gives plaintiffs a freedom symmetrically matched to the security that tort immunity gives defendants. If the literature contending that the tort immunity present in workers' compensation combined with the inadequacy of payments that injured workers receive constitutes a breach of the Progressive-era bargain is correct, then paying out more is only one of two solutions; opening the courts would provide another rectification.

Workers' compensation immunity already contains several judge-made exceptions. They include liability for intentional torts, injuries arising under the employer's "dual capacity" (i.e., the injury resulted from an interaction between the worker and the employer outside the employment relationship), and bad faith.¹²⁹ Expanding tort liability without eliminating the bar could enhance freedom for plaintiffs in several directions. For example, courts could provide a tort remedy for workers discharged from employment for complaining about safety violations.¹³⁰ The Americans with Disabilities Act could be interpreted to expand access to courts by injured workers.¹³¹ Courts could classify more plaintiffs as independent contractors or other non-employees, freeing them from the tort immunity that employers enjoy.¹³² They could also expand judicial review of workers' compensation decisions.

2. Freedom for Defendants

The workers' compensation reform proposal that most overtly expands freedom for defendants is mandating or expanding consideration of the workplace history in the setting of insurance premium

129. Joan T.A. Gabel, Nancy R. Mansfield & Robert W. Klein, *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 410–14 (1998).

130. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 394–95 (2005).

131. See Gabel, Mansfield & Klein, *supra* note 129, at 414–22 (reporting on this expansion with disapproval).

132. See, e.g., Rachel Cartier, Comment, *California Farm Owner Liability for Heat-Related Injuries to Their Independent Farm Labor Contractor's Farm Worker Employees*, 19 SAN JOAQUIN AGRIC. L. REV. 93 (2009) (reviewing the controversy); Maria de Cesare, Note, *Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 692–96 (2006) (advocating that adult film performers be permitted to pursue tort claims for work-related transmission of disease). For a variation on the independent contractor theme in this context, see Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete-Patients*, 50 ST. LOUIS L.J. 185, 204–05 (2005) (proposing that professional athletes who play team sports be treated for workplace injuries by physicians who do not work for the teams, thereby removing the workers' compensation bar and installing deterrence).

prices. This measure, known as experience rating, frees employers to decide how much they want to invest in safety.¹³³ Like most interventions that affect freedom, experience rating also affects security, but not in the zero-sum sense that has occupied this Article. Deployed by providers of workers' compensation insurance, experience rating is said to have reduced "workplace fatalities by more than 25%."¹³⁴ Consistent with a hypothesis about moral hazard, the absence of experience rating endangers workers: "When premiums have not been fully experience-rated, employers have been less prone to provide a safe work environment"¹³⁵ Experience rating is already the norm in workers' compensation insurance markets, but governments could create more of it by mandating the collection of pertinent experiences in industry and making the rating calculations more transparent.

3. Security for Defendants

To fill in the content of this last square, policymakers must supply reforms that bestow predictability on employers. At this point we are familiar with defendants as seekers of security: this Article has shown how predictability in the tort reform context—the rewriting of tort liability rules, that is, rather than the insurance scheme that this section considers—has consisted of moves toward immunity. The cohort links predictability with shelter (for itself) from tort liability. Workers' compensation, however, already delivers to them this good. Unlike tort reform, reforms of workers' compensation that would make injured persons less entitled to receive compensation for workplace injury has no plausible association with predictability outside of this partisan cohort.¹³⁶ Although experience rating imposes responsibility

133. Note, *Fixing Medical Malpractice Through Health Insurer Enterprise Liability*, 121 HARV. L. REV. 1192, 1195 (2008) (praising this freedom for its deterrence value).

134. Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227, 281 (2008).

135. Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53, 79 (1998). But see Solomon, *supra* note 114, at 1177 n.112 ("[T]he empirical evidence regarding the success of experience rating as a prevention tool is mixed.").

136. Predictability in the context of trying to anticipate what will reduce workers' compensation payouts—by analogy to the quest for predictability in liability reform, see *supra* Part III.A—is elusive, at least when I am doing the predicting. For example, undocumented alien workers comprise a relatively easy group of workers to disempower through harsh applications of workers' compensation law. See J. Tim Query, *Workers' Compensation for Undocumented Workers: A Discussion of the Regulatory Complexities*, J. INS. REG. 1, 6 (2006), available at <http://business.nmsu.edu/~tquery/research/Workers%E2%80%99Compensation%20for%20Undocumented%20Workers-A%20Discussion%20of%20the%20Regulatory%20Complexities.pdf> (referring to "[a] [v]ulnerable and [e]xploited [w]orkforce"). Yet even this weak sector installs predictability of several kinds. First, one might expect undocumented workers not to seek compensation payments when they get hurt on the job. Many probably live up to that prediction, but one survey reports a robust case law, suggesting that an employer cannot assume that hiring

for accidents on employers, it does so in a setting of insurance rather than liability.

