

# Efficacy of Organic Tort Reform

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## BOOK REVIEW

### THE EFFICACY OF ORGANIC TORT REFORM

James A. Henderson, Jr.†

Depending on how one defines the term "crisis,"<sup>1</sup> the United States experienced a products liability insurance crisis in 1985 and 1986. Premiums surged dramatically after five years of remaining essentially flat, and business firms complained of not being able to obtain, or afford, adequate coverage. In his book, *Reforming Products Liability*,<sup>2</sup> W. Kip Viscusi (hereinafter "the author") examines the underlying causes of this crisis; concludes that they include, in significant measure, wrong-headed liability rules; and proposes changes in those rules, together with other institutional adjustments, to correct the deficiencies.<sup>3</sup> Building on a fairly prodigious amount of published work over the last decade,<sup>4</sup> the author combines two distinctive perspectives: economic analysis and empirical investigation. These perspectives are clearly his comparative advantages, and he exploits them successfully. The author stumbles a bit in connection with the legal analysis. Lawyers, especially products liability mavens, will realize at several junctures that the author is neither a lawyer nor a products specialist.<sup>5</sup> However, with only a

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<sup>1</sup> See generally, Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269, 275-77 (1989) (labeling a social, political, or economic phenomenon a "crisis" is a political process, subject to self-conscious manipulation).

<sup>2</sup> W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* (1991).

<sup>3</sup> One might argue that I have taken the author too seriously when I characterize him as "proposing changes." Thus, in his Preface he asserts: "This book is not an effort to advocate a specific and immediate legislative agenda. Rather, its main purpose is to provide guiding principles. . . ." *Id.* at xii. In his first chapter, however, he titles his plan "Proposals for Reform." *Id.* at 11.

<sup>4</sup> In his bibliography, the author lists 32 books and articles published in the last ten years. *Id.* at 257-66.

<sup>5</sup> Virtually every serious legal commentator finds it important to distinguish between design and warning defects. And yet, the author refers to "the emergence of a new design defect: the inadequate hazard warning." *Id.* at 9. *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960), involved a manufacturing defect, not defective design. The author, though, refers to "the emergence of the design defect doctrine in the 1960 *Henningsen* decision." VISCUSI, *supra* note 2, at 28. Finally, in *Swartz v. General Motors Corp.*, 378 N.E.2d 61, 63 (Mass. 1978), the court said that warranty liability in Massachusetts is "as comprehensive as that provided by [the strict liability in tort provision in] § 402A of the Restatement." And yet, the author says that "the principle of strict liability has not been adopted [in] . . . Massachusetts." VISCUSI, *supra* note 2, at 45.

few exceptions, these shortcomings do not detract from understanding. And the confusing substantive legal aspects can be straightened out at acceptable cost. Let me make clear that I think this is a good book, well worth the time it takes to read and react to it. Unlike some criticisms of products liability developments in recent years, it does not yell at the top of its voice.<sup>6</sup> It is balanced and sensitive to institutional limitations.<sup>7</sup> For these reasons it should attract considerable attention.

Starting from the premise that the objective of any system of safety regulation should be "to strike an appropriate balance between safety and the costs incurred to achieve this safety,"<sup>8</sup> the author provides an integrated, internally consistent package for "designing social risk policy."<sup>9</sup> In some respects, especially in connection with liability rules, his proposals would cut back product distributors' exposure under existing law. In other respects, especially in measuring damages awards, his plan would increase exposures. The author approaches each of these subjects independently, making no effort to argue that the reductions on one side would balance increases on the other. Thus, unlike some proposals for reform which appear to be directed at reducing business firms' liability costs,<sup>10</sup> the author's proposals have an engaging "chips fall where they may" freshness. For these reasons and for reasons I develop subsequently, I describe the offered reform proposals as "organic."<sup>11</sup>

Before moving to a critique of the substantive proposals for change, let us consider the empirical dimensions of the author's work. His tasks in this regard are threefold. First, he must plausibly argue that our liability system faces a crisis that, at least in significant measure, exists independently of the peculiar characteristics of the insurance industry. Second, he must connect the crisis to specific aspects of the legal doctrines and procedures that determine firms' exposures to liability. Finally, he must plausibly show that the changes he proposes will work to reduce the problems he has identified.

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<sup>6</sup> Cf. PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

<sup>7</sup> VISCUSI, *supra* note 2, at 6: "If our objective is to establish an appropriate risk policy rather than simply to consider modifications in products liability, then part of our job is to recommend an appropriate institutional division of labor."

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 4 ("The apparent objective of most tort reform efforts is simple: costs must be reduced."). See also VISCUSI, *supra* note 2, at 211.

<sup>11</sup> Webster's *New World Dictionary* defines "organic" as "systematically arranged." WEBSTER'S NEW WORLD DICTIONARY 302 (1989).

