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Pandemic Harms and Private Law's Limits

A Proposal for Tort Replacement

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8.1 INTRODUCTION

In the early days of the COVID-19 pandemic, many people predicted a flood of tort litigation against commercial businesses by individuals alleging negligent exposure to the virus.[1] Although negligently caused injuries almost certainly occurred, the flood of litigation never materialized.[2] In part, the small number of claims can be explained by many states' efforts to avert economic disaster by immunizing businesses.[3] But the private law of tort itself also proved a formidable barrier, particularly given the difficulty of establishing causation in this context. This absence of tort claims may well have helped businesses ranging from residential health care providers to restaurants, as well as the economy and social life more generally. But the dearth of claims almost certainly left a great number of negligently injured parties without recourse or compensation to address their devastating harms.

The case of the pandemic suggests that traditional private law tools ordinarily available to address negligently caused harms – civil tort claims that leave it to private parties to litigate over whether the victim or the wrongdoer will bear the financial burden of wrongdoing – were poor legal tools for the job. An obvious response would be to adjust tort law standards to ease the path toward recovery under a private system, but this approach to addressing the need for compensation would risk the flood of litigation that observers were worried about in the first place.

We propose that a publicly administered tort-replacement scheme could have done a better job. Most obviously, it would have done a better job compensating

[1] Justine Coleman, Cruz Predicts "Tidal Wave" of Lawsuits against Reopening Small Businesses without Legislation, The Hill (May 6, 2020), https://thehill.com/homenews/senate/496351-cruz-predicts-tidal-wave-of-lawsuits-against-reopening-small-businesses.

[2] See Elaine S. Povich, States Braced for a Wave of COVID-19 Lawsuits. It Never Arrived, Stateline.org (July 21, 2021), https://perma.cc/BX29-FXW7/.

[3] See generally 50-State Update on COVID-19 Business Liability Protections, Husch Blackwell (Feb. 22, 2021; updated Mar. 18, 2021), https://perma.cc/A6LV-W4C2.

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negligently injured victims who otherwise received no compensation. Moreover, a carefully designed system of tort replacement might have provided such compensation without sacrificing (much of) the deterrence that tort law, albeit imperfectly, often provides. In other words, with appropriate regulation, tort replacement can address the twin goals so commonly associated with private law tort: compensation and deterrence.

In fact, as we explain below, the government has historically replaced the private law of tort with a publicly administered system to address analogous problems to those raised by the COVID-19 pandemic. Recognizing that this pandemic will neither be the last crisis nor even the last pandemic that will raise the need for unmet financial burdens to negligently injured victims, we can learn from this history.

Section 8.2 explores the limits of applying private tort law to the COVID-19 transmission context, limits we suggest could apply to pandemics and other emergencies more generally. Section 8.3 reviews past examples of the government replacing private tort law with a publicly administered compensation system. Section 8.3.1 highlights two instances in which tort replacement was used primarily to facilitate access to compensation, whereas Section 8.3.2 highlights instances in which tort replacement was used to prevent a flood of litigation. Taken together, these examples suggest that replacing tort (rather than loosening doctrinal barriers to recovery in court or erecting new ones in the form of liability shields) is the right solution in this context. In Section 8.4 we set out a brief discussion of how public law can be used to supplement, or even supplant, private law to fill the needs left by private law to set out the substantive claim. Section 8.5 considers objections, and Section 8.6 concludes.

8.2 THE PANDEMIC LIABILITY DILEMMA: INDIVIDUAL COMPENSATION VERSUS ECONOMIC AND SOCIAL DISRUPTION

The COVID-19 pandemic harmed people around the world. In the United States alone, nearly 1.2 million people died because of the virus, and many more suffered serious, often permanent injuries.[4] The economic loss has been massive as well, with some estimates at US$14 trillion by the end of 2023.[5] Some of the spread of the disease was caused by individual negligence; some was caused by businesses,

[4] Number of COVID-19 deaths reported to WHO (cumulative total), United States of America, World Health Org., https://perma.cc/M767-DQVF (last accessed Sept. 25, 2024); Effects of COVID-19 Pandemic on Workplace Injuries and Illnesses, Compensation, Occupational Requirements, and Work Stoppages Statistics, U.S. Bureau of Lab. Stat., https://perma.cc/AVH4-BFAL (last accessed Sept. 25, 2024).