In this context, security for the defense sector comes from workers' compensation reforms that make the actuarial future of an employer easier to predict. Many possibilities are available for consideration. The level of detail that they include extends past the scope of this Article; and so I briefly note two current examples of reforms that would enhance security for defendants. To repeat my contention that both of the partisan cohorts of this Article are similarly situated—that predictability is not just a defense-side tort reform priority—I have chosen one reform from the conservative side of contemporary American politics and the other from the liberal wing.

One aspect of security for defendants is clarity about the scope of the scheme: Which injuries and workers are covered? Who has the power to resolve disputed claims? Consider new legislation enacted in a conservative state. Recent comprehensive reform had the ostensible goals of helping to “grow Oklahoma’s economy while still protecting the injured worker and helping them on their road to recovery,” as the speaker of the state house of representatives put

undocumented workers will eliminate its workers' compensation payouts. See Marjorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5TH 523 (2004) (reporting case law and statutes that both permit and refuse this coverage). I also would have predicted that regardless of whether undocumented alien employees in fact wish to make compensation claims, several states would have codified a prohibition on their doing so; such a ban would please the immigrant-unfriendly segment of the electorate without inconveniencing employers in the mode of other controls on illegal immigration, especially restrictions on hiring. But I found only one state prohibition. WYO. STAT. ANN. § 27-14-102 (2009) (“An alien who is not authorized to work by the United States . . . is not an ‘employee’ under (a)(vii), and thus is excluded from workers compensation coverage.”). The majority of states explicitly cover “aliens” in their workers' compensation statutes. National Employment Law Project, *Undocumented Workers: Preserving Rights and Remedies After Hoffman Plastic Compounds v. NLRB* (unpublished manuscript), available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf. Finally, I predicted that courts would be more supportive than legislatures of undocumented workers, another wrong (or at best incomplete) assumption. For example, the Virginia legislature overruled a state supreme court decision that had held these workers ineligible. See VA. CODE ANN. § 65.2-101 (Supp. 2007). In New York and California, courts have deemed undocumented workers ineligible for workers' compensation even though state statutes expressly cover these workers. See *Ramroop v. Flexo-Craft Printing, Inc.*, 896 N.E.2d 69, 72 (N.Y. 2008) (ruling against an employee notwithstanding the inclusion of undocumented workers in N.Y. WORKERS' COMP. L. § 17); *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767, 775 (Cal. Ct. App. 1999) (ruling against an employee notwithstanding the inclusion of undocumented workers in CAL. LAB. CODE § 3351). Even assuming that employers are better than I at predicting, which seems likely, and know how to reduce their payouts for workplace injury, gains from this predictability do not extend past this cohort. The costs of these accidents fall on injured workers and the public.

it.¹³⁷ Touted as likely to “save businesses at least \$60.5 million” a year,¹³⁸ the four reform bills in the legislative package tightened the definitions of such key phrases as “major cause” and “objective medical evidence,” raised the minimum credentials of workers’ compensation judges, and provided for enhanced training of claims adjusters.¹³⁹ Although most of the changes functioned to reduce benefits available to injured workers, the Oklahoma reform also expanded judicial review of disputed claims. If it succeeds, this undertaking would enhance the common law of workers’ compensation disputes. Employers gain security from the clarity of knowing how recurring disagreements between employers and workers are resolved.

Another aspect of security for defendants returns us to the first proposal of this Part: health insurance untethered to employment.¹⁴⁰ In a 2009 white paper on workers’ compensation reform, the American Public Health Association (the APHA) advocated replacement of the current “fragmented” regime with “a national program with uniform coverage of health care and adequate loss-of-earnings benefits for all occupational injuries and illnesses.”¹⁴¹ Going further, the APHA called for integrating workers’ compensation “in a seamless manner with the Social Security disability program; benefits should be provided for all permanent injuries and illnesses.”¹⁴²

This proposal finds security for defendants in an alternative regime that separates them from responsibility to pay for injuries associated with their worksites. Knowing that a remote compensation scheme will take care of claims that are now charged to employers under an experience-rating system furnishes these defendants with security. The unpredictability and uncertainty that characterize employer-funded insurance for workplace injury would be greatly mitigated by a universal health and disability program that the federal government would administer. Employers might have their own reasons to prefer their current vexations, to be sure.¹⁴³ But they would enjoy more se-

137. Michael McNutt, *Henry OKs Workers’ Comp Bill*, THE OKLAHOMAN, June 12, 2010, at 20A (quoting House Speaker Chris Benge).

138. *Oklahoma: Overhaul of Comp System Complete, Heads to Governor*, RISK & INS. ONLINE (June 28, 2010), <http://www.riskandinsurance.com/story.jsp?storyId=464485608>.