Regarding the first of these tasks—making a plausible case that a crisis exists—the author advances two major arguments: (1) he examines recent trends in the pricing and availability of liability insurance, showing that insurance markets have failed in recent years in ways that are plausibly linked to failures in the liability system; and (2) he examines recent trends in liability, showing that they have deviated significantly from what a properly designed and healthy liability system would have generated.

On the first front, the author looks at a number of insurance indicators over the past several decades, tracking trends in aggregate premiums paid, ratios of losses paid out to premiums taken in, and aggregate coverages.<sup>12</sup> The critical period for his analysis is 1980-1984: GNP rose dramatically, suggesting growing demand for insurance,<sup>13</sup> and liability insurance prices remained constant, suggesting that one could have expected a significant increase in the amount of insurance coverage (measured by aggregate premiums). The decline of aggregate coverage during this same period suggests market failure—insurance companies were getting out of the business of writing products liability insurance for reasons that find their source in the liability system.<sup>14</sup> If the relevant data had shown steeply rising prices or increasing coverage over the relevant period, they would have begged the question of whether or not a crisis existed.<sup>15</sup> But the counter-intuitive shrinkages in coverage caused by withdrawals of insurers and insureds from markets that should have been expanding suggest, to the author, that the tort system was not working as it should.<sup>16</sup>

Examining the liability system over recent years, the author paints a picture of surging levels of litigation and rising levels of damages awards.<sup>17</sup> At one point he notes that asbestos claims account for much of the surge in recent years,<sup>18</sup> and he refers to the comparative stability of nonasbestos cases.<sup>19</sup> Yet while he observes that asbestos accounts for much of the increases, he concludes his description of litigation trends by observing that “other products liability litigation has risen as well.”<sup>20</sup> The clear implication is that

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<sup>12</sup> VISCUSI, *supra* note 2, at 30-34.

<sup>13</sup> Holding all else constant, these variables normally have a strong positive correlation. *Id.* at 34.

<sup>14</sup> *Id.* at 35-37.

<sup>15</sup> During a growth surge in GNP, rising insurance prices and increasing aggregate coverage would have been consistent with a normally functioning liability system and a healthy insurance market.

<sup>16</sup> VISCUSI, *supra* note 2, at 36-37.

<sup>17</sup> *Id.* at 16.

<sup>18</sup> *Id.* at 41.

<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 41.

rapidly rising and largely unpredictable trends in litigation are an important part of what is causing insurance markets to fail.

When the author links existing doctrine with the real world, he shifts from an empirical to a normative mode. That is, he examines design liability, damages, liability for failure to warn, toxic torts and worker compensation. He then makes essentially normative judgments regarding which approaches make sense in light of his assumptions regarding efficiency-based objectives. I do not fault him for making this shift, because I do not know how else he could have proceeded. Though he sprinkles these chapters with empirical observations, the judgments he reaches regarding how to proceed with reform are normative.

Before assessing the author's proposals for change, let me react to his more straightforward empirical analysis of trends in the insurance and litigation systems. Regarding his empirical description of the insurance component of the crisis, I am not sure what to think. George Priest has advanced an explanation for the flight of insurers and insureds from commercial insurance markets that has less to do with uncertainty and escalating liability than with the shift from first-party to third-party insurance.<sup>21</sup> In effect, Priest advises us to eliminate the "insure against residual losses" element that he claims has crept into current thinking about products liability, and stick to deterrence. As we shall see momentarily, that advice is similar to Viscusi's. Moreover, some observers have attributed the recent insurance crisis to business cycles in the insurance industry.<sup>22</sup> Given these conflicts among informed observers of the liability insurance scene, I shall defer discussion of what insurance trends tell us until someone comes up with more hard facts and a more complete model with which to explain what has been happening.

As for the author's picture of liability trends, I have several more pointed criticisms. First, it is unhelpful to conflate, as does the author, asbestos and nonasbestos claims when talking about such recent trends in products liability as filings, trials, and outcomes. Asbestos claims so overwhelm the rest as to render analysis of the "other" meaningless.<sup>23</sup> The author appears to sympathize with this conclusion,<sup>24</sup> but then misstates the nonasbestos experience. The best sources on filings and litigation trends, as the author appears to agree,<sup>25</sup> are the federal district court data gathered by the Adminis-

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<sup>21</sup> See George Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 437 (1987).

<sup>22</sup> See Scott Harrington, *Prices and Profits in the Liability Insurance Market*, in *LIABILITY: PERSPECTIVES AND POLICY 77* (Robert E. Litan & Clifford Winston eds., 1988).

<sup>23</sup> 1988 ANNUAL REP. OF THE DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS 184 (Table C-2A).

<sup>24</sup> VISCUSI, *supra* note 2, at 20-22, 41.

