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# The Enterprise of Liability

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# Lecture

## THE ENTERPRISE OF LIABILITY

Anita Bernstein\*

### PROLOGUE: ENTERPRISE AND LIABILITY

In May 2003, I visited Cuba to look for tort liability under conditions of iron-fist socialism: Can tort law coexist, one might wonder, with official repudiation of private-property rights? What meanings will “compensation” and “deterrence” and “damages” have in a legal system that condemns any individual’s private accreting of money? For answers, I scheduled a series of interviews with Cuban lawyers.<sup>1</sup> I started out trying to find ones who specialized in torts. There weren’t any. My first clue about tort liability in Cuba.

A second clue on the subject would arise after each workday, when dinnertime rolled around. Foreigners who want to dine in Cuba, especially Havana, look for *paladares*. A *paladare* is a dining establishment, serving dinner only, located inside a private home; a 2001 news story described *paladares* as “the only small private businesses authorized in Cuba.”<sup>2</sup> One or two dinners in non-*paladare* restaurants motivated me to seek out these alternative venues. They gave a visitor a soupçon of adventure along with her best shot at a decent meal. Having missed the Roaring Twenties, I am not sure what a speakeasy feels like, but *paladares*—slightly furtive, unlisted in the telephone book, unmarked

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\* Sam Nunn Professor of Law, Emory University. Giving the Monsanto Lecture version of this Article, on January 29, 2004, was a joy as well as an honor. For kindnesses bestowed, I thank the Valparaíso community, including Dean Jay Conison; Paul Brietzke and other members of the faculty; Valparaíso students, who provided a warm and stimulating audience; and the adroit administrative staff. Thanks also to John C.P. Goldberg and Robert Blecker for their insights and comments on a draft, to Howard Fink for sympathetic attention, and to colleagues at New York Law School, Alabama, and Emory Law Schools—Bill Buzbee in particular—for the comments they shared with me at workshop versions of this Lecture. Riki King of New York Law School contributed able research assistance.

<sup>1</sup> All subsequent references to tort law in Cuba come from the interviews that I conducted in May 2003. Because I had to use a translator, knew little about the motives or bona fides of my informants, and could never repair my ignorance of Cuban tort law—the subject has a very scant literature in Spanish and no literature in English—I use my gleanings only impressionistically. They should not be misconstrued as attempts at empiricism.

<sup>2</sup> Dalia Acosta, *Cuba: New Blow to Private Initiative*, INTER PRESS SERVICE, Feb. 16, 2001, available at LEXIS.

as restaurants out front—had the speakeasy air of semi-illicit nightlife at the margins.<sup>3</sup> The governing dictatorship had reluctantly permitted Cubans to open *paladares* in 1995, following several years of economic devastation attributed to the end of the Soviet dole in 1990.<sup>4</sup> Living in their economically isolated island nation—more than a billion dollars a year in remittances from U.S.-based relatives cannot quite prop the country up<sup>5</sup>—many citizens in 2003 needed the cash that a sanctioned home-based business could provide. Demand came from customers like me. We dollar-spending foreigners preferred not to turn our dinner plates over to state-controlled establishments, where bureaucrats script their menus unable to know what might taste good (fresh fish or tomatoes, for instance) several months later.

Fidel Castro tolerated the *paladares*, I gathered, but he made it clear he didn't like them. Their proprietors had to labor under irksome regulation. High taxes on receipts. No lobster on the menu allowed, for reasons unexplained. No more than a dozen patrons at a time. No workers on the payroll unless they were related to the owners. (That last rule was often honored in the breach, if physical appearances of the multiracial 'family' personnel were any guide. I also observed tables set to accommodate more than twelve customers. Cubans were reported to defy the lobster ban too, but I never saw any on the *paladares'* menus.)<sup>6</sup> But that wasn't all. Presumably *paladare* owners ignored El Jefe while they hustled a living in the homecooked-meal business but I, less used to Cuban discourse, was struck by reports of his unremitting rhetoric against them. Entrepreneurs, said the Leader. Profiteers. Capitalists chasing a dollar.<sup>7</sup>

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<sup>3</sup> Or the Chestnut Tree Café. See GEORGE ORWELL, 1984, at 49 (1949) (describing this fictitious café as an uneasy place within the totalitarian regime, even though "no law, not even an unwritten law" prohibited frequenting it).

<sup>4</sup> For a harrowing, lightly fictionalized account of economic hardship in Cuba circa 1994 and 1995, see PEDRO JUAN GUTIERREZ, *DIRTY HAVANA TRILOGY* (Natasha Wimmer trans. Farrar, Straus, and Giroux 2001) (1998). One chapter called "The Cannibals," depicting near-starvation, is especially vivid. *Id.* at 354-62.

<sup>5</sup> Guillermo I. Martinez, *Little Notice of Big Money*, SUN SENTINEL, Feb. 5, 2004, at 21A (reporting estimate of \$1.3 billion).

<sup>6</sup> Theodore Dalrymple, *Why Havana Had to Die*, CITY J., Jul. 2002, at 92.

<sup>7</sup> I heard such names from fellow travelers; one print source reports the epithet "millionaires." *Castro Castigates Cuba's New Rich*, TORONTO STAR, Jul. 24, 1998, at A2. See generally Tracey Eaton, *Cubans Act Like Old Pros with Their Income Tax System*, DALLAS MORNING NEWS, Mar. 16, 2001 (reporting government statement denouncing "the cult of capitalist fetishes and the mentality of the small property owner"); David Rennie, *Cuba "Apartheid" as Castro Pulls in the Tourists*, DAILY TELEGRAPH, Jun. 8, 2000, at 18 (quoting a

*Paladare* quests filled my evenings. Then there were the days, the interviews. Isolated and hungry for international recognition, Cuban lawyers tried again and again to remind me that they were in a profession, if not an independent one. They wanted to lecture on their Spanish civilian heritage. In turn I wanted to ask them about money. How do you get paid when you work on a tort case? (No real answer.) Can you describe a typical claim, if there is one? Which damages can a plaintiff recover? Does the legal system recognize pain and suffering?

Even socialist Cuba had some room for tort liability, it turned out. One paradigmatic defendant appeared to be the tourist whose negligent driving of a rented car injures a Cuban citizen. No sense letting him off without paying, Cubans figured, when he'd face liability back in Sao Paulo or Calgary for doing the same thing. The state-owned bus company had been sued for injuries attributed to a vehicular defect. But on the whole, despite my persistent questions, Cuban lawyers shared few reminiscences about tort cases they had seen.

What about damages? I repeated. Could somebody please show me the money? In a system that does not recognize private enterprise, all non-human entities—including schools, hospitals, manufacturing plants, retail stores, the dreaded restaurants, the joint ventures that build hotels—are part of the nearly bankrupt state, and Cuba presumably could not tolerate money-making runs on the national treasury (although my questions about sovereign immunity, in response to the story about the bus defect, never did get clear answers). Eliminate entities, then. That left individuals as players in the liability system.

Which individuals? I could see almost no payoff to anyone for casting any Cuban citizen as either a defendant or a plaintiff. At the time of my visit, most Cubans of means had been off the island for decades. The average person in Cuba was staying alive on fewer calories per day than the daily ration even in low-income Ecuador and Paraguay.<sup>8</sup> The monthly wage for most jobs, paid in dubious pesos, hovered at what would trade for less than twenty U.S. dollars, with very little space

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dissident: "The government fears the emergence of independent businessmen, who do not need their rations, or certificates of political rectitude to get a good job.").

<sup>8</sup> Press Release, Bureau of Inter-American Affairs, *Zenith and Eclipse: A Comparative Look at Socio-Economic Conditions in Pre-Castro and Present Day Cuba*, U.S. Dep't of State tbl. 3 (2002), available at <http://www.state.gov/p/wha/ci/14776.htm> (last visited Sept. 14, 2004).

between the lowest and highest state-mandated salary.<sup>9</sup> Even members of the fortunate minority with access to dollars must be virtually judgment proof, I concluded.<sup>10</sup> (An admirer of *la revolucion* might have noted the irrelevance of tort liability in a different way, focusing on how well off a victim of tortious conduct is in Cuba compared to his counterpart in the United States. The guarantee of housing and food, however meager, along with decent medical care, certainly mitigates the consequences of injury.)

Tort liability has no job to do in Cuba, I concluded. No ruinous medical expenses for a plaintiff to recoup. Nobody to recoup them from.<sup>11</sup> The nation lacks tort liability not for the usual overfamiliar reasons—"harmony ideology,"<sup>12</sup> norms against suing, generous welfare-state payments to citizens, courts disdained as corrupt or otherwise inaccessible, too few lawyers, and so on—but because it has no money and no ideology to support the pursuit of money.

The connection between tort liability and wealth—taken for granted in the rich United States of America, and dramatized for me personally in Cuba—occupies this Article. At one level this relation is so obvious as to be trivial. The American tort reform effort holds that tort liability is excessive in the United States because of money: Lawyers go after well-heeled defendants, it is perceived, for the same reason that bank robbers go after banks.<sup>13</sup> Plaintiffs, their lawyers, and those who speak for them all do little to refute this contention. Injury linked to wrongful conduct

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<sup>9</sup> See Robert J. Caldwell, *Time Warp: A Failed Revolution Leaves Cubans Poor, Oppressed*, SAN DIEGO UNION TRIBUNE, Apr. 21, 2002, at G1 ("The Ministry of Economics and Planning puts the average Cuban salary at 200 to 250 pesos a month. At current exchange rates, that's between \$7.40 and \$9.25. Adding non-cash government benefits raises that range to between 300 and 350 pesos a month. At best, that's about \$13 a month.").

<sup>10</sup> I did encounter one Cuban citizen who appeared to have assets comparable to those of a middle-class American. He was an architect who gave high-priced private tours of Havana. I think he owned a newish automobile, an astounding thing for a Cuban individual to possess.

<sup>11</sup> My informants insisted there *were* damages in Cuba. For example, one plaintiff was reimbursed for a foreign wheelchair she managed to import. Taxi fares to treatment centers have also been covered. One plaintiff, scheduled for a promotion and tiny pay raise just before her injury, recovered the value of the pay raise. Moreover, one informant said in response to my question, income from work in tourism—the famous tips that drive the economy and make waitressing an exalted profession—would be compensable. But as of May 2003, the bottom line on Cuban tort liability was: not much.

<sup>12</sup> LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990).

