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Blending Reform of Tort Liability and Health Insurance: A Necessary Mix

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BLENDING REFORM OF TORT LIABILITY AND HEALTH INSURANCE: A NECESSARY MIX

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I
THE THESIS

The thesis of this Article is that making more health insurance benefits available to more people, far from lessening injury victims' proclivity to sue in tort (as conventional wisdom argues), will increase such suits. Thus, it is necessary to accompany any increases in health care coverage with the type of tort reform proposed herein.[1] This reform would allow parties to opt out of the cumbersome and expensive tort claim process with its compensation of noneconomic losses by substituting quicker and surer compensation of any unmet economic losses.

A. Current Views

This Article starts from the premise that tort liability insurance has long been seen as perversely ineffective and inefficient in providing compensation for illness and injury. In the words of Harvard Law School Professor Paul Weiler, a leading authority on tort law (speaking of medical malpractice claims but making an argument applicable to all types of tort claims for personal injury):

> Viewed as a form of insurance, the malpractice regime has major flaws. . . . [T]ort benefits are doled out in a rather arbitrary manner to some—but not most—deserving victims, and also to those . . . who are not even "deserving" under tort law's fault-based frame of reference. Even worse, to make payment to the relative handful . . . who do surmount the natural and legal barriers to demonstrating legal entitlement to damages, the medical malpractice system must spend an inordinate amount of both time . . . and money . . . litigat-

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[1] Even with the sweeping 1994 Republican electoral victory, some health insurance reform-expanding coverage will in all likelihood be pursued, whether by public or private avenues.

ing whether the doctor was at fault so that the victim can be compensated.[2]

On the other hand, it has long been widely assumed, even by sophisticated observers, that America's excessive reliance on inefficient tort liability stems from our comparatively inadequate forms of other private and social insurance. For example, an editorial from such a sophisticated source as *The Economist* (speaking of product liability but making an argument applicable to all types of tort claims for personal injury) states:

> The debate over product liability in America has been passionate, polarised and informed mainly by prejudice. . . . On one side, businessmen and zealous law-reformers bellow that . . . litigiousness and jackpot juries . . . are driving America's economy into the ground. . . . On the other, trial lawyers and consumer advocates bellow back that, without such huge awards, firms would sack every safety inspector in sight.
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> Neither side in this noisy debate is appealing to reason; and both are wrong. . . .
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> . . . [S]ome reformers . . . argue that "pain and suffering" awards should be abolished, and that only judgments based on "economic loss" . . . should be allowed. . . .
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> . . . [Changes in pain-and-suffering awards] and limits on punitive damages would make the system more predictable, but it would not reduce liability litigation in America to European levels. This is not because all Americans are sue-happy (though some are) but because, for millions of Americans, the legal system is also their primary health insurer. So the best way to slash the number of lawsuits would be to fix America's dreadful health-care system—another example where more reason, and less passion, is sorely needed.[3]

B. What the Data Show

"Fixing" (i.e., expanding) America's health care system, far from slashing the number of lawsuits, will likely increase, not lessen them. In this connection, note Tables A and B below.[4]

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2 Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908, 915 (1993).

3 *Sue the Rascals*, ECONOMIST, Feb. 13, 1993, at 18-19.

4 These tables are adapted from tables 1 and 3 in Part II, *infra*. For an important adjustment concerning such tables, see note 1, Appendix C. For an estimate that "liability payments represent[ed] . . . 7 percent of total annual compensation dollars [in 1988]," see DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 175 (1991).

TABLE A
BENEFITS PAID FOR INJURY AND ILLNESS BY
PRINCIPAL LOSS-SHIFTING SYSTEMS, 1982-1990.
(DOLLARS IN BILLIONS)

	1982	1984	1988	1990
Tort Liability	$23.1	29.5	53.0	65.3
Workers' Compensation	17.8	21.4	33.5	41.5
Private Loss Insurance	102.9	125.3	192.9	237.5
Sick Leave	10.6	12.9	17.0	19.3
Social Insurance	110.8	122.1	164.1	196.0
Public Assistance	39.1	44.9	65.5	85.1
Veterans	19.2	20.2	22.6	24.3
Public Health	13.2	13.0	18.0	20.3
Private Health	10.9	11.2	24.3	30.6
	$347.5	$400.5	$590.9	$719.9

Table A shows the recent expansion of all loss-shifting systems. But, as suggested, Tables A and B indicate that instead of lowering the cost of tort liability, expansion of private and social insurance seems to inflate it. At the least, it certainly does not seem to lessen it.

TABLE B
RELATIVE PERCENTAGES OF
BENEFITS PAID FOR INJURY AND ILLNESS
BY PRINCIPAL LOSS-SHIFTING SYSTEMS

	1982	1984	1988	1990
Tort Liability	6.7%	7.4%	9.0%	9.1%
Workers' Compensation	5.1%	5.3%	5.7%	5.8%
Private Loss Insurance	29.6%	31.2%	32.7%	33.0%
Sick Leave	3.1%	3.2%	2.9%	2.7%
Social Insurance	31.9%	30.6%	27.8%	27.2%
Public Assistance	11.2%	11.2%	11.1%	11.8%
Veterans	5.5%	5.0%	3.8%	3.4%
Other Public Health	3.8%	3.2%	3.0%	2.8%
Private Health	3.1%	2.8%	4.1%	4.3%
	100.0%	99.9%	100.0%	100.0%

Table B shows significant growth in the benefits paid for tort liability relative to the total benefits paid from all expanding private and social insurance systems during three years in the 1980s—1982, 1984, and 1988—and a further increase in 1990. In fact, as social and private insurance grow, tort liability insurance not only grows along with it, but also seems, if anything, to grow faster. In other words, tort liability seems to continue to take increasingly large proportions of the

universe of funds—itself increasing—available for compensating illness and injury. Even more discouraging, apparently some of the funds distributed by other loss-shifting systems, such as public and private health and disability insurance benefits, both subsidize and are subsidized by tort litigation.

C. Subsidizing Tort Litigation

Subsidization of tort liability claims by other forms of insurance occurs because claimants, buttressed by an increasingly active personal injury bar,[5] are provided with medical and other forms of relief which enable them to pursue their tort claims more aggressively.[6] Thus, benefits paid by other loss-shifting systems insulate the claimant from financial need during the normally prolonged tort claims process. That insulation is reinforced by the claimant counsel's contingent fee which largely negates any need for coming up with litigation expenses unless and until the case is settled or won. In addition, use and overuse of these "collateral sources" can serve to expand the plaintiff's claim for "pain and suffering" damages, since pain and suffering awards are often based on a multiple of the collateral sources expended by the claimant which are scheduled to be expanded under various health care reforms.[7] Thus, in turn, subsidization of health insurance by tort liability occurs because pain and suffering awards are generally calculated as entitlements equal to three or more times the cost of medical bills.[8] This creates a manifest incentive for claimants to run up medical bills, especially in light of the fact that health insurance companies, rather than patients themselves, pay those bills. Consider the following:

- When Massachusetts amended its no-fault law in 1988 to raise the threshold of economic damages required to bring a tort suit from $500 to $2000, the median number of medical treatment visits per claimant immediately rose from thirteen to thirty.[9]
- A study of tort claims from automobile accidents in Hawaii in 1990 showed that the median number of treatment visits by claim-

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5 *See* Richard B. Schmitt, *Slick Tactics: Trial Lawyers Glide Past Critics With Aid of Potent Trade Group*, WALL ST. J., Feb. 17, 1994, at 1 (discussing the political tactics of the trial lawyers).

6 Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 70-71 (1986).

7 Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payments for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, U. ILL. L. REV. 333, 334-39 (1981).