[5] COVID-19's Total Cost to the U.S. Economy Will Reach $14 Trillion by End of 2023, USC Schaeffer (May 16, 2023), https://perma.cc/93EQ-ACAB.

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including health care businesses, such as nursing homes, that failed to take appropriate precautions to reduce the risks of spreading disease.

Although many victims of COVID-19 had health insurance or other forms of insurance to cover some of the financial costs of their injuries, many did not. Private insurance, as others have pointed out,[6] has proved inadequate to handle most business- and health-related losses. For those who became infected in the workplace, workers' compensation was not available for the spread of disease in many jurisdictions. Many victims of negligently transmitted COVID-19 who were otherwise uncompensated needed immediate relief to pay for ongoing medical care, time off work, and other harms.

In theory, private tort law could provide that relief. Consider a hypothetical case of COVID-19 transmission vis-à-vis the elements of a conventional tort: (1) Injuries in the form of death, disability, treatment costs, and lost wages are all obvious consequences of COVID-19 transmission; (2) businesses owe duties to employees, customers, patients, and others to whom they could cause harm by failing to adopt reasonable precautions to prevent the spread of COVID-19; (3) businesses might breach these duties by failing to adopt such reasonable (even statutorily required) precautions; and (4) both actual and proximate cause could theoretically be established, such as where an employer knew or should have known that an employee was likely infected yet required her to come to work. Some combination of these circumstances could establish a case for damages.

In practice, however, COVID-19's characteristics pose roadblocks to the prima facie case, particularly the element of causation. Contact with any person – while shopping, filling a car with gasoline, interacting with a neighbor, or even visiting outside – raises the possibility of exposure. Thus, unless the facts line up just so or reliable DNA sequencing is applied to trace transmission – both of which are unlikely – it is nearly impossible to establish causation by a preponderance of the evidence. Tort law thus proves an ineffective mechanism for compensating injured individuals in this context. And given the nature of infectious diseases more generally, this is likely to be true in the context of future pandemics as well.

One answer to address all this uncompensated suffering is to conceive of it as an accident and allow loss to "lie where it falls."[7] But to the extent that such losses were caused by negligent behavior, it would seem unfair to leave victims without recourse for this but not other wrongs, particularly given the extent of the suffering. Moreover, there are strong policy reasons for extending coverage via tort replacement to those victims who are not eligible for other forms of relief. As we have seen

[6] Qihao He et al., The Possibilities and Limits of Insurance as Governance in Insuring Pandemics, Nat'l Libr. of Med. (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10028328/; Steven Ross Johnson, Millions at High Risk of Severe COVID-19 Outcomes Lack Coverage to Cover Costs, Modern Healthcare (June 10, 2020), https://perma.cc/38AT-LDFK.

[7] Oliver Wendell Holmes, Jr., The Common Law 49 (1881).

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through this and earlier pandemics, the more serious and sustained the human suffering, the greater the threat to our economy and social life. Indeed, we can recall in the early months of the COVID-19 pandemic the profoundly unsettling tableaux of empty streets, unattended funerals and religious gatherings, and the sudden paucity of normal human connection that accompanied the draconian steps to stop the spread of the virus.

Yet even if the causation problem could have been solved by better tracing, it is not obvious that widespread tort liability for negligent COVID-19 transmission would have been any more desirable than tort replacement during the pandemic or that it would be during the next pandemic. After all, even if plaintiffs could overcome these proof challenges (as well as other challenges such as liability shields and workers' compensation restrictions), the enormous costs for businesses (especially small ones given what would be untenably high insurance costs), the economy, and the judicial system might not be worth the benefits to victims.

Similarly, the potential negative effects of tort on social life, such as more widespread quarantines and shutdowns, might be catastrophic. A public tort-replacement system may provide an answer.