<sup>13</sup> See Anita Bernstein, *Restatement (Third) of Torts and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1374-75 (2001) (referring to bank-robber trope).

has nonpecuniary effects, but American tort law and civic culture take almost no need of them. No constituency presses seriously for apology, therapeutic jurisprudence, medical monitoring and equitable relief in lieu of cash damages, the criminal prosecution of injury-causing malefactors, or other remedies without cash attached.<sup>14</sup> Money makes tort liability go round.<sup>15</sup>

At another level, however, the relation is underexplored and warrants investigation, which I begin here with reference to a famed phrase, “enterprise liability.” First coined in the mid-twentieth century, this term refers to the law-based obligation of for-profit businesses to internalize the costs of activities that cause physical injury. According to the enterprise liability hypothesis, these businesses tend to accrete wealth, and by hypothesis can afford to pay their own way.<sup>16</sup> This transfer of wealth from defendants to plaintiffs compensates for what injury-causing entrepreneurial activity costs individuals. Over decades, enterprise liability theorizing introduced changes in tort law, of which reducing the plaintiff’s obligation to show fault was the most fundamental.<sup>17</sup> Although contemporary observers have disagreed on whether enterprise liability has gone too far—that is, to the point of threatening the well-being of business beyond any gain associated with cost internalization—they take for granted the entitlement of business to call itself Enterprise and keep the word to itself, not sharing it with any other institution.<sup>18</sup>

In response, I propose a term to complement “enterprise liability,” referring to a sector that both gives effect to enterprise liability and has become an enterprise in its own right. At one time poorly capitalized, unable to plot long-term or national-level strategy, and unconscious of

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<sup>14</sup> *Id.* at 1376.

<sup>15</sup> A similar link connects wealth to regulation. See Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 291 (1992) (“As more people satisfy their basic needs for food, shelter, and the like, they move on to previously neglected desires. Suddenly, they want more and better health care; they want a cleaner environment.”).

<sup>16</sup> See Fleming James, Jr., *An Evaluation of the Fault Concept*, 32 *TENN. L. REV.* 394, 399-400 (1965) (explaining “enterprise liability” with reference to a belief “that an activity . . . should pay for the accident loss it causes because, as a general proposition, each enterprise in our society should pay its own way.”).

<sup>17</sup> See *infra* Part I.B.

<sup>18</sup> See, e.g., Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 *SMU L. REV.* 163, 200 (2004) (expressing a concern “that liability not take so large a portion of the capital of enterprises that too little is left to animate a free enterprise system . . .”).

itself as a political actor, the plaintiffs' bar has now achieved a kind of parity with the for-profit corporations that it hales into court.<sup>19</sup> It has grown beyond its earlier role as an instrument used to reverse a tendency within some businesses to externalize their costs onto injured persons. It is "the enterprise of liability."<sup>20</sup>

Just as "enterprise liability" refers to both individual corporate entities (such as the Coca-Cola Bottling Company of Fresno, named in one famous decision<sup>21</sup>) and whole sectors (such as product manufacturers and its subgroups like the pharmaceutical industry), "the enterprise of liability" covers different actors: individual lawyers, the small firms in which most of them work, and the plaintiffs' bar in general, an aggregation that in recent years has realized significant gains from cooperation and mutual effort.<sup>22</sup> As I detail below with reference to

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<sup>19</sup> Following the Monsanto tradition, my discussion of the plaintiffs' bar refers to personal injury litigation in particular, while drawing occasionally on the literature that focuses more on securities practice. See Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902 n.10 (1996) (noting that references to entrepreneurial tendencies in the plaintiffs' bar began in the securities context and have moved to personal injury law).

<sup>20</sup> Using "the plaintiffs' bar" in this monolithic sense to cover all lawyers who represent plaintiffs, from those who collect billions in fees through those who cannot afford even to rent office space, receives admonition in Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219 (2001). Kritzer argues that spectacularly successful plaintiffs' firms now have so little in common with other plaintiffs' lawyers that it has become misleading to generalize about the plaintiffs' bar. *Id.* at 233-38 (noting that the two groups have conflicting interests on solicitation, caps on damages, and fee shifting, among other issues of professional regulation). As always, a reader of Kritzer must appreciate his careful presentation of evidence. He may be right. But not yet, in my view. The divergent interests he lists are more moot points than live controversies—most of them are not in play; none has provoked open division among lawyers who represent plaintiffs—and the humble origin of multimillion-dollar plaintiffs' lawyers further blurs the line between the two groups, at least from the viewpoint of the less successful. See John Helyar, *They're Ba-a-ack*, FORTUNE, June 11, 2000, at 222. Perhaps in the future, stratification will become deep enough to render the phrase "plaintiffs' bar" obsolete. In that event, my "enterprise of liability" thesis would still hold, but it would be wrong to equate the enterprise with the "plaintiffs' bar." What I later discuss as a landmark of scholarship on the enterprise of liability, Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001), see *infra* Part III, shares my view that the plaintiff's bar is more like one entity than two. *Id.* at 207-14 (finding significant ground held in common between "the drab" and "the golden" segments of the plaintiffs' bar).

<sup>21</sup> *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944).

<sup>22</sup> Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000). Aggregation of plaintiffs is not new. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV.

the tenets of free enterprise, the plaintiffs' bar now has as good a claim on "entrepreneurial" and "enterprise," the adjectives, as does the contemporary American business corporation.<sup>23</sup> Yet despite the esteem for enterprise that prevails in the capitalist United States, American scholarship and public discourse seldom omit a dash of hostility when they refer to the entrepreneurial tendencies of the plaintiffs' bar. Writers sound a little like Castro railing against the *paladares* as they attack plaintiffs' lawyers for their hustle, initiative, and bringing to a market that which a market wants.<sup>24</sup>

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(forthcoming 2004) (exploring nineteenth-century instances of aggregation). The new condition here is gain for their lawyers.

<sup>23</sup> See *infra* notes 34-47 and accompanying text.

<sup>24</sup> An early reference to the plaintiffs' bar as "entrepreneurial" is John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]. In this article Coffee, an expert on the law and economics of business enterprises, omits saying why the word entrepreneurial has negative connotations for him as he describes this kind of litigation in negative terms, focusing on its noncompliance with a client-as-principal, lawyer-as-agent model. *Id.* at 885-90. In a later article Coffee complains that at one time "the plaintiffs' attorney was once seen as a public-regarding private attorney general," but "increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions"—as if such an exemplar of *homo economics* deserves opprobrium. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000).

Numerous electronic searches of "enterprise" and "entrepreneurial" yielded zero applause for the plaintiffs' bar. For a sampling of uncomplimentary references, see Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 570 (2001) (defining "entrepreneurial litigation" as "a plaintiff's filing of a lawsuit with a low probability of success viewed *ex ante*, in the hopes of extracting a 'nuisance settlement' from a defendant"); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government's Tobacco Litigation*, 33 CONN. L. REV. 1143, 1167 (2001) (revising DeBow's definition: "a weak lawsuit with a low probability of success *ex ante* filed in the expectation of achieving a quick, lucrative settlement"); Victor E. Schwartz, et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. LEGIS. 483, 499 (2000) (protesting that in state courts, "entrepreneurial contingency fee attorneys can bypass the rigorous review given by federal judges and obtain certification of questionable claims and approval of outrageous settlement agreements."); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215 (2001) (using the adjective to lead with a trenchant sentence: "Entrepreneurial plaintiffs' lawyers and activist state judges are increasingly working to bypass elected lawmakers and impose their own public policy choices on Americans."). For milder misgivings, see Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495 (2001) ("Should important social policy decisions . . . be entrusted to entrepreneurial private lawyers?"); Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 837 (2003) (noting that "adversarial legalism"



Below I defend the contributions of an American institution that offers up the bounty of what enterprise delivers: wealth and choice. The argument begins with terminology: To provide a context for my neologism, Part I expounds briefly on "the free enterprise system" and "enterprise liability," both well-established phrases. "Enterprise liability," "the free enterprise system," and "the enterprise of liability" all refer to markets, and so Part II describes markets for the services that a plaintiffs' bar can render. Part III continues with a description of the plaintiffs' bar as a mature, amply capitalized, and responsive institution. This enterprise furnishes two distinct items, or perhaps serves two markets: It provides plaintiffs with legal services, and it gives nonparties to litigation—citizens, that is—an array of the political goods they have indicated that they want. Part IV discusses these goods. Part V responds to three objections. Part VI, the conclusion, compares the plaintiffs' bar with the American institution that most often gets called an enterprise: the business corporation. The comparison shows the plaintiffs' bar to be at least equally entitled to the laurel of "enterprise."

## I. "ENTERPRISE"

### A. *What Is the Free Enterprise System?*

What do we admire when we admire free enterprise?<sup>25</sup> Great books and fine minds have pondered the question,<sup>26</sup> but for present purposes a ready-to-digest synthesis will serve: Robert McTeer, chief executive officer of the Federal Reserve Bank of Dallas, has posted his own composition, "The Free Enterprise Primer," on the bank's website.<sup>27</sup>

McTeer gives praise to six features. First is *consumer sovereignty*, which may be contrasted to central planning, as a means to distribute and receive goods. Second, *profit*: Human beings are motivated to seek financial gain; appeals to other motives are likely to be less availing. Third, and related to the first two, is *competition*: Sellers and other

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creates "opportunities and incentives for angry disputants, organized political and ideological interest groups, and entrepreneurial lawyers.").

<sup>25</sup> Caveat: I do not say that "we," all of us, admire free enterprise and "the free enterprise system;" nor that free enterprise deserves admiration; nor that free enterprise is better, more benign, or more consistent with some natural design than its competitors. The purpose of Part I.A is only to describe the free enterprise system with reference to what its admirers admire.

<sup>26</sup> See FRIEDRICH A. VON HAYEK, *ECONOMIC FREEDOM* (1991); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

<sup>27</sup> Bob McTeer, *The Free Enterprise Primer*, at <http://www.dallasfed.org/mcteer/essays/primer.html> (last visited Sept. 14, 2004).

providers work hard to give clientele better deals than other providers can offer. Fourth, says McTeer, is the linking of *income with output*. In contrast to the Marxist cliché that would give “to each according to his needs,” the free enterprise system allots prosperity in relation to what a provider can generate. Fifth is the use of *prices to achieve order* through “the invisible hand” – because markets function to establish prices, every individual can arrange a mix of tradeoffs to align with his or her tastes and needs. McTeer concludes with *choice*. Even a wise, fair, and deliberative government acting as central planner cannot deliver the variety that the free enterprise system turns over to individual consumers.

Although this summary is brief, it can be stated even more tersely: Free enterprise renders wealth and choice. The chance to make oneself wealthier draws providers and consumers together in a market. Their behaviors use dollars to promote the strongest money-generating endeavors and kill off the weaklings. Selling and buying within a nation will tend to make that nation prosperous—as one need not travel to Cuba to know (but the trip helped me grasp this point). Adding choice to wealth redeems “free enterprise” from the charge that it focuses excessively on cold cash: Choice gives meaning to human agency and autonomy, which all individuals desire.<sup>28</sup> Even vast material prosperity can feel oppressive when it is not chosen; an individual might rationally sacrifice some wealth to get more freedom to make choices. In fostering “the wealth of nations,” then, free enterprise builds not only monetary gain but welfare in a broader sense, including the pursuit of happiness through choice.