8 H. LAWRENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 107-08 (1970).

9 Sarah S. Marter & Herbert L. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Liability Claims*, 10 J. INS. REG. 462, 488 tbl. 12 (1992).

ants to chiropractors was fifty-eight, with one-quarter of such claimants having more than eighty-four visits.[10]

- In 1993, state authorities in New Jersey conducted a sting operation, staging a fake bus crash after which seventeen people raced to get on the bus in order to claim they had been injured. Two others filed tort claims without ever having been at the scene. Indeed, potential claimants had been motivated to monitor police radio frequencies to hear of an accident at which they could arrive before the police in order to make an injury claim.[11]

> As part of the sting, some of the investigators agreed to be treated, and were taken to chiropractors or physicians who provided 10-minute . . . treatments three times a week for up to 15 weeks. The doctors charged between $4500 and $6000 for the unneeded care and often padded the bills with numerous treatments that never took place.[12]

New Jersey state insurance officials expressed fears that national health care reform would not "contend with the tens of billions of health care dollars or more lost each year to [such] insurance fraud."[13]

Note further that efforts to include (at least eventually) more mental health care in health insurance coverage[14] will likely serve to inflate costs even more because plaintiffs can use such care to substantiate claims for mental suffering.[15] Health insurance now typically offers sparse coverage for such care.[16]

D. Present Tort Reform Proposals

Health care debates usually focus only on medical malpractice reform as the element of legal reform to accompany health insurance reform generally. But, in fact, medical malpractice is only a small part of the total personal injury tort system.[17] As can be perceived from

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10 INSURANCE RESEARCH COUNCIL, AUTOMOBILE INJURY CLAIMS IN HAWAII, 2, 26-27 (1991).

11 Peter Kerr, *'Ghost Riders' are Target of an Insurance Sting*, N.Y. TIMES, Aug. 18, 1993, at A1.

12 *Id.* at D2.

13 Peter Kerr, *Jersey's Insurance Sting: Cashing in on a Crash Without Pain and Suffering*, N.Y. TIMES, Aug. 22, 1993, § 4 (Week in Review), at 2.

14 Peter Passell, *The Health Care Plan Could Worsen Injury-Claim Abuses*, N.Y. TIMES, Oct. 14, 1993, at D2.

15 *See, e.g.*, Waddle v. Sparks, 331 S.E.2d 22, 27 (N.C. 1992) (mental suffering may be proved by expert medical testimony); Payton v. Abbott Labs., 437 N.E.2d 171, 181 (Mass. 1982) (same).

16 *MacNeil/Lehrer NewsHour*, (Sept. 22, 1993), *available in* LEXIS, News Library, Transcript 4760.

17 *See, e.g.*, INSURANCE INFORMATION INSTITUTE, THE FACT BOOK, 1993: PROPERTY/CASUALTY INSURANCE FACTS 16 (indicating, for example, that in 1991 net automobile liability premiums for automobile liability coverage totalled $63 billion versus approximately $4 billion for medical malpractice premiums).

the foregoing material, the personal injury tort system as a whole—including injuries from auto accidents, manufactured products, slips and falls, and other sources—must be considered as a factor of rising medical costs. Indeed, as also can be perceived from the foregoing material, by expanding both the number of insureds and the scope of basic coverage available not only for the newly insured but also for many others, reforms are also likely to expand the already inflationary effects of health insurance on tort liability insurance and vice versa.

Professor Gary Schwartz, in his Article in this symposium, disputes the above conclusion:

> If a national health program is adopted, judges would be aware that the insurance mandated by federal law now covers accident victims for the medical care they need. Granted, those victims' income losses would remain; still, judges might be less inclined to rely on loss-spreading notions to approve either individual verdicts or new causes of action. If so, then the growth of tort liability would be constrained.
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> . . . In short, the implementation of a national program would tend to constrict both the effective scope and the actual cost of the current regime of tort liability. At the least, that program would slow down the rate at which the current tort system would otherwise grow.[18]

In addition to the data and arguments I have presented above, another facet of my reply to Professor Schwartz's point lies in the aftermath of enactment of both workers' compensation and no-fault auto insurance, both, in effect, forms of health and disability insurance. By Professor Schwartz's reckoning, such a huge expansion of accident benefits (including in both instances compensation for wage loss) should have meant a corresponding contraction of tort disbursement. But in both instances tort claims have increasingly been pursued,[19] arguably based on the subsidy effects of such health and disability benefits on tort claims. And this has occurred despite explicit barriers in both instances to pursuing tort claims (in the form of "sole remedy" provisions under workers' compensation and "threshold" provisions under no-fault auto insurance), barriers not present, of course, when health benefits are simply provided without constraints on tort actions.[20]

Proponents of health care reform may assert in reply that portions of their proposals to control health care costs will adequately

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18 Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1354 (1994).

19 O'Connell & Joost, *supra* note 6, at 70-72; Jeffrey O'Connell, *No-Fault Insurance: Back by Popular Demand?*, 26 SAN DIEGO L. REV. 993, 995-99 (1989).

20 *Id.*

deal with all these problems.[21] In the first place, interest in cutting costs has waned in comparison with interest in expanding coverage as health care reform has been formulated.[22] Even more basically, consider that throughout the world, under socialized and private health insurance and any combination thereof, health care costs continue to escalate.[23] Yet, nowhere in the world is there anything remotely comparable to the incentives to incur wasteful health care costs as is provided by America's combination of health insurance and tort law, fueled by tort lawyers' contingent fees and huge payments for tort claimants' pain and suffering. To retain these mutually reinforcing combustibles while also expanding the base provided by health insurance will inevitably greatly increase all costs, even granting the (heroic?) assumption of the efficacy of reform efforts generally to deal with rising health care costs.[24]

The typical tort reform proposals contained in the congressional reform plans, including those in the 1994 Republican "Contract with America," mirror prior state tort reform proposals emanating from the insurance industry as well as their insureds—and self-insureds—who provide goods and services. Such typical tort proposals simply circumscribe the rights of the injured (by establishing, for example, limits on pain and suffering, contingent fees, and joint and several liability).[25] Not only do they unfairly favor only one side of the battle between the injured and those who allegedly injure them, but they also leave intact in every case the cumbersome basis of payment that prompts cries for tort reform in the first place: basing payment on fault and paying for pain and suffering (albeit with upper limits under reform proposals). Caps on large pain and suffering awards also fail to address abuses in minor cases leading to padding of claims and ambulance chasing.

E. Better—And Balanced—Reforms

Far more fair and sensible would be tort reform providing not only relief for defendants from undue tort burdens but a genuine quid pro quo for the injured through better liability insurance involv-

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21 For an indication of the imaginative steps that can be expected to evade health care cost controls, see Rick Wartzman & Hilary Stout, *Shifting Incentives: Some Seek Profit As White House Mulls Curbs on Health Costs*, WALL ST. J., May 4, 1993, at A1.

22 *E.g.*, Robert Pear, *Cost is Obscured in Health Debate—Focus on Universal Coverage Eclipses a Starting Issue*, N.Y. TIMES, Aug. 7, 1994, at 1; Stephen Pearlstein, *Containing Spiraling Medical Costs Isn't Popular Topic With Reformers*, WASH. POST, Jul. 27, 1994, at A13.

23 Philip J. Boyle & Daniel Callahan, *Minds and Hearts: Priorities in Mental Health Services*, HASTINGS CENTER REPORT, Sept. 1993, at S3, S3-S4.

24 Passell, *supra* note 14, at D2.

25 *Health Care: Clinton's Plan and the Alternatives*, N.Y. TIMES, Oct. 17, 1993, at 22; Joan Biskupic, *To Discourage Lawsuits, House GOP Would Preempt State Laws*, WASH. POST, Dec. 15, 1994, at A25.

ing fewer disputes and quicker payment for unreimbursed economic losses. Such coverage would include not only health care costs, such as rehabilitation, which is often not covered under private, public, or social insurance, but wage loss as well. Such coverage, as will be demonstrated below, can also result in better and less expensive insurance for both hard-pressed consumers and providers of goods and services.