8.3 LESSONS FROM PRIOR EXAMPLES OF TORT REPLACEMENT

Unlike COVID-19, the liability dilemma posed by the virus is not novel. In the past, legislatures have adopted administrative compensation schemes to (1) meet the needs of potential plaintiffs who face substantial obstacles to recovery under the conventional tort system and (2) avoid excessive costs to defendant businesses, industries, the economy, and social order that could result from reforming tort to allow mass recoveries.

8.3.1 *Meeting the Unmet Needs of Potential Plaintiffs*

Here, we consider two examples of administrative solutions that legislatures have offered in the past that provide a useful analogy to COVID-19:

8.3.1.1 The Federal Black Lung Compensation Scheme

Following a deadly explosion at a mine in West Virginia in 1968, Congress passed the Federal Coal Mine Health and Safety Act, including Title IV, the Black Lung Benefits Program.[8] Congress designed the program to compensate coal miners

[8] Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 798 (codified as amended at 30 U.S.C. § 901 et seq.).

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suffering from black lung disease and address the lack of benefits for inactive miners and their survivors.[9]

As in the COVID-19 context, injured miners had difficulty establishing a tort claim, and workers' compensation was not generally viable. State administrative programs tended to exclude occupational disease,[10] and injuries often emerged from symptomless exposure, taking the form of long-term and unpredictable respiratory disorders that were hard to identify within the statutes of limitations.[11]

Congress' first attempt to aid miners faltered. Despite Congress creating two rebuttable presumptions to assist claimants – that (1) the disease "arose out of the [ir] employment" and (2) the death was a direct result of the disease[12] – claimants continued to struggle with the statute's causation requirements for reasons similar to why they struggled to establish causation under tort law, namely the amount of time between exposure and illness and the unpredictable nature of the disease. In 1972, Congress loosened the tort-like requirements to expand eligibility for benefits, such as by allowing surviving spouses to demonstrate only that at death the miner "was totally disabled due to black lung disease," rather than that the miner's death was the result of the disease.[13] The Act provides a useful example of a legislative solution when potential plaintiffs are unable to establish causation or access workers' compensation benefits.

8.3.1.2 The Federal Nuclear Worker Compensation Program

In 2000, President Clinton issued an executive order recognizing the thousands of Americans exposed to nuclear radiation who developed "disabling or fatal illnesses" while building America's nuclear defense.[14] Like black lung victims, these potential plaintiffs faced significant evidentiary hurdles in recovering under tort particularly with respect to causation "because of long latency periods, the uniqueness of the hazards to which they were exposed, and inadequate exposure data."[15]

In 2000, Congress passed the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), which confers on the Department of Labor the primary responsibility of administering the compensation program[16] and provides cash compensation for medical expenses to workers and survivors "who

[9] 30 U.S.C. § 901(a).
[10] Robert L. Rabin, The Renaissance of Accident Law Plans Revisited, 64 Md. L. Rev. 699, 704 (2005).
[11] Peter S. Barth, The Tragedy of Black Lung: Federal Compensation for Occupational Disease 169–71 (1987).
[12] 30 U.S.C. § 921.
[13] Id.
[14] Exec. Order No. 13179, Providing Compensation to America's Nuclear Weapons Workers (Dec. 7, 2000).
[15] Id.
[16] 42 U.S.C. § 7384 et seq.

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contracted certain diseases as a result of exposure to beryllium, silica, or radiation while working for [the Department of Energy], its contractors, or subcontractors in the nuclear weapons industry."[17] Although EEOICPA presents a different reason for tort replacement than the pandemic scenario – the government employed the injured workers and, therefore, stood in the role of the tortfeasor, whereas in the COVID-19 case the government would provide relief to victims harmed by others – the example remains relevant insofar as the government stepped in to compensate injured parties who needed relief but were unable to show causation or access workers compensation. Some level of deterrence may have been preserved during the shift from private tort law to administrative tort replacement, given the dual role of the government as both the administrative payer and the tortfeasor.