#### B. What is Enterprise Liability?

This term flourishes in scholarly writing much more than in doctrine; observers and commentators have renegotiated its meanings with little direct effect on the outcome of decisional law, or the fate of litigants. Yet the term retains both descriptive and normative force. Below I consider what limits “enterprise liability,” as now understood, might place on the formation of “the enterprise of liability” as a new term that esteems the plaintiffs’ bar. I first retell its official story, then look at some lacunae in the phrase.

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<sup>28</sup> Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1204 (1997).

## 1. The Official Story: Cost Internalization and Deterrence

The ambitions of enterprise liability are straightforward: The law should place the costs of product-caused physical injury "on those who are in position to pass part of the loss on to purchasers of their products or to factors employed in the production of their products (including labor and capital), in this way bringing about a fairly wide spreading of accident losses," writes Guido Calabresi.<sup>29</sup> Because the system is "more expensive to administer than simple social insurance," loss spreading is probably not "the only goal" that the enterprise liability system pursues; enterprise liability seeks deterrence as well.<sup>30</sup> The first American judicial opinion to speak explicitly about compelling product manufacturers to internalize the costs of their activities also mentioned deterrence: "It is to the public interest to discourage the marketing of products having defects that are a menace to the public," wrote Roger Traynor in what became the harbinger of strict products liability as stated in the most-cited section of the *Restatement of Torts*.<sup>31</sup> Within the compensation scheme that enterprise liability builds, product manufacturers "function as insurers against defect-caused losses" by "selling casualty loss insurance policies to product purchasers and charging premiums as part of the prices for those products."<sup>32</sup> This insurance function works alongside deterrence in a two-part endeavor. Enterprise liability seeks to encourage safety and then, to the extent safety cannot be attained, impose the costs of accidents on enterprises rather than hurt persons.<sup>33</sup>

## 2. Eligibility to Be Considered an Enterprise

Although the "enterprise" in "enterprise liability" has always been for-profit business, lexicons speak more generally of an undertaking or the execution of a design.<sup>34</sup> Usages of "enterpris," "[e]nterprinses," and

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<sup>29</sup> GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 50 (1970).

<sup>30</sup> *Id.* at 54.

<sup>31</sup> *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). On the connection of this decision and the later *Greenman v. Yuba Power Products, Inc.*, 377 P. 897 (Cal. 1962), also written by Traynor, to the emergence of § 402 of the *Second Restatement*, see JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 19 (5th ed. 2004).

<sup>32</sup> HENDERSON & TWERSKI, *supra* note 31, at 30.

<sup>33</sup> See generally David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Cases for Future Loss*, 88 VA. L. REV. 1871, 1879-1882 (2002) (pairing "Optimal Deterrence to Prevent Unreasonable Risk" with "Optimal Tort Insurance to Cover Reasonable Risk").

<sup>34</sup> OXFORD ENGLISH DICTIONARY 293 (2d ed. 1989).

"entrepryse" in the fifteenth and sixteenth centuries, reported in the *Oxford English Dictionary* as the earliest versions of the word, do not refer to moneymaking.<sup>35</sup> The for-profit gloss on "enterprise" apparently did not develop until the early nineteenth century. Nevertheless, in commentary on contemporary American law "enterprise liability" excludes not only such potential defendants as charities, departments of government, and service-providing individuals, but also what Calabresi contrasts as "simple social insurance."<sup>36</sup>

This outcome is puzzling, because nothing in the stated goals of cost internalization and deterrence implies that the entity held liable must be a for-profit business. For instance, the government holds a power to tax that resembles the product manufacturer's power to set prices. Where the resemblance ends, it would appear that the government is better-suited than a for-profit business to achieve the goal of internalization.<sup>37</sup> Deterrence also may be difficult to impose on, or expect from, the modern corporation.<sup>38</sup>

The disconnect between the stated purposes of enterprise liability and the difficulty of achieving these goals through litigation against private for-profit business suggests that in order to be consistent with what "enterprise" means inside the phrase "enterprise liability," the neologism under development in this Article must describe something motivated at least in part to seek profit; it must emulate McTeer's *homo economicus*. The exclusion of charities, governments, and individuals from "enterprise" demonstrates that enterprises are private, for-profit entities. They have no other defining traits.<sup>39</sup>

### 3. The Passivity Paradox

The chief doctrinal move of enterprise liability was to ease the plaintiff's burden of proving the defendant's fault. In some versions, enterprise liability professes not to care whether the defendant's behavior fell short of a standard of conduct; in others, by contrast,

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<sup>35</sup> *Id.*

<sup>36</sup> See CALABRESI, *supra* note 29, at 50-54.

<sup>37</sup> See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 520 (1960) (noting that among for-profit actors, only monopolists have the power to set prices).

<sup>38</sup> See *infra* notes 129-138 and accompanying text.

<sup>39</sup> For instance, pursuant to enterprise liability a plaintiff can prevail against business defendants without proving that a finding of liability would cause cost internalization or deterrence, or advance any other goal.

enterprise liability seeks to achieve the outcomes of a fault- or negligence-based regime—that is, to hold the defendant responsible only if fault or negligence reasoning could support the same result—but takes a shortcut or two to get there, such as allowing the product itself to support a *res ipsa* like inference. This second version of enterprise liability appears in *Restatement (Third) of Torts: Products Liability*, which assigns strict liability to manufacturing-defect claims (while rejecting it for all other products liability claims) on the ground that a manufacturer, whose product deviated from its own design, has demonstrated its responsibility for injury.<sup>40</sup> The contrasting approach, taking no interest in fault, is enterprise liability as seen through the lens of tort reform—that is, blameless business defendants forced to pay for greed-fueled lawsuits—and also turns up, for example, at the end of Virginia Nolan's and Edmund Ursin's book on enterprise liability, where the authors recommend holding possessors of injurious premises liable for injuries suffered there, without regard to anyone's behavior on or near this space.<sup>41</sup>

These two versions of enterprise liability show that the doctrine's signature move—relieving plaintiffs from their obligation to prove fault—of itself says nothing about whether enterprise liability deems fault central or not. Just as the development of *res ipsa loquitur* did not impede the fault-focused growth of negligence law but simply made the plaintiff's job of proving negligence easier, back in the nineteenth century, enterprise liability can coexist with the version of fault-focused law that has come to us from the twentieth century: All one needs to do is say yes to the *Restatement* version and no to Nolan and Ursin's. It appears that the heart of enterprise liability is not a particular stance on fault. What remains? Plaintiff passivity. Enterprise liability ascribes to for-profit business all the activity in its sights.

The goals of internalization and deterrence address only the behavior of defendants, proceeding as if injured persons and their agents have almost nothing to do.<sup>42</sup> While the contract-based antecedents of

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<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 2(a) (1997).

<sup>41</sup> VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY 168 (1995).

<sup>42</sup>

Reminiscent of Traynor's contemporary Dagwood Bumstead of the comic strip *Blondie*, the consumer is an ordinary man, something of a dupe, lulled into false security and manipulated into purchases that are profitable to a manufacturer. Using a product in his bumbling fashion, he risks physical injury, for which he is presumptively not

modern products liability law have always recognized the consumer as an agent—scholars of accident law, at least since *The Problem of Social Cost*, understand that the plaintiff's existence, if not her behavior, is just as central to a tort claim as the defendant's challenged conduct or product<sup>43</sup>—enterprise liability theory has never been able to see hurt persons as in any way robust. To the extent these plaintiffs do anything, they goof: They misuse the goods that enterprises supply. Enterprise liability writers do discuss contributory negligence, comparative fault, and aspects of the prima facie case that consider user error;<sup>44</sup> these writings do not, however, consider the strengths of plaintiffs (or their lawyers) as institutional actors. Tort-reform critics have exploited this gap effectively, implying that anyone who favors expansive liability is either an infant who wants the nanny state to burp him or an abettor of such persons: the spillers of hot coffee, the psychics who feel they've lost their clairvoyance, and the oafs who crash through skylights while attempting burglary.<sup>45</sup>

Its construct of the hapless, doing-nothing, good-for-nothing plaintiff notwithstanding, enterprise liability could not exist without the force that comes from the left side of the caption. Although its approach to multiple-victim injury eases the burdens of suing, it does not eliminate them. Enterprise liability is not imposed on a business unless a plaintiff, aware of her injury and willing to assert a claim, connects with a lawyer who can get through a sequence of tasks: The lawyer must be able to communicate with the client, execute a retainer contract, prepare a summons and complaint and (usually) accompanying memoranda, proceed with discovery and pretrial procedure (at which point

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responsible. Moreover he cannot, according to Traynor, achieve fair redress through the old-fashioned doctrines of negligence and contract. Negligence obliges him to prove more than he often can, and the rules of contract were designed for sharp commercial transactions between equals, rather than between a manufacturer and an injured consumer.

Anita Bernstein & Paul Fanning, "Weightier than a Mountain": *Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 54-55 (1996) (citations omitted) [hereinafter Bernstein & Fanning, *Japan*].

<sup>43</sup> R.H. Coase, *The Problem of Social Cost*, 2 J. L. & ECON. 1 (1960).

<sup>44</sup> See, e.g., Mark D. Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157, 1166-69 (1992) (discussing ways in which enterprise liability can take account of the plaintiff's conduct); Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129 (1990) (urging a version of enterprise liability that does not take the plaintiff's conduct into account).

<sup>45</sup> See Michael L. Rustad, *Books of Note*, 7 CIV. JUST. DIG., Summer/Fall 2002, at 14 (referring to the "tall tales" that tort reformers tell).

"enterprise liability" as doctrine finally begins to lend client and lawyer a hand), parry the defensive maneuvers of an opponent that is usually wealthier, more experienced, and more able to withstand risk, and then manage the case until settlement or judgment. This path is not always difficult but it does require initiative, even in the much-caricatured context of class actions where plaintiffs and their lawyers are portrayed as something like the flow of a mindless, avaricious torrent. One demand that enterprise liability always makes of plaintiffs and their lawyers is to be assertive rather than passive. This eccentric view of the roles of plaintiff and defendant inverts a paradigm: In litigation generally, plaintiffs are initiators and defendants are passive.<sup>46</sup>

### C. *Summary and Transition*

"Enterprise liability" and "the free enterprise system" both address the attainment of material gain and autonomy, or wealth and choice. Regarding wealth, the first of these goods, enterprise liability aspires to transfer monies from businesses to injured persons who, but for liability, would bear the externalized costs of the activity. It seeks also to increase aggregate wealth by rewarding businesses for marketing safer items and removing dangers from the market. The standard tort-reform denunciation of enterprise liability as tending to reduce the freedom of consumers notwithstanding,<sup>47</sup> enterprise liability also advances choice. It forestalls choice only insofar as its competitor is laissez-faire noninterference: Compared to any other mode of law-based regulation, enterprise liability is positively libertarian. It refrains from criminalizing the sale of dangerous goods or services, and allows providers to pass the costs of liability to market-based volunteers, rather than taxpayers. As a form of legal control, enterprise liability chooses to foster choice—the options available to both sellers and buyers—rather than override choice by fiat.