<sup>25</sup> *Id.* at 16.

trative Office of the United States District Courts.<sup>26</sup> Contrary to the author's view, nonasbestos products filings in federal courts have been in a dramatic, unrelenting decline from 1985 through 1990.<sup>27</sup> This decline, coupled with concomitant declines in plaintiffs' success rates and other indicators over the same period, suggests an easing of whatever liability crisis may have been building over the years prior to 1985.<sup>28</sup> My point here is not that products liability reform is no longer needed. The post-1985 declines to which I refer may still leave the system in need of repair. Moreover, normative reasons, to which we will now turn attention, may justify changing the existing system. My narrower point is that some aspects of the author's depiction of our current situation, which he uses to show a need for change, are misleading.

Turning to the author's proposals for change, or at least to what the author refers to as "guiding principles,"<sup>29</sup> I will first describe them and then assess their merits. On the legal standards for liability, he proposes that courts continue to impose strict liability for manufacturing defects because commercial distributors can perform an insurance function in that context.<sup>30</sup> His major concerns focus on the rules determining liability for failure to warn, liability for defective designs, and the measure of compensatory recovery when death or injury to health are involved. Regarding liability for failure to warn, the author would tighten courts' analyses in ways that closely track suggestions in an article I recently co-authored,<sup>31</sup> an article he cites elsewhere with approval.<sup>32</sup> Courts should apply a risk-utility test in determining when warnings should be given. Warnings should be required only when they convey new information in a convincing manner—that is, when the court has confidence that a warning would have communicated helpful information that the user needed.<sup>33</sup> The author also rejects imposing liability for failures to warn of risks that were unknowable at the time of original distribution. In short, courts should understand the cost of warnings and should review warnings-based claims more rigorously.

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<sup>26</sup> See generally James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 518-22 (1990).

<sup>27</sup> *Id.* at 532-36. Recently published data for 1989 and 1990 show further declines.

<sup>28</sup> See generally Henderson & Eisenberg, *supra* note 26.

<sup>29</sup> See *supra* note 3.

<sup>30</sup> See VISCUSI, *supra* note 2, at 209.

<sup>31</sup> See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).

<sup>32</sup> A.L.I. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 57 n.36 (1991).

<sup>33</sup> See VISCUSI, *supra* note 2 at 139-46.

Two aspects of the author's proposal regarding failure to warn depart from my own recently published analysis. First, he advocates that compliance with regulatory provisions constitutes a complete bar to liability;<sup>34</sup> my co-author and I considered and rejected this conclusion in our earlier product warnings article.<sup>35</sup> Second, the author calls for a "national warnings policy" to establish a uniform vocabulary for warnings. He appears to be calling for an extension of FDA-like, standardized warnings for all products, not just drugs.<sup>36</sup> Only regulations that meet the FDA-like standards will bar liability for firms complying with them. Thus, until such a national warnings policy is established (or rather, to the extent that such a policy has enjoyed only limited implementation at any point in time), the author expects his "compliance is exculpatory" approach to apply to relatively few product categories.<sup>37</sup>

The author's proposals regarding liability for defective designs are somewhat confusing. He begins by making clear that he favors a risk-utility, essentially negligence-based approach. Strict liability, with its insurance implications, should not be applied in the context of liability for defective product designs.<sup>38</sup> With that I can hardly disagree.<sup>39</sup> The author then divides the risk-utility test into three separate components, to be applied independently and sequentially. This is where I found the analysis a bit confusing. The first test weighs three factors.<sup>40</sup> The second test adds a fourth factor to the those weighed in applying the first test.<sup>41</sup> And the third test adds three more factors into the second test.<sup>42</sup> Putting all three risk-utility tests together in a sequence results in what the author refers to as "a more tightly specified negligence standard" than that applied under existing risk-utility approaches to defective design.<sup>43</sup> On my initial reading it was not clear why each test was framed the

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<sup>34</sup> Viscusi, *supra* note 2, at 128-29.

<sup>35</sup> See Henderson & Twerski, *supra* note 31, at 321. Essentially, we rejected the compliance defense because we did not have adequate confidence in the standards to which firms would presumably conform. The author purports to solve this problem by mandating new, more adequate federal standards.

<sup>36</sup> Viscusi, *supra* note 2, at 155.

<sup>37</sup> *Id.* at 154.

<sup>38</sup> *Id.* at 75-78.

<sup>39</sup> See James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979).