1. *Auto Insurance Reform*

In accord with the foregoing, federal health insurance reform should offer motorists the option of being paid promptly for their unreimbursed out-of-pocket losses from personal injury in auto accidents, without reference to fault, along with the right to opt out of suing and being sued for pain and suffering, thereby greatly reducing any incentives to pad medical bills.[26]

2. *Beyond Auto Insurance*

Concerning other personal injury claims—such as those for medical malpractice, defective products, and occupier's liability—reform should offer defendants the choice of eliminating pain and suffering claims when an offer is promptly made (within, for example, ninety days of a claim) to pay periodically for an injured party's actual economic losses, plus a reduced claimant's attorney's fee.[27]

Estimates are that such reforms for auto and other claims, by eliminating inducements to pad claims and greatly reducing lawyers' fees (on both sides), could save in the vicinity of thirty billion dollars in annual insurance costs.[28] Such savings could indeed be viewed as making up for the almost inevitable increase in health insurance costs

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26 Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993) (explaining this proposal in more detail).

27 For a description of the plan and its underlying rationale, see Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871 (1992).

28 For an indication of the huge savings from automobile insurance alone, see O'Connell et al., *supra* note 26. *See also* Jeffrey O'Connell & Michael Horowitz, *A Look at . . . Hidden Health Hazards—The Lawyer Will See You Now: Health Reform's Tort Crisis*, WASH. POST, June 13, 1993, at C3. For a study indicating that the expansionary trend of product liability law seemed to end, beginning in the mid-1980s, see James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). *But see* A. HAVENNER, NOT QUITE A REVOLUTION IN PRODUCT LIABILITY (1990) (recalculating the data in Henderson & Eisenberg, *supra*, and finding at most only a stabilization in product filings and recoveries in federal district courts at far higher levels than for a decade earlier); 1 AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 265-78 (1991) (analyzing the increasing social costs of products liability litigation). Certainly no such stabilization is seen for auto accident claims. *See* O'Connell et al., *supra* note 26, at 1021-24.

accompanying any increases in the number of insureds and the scope of coverage.

F. The Politics of Reform

Of course it is true that such tort reforms will face bitter—and hugely powerful—opposition from the plaintiffs' personal injury bar. Speaking of the very modest proposals for tort reform included for medical malpractice claims in the original Clinton administration's health care reform proposal (the most stringent of which would only cap contingent fees at one-third of any award),[29]

> Robert Berenson, a Washington internist who co-chaired the administration's working group on medical-malpractice reform, sa[id] he wondered whether the trial lawyers' strong support for fellow lawyers Bill and Hillary Clinton during the campaign—ATLA [The Association of Trial Lawyers of America] members contributed about $500,000—just might have played a role. Dr. Berenson sa[id] he and some others in the working group sought much tougher changes . . . but were ignored by the White House.[30]

The plaintiffs' personal injury bar[31] has certainly long shown great political strength and sophistication in protecting its interests, especially in developing powerful ties with the Democratic Party.[32]

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29 *See supra* note 25 and accompanying text.

30 Schmitt, *supra* note 5, at 1; *see also* Morton Kondracke, *Latest Winners of Health Insurance Fight: Trial Lawyers*, ROLL CALL, Aug. 6, 1994, at 6.

31 For a list of 63 plaintiffs' attorneys who each made more than $2 million in hoth 1989 and 1988, see Peter Bremilow & Leslie Spender, *The Best Paid Lawyers in America*, FORBES, Oct. 16, 1989, at 197.

32 *Id.*; *see* Paul A. Gigot, *Dems Step Up To Well-Stocked Plaintiff Bar*, WALL ST. J., Sept. 4, 1992, at A8; Paul A. Gigot, *Bill Clinton Bellies Up To The Tort Bar*, WALL ST. J., Apr. 10, 1992, at A16. According to the *Wall Street Journal*, "[t]he plaintiffs' bar, especially the Association of Trial Lawyers of America (ATLA), has become the most important single fund-raising source for liberal Democrats." *Litigation Liberalism*, WALL ST. J., May 12, 1992, at A24. Consider the following account of the defeat hy the U.S. Senate of a federal bill changing product liability law (for criticisms of this bill on its merits, including those from Jeffrey O'Connell, see Passell, *supra* note 14, at D2): At the Senate Democratic caucus, Senator Howell Heflin, a former Alabama Supreme Court justice and trial lawyer, declared that "Jews, labor unions, and trial lawyers" are the three most important financial supporters of the Democratic party, with the result that Democratic "Senators cannot afford to let the trial lawyers down by passing a bill [that such lawyers] oppose." (The hill was then defeated by Democratic votes.) *Tort Song Tragedy*, WALL ST. J., Sept. 18, 1992, at A14; *see also Senatorts*, WALL ST. J., Nov. 9, 1994, at A12 (commenting on Senator Heflin's statement); Sara Fritz, *Washington Lobbyists Foresee a New Era*, L.A. TIMES, Nov. 9, 1992, at A14 (discussing changes in lobbying power associated with the change in administration); Stephen Labaton, *With Gifts From All Sides, Who Gets Clinton's Ear?*, N.Y. TIMES, Nov. 15, 1992, at 34 (discussing competition between interest groups including trial lawyers). For documentation of the huge amounts contributed by plaintiffs' personal injury lawyers, overwhelmingly to Democrats, see AMERICAN TORT REFORM ASS'N (ATRA), AMERICA'S THIRD POLITICAL PARTY: A STUDY OF POLITICAL CONTRIBUTIONS BY THE PLAINTIFF'S LAWYER INDUSTRY (Undated but published in 1994), summarized in Leslie Spencer, *America's Third Political Party*, FORBES, Oct. 24, 1994, at 60.

Plaintiffs' personal injury lawyers are among the relatively rare wealthy contributors to Democratic politicians who give to them out of preference, as opposed to simply trying to assure access to an incumbent or a likely incumbent-to-be.[33] Generally speaking, aside from some "limousine liberals" and members of the entertainment industry, who else among the wealthy routinely prefers to contribute to Democrats at both the state and federal level?[34] In many respects, too, the Democratic party is a natural base for the pursuit of the interests of the plaintiffs' personal injury bar. Relatively large numbers of personal injury lawyers are members of ethnic minority groups, as is true of Democrats generally—*e.g.*, Jewish, Irish, Italian, Hispanic, African-American, etc.[35] They also tend to be generally sympathetic to important Democratic party issues and concerns, including civil rights, civil liberties, and the redistribution of income.[36] Reallocating wealth is, after all, part of their business. In short, although wealthy and influential, they are not part of the establishment. They do not, for example, serve on boards of directors of corporations. On the contrary, they are in the business of *suing* the establishment. Finally, as lawyers they are often active in, or at least comfortable with, political and legislative matters. And they are individuals, spread all over the country in community after community with corresponding access to both state and federal officeholders. This access is in contrast to insurance companies, which are relatively few in number and location, and bear the political taint of being large corporations.

The plaintiffs' personal injury bar can also plausibly align itself with society's unfortunates—the injured—and with consumer groups in attacking large institutions which can be seen as either causing injuries or insuring those that do, especially in view of the one-sided tort reforms urged by the insurance industry and its allies. In this connec-

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33 *See* sources cited *supra* note 32. The following anecdote is pertinent: A Washington lawyer-lobbyist, formerly a power in his home state's Democratic party, went to one of his state's Democratic senators for whom he had raised substantial amounts of campaign money. The lobbyist wanted the Senator to include an amendment to a federal product liability bill (see note 22 *supra*) favorable to a manufacturer in their home state. The Senator replied that he couldn't touch anything that curbs tort law. He explained that although he gets a lot of money from business interests, those interests would desert him in a moment, and give three or four times what they give him, to a really promising Republican challenger. On the other hand, the plaintiffs' bar, he said, is with him first, last and always. And their only price is no interference with personal injury law. So, he said, much as he'd like to help, he'd have to pass. Confidential personal conversation with the author (July 1989).