The story that "enterprise liability" and "the free enterprise system" both tell—juxtaposing providers against consumers, sellers against buyers, wishers against wish-fulfillers, internalization against externalization, incentives to pursue against incentives to desist—gives inadequate attention to a key constituent of both terms. Preoccupied

<sup>46</sup> See generally Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1 (2001) (exploring the law's characterizations of dealings between people who initiate or encroach and people who respond to these encroachments).

<sup>47</sup> Contributions of this genre include PAUL RUBIN, *TORT REFORM BY CONTRACT* (1993); Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

with the activities of for-profit business, "enterprise liability" has paid little heed to the forces that kick-start its big machinery. The focus on overt commerce that occupies admirers of "the free enterprise system" keeps them from seeing other actors that execute its designs and fulfill its ideals.

## II. DEMAND FOR AN ENTERPRISE OF LIABILITY

Popular writings that decry an excess of litigation sometimes make this proclamation in their titles—*The Litigation Explosion*,<sup>48</sup> *The Rule of Lawyers*,<sup>49</sup> *Whiplash!: America's Most Frivolous Lawsuits*<sup>50</sup>—and sometimes explore the theme inside more somber packaging.<sup>51</sup> One might ask any critic who claims any kind of excess: How much is much? Within the tort reform debate, the answer seems to be: More than is in the interest of Americans—as citizens, patients, consumers, stockholders, and participants in a global economy. Some tiny sector is profiting, goes the refrain, but the national excess of personal injury lawsuits harms the majority. This Part ventures a contrary stance: Depending on which measures one chooses, the rate at which Americans pursue lawsuits might be about right, or perhaps much too low.

### A. Demand from Persons in Need of Legal Services

It is impossible for researchers to count the number, or rate, of such events as "lawsuits," "class actions," "personal injury litigation," "products liability claims," and the like that are filed, or adjudicated, in the United States each year.<sup>52</sup> Methodological difficulties doom even narrower endeavors. Nevertheless, evidence is available to support a provocative thesis that Richard Abel proclaimed in 1987: *The Real Torts Crisis: Too Few Claims*.<sup>53</sup>

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<sup>48</sup> WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

<sup>49</sup> WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2003).

<sup>50</sup> JAMES L. PERCELAY, *WHIPLASH!: AMERICA'S MOST FRIVOLOUS LAWSUITS* (2000).

<sup>51</sup> GAVIN ESLER, *THE UNITED STATES OF ANGER: THE PEOPLE AND THE AMERICAN DREAM* (1997); MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* (1992).

<sup>52</sup> For an overview of the methodological difficulties published last year, see Kagan, *supra* note 24, at 839; the older classic is Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

<sup>53</sup> Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987).



Empirical explorations of the too-few-claims thesis compare the number of lawsuits not to the total population, but to the number of incidents or occasions that support a tort claim;<sup>54</sup> by this measure, evidence of underclaiming has been solidly in place for decades.<sup>55</sup> When William Miller and Austin Sarat used the telephone in the 1970s “to inquire about potentially legally remediable injuries” that household members had suffered, they found that only 50 out of 1000 such instances resulted in the filing of a lawsuit.<sup>56</sup> A famed study by the Harvard Medical Malpractice Group, completed during the late 1980s, estimated that of every 100,000 patients discharged from the hospitals under study, about 4,000 experienced “an adverse event” in the hospital. Of these adverse events, about one-fourth, or 1,000, are attributable to malpractice. But only 125 patients of this set of 1,000 make a legal claim.<sup>57</sup> A Rand study found that after disabling accidents, eighty-one percent took no action.<sup>58</sup> Automobile accident victims—the most lawsuit-prone group among all plaintiff classifications—typically file no claims.<sup>59</sup>

Evidence of underclaiming extends beyond personal injury. According to one study, of those Americans who believe that they lost at least one thousand dollars due to illegal conduct, only five percent sue.<sup>60</sup> Even assuming a great deal of contributory fault, erroneous perceptions about being victimized, unclean hands, grievances barred by statutes of limitations, absconding rascals, and defendants amenable to suit but without assets, the statistic suggests the existence of unmet legal needs in general and unfilled yet valid claims in particular.

The phenomenon of underclaiming—the gap between potential claims and actual claims—can be seen as the basis for a business plan for

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<sup>54</sup> Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 575-76 (2004).

<sup>55</sup> See generally Richard L. Abel, *Big Lies and Small Steps, A Critique of Deborah Rhode's Too Much Law: Too Little Justice, Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1023 (1998) (“The truth, established by every reputable study, is gross underclaiming and gross undercompensation of the largest claims.”).

<sup>56</sup> George & Guthrie, *supra* note 54, at 576 (summarizing Miller and Felstiner study).

<sup>57</sup> PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 12, 13 (1991) (noting that less than half of this 125 receive compensation).

<sup>58</sup> Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1297 (1999) (citation omitted).

<sup>59</sup> Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 594 n.100 (1998).

<sup>60</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 3 (2002).

entrepreneurs to reach a nascent market. Consider the prejudices against plaintiffs that jurors appear to harbor. The typical plaintiff will fare better before a judge, and also in his settlement negotiations, than he will before a jury.<sup>61</sup> Findings that members of the lay public doubt plaintiffs' motives and the veracity of their claims<sup>62</sup> can suggest to the entrepreneur that the hurdles will be insurmountable, but support optimism as well as defeat: They imply undervalued assets that await business development. Given the size of the denominator—the sum of potentially compensable injuries linked to tortious conduct—it stands to reason that an enterprising lawyer would pursue the numerator, the number of claims made, by establishing that a client's claim is real, his injury wrongful, and the defendants he names to blame.

*B. Demand from a Wider Base*

In a recent essay called *Induced Litigation*, Tracey George and Chris Guthrie depict civil litigation with reference to its "supply," a word they use to refer to resources that include courts and judges, and "demand," manifested in the quantity of lawsuits.<sup>63</sup> By their analogy, courts are like highways: Both are public goods that gain traffic when new users find themselves drawn to expanded offerings.<sup>64</sup> In response to increased supply, demand increases. Although George and Guthrie offer an ingenious defense of increased supply that lines up with this Article's cheers-for-the-enterprise thesis, my use of *Induced Litigation* here relates not to normative support but its invocation of the American road.

The United States of America is famous for both civil litigation and paved highway mileage. While both phenomena get attributed to what may be imprecisely called "national culture,"<sup>65</sup> the literature on roads has been much more candid than the litigation literature about a simple revealed preference: We Americans like them both.<sup>66</sup> One need not descend to vulgar functionalism to suppose that, given the relative wealth and freedom of this country, any feature of the American

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<sup>61</sup> Peters, *supra* note 58, at 1290-93.

<sup>62</sup> *Id.* at 1293.

<sup>63</sup> George & Guthrie, *supra* note 54, at 547.

<sup>64</sup> *Id.* at 555-56.

<sup>65</sup> Bernstein & Fanning, *Japan*, *supra* note 42, at 49-50; Anita Bernstein & Paul Fanning, *Heirs of Leonardo: Cultural Obstacles to Strict Products Liability in Italy*, 27 VAND. J. TRANSNAT'L L. 1, 4 (1994).

<sup>66</sup> Numerous law review articles note the American infatuation with automobiles. See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1260 n.162 (2000) (citations omitted).

landscape is there at least in part because citizens favor it, or at least prefer it to some alternative. Uncontroversial with respect to American cars and roads, the inference about revealed preference still does not have a secure place in commentary about American litigation. Writers condemn a national preoccupation with law, litigation, and rights as if citizens have gone astray, opted for a wasteful pursuit, or failed to achieve what they really want and should have.

Offering a valuable contrast to these scoldings, political scientist Thomas F. Burke faces up to the taste for lawsuits that Americans manifest. Burke depicts "adversarial legalism," in Robert Kagan's phrase, as fundamental to American law and government by design rather than by happenstance, venality, or plaintiff stupidity.<sup>67</sup> The blueprint of American government that comes from foundational constitutional theory expresses deep distrust for officials. However wise or benign any holder of government power may seem, he must be checked and balanced; even in their attenuated American form, the prerogatives of European-style royalty must fall. In further defiance of a European tradition, the American stance distrusts government as a source of public welfare and wealth transfers. Thus, the nation divides and subdues its governing structures by an array of means—federalism, judicial review, separation of powers, bicameral legislatures—in what Burke calls a "constitutional theory of litigious policymaking"<sup>68</sup> that disempowers agencies, entrenched bureaucrats, and public law generally.

"Litigious policymaking" recognizes that even though the American constitutional design regards state actors as dangerous because of their power, it admits that power is unavoidable and desirable. Activists want to effect reforms, and no nation can endure without some ability to achieve change. For this task, American government favors litigation over regulation or a bureau charged with amelioration of social problems. Policies that encourage litigation "nicely match the preferences of Americans, who want action on social issues yet are ambivalent about the typical tools of the state-bureaucratic regulation and welfare programs," writes Burke. "Courts and individual rights provide a promising alternative."<sup>69</sup> The Madisonian idea of

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<sup>67</sup> BURKE, *supra* note 60.

<sup>68</sup> *Id.* at 13.

<sup>69</sup> *Id.* at 7.

decentralization thus begat citizen-initiated litigation to carry out the duties of government.

Litigation, in short, achieves regulation American style.<sup>70</sup> It dodges what the American constitutional design fears, and gives payoffs to activists and onlookers. With reference to what he calls incentives, Burke portrays a win-win game for multiple players. Compare the agency to the lawsuit in a context where activists agitate: civil rights or the environment, say. The Equal Employment Opportunity Commission, or the Environmental Protection Agency, or its state counterparts could enforce rules. Yet the United States has disfavored the bureau option. The distrust for central government that we have considered is one cause; related to that idea, Americans appear to suspect agencies of "capture," of having let in metaphoric foxes to guard henhouses. Add some adverse incentives for officials: Visible to the public, bureaucrats know that their actions will not please all constituents. Moreover, their projects need to be financed through taxation, a measure that Americans find distasteful. Litigation-as-policy shifts power to judges—who benefit from a cloak of neutrality; they do not carry a provocation like Equal Employment or Environment or the like in their title—along with lawyer-and-client teams that can diffuse and shift the cost of their initiatives.<sup>71</sup>

Elsewhere I have complemented Burke by arguing that litigation may be understood as a manifestation of anti-feudalism.<sup>72</sup> Even the powerful are often held to the law. The weak reach up and tweak the strong.<sup>73</sup> Litigious policymaking shifts power away not only from officialdom but also from the wealthy interests they might be overinclined to protect. The consequences are not all rosy; deleterious effects abound.<sup>74</sup> Yet a structure to support litigation is in place, solid as the interstate highways, connecting lawsuits to a base of support among

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<sup>70</sup> See Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at A15. Some writers deplore this result. See, e.g., REGULATION THROUGH LITIGATION 1 (W. Kip Viscusi ed. 2002) ("The policies that result from litigation almost invariably involve less public input and accountability than government regulation."); *id.* at 9-10 (noting that other contributors to the volume find the policy results of litigation, especially tobacco litigation, to be lamentable).