139. McNutt, *supra* note 137, at 20A.

140. See *supra* Part IV.A.

141. *Worker’s Compensation Reform*, OCCUPATIONAL HEALTH AND SAFETY SECTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION (Draft 2009), available at <http://www.apha.org/NR/rdonlyres/B240302E-94EF-4456-966F-6AEF329C289E/0/WorkersCompDraftNov102009.pdf>. The report is unpaginated; the quote appears on the sixth page.

142. *Id.* at 7.

143. See *supra* note 67 and accompanying text.

curity if they did not have to buy insurance to compensate their employees for workplace injury.

V. CONCLUSION

"To all appearances, lawyers abhor uncertainty," declared one authority on predictability and unpredictability.¹⁴⁴ "They learn in law school to seek out the certain and object to its absence. As practitioners, they shun the unpredictable, counseling settlement rather than trial and avoidance of that allegedly least predictable of decision makers—the jury."¹⁴⁵ No doubt. Like many other writers, I have also had occasion to remark on risk aversion as an occupational trait of lawyers¹⁴⁶ and began this Article with a quick paean to predictability as necessary to human life. Yet my paean to *un*predictability had to follow immediately—just as lawyers themselves, the predictability fans, have been heard to call for more unpredictability.¹⁴⁷

In this version of the predictability–unpredictability binary, the two words make the most sense as instruments, the means to divergent ends. What do we talk about when we talk about unpredictability and predictability?¹⁴⁸ This Article has argued that pleas for more predictability amount to pleas for more security. These law reformers want to feel safe from external onslaughts. Human beings desire control over the threatening aspects of their environments. When they themselves are controlled, however, typically they will feel chafed.

144. Clifford Symposium, *supra* note 56.

145. *Id.*

146. See Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 500–01 (2009).

147. The jurisprudential struggle between rules and standards finds value in the less predictable latter category. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701–02, 1710–11 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (1992). Another famed dichotomy of jurisprudence, the hedgehog versus the fox, locates value in not being sure of "one big thing." See Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 919 (2010) ("Pluralism presents the possibility that one may be in the wrong. The preservation of the losing opinion confronts the winner with the presence of the loser. Rather than a triumphant presentation of a neat, consistent case, pluralism reminds winners that they may need to rethink, concede, or change."). In the torts context, some defenses of punitive damages rest on a belief that adding (unpredictable) juries as decision makers adds a desirable *in terrorem* effect to what defendants face in response to their misconduct. See F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349, 360 (2008) (approving of "necessary vagueness"); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 108 (2002) (considering the possibility of randomness). Uncertainty may also be necessary to deterrence. See Clifford Symposium, *supra* note 56.

148. Cf. Anita Bernstein, *Foreword: What We Talk About When We Talk About Workplace Privacy*, 66 LA. L. REV. 923 (2006).

Examining predictability and unpredictability as rhetorical instruments rather than goals in themselves shows that what their invokers care about is security for themselves via some shelter that does not compromise or abrogate their freedom. Partisans wish to maximize their own shares of these goods. In the tort reform context, the most striking evidence for this proposition comes from the historical embraces of predictability by persons who sought advantages for plaintiffs and of unpredictability by persons who sought advantages for defendants.¹⁴⁹ Neither cohort has taken a consistent stance on predictability.

Once predictability and unpredictability become transparent as devices, the next question for policymakers is how to use them to achieve valuable ends. In its ideal form, this quest proceeds on what I have called a supra-partisan plane: that is, taking into account the needs of two cohorts with contrary interests without being bound to advance their agendas. Policymakers are free to relocate predictability and unpredictability beyond the existing battlegrounds chosen to achieve cohort-favoring ends. For defense-focused tort reformers, predictability might mean immunity or caps on damages; to their counterparts in the other camp, it might underlie support for continuing unfettered access to the courts. Law reformers independent of both camps might apply the word to health insurance untethered to employment, stronger administrative regulation, and more reliable workers' compensation.¹⁵⁰ I have mentioned these three measures not to play a game of Gotcha with defense-favoring tort reform advocates who have invoked predictability with great vehemence, but rather to say that the pursuit of predictability has been indeterminate and partial.

Many calls for more predictability in tort doctrine should be heard and understood as "I desire more security for myself and the cohort to which I belong, and I don't wish to forfeit my freedom."¹⁵¹ Resistance to these calls for more predictability comes from another set of stakeholders' mirror-desire to maximize its own freedom and security. Disinterested tort policymakers respond to the paired demands by seeking the greatest social good in a balance. Their balancing task is enhanced by an understanding of what a predictability-pleader really wants.

149. *See supra* Parts II, III.

150. *See supra* Part IV.

151. Not all, however. *See supra* notes 20–21 and accompanying text (giving examples of pleas for predictability that do not originate in zero-sum partisan struggles).