34 For analysis of the lack of political sophistication typical of theatrical people see Kim Masters, *Hollywood Strikes Back! Cause Celebrities Defend Their Potomac Presence*, WASH. POST, May 25, 1993, at B1; *see also* Richard Grenier, *Hurray For Hollywood*, THE TIMES (LONDON), July 23, 1993 (Literary Supplement), at 10.

35 On the background—including ethnicity—of the plaintiffs' personal injury bar, see JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN 146-49 (1979).

36 *Id.* at xi, 135-36, 146-48.

tion, having the almost uniformly unpopular insurance industry as an enemy gives the personal injury bar another huge advantage.

While the insurance industry and its allies undoubtedly also have great lobbying power, they, unlike the personal injury bar, are not a "single interest" lobbying force. This brings us to another source of the plaintiffs' lawyers' great lobbying strength: they have only one item on their legislative agenda, namely, the preservation of the tort system. The personal injury bar can therefore concentrate all its attention on this one issue—it not only lobbies for only one thing, but that one thing is a request to legislators only to *refrain* from acting, *i.e.*, to keep the tort system intact. The insurance industry, on the other hand, faces myriad legislative issues, including regulatory, tax, and health care issues, in addition to changes in tort law, and many of its interests require *changes* in the law. Nor can the insurance industry speak with uniformity on changes in tort law. Some insurers are not all that anxious to see fundamental changes. Finally, the insurance industry is only one among many business interests supporting more conservative (usually Republican) candidates, in contrast to plaintiffs' lawyers' relatively rare status as affluent contributors to Democrats as a first choice.[37]

CONCLUSION

Even granting all the comparative political muscle of the Association of Trial Lawyers of America (ATLA), how much sense does it really make to even consider (either by public or private means) sweeping and binding changes in the way health care is financed and delivered in the United States, overriding many existing practices, including many covered now by state law,[38] while doing very little about medical malpractice tort claims and absolutely nothing about personal injury tort claims generally? After all, one can make a convincing case that despite the inadequacies in the availability and delivery of health care in the United States, the American public benefits far more from the delivery of its health care than from its legal services under personal injury law. So it may be that, given the vast array of variables that enter into our health care system, especially uncontrollable costs, all the waste of the tort liability system may seem too tempting a target despite the legendary lobbying power of ATLA—

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37 *See supra* notes 22-23. *See generally* Schmitt, *supra* note 5 (extensively documenting the extraordinary lobbying power of the Association of Trial Lawyers of America (ATLA)).

38 For a stunning indication—and defense—of how *very* radical the Clinton health care proposal was (and not only for health care but as a precursor to winning "greater justice in education, housing, jobs, and all the other goods and chances we [Americans] now distribute so unfairly") see Ronald Dworkin, *Will Clinton's Plan Be Fair?*, N.Y. REV., Jan. 13, 1994, at 20, 25.

especially too after the results of the 1994 elections at both the federal and state levels.[39]

In this connection, a key player in the search for sensible health insurance reform (and especially the dollars to fund it) may be Senator Daniel Patrick Moynihan (D-New York), now the Ranking Minority Member of the U.S. Senate Finance Committee, who has long been widely recognized as an expert on social insurance. Luckily, he is no stranger to tort-related issues. Over a quarter century ago, then Professor Moynihan focused with his typical clairvoyance and clarity on the ills of tort liability as applied to auto accidents:

> In the present stage of motor-vehicle transportation, accidents . . . typically involve a whole range of contributory factors for which the concept of a single "cause" or "negligent party" is very near to absurd.
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> . . . .
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> The result is an insurance system that is inherently unstable. The number of . . . claims and counterclaims [goes up]. The victim has every reason to exaggerate his losses. . . . The [insurance] company has every reason to resist. . . . Delay, fraud, contentiousness are maximized, and in the process the system becomes grossly inefficient and expensive.
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> . . . .
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> Automobile accident litigation has become a twentieth century equivalent of Dickens's Court of Chancery, eating up the pittance of

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39 Peter Passell, *Civil Justice System Is Overall Target*, N.Y. TIMES, Jan. 27, 1995, at B7. For a tongue-in-cheek idea applying proposed reform of medical services to legal services, consider the following:

> The system [of inaccessible and/or expensive legal services] demands change. We should have a system of National Legal Care that would assure all Americans a lifetime of the finest legal care. The lowliest purse snatcher should be assured of legal care equal to that of the wealthiest Wall Street swindler. And at reasonable prices. Or no price, for those who don't have money, or prefer spending their money on fun things.
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> This could be done by breaking up the big law firms and assigning lawyers to Legal Maintenance Organizations. Then all Americans could have their choice of which LMO they want to belong to.
>
> To cut down on waste, the government could establish a bureaucracy—or require states to do it—that would decide how much a lawyer could charge for any service and to reject needless meetings, phone calls, briefs, motions and other bill-padding practices.
>
> They could also set limits on how much lawyers could earn a year and how much they could spend on ties and tasseled loafers.
>
> The bureaucracy could also set other professional quotas, such as how many lawyers can specialize. That could force many lawyers who chase ambulances to instead settle family disputes over who inherits grandpa's . . . flat.
>
> . . . .
>
> And who would administer this new, fair, Comprehensive Legal Care system? The answer is obvious. A panel of impartial doctors.

Mike Royko, *Americans Deserve Lawyer in Every Pot*, CHI. TRIB., Dec. 15, 1993, at 3.

> widows and orphans, a vale from which few return with their respect for justice undiminished.[40]

Returning to the topic some five years later, but focusing on products liability and medical malpractice claims, then Ambassador Moynihan spoke of not wanting to see "us litigating ourselves into a stalemated and paranoid society. We could do so. . . . And that would be such a waste, such a loss."[41] Speaking of a congressional study on medical malpractice subtitled "The Patient Versus the Physician,"[42] he described this relationship as one that

> won't help doctors and . . . won't help patients. Similar confrontational, adversarial relations seem to be developing everywhere. They can't succeed. When everyone sues, no one gets satisfied. Our experience with the automobile brought us after the fact to that realization. . . . The legal system becomes ever more encumbered; the consequences of this burden become ever more pathologic . . . . This is the way systems die.[43]

So, at long last, now Senator Moynihan—and the rest of us—are in a position where we really *must* do something about liability insurance as it affects health insurance coverage. Indeed if health care coverage—whether expanded or not—continues to be unaccompanied at either the federal or state level by the type of tort reform advocated herein, then the mutually reinforcing adverse effects of health and liability insurance on each other will continue to grow apace.

II
THE DATA

Jeffrey O'Connell, Phillip A. Bock[44] *& Stewart Petoe*[45]

In 1964, Alfred Conard, James Morgan, and several of their colleagues from the University of Michigan completed a comprehensive study of the various systems compensating injury and illness in the United States ("loss-shifting systems").[46] The Conard-Morgan study

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40 DANIEL P. MOYNIHAN, COPING: ESSAYS ON THE PRACTICE OF GOVERNMENT 104-05 (1973) (reprinting a 1967 essay).

41 Daniel P. Moynihan, *Foreword* to JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES, at xx (1975).

42 SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, SENATE COMM. ON GOV'T OPERATIONS, MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN, 91st Cong., 1st Sess. (1969).