<sup>40</sup> The author labels the first test the "purchaser's risk-utility index." Viscusi, *supra* note 2, at 78. This threshold asks whether "the expected benefits of the product exceed the expected injury costs." Three factors are considered: the consumer's willingness to pay for the product, the purchase cost, and the unexpected injury cost. *Id.*

<sup>41</sup> The second "private risk-utility test" factors in the profits to the producer. *Id.*

<sup>42</sup> The "social benefit-cost test" takes into account the "adverse effects on parties other than the purchaser" and considers three additional factors: taxes, benefits to other parties, and costs to other parties. *Id.*

<sup>43</sup> *Id.* at 81.

way it was<sup>44</sup> nor whether and how courts (or other governmental institutions) were to apply them.<sup>45</sup>

Rather than rehearse in detail the sources of this confusion, I will simply observe that a lawyer concerned with applying the author's proposals in court would need more guidance than that offered regarding which institutions are to apply which tests. At the risk of appearing to generalize from a single instance, this is probably an example of a theoretically appropriate proposal playing somewhat loose with the realities with which lawyers must deal. This is puzzling, given the author's obvious concerns for process and institutional competence.<sup>46</sup>

In my view, the author's position on the tests for defective design and who should apply them is as follows: Three tests should be used to determine whether a particular product design deserves to be marketed. Both the first and the third tests would determine the threshold question of whether any broad category of products, of which the particular product in question is an example, deserves to be marketed in the first instance. Courts are not competent to run the risk-utility calculi necessary to apply these "whether to market at all?" tests. Categorical decisions regarding marketability should be the exclusive responsibility of nonjudicial agencies, who should exercise that responsibility relatively vigorously. The courts would only apply the second test, and would apply it only in the context of marginal review of particular product designs compared with feasible design alternatives.<sup>47</sup>

I agree wholeheartedly that courts are not equipped to decide whether broad categories of products are "good for America."<sup>48</sup> However, the way the author presents the issues, one could read him as urging upon Congress and nonjudicial regulatory agencies a more vigorous review, at the categorical level, of which classes of products should or should not be marketed. If that is his intent, then I must dissent. Even if Congress is institutionally capable of conducting such review, as courts surely are not, I trust that Congress will see the folly in substituting its categorical judgments on

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<sup>44</sup> I was particularly puzzled about how a product could meet the first test (*see supra* note 40) and yet fail to meet the second (*see supra* note 41). It seemed to me that the question of profitability was one for the defendant to answer, not the court. I now understand that profitability (or rather, lack thereof) is an issue the defendant raises in attacking the plaintiff's suggested alternative design. The book, however, does not make this clear.

<sup>45</sup> The book never sets forth the rules clearly and straightforwardly.

<sup>46</sup> *See supra* note 7 and accompanying text.

<sup>47</sup> Viscusi, *supra* note 2, at 84.

<sup>48</sup> For an article making this very point, see James A. Henderson, Jr. & Aaron Twerski, *Closing the American Products Liability Frontier: Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263 (1991).

overall marketability with those reached by the market. Congress and the agencies certainly may (and do) engage in marginal reviews of how firms are designing and marketing products.<sup>49</sup> But macro analysis regarding which broad categories of products deserve to be marketed should, and surely will, be left almost entirely to the marketplace. That the author would suggest otherwise is undoubtedly due, at least in part, to his treating all three risk-utility tests as legal tests for defectiveness, which product designs must pass, and then assigning two of these tests to nonjudicial governmental agencies. By implying that the first and third tests are legal tests for defectiveness, he feels constrained to assign them to one governmental agency or another. I would insist that categorical judgments regarding which broad classes of products deserve to be marketed in most instances ought not be decided by *any* governmental agency, but rather by the market.

Two more features of the author's proposal regarding liability for defective designs remain. Consistent with his position on warnings, the author concludes that designs should not be found defective if they conform to applicable design safety standards established by regulatory agencies.<sup>50</sup> Once again, conformance to regulation is exculpatory. The last feature of the author's proposal for regulating product designs relates to whether the relevant risk-utility analyses are to be run on the basis of knowledge of risk at the time the producer acted, or knowledge of risk at the time the regulatory decision was reached. The author adopts "time producer acts" for the first and second tests,<sup>51</sup> but "time of regulatory decision" for the third.<sup>52</sup> If my gloss of his institutional competence analysis is correct, then "time of regulatory decision" is appropriate for the third test because that test is to be applied not by courts retroactively, but prospectively, by nonjudicial regulators.<sup>53</sup> Of course, that leaves the question of why the first test should not also be applied based on "time of regulatory decision" knowledge.

The last major element on the author's products reform agenda is the appropriate measure of compensatory damages. He distinguishes between an "insurance" measure, which coincides with what persons at risk of injury would be willing to buy in the way of coverage *ex ante*;<sup>54</sup> and a "deterrence" measure, which coincides with what it would take to achieve optimum producer deterrence, again

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<sup>49</sup> See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2051 (1988).

<sup>50</sup> VISCUSI, *supra* note 2, at 85.

<sup>51</sup> *Id.* at 78-79.

<sup>52</sup> *Id.* at 81.

<sup>53</sup> See text preceding note 46, *supra*.

<sup>54</sup> VISCUSI, *supra* note 2, at 89.