8.3.2 *Harms to Industry, the Economy, and Society*

One way to meet the needs of frustrated, would-be tort plaintiffs would be to loosen the causal requirements of tort law so that those plaintiffs can bring claims. Such a reconfiguration of tort law, however, would introduce the problem that so many worried about at the start of the pandemic: The costs of defending all claims and satisfying judgments in successful claims would harm certain industries and the economy more generally. As with the compensation problem discussed above, tort replacement has been employed to solve the problem of expected harms being too widespread and the costs imposed on defendants being too high. Here we review two examples of tort-replacement schemes established to protect the public interest by shoring up an industry or service – those for 9/11 victims and for neurologically impaired infants. We then briefly consider workers' compensation, the most salient example of tort replacement.

8.3.2.1 The 9/11 Victims Compensation Fund

Congress enacted the Air Transportation Safety and System Stabilization Act both to compensate 9/11 victims via the US$7.375 billion Victims' Compensation Fund and to prevent devastation to the airline industry and its insurers from flight stoppages, decreased demand, and tort litigation.[18] Although the former purpose is more well-known, the preamble to the Act describes it as "[a]n act to preserve the continued viability of the United States air transportation system."[19] The Act provided air

[17] The Act/EEOICPA, Part B, Ctrs. for Disease Control and Prevention, https://perma.cc/3Y2B-E45W.

[18] 49 U.S.C. § 40101. See also Raymond L. Mariani, The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People, 67 J. Air L. & Com. 141, 142 (2002).

[19] Preamble Public Law No: 107-42 (Sept. 22, 2001).

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carriers with US$5 billion in direct grants for losses incurred due to the attacks,[20] up to US$10 billion in loan guarantees,[21] and, as amended, precluded compensated victims from filing claims,[22] capped damages in cases against airlines by plaintiffs not eligible for or otherwise participating in the Fund,[23] and capped liability for other types of industry participants such as aircraft manufacturers, airport owners, and governmental entities.[24]

Potential 9/11 and COVID-19 plaintiffs faced some similar challenges; namely, identifying the tortfeasor (the negligent COVID-19 transmitter or the terrorist organization) was difficult if not impossible. And the airlines – like many businesses in the COVID-19 context, particularly smaller ones – faced potential damages amounts far exceeding insurance funds.[25]

8.3.2.2 No-Fault Medical Malpractice: Neurologically Impaired Infant Programs

The American medical malpractice system has long been criticized as imprecise and unjust, largely ineffective at addressing the high rate of medical errors in the medical system.[26] In brief, "only a small fraction of those injured by medical negligence ever bring a claim; those who do sue may face years of litigation before they recover; and much of the money spent on malpractice litigation goes to cover its costs rather than to compensate the victims of malpractice."[27] And what these deficiencies reveal, apropos of the larger dialogue of the book of which this chapter is a part, is the often intrinsic difficulties of using classic tort law remedies to accomplish wider social aims, be they deterring bad behavior while maintaining an optimal level of social activity or, returning to our central focus, providing adequate compensation to redress harm.

No-fault malpractice – a system under which an administrative body awards compensation for medical injuries based on a predetermined, standardized

[20] 49 U.S.C. § 40101, sec. 101(a)(2).
[21] Id. at sec. 101(a)(1).
[22] Id. at sec. 405(c)(3)(B)(i).
[23] Id. at sec. 408.
[24] Id. at sec. 201(b)(2).
[25] Kenneth S. Abraham & K. D. Logue, The Genie and the Bottle: Collateral Sources and the 9/11 Victim Compensation Fund, 53 DePaul L. Rev. 591, 595 (2003).
[26] See, e.g., Troyen A. Brennan et al., Incidence of Adverse Events and Negligence in Hospitalized Patients – Results of the Harvard Medical Practice Study I, 324 N. Engl. J. Med. 370 (1991); Lucian Leape et al., The Nature of Adverse Events in Hospitalized Patients: Results of the Harvard Medical Malpractice Study II, 324 N. Engl. J. Med 377 (1991); David M. Studdert et al., Claims, Errors, and Compensation Payments in Medical Malpractice Litigation, 354 N. Engl. J. Med. 2024 (2006); Allen B. Kachalia et al., Beyond Negligence: Availability and Medical Injury Compensation, 66 Soc. Sci. Med. 387 (2008); Eric J. Thomas et al., Incidence and Types of Preventable Adverse Events in Elderly Patients: Population Based Review of Medical Records, 38 Med. Care. 261 (2000).
[27] Catherine Struve, Improving the Medical Malpractice Litigation Process, 23(4) Health Affs. 33, 34 (2004).