43 *Id.*

44 B.A., Augustana College, 1989; M.A., University of Illinois, 1991; J.D., University of Virginia, 1994, joining only as to Part II.

45 B.A., College of William & Mary, 1992; J.D., University of Virginia, 1994, joining only as to Part II.

46 ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964) [hereinafter CONARD-MORGAN].

focused on benefit payments by the nine primary loss-shifting systems during 1960: Tort Liability;[47] Workers' Compensation;[48] Private Loss Insurance;[49] Sick Leave;[50] Social Insurance;[51] Public Assistance;[52] Veterans' Benefits;[53] Public Health;[54] and Private Health.[55] As the authors intended, their study created a "pool of data"[56]—and a technique useful for scholars studying loss-shifting systems in empirical ways.

The Conard-Morgan study has been twice updated by the senior author of this Article in conjunction with two different co-authors. In 1986, the first update, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*,[57] replicated the empirical efforts of Conard-Morgan, showing developments in injury and illness reparations during 1982. In addition, this first update discussed at some length the numerous systems available for injury and illness compensation.[58] In 1988, the senior author and another co-author replicated Conard-Morgan's empirical efforts in a second update, *An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance*,[59] this time with data for the benefits paid during 1984. Like its predecessor, the second update detailed the benefits paid for injury and illness by the various loss-shifting systems. In addition to compiling the most recent descriptive statistics on benefits payments in the United States, the second update analyzed a significant increase

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47 For an extensive discussion of this system, see Jeffrey O'Connell & Jay Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 928-30, 933-34 (1986).

48 For an extensive discussion of this system, see *id.* at 931-33.

49 For an extensive discussion of this system, see *id.* at 934-36.

50 For an extensive discussion of this system, see *id.* at 936-38.

51 For an extensive discussion of this system, see *id.* at 938-46.

52 For an extensive discussion of this system, see *id.* at 946-48.

53 For an extensive discussion of this system, see *id.* at 948-49.

54 This system is composed of expenditures from public health service facilities, combining expenditures by "state and local hospitals" (not offset by other revenues) and by "other public programs for personal health care," including "program spending for maternal and child health; vocational rehabilitation medical payments; temporary disability insurance medical payments; Public Health Service and other Federal hospitals; Indian health services; alcoholism, drug abuse, and mental health; and school health." OFFICE OF RESEARCH AND DEMONSTRATIONS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH CARE FINANCING REV., Summer 1990, at 39 tbl. 22.

55 This system covers expenditures by private health services facilities and includes "[s]pending by philanthropic organizations, industrial inplant health services, and privately financed [health] construction." OFFICE OF RESEARCH AND DEMONSTRATIONS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH CARE FINANCING REV., Fall 1985, at 10, 11 n.1 & tbl. 3.

56 *See* CONARD-MORGAN, *supra* note 46, at 2.

57 *See* O'Connell & Barker, *supra* note 47.

58 *Id.* at 927-49.

59 Jeffrey O'Connell & James Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance*, 49 OHIO ST. L.J. 757 (1988).

in the amount of Tort Liability payments. The second update found that Tort Liability payments had increased not only in terms of dollars paid, but also in terms of the relative percentage of total benefits paid during 1984, as that article's title indicates.[60] As described in the second update, Tort Liability expands through the decisions of judges and juries as they allocate individual, case-specific compensation without much consideration of the overall cost of such a system.[61] As a result, Tort Liability payments are subject to far fewer budgetary controls—whether public or private—compared with the expenditures from the other loss-shifting systems.

Presented here is a third update, detailing the benefits paid for injury and illness during both 1988 and 1990.[62] This latest updating effort confirms a trend first explicitly noted in the second update: Tort Liability continues to grow in relation to other loss-shifting systems.[63]

A. Descriptive Statistics

The benefits paid for injury and illness by the primary loss-shifting systems during 1960, 1982, 1984, 1988, and 1990 are detailed in Appendices to this Article. As in the first and second updates, this third update uses the loss-shifting categories originally assembled in the Conard-Morgan study. Tables 1 through 4 and the Graphs accompanying Tables 1 and 3, which present the benefits statistics in different ways, are analyzed below.

Our analysis of the loss-shifting systems begins with a look at the relative benefits paid from each system. While it is instructive to compare the expenditures by various systems, as we do in Tables 3 and 4 and the companion Graph to Table 3, more striking are the revelations produced in Table 1, Relative Percentages of Benefits Paid for Injury and Illness From Each of the Principal Loss-Shifting Systems, 1960-1990, which shows the relative amount of benefits paid for each system during a given year. The percentages shown reflect the comparisons of each loss-shifting system's benefits with the total benefits paid for injury and illness during a given year. In turn, such statistics

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60 *Id.* at 759.

61 *Id.*

62 Comprehensive figures for 1990 are the most recent available from the varied reporting services. The authors do not anticipate, however, any major changes in benefit payments that would affect the trends discussed herein.

63 See ROBERT W. STURGIS, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE (1992) for a study finding similar results. *See also* Sara J. Harty, *Tort Costs Grow Faster than Economy*, BUS. INS., Oct. 19, 1992, at 1, 1, 38 (detailing the primary conclusions of the Sturgis study); *cf.* Robert J. Samuelson, *Still No Free Lunch*, WASH. POST, Apr. 7, 1993, at A27 (arguing that rising legal costs are a disproportionate part of a general increase in non-wage costs of businesses).

make possible a comparison of an individual loss-shifting system against any of the other systems. This permits an analysis of changes in the ways individual systems relate with other systems and with the total universe of benefits paid during any given year.

TABLE 1
RELATIVE PERCENTAGES OF BENEFITS PAID FOR INJURY AND ILLNESS WITHIN EACH OF THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960-1990.

	A 1960	B 1982	C 1984	D 1988	E 1990
1 Tort Liability	7.9%	6.7%	7.4%	9.0%	9.1%
2 Workers' Compensation	5.4%	5.1%	5.3%	5.7%	5.8%
3 Private Loss Insurance	36.5%	29.6%	31.3%	32.6%	33.0%
4 Sick Leave	5.1%	3.1%	3.2%	2.9%	2.7%
5 Social Insurance	18.1%	31.9%	30.5%	27.8%	27.2%
6 Public Assistance	6.3%	11.2%	11.2%	11.1%	11.8%
7 Veterans	7.4%	5.5%	5.0%	3.8%	3.4%
8 Public Health	9.4%	3.8%	3.2%	3.0%	2.8%
9 Private Health	4.0%	3.1%	2.8%	4.1%	4.3%
	100.0%	100.0%	100.0%	100.0%	100.0%