<sup>71</sup> See generally BURKE, *supra* note 60, at 22-59.

<sup>72</sup> Bernstein & Fanning, *Japan*, *supra* note 42.

<sup>73</sup> Anita Bernstein, *Muss es Sein? Not Necessarily, Says Tort Law*, 67 LAW & CONTEMP. PROBS. (forthcoming 2004) [hereinafter Bernstein, *Muss es Sein?*].

<sup>74</sup> See REGULATION THROUGH LITIGATION, *supra* note 70; Kagan, *supra* note 24.

Americans—including those who may never file, let alone benefit directly from, a single claim for as long as they live.

### III. THE SUPPLY SIDE: ENTREPRENEURS

#### A. *The Plaintiffs' Bar Changes in the Twentieth Century: A History* by Stephen Yeazell

The middle of the twentieth century ushered in new conditions that allowed the plaintiffs' bar to reach new heights of power and prosperity. My discussion here relies on an extraordinary exposition, elegantly laid out by Stephen C. Yeazell, to connect these twentieth-century changes with the rise of an enterprise.<sup>75</sup>

##### 1. New Sources of Profit

Yeazell begins by noting that "[a]nything that changes the proportion of solvent defendants has the potential for increasing the proportion of lawsuits to liability-producing events."<sup>76</sup> As he details, solvent defendants flourished during the twentieth century. The postwar housing boom, along with greater government support for mortgages, meant that more households came to own the homes in which they lived.<sup>77</sup> As a condition for lending, the government required homeowners to buy homeowner's insurance, which after the war had come to include liability coverage.<sup>78</sup> Similarly, automobile lenders universally require insurance.<sup>79</sup> Federal tax law encourages the furnishing of health insurance to workers,<sup>80</sup> and a rise in affluence fostered an increase in the proportion of Americans who held this insurance. Although health insurance would appear to discourage rather than encourage suing, it served as an inducement to litigation: An injured person could run up medical bills knowing that the collateral source rule would permit recovering from a defendant, and this increase

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<sup>75</sup> Yeazell, *supra* note 20. One need not be delighted with the outcome of this history to esteem Yeazell's work: *Re-Financing Civil Litigation* has won praise from a noted critic of the enterprise of liability. Lester Brickman, *The Market for Contingent-Fee Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 67 n.3 (2003) (calling Yeazell's article "a remarkable analysis").

<sup>76</sup> Yeazell, *supra* note 20, at 186-87.

<sup>77</sup> The figure in 2000 was 67%, up from 45% in 1920. *Id.* at 187.

<sup>78</sup> *Id.* at 187-88.

<sup>79</sup> *Id.* at 188.

<sup>80</sup> On the significance of this point see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 172-73 (2003).

in the size of the tab made contingent-fee lawsuits more attractive.<sup>81</sup> These changes look quaintly small through a post-tobacco litigation lens, but they moved wealth around enough to enable more lawyers to make a living in personal injury work.

## 2. Profitable Changes in Substantive Law

While defendants worth suing grew in number, doctrine changed to increase the potential payoff per claim. The rise of strict products liability in the 1960s gave plaintiffs' lawyers incentives to invest in specialized knowledge about, for example, automobile design, or adverse effects attributable to prescription drugs.<sup>82</sup> Longtime immunities came to an end, opening up new vistas into hospital and government treasuries.<sup>83</sup> When comparative fault grew to supersede contributory negligence, claims that would have been dead on arrival revived. Yeazell recalls here "the secondary defendant," a phrase of the late Gary Schwartz—a new being formed in response to these three developments. Once substantive law was liberalized, it became possible for a plaintiffs' lawyer to reach the coffers of a relatively remote, relatively faultless, and relatively well-heeled entity defendant.<sup>84</sup>

## 3. Profitable (at least in the longer run) Changes in Procedural Law

Until 1938, Yeazell explains, civil litigation had been "what criminal litigation is today—essentially a trial practice," but then the Federal Rules of Civil Procedure "moved the focus of civil litigation from the back to the front of the lawsuit."<sup>85</sup> Discovery took center stage. This shift at first gave new bounty to the defense side rather than the plaintiff: Because of the delays that discovery occasions, making discovery more elaborate and significant would tend to favor the well-capitalized. The 1938 rules and their state-law counterparts could have crushed the plaintiffs' bar. Undoubtedly, they did help destroy some practitioners' careers. But the move from trial to discovery is also a source of enrichment for plaintiffs' lawyers that can afford to take the long view: Bureaucracies yield paper trails, if one can keep looking.<sup>86</sup> Discovery produced bounty. Herbert Kritzer's division of "the plaintiffs' bar" into

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<sup>81</sup> Yeazell, *supra* note 20, at 186-90.

<sup>82</sup> *Id.* at 190-91.

<sup>83</sup> *Id.* at 191-92.

<sup>84</sup> *Id.* at 192-93 (referring to a conversation that Yeazell had with Schwartz in May 2001, shortly before Schwartz's death).

<sup>85</sup> *Id.* at 194.

<sup>86</sup> *Id.* at 195.

subgroups bears mention here: An external development can hurt one sector of this cohort while enriching another.<sup>87</sup> The ascendancy of discovery ultimately became a source of wealth to the plaintiffs' side.

#### 4. Meanwhile, the Defense Rests . . .

Although these twentieth-century changes that "either rewarded or required increased investment by plaintiffs' law firms"<sup>88</sup> did not come at the direct expense of the defense bar, they contributed to a shrinking of resources available to defendants in many types of litigation—particularly those that insurers regard as routine or recurring, such as automobile cases. Yeazell reports a rise in constraints on defense costs: Today attorneys' fees, expert witness expenses, and even the quantity of research authorized have all been trimmed.<sup>89</sup> Such constraints virtually disappear in high-profile, bet-the-company litigation, but play a big enough role in ordinary work that a plaintiff can sometimes outgun a defendant.<sup>90</sup>

These developments are of particular interest to those who keep in mind "free enterprise" and "enterprise liability." According to Yeazell's dichotomy, one sector—the plaintiffs' bar—follows the money, moves in response to new (substantive and procedural) frontiers, makes rational investments (in discovery), and diversifies its portfolio with a variety of claims. The other side—the defense—may well be thriving away from its lawsuits; from the vantage point of its attorneys, however, it fails to grow, must react rather than initiate, and lives under cost-cutting and drab middle-management oversight. If the hallmarks of enterprise are indeed wealth and choice,<sup>91</sup> then it seems perverse to restrict that word and its adjectival forms to the second group. "Enterprise liability" for a stagnant bureaucracy may not be quite a contradiction in terms, but it certainly invites a complementary coinage to re-describe the opposite side.

#### B. *The Enterprise of Liability Flexes Its Muscle*

Continuing to follow along with Professor Yeazell, we now consider how changes in the structure of plaintiffs' firms permitted them to

<sup>87</sup> See Kritzer, *supra* note 20 (describing the plaintiffs' bar).

<sup>88</sup> Yeazell, *supra* note 20, at 197.

<sup>89</sup> *Id.* at 197-98.

<sup>90</sup> *Id.* at 198.

<sup>91</sup> See *supra* Part I.A; *infra* Part IV.A.1-2.

exploit the new substantive law, procedural law, and demographics just noted. The late twentieth century brought to the plaintiffs' bar "aggregation, marketing, specialization, and diversification."<sup>92</sup> Professional responsibility codes began to tolerate advertising and some kinds of solicitation, allowing lawyers to reach more prospective clients.<sup>93</sup> Specialization allowed lawyers to invest in their own human capital and increased the power of networks; a plaintiffs' lawyer in a particular field could gain clients through referrals from general practitioners.<sup>94</sup> New sources of credit arose: After banks began to lend money to plaintiffs' firms that could present a good enough business plan, satellite businesses arose to lend money to plaintiffs on a no-recourse basis, using their legal claims as collateral.<sup>95</sup>

The enterprise of liability has received particular attention from its gains in the 1998 national tobacco settlement, where private attorneys contracted with state governments to gain lucrative contingent fees. Less than twenty years after the Minnesota Supreme Court shocked the products liability bar and public onlookers—and went where no state supreme court had gone before—by upholding a jury's million-dollar punitive damages award,<sup>96</sup> the tobacco lawsuits crossed the threshold into what Herbert Kritzer has called litigation in "twelve figures."<sup>97</sup>

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<sup>92</sup> Yeazell, *supra* note 20, at 199 (italics and capitalization omitted).

<sup>93</sup> *Id.* at 201. One might also note the liberalization of fee-splitting rules during the 1980s. Compare ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107 (1970) (prohibiting lawyers from splitting fees unless the division is consistent with the relative contributions of each lawyer) with MODEL RULES OF PROF'L CONDUCT R.1.5(e)(1) (1983) (permitting divisions of fees not in "proportion to the services performed" if "each lawyer assumes joint responsibility for the representation," a more lenient standard). Without discussing these rules, Yeazell mentions fee-splitting as a source of growth for the enterprise of liability. Yeazell, *supra* note 20, at 202-03.

<sup>94</sup> *Id.* at 203.

<sup>95</sup> *Id.* at 204 (describing this "emerging" field with reference to one individual entrepreneur, Perry Walton). The business has grown in the years since the publication of Yeazell's article in 2001. See Christina Merrill, *Judgment Call: Firms That Lend to Personal-Injury Plaintiffs Take Steps to Improve Their Bad-Guy Image*, CRAIN'S N.Y. BUS., Jan. 27, 2003, at 1 (describing the maturation of the industry with reference to the loan that Abner Louima took out and repaid, using his much-publicized settlement of \$8.75 million for his police brutality lawsuit against the city of New York).

<sup>96</sup> *Gryc v. Dayton-Hudson Corp.*, 297 N.W. 2d 727 (Minn. 1980). On the decision as a landmark, see Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 271 n.6 (1983) (citing other cases that involved large punitive damages awards: the awards that exceeded \$1 million either came after *Gryc*, or were struck down by appellate courts).