*ex ante*.<sup>55</sup> Having argued that products liability should not try to serve a social insurance function, the author concludes that the deterrence measure is in many cases an appropriate measure of compensatory damage awards. For deaths and adverse effects on health, he observes that current law often seriously undervalues awards to victims.<sup>56</sup> Indeed, he implies that in some cases, when the need for deterrence is great, plaintiffs should recover approximately ten times more in tort compensatory damages than they are currently recovering.<sup>57</sup>

So much for a description of the major elements of the author's proposal for reforming products liability. Do they make sense? To answer this question, several assessments are required. First, is the guiding objective of allocative efficiency appropriate? Second, in theory would his proposal achieve that objective? Third, if the elements of his proposal could somehow be implemented, would we like what we ended up with? Fourth, how likely, as a practical matter, are the elements to be implemented? And finally, what are the implications of gradual, or only partial, implementation?

I shall not try to answer questions one and two. Regarding the first, a rich debate continues over whether and to what extent efficiency provides a legitimate, workable norm for guiding law makers.<sup>58</sup> Regarding the second, while an affirmative answer seems appropriate, I lack the expertise in microeconomics to offer it with complete confidence. For these reasons, and because I believe the last three questions are more interesting, I will assume "yes" answers to questions one and two in order to address the others.

Before answering questions three, four and five, it will be helpful to review the major elements of the author's proposal and their organic relationship. Let us begin by observing that three major institutions regulate product safety decisions in this country: the tort liability system, other (nonjudicial) systems of safety regulation, and the market. All three interact with each other; each one affects, and

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<sup>55</sup> *Id.* at 90.

<sup>56</sup> *Id.* "If the courts wish to become a significant social institution for controlling risks, then changing the damages calculation procedure is essential."

<sup>57</sup> *Id.* at 214: "We are sending firms price signals that in effect enable them to pay ten cents on the dollar for the economic value of the lives that will be lost as a result of product risks." See also *id.* at 211 ("If courts generally adopt novel damages concepts, such as the deterrence value of life, . . . damages will increase by a factor of ten. . . .") The author's reform package of making it more difficult to find liability while allowing significantly greater measures of recovery when liability is found is similar to a proposal advanced recently by Jason Johnston, albeit for different reasons. Jason Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 COLUM. L. REV. 1385 (1987).

<sup>58</sup> See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); Jules L. Coleman, *The Economic Analysis of Law*, 24 NOMOS 83 (1982).

is affected by, the other two. Within the tort liability system it is useful to distinguish between decisions affecting liability, on the one hand, and damages, on the other. And within decisions affecting liability, one may usefully distinguish in this context between decisions regarding product design and decisions regarding product marketing.

One may represent the foregoing institutional components of product safety regulation diagrammatically as follows, with the arrows representing the interdependencies among the elements.

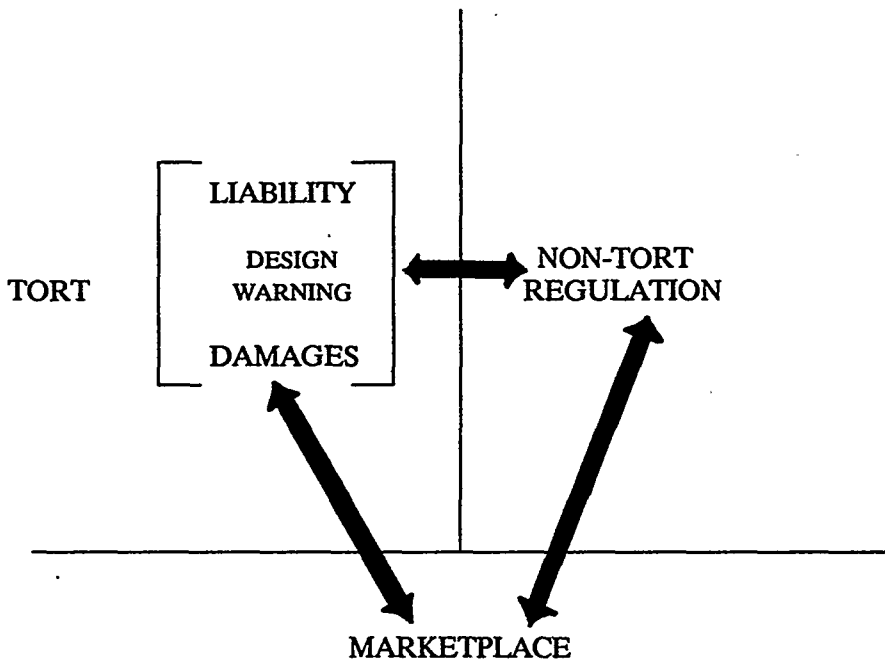


FIGURE 1

Assuming that Figure 1 metaphorically represents the existing system, Figure 2, on the next page, represents the author's proposed alternative liability system, with the changes in regulatory emphasis reflected in changes in size and boldness of the typeface.