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schedule – garnered considerable attention in the 1990s and early 2000s.[28] For example, in 2002, before becoming Administrator of the Centers for Medicare and Medicaid Services, Don Berwick wrote: "We badly need at least one courageous, time-limited experiment on a no-fault tort system at a statewide or regional level with enterprise-level responsibility for compensating victims of medical injury."[29] Two states subsequently adopted (quite narrow) no-fault medical malpractice programs.

In response to insurers canceling obstetricians' malpractice coverage and obstetricians' subsequent threats of quitting, Florida and Virginia implemented tort-replacement programs for the families of severely injured newborns, the cases constituting the largest percentage and highest-cost obstetrical claims.[30] These programs provide compensation in the form of medical, rehabilitation, nursing care, and other expenses for categories of newborns who suffer particular iatrogenic harms, regardless of whether the cause of the harm was negligent.[31] The programs were primarily designed to prevent an exodus of medical providers,[32] and they largely worked. Hospitals and physicians participate in extraordinary numbers.[33] Whereas previously, obstetricians increasingly could not obtain medical malpractice liability insurance due to untenable cost, the programs took the most expensive cases out of the malpractice system, spread costs beyond obstetricians, and ultimately resolved the crisis.

8.3.2.3 Workers' Compensation

Perhaps no administrative tort-replacement scheme is as well-known and long-standing as workers' compensation. Until the mid-nineteenth century, the common law provided workers effectively no recourse to recover against their employers

[28] See, e.g., David M. Studdert & Troyen A. Brennan, No-Fault Compensation for Medical Injuries: The Prospect for Error Prevention, 286(2) JAMA 217–23 (2001); Marie Bismark & Ron Patterson, No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety, 25(1) Health Affs. 278, 278–83 (2006); Randall R. Bovbjerg & Frank Sloan, No Fault for Medical Injury: Theory and Evidence, 67 U. Cincinnati L. Rev. 53 (1998).

[29] Don Berwick, A User's Manual for the IOM's "Quality Chasm" Report, 21(3) Health Affs. 89 (2002).

[30] James A. Henderson, The Virginia Birth-Related Injury Compensation Act: Limited No-Fault Statutes as Solutions to the "Medical Malpractice Crisis," in Medical Professional Liability and Delivery of Obstetrical Care: Volume II: An Interdisciplinary Review 194 (Victoria P. Rostow & Roger J. Bulger eds., 1989).

[31] Jill Horwitz & Troyen A. Brennan, No-Fault Compensation for Medical Injury: A Case Study, 14(4) Health Affs. 164 (1995).

[32] Id. See also Cynthia L. Gallup, Can No-Fault Compensation of Impaired Infants Alleviate the Malpractice Crisis in Obstetrics?, 14(4) J. Health Pol. Pol'y L. 691 (1989), https://read.dukeupress.edu/jhppl/article/14/4/691/74327/Can-No-Fault-Compensation-of-Impaired-Infants.

[33] Gil Siegal et al., Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation, 34 Am. J.L. & Med. 489 (2008).

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under tort for injuries suffered on the job.[34] The lack of recourse was grounded in an outdated notion that "an employee should be grateful for the opportunity for gainful employment . . . any special legal protection on top of his good fortune was quite unthinkable."[35] As the law developed and workers began to win some tort claims, concerns about employer liability costs grew.[36]

Based on the Prussian system of workers' compensation,[37] which offered benefits and compensation for "job-related injuries and medical care and rehabilitation. . ." and precluded employees from suing their employers, states began adopting comprehensive workers' compensation laws in the 1920s.[38] By 1948, every state had adopted some form of this no-fault insurance, a move that was largely motivated by the need to mitigate a broad threat to the economy, one similar to the economic paralysis that has often accompanied pandemics in the past and present.