<sup>97</sup> Kritzer, *supra* note 20, at 227 (noting the \$206,000,000,000 national settlement and a punitive damages award of \$145,000,000,000). Others price the tobacco settlement at \$246 billion, leaving Kritzer's point undisturbed. Jonathan Saltzman, *Suit on Light and Low-Tar*



Arbitration panels awarded the tobacco-settlement lawyers a total of \$15 billion in fees.<sup>98</sup> In May 2004, a New York appellate panel, reversing a lower court decision, upheld a fee of \$1.3 billion to one firm-like consortium of tobacco lawyers.<sup>99</sup>

Successful tobacco-litigation entrepreneurs have chosen to plow their unprecedented revenues into new litigation ventures.<sup>100</sup> Soon after the tobacco settlement was signed, one leader from the plaintiffs' bar, Richard Scruggs, announced that health maintenance organizations would be his next target.<sup>101</sup> A Charleston newspaper detailed litigator Ronald Motley's decision to spend millions of dollars in legal action pursuing funds held by the terrorist group al-Qaida, following expenditures he had made on litigation against HMOs and lead paint defendants.<sup>102</sup> "As surely as entrepreneurs need to start new businesses, these lawyers need to launch new cases and causes," concluded a Fortune magazine story in 2000. "In fact you could say that what they do is, in its own way, a form of risk-capital entrepreneurialism."<sup>103</sup>

More significant than the tobacco-money glitter and splash has been the power of the workday plaintiffs' bar to achieve capitalization.<sup>104</sup> The decline of the solo practitioner helped to foster this change. In the late twentieth century, as Yeazell explains, "the mean and median lawyer" in the United States ceased working solo and began to be found in a small firm.<sup>105</sup> When individual lawyers acquired this opportunity to invest in firm-specific capital rather than remain restricted to their own reputations and careers, they could exploit niches, refer and be referred,

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*Cigarettes Heads to SJC*, BOSTON GLOBE, Apr. 5, 2004, at A1; Richard Willing, *Lawsuits Target Alcohol Industry; Ad Campaigns Are Aimed at Underage Drinkers, Lawyers Say in Cases Similar to Tobacco Litigation*, USA TODAY, May 14, 2004, at 3A.

<sup>98</sup> Susan Beck, *Giveback Time? Republican Senators Get Their Way*, AM. LAW., Aug. 2003, available at LEXIS.

<sup>99</sup> Tom Perrotta, *\$1.3 Bilion. Legal Fee Upheld in California Tobacco Case*, N.Y.L.J., May 19, 2004, at 1. This one was the only fee award that the industry defendants had challenged. *Id.*

<sup>100</sup> Some observers prefer to focus on the entrepreneurs' personal wealth. Beck, *supra* note 98 (noting that Senator Jon Kyl, sponsor of federal legislation to limit contingent fees and take back some fees already paid to tobacco lawyers, called his proposed law the "one yacht" bill).

<sup>101</sup> Helyar, *supra* note 20.

<sup>102</sup> Tony Bartelme, *The King of Torts vs. al-Qaida Inc.*, CHARLESTON POST & COURIER, June 22, 2003, at 1A.

<sup>103</sup> Helyar, *supra* note 20.

<sup>104</sup> Yeazell speaks of "what the drab and the golden share: litigation as investment." Yeazell, *supra* note 20, at 212 (italics and capitalization omitted).

<sup>105</sup> *Id.* at 199.

improve their returns to scale, and “hedge their bets by combining complex, high-risk, high-payout cases with simple, lower-risk, lower-payout cases that pay the rent while waiting for the larger ships to come in.”<sup>106</sup> Embodiments of the enterprise from the “golden” side include individuals like David Boies, who could cross to the plaintiffs’ side from white-shoe eminence Cravath Swaine and Moore in 1997 without relinquishing the business plans and office layouts in which he had built his career;<sup>107</sup> investment opportunities like litigation financing,<sup>108</sup> “litigation bonds,”<sup>109</sup> and of course one litigation so big that most state governments eagerly bought stock in it, bringing profit to their treasuries alongside the profits that lawyers made.<sup>110</sup> For the enterprise of liability, as Yeazell sums up, litigation has become “an investment portfolio in which the task is to manage and spread risks, maximizing gains, and insuring and reinsuring against losses.”<sup>111</sup>

#### IV. GOODS DELIVERED

Civil-justice scholar Marc Galanter has praised litigation for offering “not only benefits to the winning party (compensation, vindication, etc.), but to the loser (his ‘day in court’), to others who might have been victimized by the loser (through incapacitation, rehabilitation, special deterrence), as well as effects on wider audiences (general deterrence, moral validation, channeling, habituation . . .).”<sup>112</sup> I expand on these ideas with reference to the criteria of wealth and choice. If wealth and choice are the markers of what free enterprise renders, then the plaintiffs’ bar warrants a place as a constituent of “the free enterprise system,” rather than one of its antagonists.<sup>113</sup> Its furnishing of wealth and choice to one set of clients—injured persons—seems hard to deny.

<sup>106</sup> *Id.* at 200.

<sup>107</sup> Adam Bryant, *A David (Boies) vs. Goliaths: Microsoft Is Just One of His High-Profile Cases*, NEWSWEEK, June 12, 2000, at 50.

<sup>108</sup> See *supra* note 95 and accompanying text.

<sup>109</sup> See Pierre Lemieux, *Smoke-Filled Rooms: A Postmortem on the Tobacco Deal*, INDEP. REV., Jan. 1, 2004, available at LEXIS (reviewing W. Kip Viscusi, *Smoke-Filled Rooms* (2002), which describes these bonds that allow tobacco lawyers to securitize future income from the settlement).

<sup>110</sup> Yeazell, *supra* note 20, at 210 (describing the tobacco litigation as an investment that featured “pooling of resources and sharing of risk”).

<sup>111</sup> *Id.* at 212.

<sup>112</sup> Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a “Better Way:” Litigation, Alternatives, Accommodation*, 1989 DUKE L.J. 824, 845-46 (quoting MARC GALANTER, *THE RADIATING EFFECTS OF COURTS*, IN *EMPIRICAL THEORIES OF COURTS* 117, 135 (K. Boyum & L. Mather eds. 1983) [hereinafter GALANTER, *RADIATING EFFECTS*]).

<sup>113</sup> See *supra* note 18 (referring to Professor King’s casting “liability” as a drain on free enterprise).

Here I go further, along with Galanter, to claim that it has furnished these two goods to the American public as well.

#### A. *Goods for Persons in Need of Legal Services*

##### 1. Wealth

That tort liability transfers wealth to individuals from business enterprises is a truism that needs little elaboration here.<sup>114</sup> Following a loss occasioned by wrongful conduct, litigation shifts the cost of this loss between the parties.<sup>115</sup> Proponents and opponents of liability agree on the point, as well as its converse: Restrictions on liability transfer wealth to business enterprises from individuals.<sup>116</sup> Even though most of the sums spent on lawsuits get classified as “transaction costs” and are deemed not to reach victims,<sup>117</sup> hurt persons gain from litigation. A hurt person can also achieve gains when retaining lawyers who, serving as agents, do not file lawsuits.<sup>118</sup>

The establishment of an enterprise of liability—more powerful than its precursors in the plaintiffs’ bar—built wealth for persons in need of legal services. The most thorough study of contemporary class actions, done by Rand in the late 1990s,<sup>119</sup> attributes gains in wealth for plaintiffs to the development of an enterprise of liability. One type of class action that delivers wealth to plaintiffs involves a claim where damages for each plaintiff are too low to justify a lawyer’s decision to represent one

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<sup>114</sup> A venerable truism: The Illinois Supreme Court adverted to it 135 years ago. *TXO Prod. Corp. v. Alliance Resource Co.*, 509 U.S. 443, 490-91 (1993) (O’Connor, J., dissenting) (quoting *Ill. Central R. Co. v. Welch*, 52 Ill. 183, 188 (1869) (asserting that when determining damages, jurors treat railroad defendants unfairly)).

<sup>115</sup> Abel, *supra* note 55, at 1023.

<sup>116</sup> On the latter transfer, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 n.15 (1995) (stating that tort reform “may produce a wealth transfer from plaintiffs to defendants”).

<sup>117</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 986-87 (2003) (considering transaction costs).

<sup>118</sup> See Ronald J. Gilson & Robert F. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512 (1994) (using game theory to show that “lawyers may allow clients to cooperate in circumstances when their clients could not do so on their own”). The Gilson-Mnookin thesis, if credited—and, of course, if interpersonal strife is assumed to exist independent of a civil liability system—extends the benefits of “the enterprise of liability” to defendants and prospective defendants.

<sup>119</sup> DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000).

plaintiff; aggregation makes the lawsuit profitable.<sup>120</sup> Each individual plaintiff collects little, but the class of plaintiffs gains wealth. Another category of wealth creation is the turnaround made possible by resources Yeazell has described: In the litigation over blood clotting products that injured hemophiliacs, for instance, the formation of a class turned a history of plaintiff defeats into a payout of about \$620 million in compensation.<sup>121</sup> As mentioned, the tobacco litigation is perhaps the most celebrated account of wealth accreted, not only for state governments but class members and individual litigants, only after the plaintiff's bar became established as an enterprise.<sup>122</sup>

## 2. Choice

Tort-reform critics have seized "choice" for their side of the dispute, denouncing liability as antithetical to freedoms and prerogatives while conceding that it gives consumers and other individuals "wealth." Yet the enterprise of liability has given plaintiffs more opportunities to pursue what they want. Deborah Hensler and her Rand colleagues have refuted the notion that lawyers in class actions always manipulate, exploit, and control their clients,<sup>123</sup> relating several detailed accounts of plaintiff choice. Of the ten class actions that anchor *Class Action Dilemmas*, four started as individual litigation; in all but one of the ten, individuals initiated a search for legal assistance.<sup>124</sup> In class actions and out of them, individuals have a choice whether to become plaintiffs.<sup>125</sup> Moreover, choice and wealth are not independent variables: Because the enterprise of liability gives plaintiff-litigants more clout vis-a-vis the defense, they can acquire more of what they choose to pursue.

### B. Goods for a Wider Base

Surely individuals, acting as customers, might include justice among the goods that they seek. Justice is abstract, but so are the traits that Americans objectify in order to possess, sometimes by shelling out cash:

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<sup>120</sup> *Id.* at 279-83 (describing small individual recoveries in a multimillion-dollar class action for insurance company overcharges).

<sup>121</sup> *Id.* at 295-96, 310.

<sup>122</sup> REGULATING TOBACCO (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

<sup>123</sup> See Coffee, *Entrepreneurial Litigation*, *supra* note 24 (referring to explorations of this belief in the context of securities litigation).

<sup>124</sup> HENSLER ET AL., *supra* note 119, at 403.