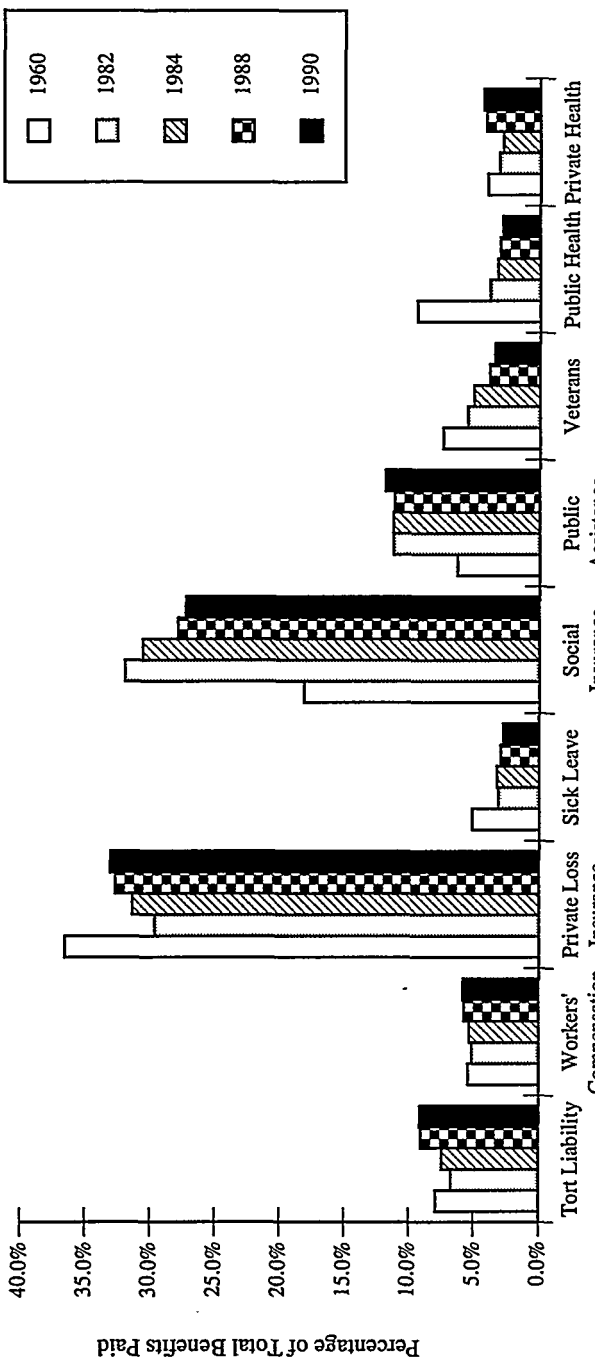
Note in particular that during 1960 Tort Liability was responsible for 7.9% of the total benefits paid for injury and illness (Cell A1).[64] By 1982, the percentage of total benefits paid for Tort Liability was down to 6.7% (Cell B1), a decrease arguably reflecting dramatic increases in Social Insurance (especially Medicare) and Public Assistance (especially Medicaid). (In effect, we hypothesize that Medicare and Medicaid grew so fast that it took some time for tort law to correspondingly catch on—and up.) Later, however, the benefits paid for Tort Liability increased relative to all other benefits paid, including Medicare and Medicaid, climbing to 7.4% of benefits paid during 1984 (Cell C1), to 9.0% during 1988 (Cell D1), and to 9.1% during 1990 (Cell E1). From 1982 to 1990, then, Tort Liability increasingly took larger portions of the total benefits "pie."

Increases in Tort Liability relative to the total benefits paid may be compared to changes in the other loss-shifting systems. For example, in 1960, 5.4% of the total benefits paid for injury and illness were paid for Workers' Compensation (Cell A2). In each of the successive years studied, the percentage of total benefits attributable to Workers'

64 Throughout this Article, we refer to figures found in the attached Tables by their respective cell coordinates within such Tables. For example, the figure given for Tort Liability payments during 1960, 7.9%, is located in Table 1 at Column A, Row 1: thus, Cell A1.

TABLE 1 IN GRAPH FORM

RELATIVE PERCENTAGES OF BENEFITS PAID FOR INJURY AND ILLNESS FROM EACH OF THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960-1990



Compensation changed only to 5.1% in 1982 (Cell B2), to 5.3% in 1984 (Cell C2), to 5.7% in 1988 (Cell D2), and to 5.8% in 1990 (Cell E2). Since both Tort Liability and Workers' Compensation payments increased in terms of dollar expenditures during those years,[65] the perspective gained by looking at expenditures relative to the total universe of benefits paid is a useful one. Although both Workers' Compensation and Tort Liability increased, tort claims took increasingly larger pieces of the benefits pie. The same is true with respect to Tort Liability's relationship to other loss-shifting systems.

The relationships depicted in Table 1 are recreated in its companion Graph, Relative Percentages of Benefits Paid for Injury and Illness From Each of the Principal Loss-Shifting Systems, 1960-1990.

Note the successive steps in Tort Liability, each representing an increase in Tort Liability's share of the total benefits paid. Such a visual analysis is helpful in understanding the way each loss-shifting system relates to the entire universe of injury and illness reparations. As the Graph shows, only the increases in Private Loss Insurance (principally employer-provided fringe benefits) rivalled those of Tort Liability in terms of taking larger portions of the benefits pie during the 1980s. During the same period, the other loss-shifting systems decreased or increased only slightly in relation to the total benefits paid.

Table 2, Periodic Changes in the Relative Percentages of Benefits Paid for Injury and Illness From Each of the Principal Loss-Shifting Systems, 1960-1990, underscores several of the points raised in Table 1.

TABLE 2
PERIODIC CHANGES IN THE RELATIVE PERCENTAGES OF BENEFITS PAID FOR INJURY AND ILLNESS WITHIN EACH OF THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960-1990.

		A 1960-1982	B 1982-1984	C 1984-1988	D 1988-1990
1	Tort Liability	−1.22%	+0.72%	+1.59%	+0.11%
2	Workers' Compensation	−0.30%	+0.22%	+0.33%	+0.09%
3	Private Loss Insurance	−6.89%	+1.69%	+1.35%	+0.35%
4	Sick Leave	−2.00%	+0.16%	−0.33%	−0.20%
5	Social Insurance	+13.76%	−1.39%	−2.71%	−0.54%
6	Public Assistance	+4.99%	−0.02%	−0.13%	+0.73%
7	Veterans	−1.84%	−0.48%	−1.22%	−0.45%
8	Public Health	−5.61%	−0.55%	−0.20%	−0.23%
9	Private Health	−0.90%	−0.34%	+1.32%	+0.14%

65 *See infra* Table 3 (Cells A1-E1 and A2-E2).

This Table shows periodic changes in the relationships between each of the various loss-shifting systems and the total benefits paid. For example, Tort Liability's relative percentage of the total benefits paid decreased between 1960 and 1982 (Cell A1), a change caused by huge increases in Social Insurance (Cell A5) and Public Assistance (Cell A6), as suggested above. Between 1982 and 1984, however, the percentage of total benefits attributable to Tort Liability increased by 0.72% (Cell B1), an increase second only to that of Private Loss Insurance (Cell B3). Then, again, between 1984 and 1988, Tort Liability's percentage of the total benefits paid increased, this time by 1.59% (Cell C1), an increase larger than that of any other loss-shifting system. Thus, not only did Tort Liability's relative share of the total benefits pie increase, but, during the 1984-1988 period, its relative share increased faster than any other loss-shifting system. Between 1988 and 1990, Tort Liability's relative share of the total benefits paid increased by 0.11% (Cell D1), which was less than the increases in Public Assistance, Private Loss Insurance, and Private Health.

While our analysis of the relative percentages of total benefits paid provides the most provocative findings regarding Tort Liability, a look at the changes in dollar expenditures among the various loss-shifting systems is also informative. As mentioned earlier, all of the systems have continued to grow in terms of dollar expenditures.[66] Table 3, Benefits Paid for Injury and Illness by Principal Loss-Shifting Systems, 1960-1990, summarizes the dollar expenditures from each of the loss-shifting systems during 1960, 1982, 1984, 1988, and 1990.

66 Only the expenditures from Public Health decreased at any time during the thirty year expenditure window, a decrease occurring sometime between 1982 and 1984. Table 3 (Cells B8 and C8).