8.4 A BRIEF PROPOSAL AND POLICY IMPERATIVES

Wrongs between private parties – whether in health care or outside – are typically adjudicated under private law. Yet, however coherent a system for deciding where the costs of accidents should fall generally, sometimes private law fails to realize either its own goals (e.g., compensation and aligning incentives) or important social goals. In such cases public law can supplement, or even supplant, private law to fill the needs left by private law.

Offering a full proposal is far beyond the scope of this short chapter. Instead, we have focused on two more modest aims. First, we suggest that tort replacement in the form of a social insurance-like compensation scheme might have solved some of the problems that private tort law failed to address during the pandemic and offers a policy solution for next time. Second, we offer multiple examples of effective use of tort replacement to solve compensation problems or, in the alternative, to forestall crushing litigation.

Importantly, we do not envision complete replacement but, instead, propose to supplement tort. For example, conventional tort should be available for cases involving any breach more culpable than negligent behavior, including grossly negligent, reckless, willful and wanton, and intentional behavior that causes harm. Moreover, we recognize the need to protect against the risk that tort replacement would effectively provide social insurance for all relevant harms, such as all COVID-19 transmission, and, thereby, lead to unsustainable costs. We, therefore, envision

[34] Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775, 777–78 (1982).
[35] Id.
[36] Gregory P. Guyton, A Brief History of Workers' Compensation, 19 Iowa Orthopaedic J. 106 (1999), https://perma.cc/M7CU-EGRE.
[37] Id. at 107.
[38] Id. at 108.

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limiting the program in various ways, such as through subrogation rules that would only cover damages not otherwise covered through existing health insurance, unemployment coverage, business insurance, or other programs.

Tort replacement is worth considering in the pandemic or similar contexts for at least the following four overlapping policy reasons:

First, it would provide compensation more quickly and efficiently than tort law can likely do during the time of a pandemic. COVID-19 victims, for example, have faced great obstacles in maintaining a successful tort suit. To wit, they are not likely to establish causation, and even if they could, many defendant tortfeasors (namely, small businesses) would be effectively judgment-proof. With a replacement regime, these would-be plaintiffs could promptly receive the compensation they need to take care of health and other pressing expenses.

Second, equity and fairness favor tort replacement in these circumstances. More than in other mass tort settings, the facts often differ by case – the manner of exposure varies tremendously across and within industries. Consider the differences in congregate care settings, nursing homes, and college dorm rooms. With such different underlying facts, opportunities for class actions or other consolidated litigation are limited. Compensation schemes are likely to reach more potential plaintiffs and be more equitable across a range of plaintiffs and defendants than conventional tort law.

Third, a sensible administrative mechanism would provide greater certainty and finality for potential plaintiffs. It would also lead to less business disruption because businesses could plan for the fees they would need to pay to benefit from a replacement system, and they would not need to adjust business to avoid a potential and uncertain spate of claims, which happened not to arrive during this pandemic. Of course, the cost of this system would be deterrence. We would address this in two ways. As discussed above, we would maintain the tort system for cases that involve breaches based on more culpable behavior than ordinary negligence. And we would rely on accompanying regulation that required compliance with safety standards for a business defendant to benefit from the replacement system. Other regulations, potentially at all levels of government, might penalize defendants who did not adhere to specific standards of behavior. Establishing workable criteria for business conduct consistent with current scientific expertise would be both more effective and less turbulent than the behavior required as revealed through aggregated tort judgments.

Fourth, the vast majority of states immunized businesses from tort liability to encourage them to stay or reopen in the face of various uncertainties

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relating to insurance, liability, and other factors beyond their control. The impact on certain segments of the economy, such as restaurants and concert venues, has been massive, and it likely would have been worse without such immunity. However, the benefits of immunity in terms of maintaining and restoring commerce and social life came at a great cost. Tort replacement would have allowed victims to have some recourse. In terms of potential defendants, linking participation in a replacement system with adhering to safety standards, as some immunity statutes did, might have avoided some harm.