<sup>125</sup> See Abel, *supra* note 55, at 1022 ("No one, not even the plaintiffs' bar, makes litigants sue."). I elaborate on this voluntarism in Bernstein, *Muss es Sein?*, *supra* note 73; Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37 (2000); Bernstein & Fanning, *Japan*, *supra* note 42, at 59-60.

beauty, youth, virility, femininity, a dose of cathartic laughter or weeping, and so on. Law might be seen as a service industry, offering the service of delivering justice at a reasonable price. Where are the rational-actor theorists who usually stand tall in defense of customer preferences? Perhaps they remain seated to deny that tort law could be an object of customer preference. It doesn't look like a consumer good because it turns backward, effects redistribution, coerces the transfer of assets, and collides with property rights. But a customer might want retribution, redistribution, and the ranking of a wrong (the tort) over some right (to hold assets). The question of justice as something consumers prefer comes down to whether, on balance, tort law achieves improvement.<sup>126</sup>

Ideals of free enterprise inform this question. An earlier portion of this Article explored reasons to find that Americans endorse the enterprise of liability as citizens and participants in constitutional government, without reference to whether they participate in lawsuits.<sup>127</sup> To conclude this Part, here I ask about the wisdom of empowering that desire. Does this broader clientele, which extends to nonlitigants and includes all citizens, gain wealth and choice from the enterprise of liability?

### 1. Wealth

When it effects compensation, tort liability transfers rather than creates wealth; if it can effect deterrence, however, tort liability does increase wealth by reducing the social cost of injury. Members of the public do not gain wealth when money moves from one stranger's pocket to another's.<sup>128</sup> From the perspective of our "broader clientele," then, the wealth query will turn on whether liability encourages decisions that increase safety.

This perennial question about deterrence of dangerous behaviors has remained open for a long time. Gary Schwartz's answer of "Yes, but not

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<sup>126</sup> Here I rely on the insights that John Goldberg has shared with me. E-mail from John C.P. Goldberg, to Anita Bernstein (Jun. 21, 2004) (on file with author).

<sup>127</sup> See *supra* Part I.A.

<sup>128</sup> Alfred Conard argues that for the public, the outcome is actually worse: When enterprise liability imposes the costs of accidents on enterprises, individual malefactors escape responsibility; other "innocent contributors," including customers and taxpayers, are forced to pay. Transfers occasioned by tort liability are thus "subtractions from the food, clothing, and shelter of human beings that have played no part in the injuries that are compensated." Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283, 285 (1993).

that much" in response to his query, "Does tort law really deter?," published ten years ago and supported by a range of measurements,<sup>129</sup> comes closest to a consensus: Tort law does impose some deterrence.<sup>130</sup> One study of deterrence in the automobile industry describes automobile manufacturers as spurred to make investments in safety by a combination of litigation and phenomena that accompany litigation, including adverse publicity and the threat of new regulations.<sup>131</sup> This description helps to refute the principal argument against liability-as-deterrence—which concedes that deterrence may exist in a "subtly anthropomorphic" theoretical paradigm of business enterprise, but in practice, vicarious liability will defeat it<sup>132</sup>—by framing the effects of litigation as going beyond transfers of money and threats thereof. Add to this pressure the relative weakness of non-litigation sources of potential deterrence—regulation and criminal prosecution—and liability becomes a source of wealth through deterrence of unsafe products and behaviors, albeit a modest one.<sup>133</sup>

Beyond deterrence, the enterprise of liability helps to make regulation possible. While most uses of the phrase "regulation through litigation" remain pejorative, a substantial literature applauds the phenomenon as integral to contemporary regulation. In a classic dichotomy developed twenty years ago, Matthew McCubbins and Thomas Schwartz contrasted "fire alarms" to "police patrols" as

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<sup>129</sup> Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

<sup>130</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987) (concluding that "what empirical evidence there is indicates that tort law . . . deters").

<sup>131</sup> John D. Graham, *Product Liability and Motor Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120, 180-82 (Peter W. Huber & Robert E. Litan eds., 1991). Other chapters in *The Liability Maze* conclude that tort law does indeed deter; some contend that it ought to be strengthened to achieve more deterrence. Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 857-58 (2002) (citations omitted).

<sup>132</sup> King, *supra* note 18, at 187 (quoting Louis Jaffe's classic *Damages for Personal Injury* (1953)).

<sup>133</sup> It bears mention that, like "the free enterprise system," "the enterprise of liability" need not create much wealth in order to earn recognition as having created some. See *supra* note 118 and accompanying text. Accordingly, then, Peter Huber's criticism of liability as a source of unsafety—Huber argues that liability law is prejudiced against newer technologies, and in favor of the old, leaving the public saddled with, *inter alia*, the worse harms of wood stoves instead of the better harms of nuclear power Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 302-03 (1985)—does not defeat the claim that liability is a source of wealth. See *infra* Part V.

methods to effect legislative oversight.<sup>134</sup> "Police patrols" refers to direct monitoring; by contrast "fire alarms," or decentralized power-sharing, refers to the incentives that legislators can give to outsiders to help them keep track of misconduct.<sup>135</sup> As competing means to reach the same end, fire alarms "can be both more effective" than police patrols "in that they cover more areas, and more efficient, in that the costs associated with oversight are borne by the empowered outside parties."<sup>136</sup> The enterprise of liability has caused new regulations to be written and enforced.<sup>137</sup> "In sum," as Peter Schuck describes the plaintiff's bar, from his vantage point of a specialist on regulation, "an intricate and increasingly efficient private system generates, processes, disseminates, coordinates, and deploys most of the risk information that lawyers need to initiate mass tort litigation. Personal, organizational, and professional incentives fuel this system—a blend of material gain, professional prestige, and ideology."<sup>138</sup>

## 2. Choice

Legal scholars have argued that tort liability fosters choice among consumers and the public;<sup>139</sup> Thomas Burke, as we have seen, identifies "litigious policymaking" as an American political choice.<sup>140</sup> One might support this relatively abstract work with anecdotes about freedoms and prerogatives that the enterprise of liability has expanded. *Class Action Dilemmas*, for instance, recounts several: The story about the class action that began when an optometrist became angry about the defendant's business practices and decided to try to do something about them,<sup>141</sup> and

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<sup>134</sup> I thank Bill Buzbee for lending his expertise in administrative and regulatory law to this paragraph.

<sup>135</sup> Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

<sup>136</sup> Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 562 (1997).

<sup>137</sup> Peck, *supra* note 131. For example, before tort liability uncovered the danger of asbestos—a danger long known to the industry, and actively concealed—regulation and legislation had not acted against its toxic effects. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 89 (1985); David E. Lilienfeld, *The Silence: The Asbestos Industry and Early Occupational Cancer Research—A Case Study*, 81 AM. J. PUB. HEALTH 791, 793 (1991).

<sup>138</sup> Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952 (1995).

<sup>139</sup> Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 849 (noting that tort liability can foster public awareness of risk and make consumer choices more informed); GALANTER, *RADIATING EFFECTS*, *supra* note 112.

<sup>140</sup> See *supra* notes 67-69 and accompanying text.

<sup>141</sup> HENSLER ET AL., *supra* note 119, at 145-46, 149.

the spreading of settlement monies to a charity,<sup>142</sup> are two examples. Its chart, captioned “How the Ten Class Actions Affected Defendants’ Practices,” recites several enhancements of consumer choice: better packaging, beneficial new regulation, more detailed disclosure, and an extended “grace period” in the consumer class actions; on the mass torts side, better screening for HIV as well as improved heat-treating of blood products; changes in design to eliminate a hazardous material from plumbing; and redesigns to make home siding less susceptible to water damage.<sup>143</sup> Lawsuits alleging that fast-food establishments caused their customers to become unhealthy fostered change: ridicule and immunizing legislation, indeed, and dismissals with prejudice,<sup>144</sup> but also newer menus offering smaller and more healthful options.<sup>145</sup>

What do stories like these tell us? The “fire alarms” mentioned two paragraphs ago link with Thomas Burke’s constitutional theory to suggest that nonlitigants, as citizens, choose liability to achieve regulation and governance by the decentralized means they prefer. This conclusion veers close to tautology, of course. It would be an overstatement to say that Americans have the enterprise of liability because they asked for it, presumably in contrast to citizens in other nations who declined to ask for it. Instead, I would locate “choice” in the regulation-through-litigation paradigm, a tradition that, as Burke writes, “leads Americans to favor litigation as a way of taming the powerful and punishing bad behavior without creating more government.”<sup>146</sup> The paradigm fosters significant non-choice, to be sure—unreviewable decisions by unelected judges, unintended consequences, resources and options lost to foolish litigation—and yet the enterprise of liability is a veritable garden of individual autonomy and freedom when compared

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<sup>142</sup> *Id.* at 220-21.

<sup>143</sup> *Id.* at 431-33.

<sup>144</sup> In the spring of 2004 the House of Representatives passed a bill immunizing restaurants from obesity liability; the measure appears defunct in the Senate. Alex Beam, *A Super Size Portion of Half Truths*, BOSTON GLOBE, May 11, 2004, at E1.

<sup>145</sup> Delroy Alexander, *Court Tosses McDonald’s Health Suit; Chain Calls for Debate on Nutrition*, CHI. TRIB., Sep. 5, 2003, at C1 (indicating the impact of “Big Food” litigation by noting that McDonald’s called for “a new national debate on nutrition and fitness”); Beam, *supra* note 144 (attributing fast-food menu changes to “legal wolves baying at the door”); see also Jeremy H. Rogers, *Living on the Fat of the Land: How to Have Your Burger and Sue It Too*, 81 WASH. U. L.Q. 859, 883 (2003) (speculating that if this litigation were encouraged, “Big Food may begin to create and advertise more healthy items in efforts to preclude further liability”).

<sup>146</sup> BURKE, *supra* note 60, at 203.



to its rival, tort reform, which works mainly to thwart plaintiffs' initiatives.<sup>147</sup>

#### V. HOW GOOD A GOOD? THREE OBJECTIONS, WITH BRIEF RESPONSES

##### A. *The Analogy to Extortion and Blackmail*

Distinguished jurists who have seen a resemblance between litigation and extortion or blackmail include Richard Posner, Milton Handler, Henry Friendly, and Frank Easterbrook, each of whom has expressed divergent concerns about the extortion-like potency of class certification.<sup>148</sup> The metaphor has taken on the force of doctrine: Courts have held that pressure on defendants to settle is "a recognized objection to class certification."<sup>149</sup> *Class Action Dilemmas* quotes testimony presented to the Advisory Committee on the Civil Rules when the Committee was considering changes to Rule 23 in 1996; witnesses spoke about blackmail and extortion.<sup>150</sup> The rise of an "enterprise of liability," then, to some suggests augmented powers to extort, beyond class certification. As Charles Silver has pointed out, this reasoning may be applied more widely to cover any settlement demand from a plaintiff.<sup>151</sup>

Relying in part on the work of Mitchell Berman, Silver continues this line of thought to refute the charge of extortion and blackmail. A defendant's feeling pressured by a lawsuit or a settlement demand, he explains, is not the same as its being a victim of one of these crimes, even in their metaphorical sense. The crux of blackmail and extortion—what makes them crimes, even though silence and revelation, the behaviors that the blackmailer or extorter proposes to do or not do, are usually

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<sup>147</sup> *Id.* While critics of litigation in such debates voice a range of complaints—the uncertainty created by jury verdicts, the high transaction costs, the long delays common in adjudication—the main purpose of discouragement reforms is simply to discourage plaintiffs. The rationale for many reforms is that many claims of plaintiffs are illegitimate. Yet most discouragement reforms—caps on damages are a particularly vivid example—fail to separate legitimate and illegitimate claims. They just put a damper on all lawsuits. BURKE, *supra* note 60, at 200.