TABLE 3
BENEFITS PAID FOR INJURY AND ILLNESS BY PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960-1990.
(DOLLARS IN BILLIONS)

		A 1960	B 1982	C 1984	D 1988	E 1990
1	Tort Liability	$1.9	$23.1	$29.5	$53.0	$65.3
2	Workers' Compensation	1.3	17.8	21.4	33.5	41.5
3	Private Loss Insurance	8.7	102.9	125.3	192.9	237.5
4	Sick Leave	1.2	10.6	12.9	17.0	19.3
5	Social Insurance	4.3	110.8	122.1	164.1	196.0
6	Public Assistance	1.5	39.1	44.9	65.5	85.1
7	Veterans	1.8	19.2	20.2	22.6	24.3
8	Public Health	2.3	13.2	13.0	18.0	20.3
9	Private Health	1.0	10.9	11.2	24.3	30.6
		$23.9	$347.5	$400.5	$590.9	$719.9

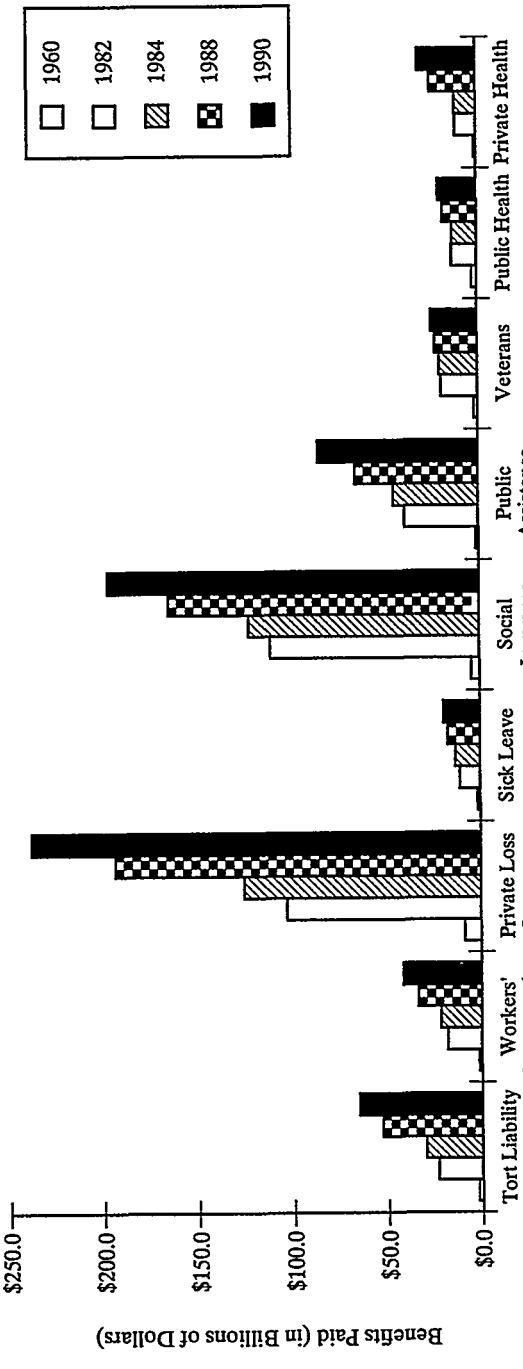
A closer scrutiny of the figures reported for each system shows that, although each system's expenditures have increased, the maguitudes of these changes differ. For example, during 1960, the expenditures from Private Loss Insurance (principally employer-provided health and disability coverages) were higher than those for any other system (Cell A3), but in 1982, Social Insurance replaced Private Loss Insurance as the highest paying loss-shifting system (Cell B5). By 1984, this situation reversed itself once again, and Private Loss Insurance recaptured the lead among loss-shifting systems in terms of dollars expended (Cell C3). This trend continued in 1988 (Cell D3) and 1990 (Cell E3), reflecting, we conjecture, recent special budgetary constraints on Social Insurance, starting with the Reagan administration.

Tort Liability ranked fourth among all loss-shifting systems during each of the five years studied. In 1988 and 1990 the expenditures from Tort Liability (Cell D1), while much lower than those from Private Loss Insurance (Cell D3) and Social Insurance (Cell D5) and somewhat lower than from Public Assistance (Cell D6), were higher than any of the remaining systems' expenditures.

The figures from Table 3 are hereby graphically presented: Benefits Paid for Injury and Illness by Principal Loss-Shifting Systems, 1960-1990.

TABLE 3 IN GRAPH FORM

BENEFITS PAID FOR INJURY AND ILLNESS BY PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960-1990



The periodic changes in dollar expenditures are displayed in Table 4, Changes in the Amounts of Benefits Paid From Each of the Principal Loss-Shifting Systems.

TABLE 4

PERIODIC CHANGES IN THE AMOUNTS OF BENEFITS PAID WITHIN EACH OF THE PRINCIPAL LOSS-SHIFTING SYSTEMS.

		A	B	C
		For the Period 1960-1982		
		Amount of Increase (dollars in millions)	Percentage Change	Average Annual Change
1	Tort Liability	$21,240	1,127.4%	+51.2%
2	Workers' Compensation	$16,475	1,273.2%	+57.9%
3	Private Loss Insurance	$94,132	1,078.3%	+49.0%
4	Sick Leave	$9,398	777.3%	+35.3%
5	Social Insurance	$106,423	2,456.1%	+111.6%
6	Public Assistance	$37,571	2,511.4%	+114.2%
7	Veterans	$17,407	989.0%	+45.0%
8	Public Health	$10,949	486.4%	+22.1%
9	Private Health	$9,935	1,029.5%	+46.8%
	TOTALS	$323,530	11,728.7%	+533.1%

		D	E	F
		For the Period 1982-1984		
		Amount of Increase (dollars in millions)	Percentage Change	Average Annual Change
1	Tort Liability	$6,404	+27.7%	+13.8%
2	Workers' Compensation	3,602	+20.3%	+10.1%
3	Private Loss Insurance	22,476	+21.9%	+10.9%
4	Sick Leave	2,251	+21.2%	+10.6%
5	Social Insurance	11,346	+10.2%	+5.1%
6	Public Assistance	5,875	+15.0%	+7.5%
7	Veterans	1,016	+5.3%	+2.7%
8	Public Health	−200	−1.5%	−0.76%
9	Private Health	300	+2.8%	+1.4%
	TOTALS	$53,070	+122.9%	+61.4%

		G	H	I
		For the Period 1984-1988		
		Amount of Increase (dollars in millions)	Percentage Change	Average Annual Change
1	Tort Liability	$23,449	+79.4%	+19.9%
2	Workers' Compensation	12,134	+56.8%	+14.2%
3	Private Loss Insurance	67,561	+53.9%	+13.5%
4	Sick Leave	4,171	+32.4%	+8.1%
5	Social Insurance	42,016	+34.4%	+8.6%
6	Public Assistance	20,565	+45.8%	+11.4%
7	Veterans	2,387	+11.8%	+3.0%
8	Public Health	5,000	+38.5%	+9.6%
9	Private Health	13,100	+117.0%	+29.2%
	TOTALS	$190,383	+470.0%	+117.5%

		J	K	L
		For the Period 1988-1990		
		Amount of Increase (dollars in millions)	Percentage Change	Average Annual Change
1	Tort Liability	$12,222	+23.0%	+11.5%
2	Workers' Compensation	7,997	+23.9%	+11.9%
3	Private Loss Insurance	44,634	+23.1%	+11.6%
4	Sick Leave	2,248	+13.2%	+6.6%
5	Social Insurance	31,912	+19.4%	+9.7%
6	Public Assistance	19,546	+29.8%	+14.9%
7	Veterans	1,703	+7.5%	+3.8%
8	Public Health	2,300	+12.8%	+6.4%
9	Private Health	6,300	+25.9%	+13.0%
	TOTALS	$129,010	+179.1%	+85.3%

We have presented such periodic changes in three ways. The first set of columns of figures (A, D, G, and J) simply represents the increases in dollar payments. The second set of columns (B, E, H, and K) represents the percentage increases in dollars expended during the four periods. Finally, the third set of columns (C, F, I, and L) represents the average annual percentage increases in dollars expended.