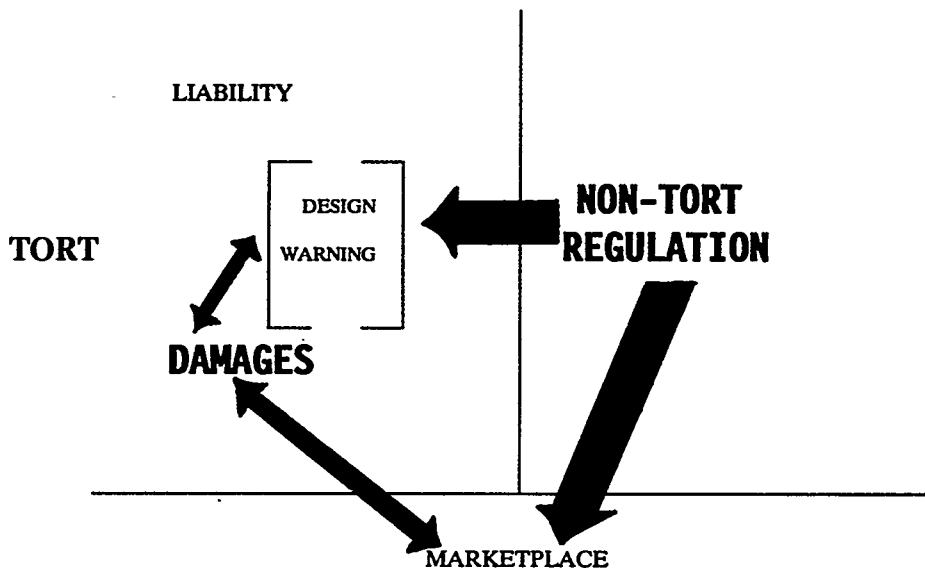


FIGURE 2

Figure 2 captures graphically the changes that the author's proposal, if implemented, would bring. Within the tort system, exposure to liability has diminished and damages have increased. (Overall, Figure 2 shows "Tort" to have remained constant, but that might or might not actually occur.) Moreover, reflecting these changes, the linkage between liability and damages is for the first time made explicit in Figure 2. Nontort regulation has increased dramatically, and the linkage between tort and nontort is now primarily focused on design and warning. Finally, the role of the marketplace has been diminished, reflecting the intrusion of nontort regulation into the processes of decisionmaking regarding which categories of products may and may not be marketed at all.

Armed with the insights Figures 1 and 2 provide, we may now address the remaining questions. Assuming that the author's proposal could be implemented, would Americans be pleased with the results? Here I may be estopped, given my earlier assumptions that efficiency is an appropriate goal and that the author's plan would achieve that goal. But consider the realities to which we would have to adjust. A new, product-oriented federal bureaucracy would have been created that would dictate the level of safety that must be achieved in connection with product design and marketing. Think of the concentration of centralized, bureaucratized power this would entail. From the regulatory standpoint, hairdryers and hand drills might receive practically the same attention as prescription drugs.

Moreover, far fewer tort plaintiffs would succeed in court;<sup>59</sup> but those that did succeed would be perceived as having hit the jackpot.<sup>60</sup> I plead guilty to bringing nonefficiency-based values into these remarks, and I may be accused of changing the rules of my critique in mid-play. Yet, it is one thing to accept the efficiency objective as an abstract ideal; it is quite another to face the practical realities generated by logically relentless reliance on that ideal.

That brings us to the question of implementation. I begin with the assumption that only federal legislation could accomplish the changes the author advocates. Certainly the systems that regulate the contents of warnings and decide "which product categories benefit purchasers?" would, by the author's own admission, require regulation at the federal level.<sup>61</sup> Moreover, the changes in the liability rules to be applied by courts would require federal legislation in order to achieve economy-wide efficiency.<sup>62</sup>

How likely is it that Congress would promulgate and enact the necessary statutes and regulations? I peg the probability at near zero for the foreseeable future.<sup>63</sup> Even if promulgation and enactment were to occur, how likely is it that those actors to whom the mandates were addressed—regulatory agencies and courts—would comply fully enough to achieve the system's efficiency goals? I would peg this probability at near zero for longer than the foreseeable future. Regarding the regulations aimed at categorical design decisions, I would be just as happy if agencies failed to promulgate regulations.<sup>64</sup> Regarding product warnings, the prospects of creating an FDA-like agency for every product area and expecting those agencies to stay abreast of changing technology boggles one's mind.

Of course, under the author's scheme, courts would play an important back-up role in reviewing the adequacy of warnings for products that have not been the subject of federal regulation. But I am already on the written record to the effect that the common law governing liability for inadequate product warnings is on the edge of total collapse.<sup>65</sup> Would a federal statute, aimed at stiffening the courts' resolve to do a better job in reviewing warnings, solve the

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<sup>59</sup> See VISCUSI, *supra* note 2, at 212.