<sup>148</sup> Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003) (identifying significant differences among the various analogies to blackmail).

<sup>149</sup> *Id.* at 1358 (citing cases).

<sup>150</sup> One source gathered several quotations from unnamed witnesses: "The class action has become an opportunity for a kind of 'legalized blackmail'. The courts have described class actions as 'judicial blackmail' and, inducements to 'blackmail settlements' . . . . [The class action] 'has become a racket—that is the simple truth of it.'" HENSLER ET AL., *supra* note 119, at 33.

<sup>151</sup> Silver, *supra* note 148, at 1387-88.

legal—is an improper motive. Seeking redress for injuries attributable to wrongful conduct does not evidence any impropriety.<sup>152</sup>

*B. Money Meets Justice*

Lawyer-economist Gillian Hadfield, beginning with the question of why lawyers charge so much, finds an issue in the unfortunate conjunction of money with “justice.”<sup>153</sup> Not every would-be provider can take part in the enterprise of liability, Hadfield reminds us: Licensing rules and the crime of unauthorized practice of law exclude many who might otherwise offer lower prices for similar services, and thereby make the market more competitive. The rationale for this monopoly is “justice,” a concept that lawyers see as antithetical to commerce and the market. Yet rhetoric about justice does not deter most lawyers from the marketish practice of allowing money to determine how they will spend their professional time; they will reject a prospective client with a good justice-based claim if the work is not lucrative. Hadfield sees the enterprise of liability as an unfair game of heads-we-win, tails-you-lose: Suppliers define their occupation in idealistic, anti-commercial terms when they want to exclude competitors but favor a contrary, market-focused set of defining terms when they want to accrete money.<sup>154</sup> Hadfield concludes by proposing to regulate the separation of justice from money: She would withdraw from those lawyers who benefit from “justice”—that is, the majority in the profession who gain prestige or monopoly powers from rhetoric and norms that oppose the market—their prerogative to work for their highest bidders.

Although this criticism can be read to deny the label of “enterprise” to any sector that refuses to play by the rules of an open market, and thus to declare “the enterprise of liability” to be a contradiction in terms—as absurd as “the market of justice”<sup>155</sup>—a more nuanced reading

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<sup>152</sup> *Id.* at 1386-89.

<sup>153</sup> Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

<sup>154</sup> *Id.* at 1005.

<sup>155</sup> Alabama lawyer Robert D. Shattuck, Jr. has circulated a petition that offers a version of this criticism. Shattuck criticizes the plaintiffs’ bar, particularly the well-heeled tobacco lawyers, for pursuing profit the way a commercial enterprise does, while receiving “extremely excessive compensation” that, he argues, no enterprise in a real market would receive. With respect to the plaintiffs’ bar, Shattuck finds “an absence of a regularly operating labor marketplace,” “no accountability to taxpayers/voters,” and judges and juries who neither spend “their own money” nor exercise “reasonable mindfulness about

of Hadfield is available. Hadfield has revealed an enterprise that holds unique monopoly-like privileges, in exchange for which it may well be expected or compelled to forgo other privileges. Just as private ordering, customer choices, administrative regulation, the rule of law, imperfect information, and a host of other phenomena limit what any for-profit business enterprise can do, the plaintiffs' bar works under considerable constraint; and nothing in the construct of an enterprise of liability should prohibit regulators from constraining it more.

### C. *The Criticism About Value*

The third objection to praising "the enterprise of liability" need be noted only briefly, as it applies to this entire Article: Lawyers cannot be seen as the providers of any enterprise, because they create nothing of value. This objection flourished during Japan's economic boom of twenty years ago, when critics faulted the United States for its excessive investment in lawyers and litigation. As Curtis Milhaupt and Mark West restate the point, nations and societies "have a choice: they can either nurture engineers and other innovators who produce wealth or they can churn out lawyers and other rent seekers who will redistribute wealth and contribute to the complexity and adversarial nature of human interaction."<sup>156</sup> According to this view, the enterprise of liability creates either nothing (beyond mere shuffling of money from one pocket to another) or bad things like "complexity" and strife: One might speak in the same tone about the enterprise of pollution, or the enterprise of organized crime. This Article has presented a contrary picture of expansions in wealth and choice. The picture joins a larger one that depicts lawyers as instrumental to value creation.<sup>157</sup>

## VI. CONCLUSION: ON BEING ENOUGH OF AN ENTERPRISE

The phrases "enterprise liability" and "the free enterprise system," I have contended, advert to gains in welfare without giving credit to the facilitators that make these gains possible. A complementary phrase would extend the word "enterprise" to an institution that helps to bestow the two gifts of a free enterprise system, wealth and choice, on injured persons and the general public. Robust tort liability not only

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the compensation that their actions award to plaintiffs' lawyers." E-mail from Robert D. Shattuck, Jr., to Anita Bernstein (Sept. 10, 2004) (on file with author).

<sup>156</sup> Curtis J. Milhaupt & Mark D. West, *Law's Dominion and the Market for Legal Elites in Japan*, 34 LAW & POL. INT'L BUS. 451, 452 (2003).

<sup>157</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Gilson & Mnookin, *supra* note 118.

creates wealth and choice but also—as visiting Cuba revealed to me—*signifies* both of these goods. It is a banner of prosperity and freedom.

The claim about freedom may warrant a cautionary note here. Consider one illustration of how liability might indeed reduce rather than expand freedom expressed as consumer choice. Some products—vaccines are the tort-reformer's favorite example—disappear from the market, and their manufacturers attribute the withdrawal decision to the cost of liability. Dare I speak of wealth and choice when, back in a pre-crisis idyll, vaccines flourished abundantly?<sup>158</sup> I dare. I am emboldened by the fact that “the free enterprise system,” juxtaposed next to “the enterprise of liability” here to show their common ground, reduces as well as increases welfare.

Free enterprise demonstrably fosters wealth and choice, as Robert McTeer of the Federal Reserve Bank and others have shown.<sup>159</sup> But it also drives competitors out of business, imposes a monolithic neoliberal model on the world's nations that would have otherwise evidenced more variation in their economic policies, reduces the strength of socialism and protectionism and other economic alternatives, and paradoxically might bestow too many choices on consumers—than they want. Because free enterprise does not, *pace* Pareto, leave everyone better off, the enterprise of liability is not necessarily inferior if it does not increase choice at every turn.

Just as the ideology of free enterprise fails to leave everyone better off, the entity regarded today as most entitled to call itself “enterprise”—the contemporary American business corporation—fails to live up to the wealth-and-choice ideal. For more than a century, numerous corporate decisions have demonstrably smothered wealth and choice. Governed by what business scholars Shoshana Zuboff and James Maxmin call

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<sup>158</sup> This blissful idyll may never have existed, but vaccine supplies have indeed become constricted in the United States—not only because manufacturers have withdrawn from the market citing liability concerns, but for less dramatic reasons as well: temporary shutdowns to maintain or upgrade manufacturing plants, and management decisions not to invest in new production facilities. Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. REV. 741, 743-45 (2003). While this Article was going to press in late fall 2004, a recurrence of this type of national crisis—a shortage of influenza vaccine—was in full force. See *HDC Research: Majority of Physicians Say Flu Vaccine Shortage Is Crisis, E-Survey Shows*, BIOTECH L. WEEKLY, Nov. 26, 2004 (available at LEXIS) (reporting that 95% of physicians agreed that “crisis” accurately described the flu vaccine shortage).

<sup>159</sup> See *supra* Part I.A.

"organizational narcissism,"<sup>160</sup> American businesses have foregone millions of dollars of wealth they could have earned, and deprived consumers of countless chances to express their wishes. Zuboff and Maxmin, after recounting in painful detail several examples of multi-million dollars lost when business refused to heed consumers' wishes, sum up what they call "the standard enterprise logic," a tangle of pernicious notions that they hope will be abandoned:

The standard enterprise logic expresses the social realities of the early twentieth century: the emphasis on the mass; the elitism and threatened masculinity that led to a sexualized contempt for end consumers, enforced their lack of voice, fixed their distance from producers, and supported the tendency to extol male producers as the creators of value over female consumers as the destroyers of value; the romance with products and technology; the faith in 'systems' and science that led to an emphasis on control, centralization, and bureaucracy; the vast disparities in education that were used to underscore and legitimate the need for a managerial hierarchy.<sup>161</sup>

Those for whom a Harvard Business School-authored tome is too opaque will find in any daily newspaper specifics on how the contemporary American business corporation veers from the ideals of free enterprise. Taxpayer-funded bailouts, stock options given as compensation (rather than stock, that is, and unexpensed to boot), astronomical pay for officers and directors whether they perform well or poorly, Enron-style looting of retirement funds to impoverish workers and enrich the executive suite, corporate governance without measurement or rational incentives, federal subsidies to inefficient and insignificant industries, and the ongoing resistance to transparency in publicly traded corporations are just a handful of the available examples.<sup>162</sup> Here my purpose is not to fire a cheap shot at modern

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<sup>160</sup> SHOSHANA ZUBOFF & JAMES MAXMIN, *THE SUPPORT ECONOMY: WHY CORPORATIONS ARE FAILING INDIVIDUALS AND THE NEXT EPISODE OF CAPITALISM* (2002).

<sup>161</sup> *Id.* at 285.

<sup>162</sup> One more example from the multitude: The most famous company in my city of residence received strong criticism in a New York Times editorial. *Another Coke Classic*, N.Y. TIMES, June 16, 2004, at A20 (faulting the Coca-Cola board for having paid "more than \$200 million in recent years to departing executives" who had presided over the company's declining fortunes). For readable books on the subject published last year, see ARIANNA HUFFINGTON, *PIGS AT THE TROUGH: HOW CORPORATE GREED AND POLITICAL CORRUPTION*

American business but to suggest that no contemporary institution or sector has ever delivered unmitigated wealth and choice to American citizens.

Among those institutional actors that might claim to stand for ideals of “the free enterprise system,” then, the plaintiffs’ bar compares favorably to all other sectors of the contemporary United States, including the main pretender to this throne, the business corporation. The plaintiffs’ lawyers hustle in behalf of their clientele—working for injured persons in particular and the American public in general—to increase material wealth and augment individuals’ powers to choose. We who esteem free enterprise ought to esteem the enterprise of liability.

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ARE UNDERMINING AMERICA (2003) (recounting anecdotes of greed and shortsightedness in American business); PAUL R. KRUGMAN, *THE GREAT UNRAVELING: LOSING OUR WAY IN THE NEW CENTURY* (2003) (reviewing corporate scandals and linking them to the Bush administration).