8.5 POTENTIAL OBJECTIONS

A tort-replacement system raises a host of practical and theoretical considerations as well as federalism issues. We briefly consider some of the most salient objections to tort replacement in this context.

First, and perhaps the biggest objection, is that a compensation scheme might fail to motivate individuals and businesses to take adequate precautions to reduce risk. As we explained above, although no-fault might impede certain corrective actions, we believe a system can be developed to incentivize good behavior and deter bad behavior. Moreover, one should not overstate the deterrent effects of conventional tort law; since most claims predictably have little chance of success, they are unlikely to deter bad behavior.

The second is that replacing tort might undermine a morally centered conception of tort law and liability recovery. To over-simplify, scholars have argued that tort is fundamentally about addressing a wrong committed by a particular party against a particular party, and so it is important that the tortfeasor, not an anonymous fund, compensate the victim. Under the contrary view – where tort consists of a simple economic calculation based only on deterrence and compensation – it doesn't matter that a victim is compensated by the responsible tortfeasor, as long as potential tortfeasors are deterred by the threat of penalty and victims are compensated.[39]

Although this objection is theoretically important, the practical counterfactual matters. The moral case for tort law assumes that businesses' misconduct will be redressed through litigation between parties. But as we've discussed, litigation in this context has been stymied. Moreover, insofar as it is very difficult to identify misconduct in the infectious disease context, unless we make the untenable assumption that the very fact of operating a business and not knowing the health status of customers or employees is negligent behavior requiring redress, these pandemic cases are not viewed well through the lens of morally condemnable action.

The third objection is that this short chapter has not grappled with important practical questions, perhaps chiefly funding needs, which could be very large.

[39] Horwitz thanks Professor Don Herzog for this insight.

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Importantly, we are not suggesting the establishment of a new entitlement but only a supplement to existing insurance systems. Applying subrogation rules and the like, we propose tort replacement only for individuals and small businesses that do not have adequate means through insurance or other resources to deal with the serious harms that COVID-19 or some future pandemic disease may cause. In evaluating schemes, and especially in doing the cost/benefit analysis integral to making sound regulatory choices, policymakers should consider the economic (and other) effects of not dealing effectively with the matter of damage and compensation.[40] So viewed, it is by no means clear that a scheme of the sort we describe is much more costly than doing nothing of the sort.

Finally, this chapter cannot adequately analyze the enormous and enduring issues of federalism and comparative institutional competence that tort replacement raises. On the one hand, as tort is traditionally state law, it may make good sense to pursue compensation reform at the state level. On the other hand, the characteristics of COVID-19-related injuries, beginning with the ineluctability of borders in controlling transmission and the national impact on public health and the economy, suggest that an effective compensation scheme might require national action. In any event, our suggestion to consider tort replacement does not depend on whether a scheme is enacted by Congress or the states, and any constitutional problems can and should be addressed in the structure of proposed legislation.

8.6 CONCLUSION

Rather than reforming private tort law to address the great needs caused by pandemics such as COVID-19, we have considered replacing it with a public system. Precedents for such replacement were motivated by issues we saw in this latest pandemic, namely (1) the unmet needs of potential plaintiffs and (2) the significant harms to social life and the economy that would result from reforming tort by relaxing the requirement to connect the injury with the commission of a wrong. These programs have been generally successful at addressing both issues and serve as models for the type of compensation scheme legislatures should consider adopting in the COVID-19 context and in the face of pandemics to come.

[40] Innovative financing would be necessary to support what would be an expensive program. Because protecting businesses, especially small businesses, from ruinous lawsuits partly motivates the proposal, legislatures might contemplate a special tax on businesses to generate a fund. Although such a tax might become complex in implementation (e.g., are lawyers involved? Are punitive damages available?), not to mention politically difficult, the issues are not insurmountable, as the creation of enduring or sinking funds is a budget device familiar to Congress and state legislatures.

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