<sup>60</sup> *Id.* at 213: "If we wish to create appropriate incentives, the products liability system must rely on . . . deterrence values for life and injury. . . . Saying that an individual's life is worth \$3 million or \$5 million may be surprising, [but is necessary to induce firms to invest adequately in safety.]"

<sup>61</sup> VISCUSI, *supra* note 2, at 85.

<sup>62</sup> The organic approach to change that the author advocates could be achieved only by uniform regulations at the national level.

<sup>63</sup> Much more modest federal reforms have yet to win passage in the Congress, and future prospects appear dim.

<sup>64</sup> See *supra* text accompanying note 49.

<sup>65</sup> See Henderson & Twerski, *supra* note 31.

problem? I would set the probability of that occurring, even in the distant future, at near zero. Bearing in mind that the federal statute would be aimed largely at state and not federal judges, judicial cooperation with essentially hortatory commands from on high would be conspicuous by its absence.<sup>66</sup> Not surprisingly, measures aimed at reforming state failure-to-warn rules have been excluded from federal products reform proposals in recent years. Indeed, even at the state level, legislative efforts to reform warnings jurisprudence have largely been abandoned, given the futility of state legislatures begging their own judges to take failure-to-warn litigation more seriously.<sup>67</sup>

Now for the last question: What are the implications of gradual, or only partial, implementation of the author's reform proposals? To understand the importance of this question, and to begin to discover its answer, one must re-examine an aspect of the author's project significant enough to have gotten into the title of this review essay: the author's package for reform is, in contrast to most others, emphatically organic in nature. The author has offered an integrated, internally consistent package of reforms, each part of which is both justified by reference to an underlying norm—allocative efficiency—and interrelated with the other parts. Moreover, the reform package recognizes the differences in institutional competence between and among the various social institutions that may regulate product safety, and allocates to each those tasks for which each is best suited. Thus, the author's reform package is "organic" in the true meaning of the term.<sup>68</sup> It is not radical in the sense that social insurance or no-fault compensation would replace tort.<sup>69</sup> If the author's proposals for change were to be implemented wholesale, one would be left with a products liability system. However, it would be a system whose parts very much depended on each other for their efficacy.

At this point it might be helpful to pause and observe that *all* legal systems are to some extent organic, as I have defined the term. Certainly the common law is organic, as are reforms that have codified,<sup>70</sup> or replaced altogether, the common law.<sup>71</sup> When one con-

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<sup>66</sup> I assume that, as traditionally the case, state courts are the primary implementors of tort law.

<sup>67</sup> As of July, 1989, 33 jurisdictions had enacted products liability reform legislation. Of these, only eight statutes explicitly addressed the question of liability for failure to warn.

<sup>68</sup> See *supra* note 11 and accompanying text.

<sup>69</sup> The author counsels against a worker compensation no-fault approach. See VISCUSI, *supra* note 2, at 180.

<sup>70</sup> See, e.g., the Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979).

<sup>71</sup> See, e.g., a typical worker compensation act.

siders proposals to change the common law, or to supplement it, relatively nonorganic approaches are available. For example, the author suggests that courts should hold a tighter rein on failure-to-warn claims<sup>72</sup> and that courts should require plaintiffs in product design litigation to show feasible alternatives;<sup>73</sup> both suggestions are marginal adjustments to the common law existing in some states that could stand alone.<sup>74</sup> But Figure 2 indicates the emphatic interdependence of his suggestions that compensatory damages be increased dramatically while liability is reduced, that statutory compliance be a complete bar, and that regulation largely replace the market in deciding which categories of products should be marketed.

In contrast to the author's organic approach, most other reform proposals advanced in recent years take what the author describes, somewhat derogatorily, as a "grab bag"<sup>75</sup> or "Chinese menu"<sup>76</sup> approach. From a long list of possible reforms, one chooses a smaller number for inclusion in a reform package on the basis of considerations that purport to include policy justifications, likely impacts on producers' exposures to liability, and political appeal. Each element of such a reform package stands independently; passage of any one or any combination would represent some improvement from the standpoint of traditional reform proponents.<sup>77</sup> In one sense, the author is correct in criticizing the haphazardness of such incremental approaches to products liability reform. Even if each item in an incremental reform package can be defended on policy grounds, the comparative lack of self-conscious organic integration betrays a certain "any stick to beat a dog" quality. To this point, the organic nature of the author's reform package appears a definite plus. Indeed, nonorganic approaches appear inelegant, to the point of being scruffy. The emphatically organic approach to reform, on the other hand, appears more principled, more dignified.

But now consider the implication of gradual, or partial, implementation of each type of tort reform. Scruffy, nonorganic reform confronts few problems in this regard. If sponsors of such a propo-

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<sup>72</sup> See *supra* note 33 and accompanying text.

<sup>73</sup> See *supra* note 47 and accompanying text.

<sup>74</sup> That is, both of these suggestions relate directly to existing law and practice, and both would work improvements if adopted by themselves. Indeed, in some jurisdictions the author's suggestions approximate existing law.

<sup>75</sup> Viscusi, *supra* note 2, at 4.

<sup>76</sup> *Id.* at 211.

<sup>77</sup> The author asserts, and I tend to agree, that most reform proposals are sponsored by business interests and are aimed at reducing producers' exposures to liability. *Id.* at 4. If one views current exposures as excessive, of course, cutting back is a reasonable and rational objective. But the point here is that the cost-reduction objective can be achieved by nonorganic changes in the law.

sal approach a legislature with a ten-point reform package and only six or seven are enacted, they can treat the result as no small victory. "Half a loaf," as they say. What are the parallel implications for organic reform? They might be nothing short of disastrous. Because each of the parts depends for its efficacy on the others, anything short of a complete, or very nearly complete, implementation is worse than no implementation at all.

Consider the implications of adopting one aspect of the author's plan without the other, and focusing on the organic interdependency between liability and damages introduced by the author's proposals for change: significantly increase compensatory damages but leave the liability issues much as they are, or leave compensatory damages as they are and cut back substantially on liability. Since the two reforms are meant to complement one another, adoption of only one would make things worse, not better.<sup>78</sup> I am certain the author would agree with these observations, and then would remind us that Congress would enact all of these changes in one complete package. But would change occur quickly? To the contrary, change would more likely come slowly, haltingly and, to some extent, not at all. During the long, perhaps interminable period of transition, things would be worse than before, judged by most criteria, including the author's.

Thus I return to the question with which this critique began. Do the author's proposals make sense? As a theoretical matter, I believe most of them do. In theory, assuming that efficiency is an appropriate goal for products liability, the author's assignments of responsibility for safety among courts, legislatures, agencies, producers and consumers would constitute improvements over existing law. As I noted earlier, I would favor leaving questions of "Which broad product categories deserved to be produced and distributed?" to the market rather than to government regulators; but reasonable minds may differ on this issue.

As a practical matter, however, I would not recommend acting on his proposals. Organic tort reform only works if taken as a whole, which is very unlikely to occur even if Congress could somehow be convinced to try. Taking such reform by halves invites disaster. Having said this, I may appear to contradict myself when I conclude that two elements of his plan could, and I believe should, be implemented independently of the others. I agree with the author that courts should run a tighter ship in connection with failure-

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<sup>78</sup> Clearly the author intends them to balance one another. "My proposals pertaining to liability standards will reduce the costs imposed by products liability. In contrast, my proposals for scheduling damages . . . will boost the cost imposed by liability." *Id.* at 12.

to-warn claims and should require plaintiffs complaining of risky product designs to prove the availability to defendant of a feasible, cost-effective alternative at the time of distribution. He probably envisions more drastic cutbacks in liability than I do, but we are in substantial agreement. These suggestions are not new with the author,<sup>79</sup> but he gets credit for recognizing their inherent good sense. These suggestions for change are acceptable because they are not, as are the other major elements of his proposal, tied organically to the other changes he espouses.<sup>80</sup> In contrast, the uniquely organic aspects of his reform package—that Congress and new FDA-like regulatory agencies should become more active regarding product safety and that compensatory damages for death and injury to health should be increased substantially—are fraught with the potential for making our admittedly imperfect products liability system even worse.

At this point I may appear to be taking the side of piecemeal, eclectic, grab-bag, politically-oriented, scruffy tort reform. On balance, I suppose I am. Integrated, emphatically organic approaches to tort reform have a "good side-bad side" quality to them. On the good side, they are principled, internally consistent, often elegant. On the bad side, they have an all-or-nothing quality and their logic tends to have a grinding relentlessness that answers every issue but does so uncompromisingly. This is true to some extent even with respect to proposals that codify or replace the common law altogether;<sup>81</sup> but it is inescapably true of organic proposals to reform tort law. Thus, it is not surprising that Professor Viscusi is an economist, since economics, after all, is a quintessentially integrated, organic approach to problem-solving. To the extent that other integrated approaches to social problems might generate their own tort reform packages,<sup>82</sup> I suspect they would make me nervous for the same basic reasons this author's proposals do. While I reject the author's reform package, I respect him for having written an interesting book, full of provocative insights. Those involved with products liability and the reform thereof should read it and reach their own conclusions.

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<sup>79</sup> See *supra* notes 31, 49 and accompanying text.

<sup>80</sup> See *supra* note 74 and accompanying text.

<sup>81</sup> See *supra* notes 70-71 and accompanying text.

<sup>82</sup> For example, one might accept accident victim compensation and loss-spreading as one's goal, proposing changes that would expand liability dramatically but cut back significantly on damages.