As the Table shows, between 1960 and 1982, the increase in Tort Liability payments (Cell C1) ranked relatively low among the various systems (Cell C1-C9). However, later time intervals tell a different story. Between 1982 and 1984, Tort Liability's corresponding increase (Cell F1) was the highest among all loss-shifting systems. Between 1984 and 1988, the average annual increase in benefits paid from Tort Liability (Cell I1) was second only to the increase in Private Health expenditures (Cell I9).[67] Admittedly, for the period from 1988 to 1990, Tort Liability's increase lagged—but only slightly—behind those of Public Assistance (Cell L6), Private Health (Cell L9), Private Loss Insurance (Cell L3), and Workers' Compensation (Cell L2).

Although total Tort Liability payments ranked third or fourth in total dollars of increase among all loss-shifting systems in each of the five years studied (1960, 1982, 1984, 1988, and 1990), Table 4 shows that during a six-year period Tort Liability payments increased faster than any other system during the period from 1982 to 1984, and faster than any of the top three ranked systems during the period 1984 to 1988. As a result, the gap between Tort Liability and the three largest payment systems continued to decrease. Granted, as indicated above, the figures from a recent two-year period, from 1988 to 1990, show a slightly diminishing relative—but still substantial absolute—growth in Tort Liability. Given Tort Liability's relative growth in the more statistically significant six-year period from 1982 to 1988, the plateauing of Tort Liability's relative growth could well be temporary. And at the least the idea that the growth of other more efficient compensation systems will itself stem the growth of Tort Liability—with all its inefficiencies[68]—seems questionable indeed.

This leads to one final point: All the above data—starting with those of Professors Conard, Morgan, and their colleagues[69]—reflect

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67 Between 1982 and 1984, however, the increase in Private Health benefits was only 1.4% (Cell F9). For a description of this system, see *supra* note 55 and accompanying text.

68 For narrative, tabular, and graphic presentations of the hugely disproportionate transaction costs under Tort Liability compared with other compensation systems, both public and private, see CONARD-MORGAN, *supra* note 46, at 60-61. For Professor Conard's more recent discussion of this continuing phenomenon, see Alfred Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283, 292 (1993).

69 CONARD-MORGAN, *supra* note 46.

not total premiums or other amounts paid into any given compensation system, but only payments after deducting overhead and other payers' (excluding payees') transaction costs. Given the huge transaction costs associated with the Tort Liability for both payers and payees compared to other compensation systems,[70] increases in tort liability of the dimensions recorded here seem particularly regrettable.

[Appendices A through E follow.]

70 *See supra* note 68.

APPENDIX A
BENEFITS PAID FOR INJURY AND ILLNESS BY THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1990
(DOLLARS IN MILLIONS)

	Survivors	Disability	Medical	Total	% of All Benefits
Tort Liability[1]					
Auto Personal Injury					
Insured	—	—	—	41,078[2]	
Uninsured	—	—	—	493[3]	
Other Personal Injury Insurance Claims					
Medical Malpractice	—	—	—	4,933[4]	
Other	—	—	—	14,970[5]	
Railroad & Motor Carriers	—	—	—	3,725[6]	
Total Tort Liability				65,199	9.1%
Workers' Compensation[7]	1,839	21,212	15,187	38,238[8]	
Other: (State)	—	3,224	—	3,224[9]	
(Railroad)	—	40	—	40[10]	
Total Workers' Compensation				41,502	5.8%
Private Loss Insurance[11]					
Individual Policies	13,552[12]	2,400[13]	5,800[14]	21,752	
Group Policies	10,281[15]	5,200[16]	200,300[17]	215,781	
Total Private Loss Insurance				237,533	33.0%
Sick Leave[18]	—	19,277	—	19,277[19]	2.7%
Social Insurance[20]					
OASDI	50,746[21]	24,803[22]	—	75,549	
Railroad Retirement	—	—	—	2,758[23]	
Fed. Civil Service	4,699	6,189	—	10,888[24]	
Other Federal	973	1,530	—	2,503[25]	
State and Local	1,799	2,517	—	4,316[26]	
Medicare A	—	6,694[27]	54,244[28]	60,938	
Medicare B	—	4,545[29]	34,533[30]	39,078	
Total Social Insurance				196,030	27.2%
Public Assistance[31]					
Medicaid	—	—	64,859	64,859[32]	
General Assistance	—	—	3,138	3,138[33]	
SSI	—	12,855	—	12,855[34]	
Other	—	—	4,200	4,200[35]	
Total Public Assistance				85,052	11.8%
Veterans[36]	—	15,717[37]	8,556[38]	24,273	3.4%
Public Health	—	—	20,300	20,300[39]	2.8%
Private Health[40]	—	—	30,600	30,600[41]	4.3%
TOTAL ALL SYSTEMS				$719,571	100.0%

[1] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 928-30, 933-34. Because of the lump-sum nature of tort awards, these benefits cannot be separated into the survivor, disability, and medical benefits components. Note also that the figure for tort awards includes compensation for non-economic loss (such as pain and suffering, which does not fall under any of the three subcategories), and does not include certain tort payments (such as product liability or medical malpractice damages paid by self-insuring institutions).

[2] This figure was calculated as follows. First, the premiums paid for private and commercial auto policies were combined. Net Premiums Written for Private Passenger Auto ($78,393 million) were reduced by a combination of the Pure Loss Ratio (73.8%) and the Loss Adjustment Expense (11.8%), and added to the Net Premiums Written for Commercial Auto ($16,974 million), which was also reduced by a combination of the Pure Loss Ratio (65.3%) and the Loss Adjustment Expense (12.0%). So: [$78,393 million × 85.6%] + [$16,974 × 77.3%] = $80,225 million. *See* John H. Snyder, *Review and Preview: The Year of the Cats*, BEST'S REV., Feb. 1993, at 84-85, exhibits 11, 12. This figure was reduced by the percentage of payouts for property damage (estimated to have been 32% in 1990, as in 1988, *see* note 2 to Appendix B). Thus, the total was reduced to $54,553 million. Finally, the figure was reduced by the percentage of payouts for physical damage (estimated to have been 24.7% in 1990, from a confidential source provided by a major auto insurer). Thus, the final figure is $41,078 million. The calculations above reflect a change in sources; the source used for this figure in earlier articles is no longer available. The change in sources and calculations results in the following figure for 1988: $57,815 + 12,127 = 69,942, reduced by 32% (as in our earlier article) and then by 33% (a figure from the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS' 1993 AUTOMOBILE INSURANCE DATABASE 26 tbl. 8, 37 tbl. 9). Thus, the final figure for 1988 is $31,866 million, which has the effect of increasing to 9.4% the percentage of total premiums paid for tort liability.

[3] This figure was computed by assuming that the personal injury payments made by motorists themselves, apart from liability coverage or from uninsured motorist coverage, amounted to 1.2% of the insured personal injury payments. This formula was used in CONARD-MORGAN, *supra* main text note 46, at 50 n.54. Thus, $41,078 million × 1.2% = $492 million.

[4] Diane Ferraiolo, *Medical Malpractice, Fidelity and Surety—1990*, BEST'S REV., Dec. 1991, at 39, 39 and accompanying table. This figure represents premiums written for medical malpractice in 1990.

[5] Snyder, *supra* note 2, at 84. This figure was computed by adjusting the Net Premiums Written for Other Liability ($18,123 million) with a combination of the Pure Loss Ratio (55.2%) and the Loss Adjustment Expense Ratio (27.4%). So: $18,123 million × 82.6% = $14,970 million.

[6] This category of data is no longer available. For the sake of consistency with earlier studies, we have used a figure equal to 5.7% of total tort liability, which represents the percentage of 1960 tort awards paid by railroads and motor carriers. *See* CONARD-MORGAN, *supra* main text note 46, at 48 tbl. 1-2.

[7] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 931-33.

[8] SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 313 tbl. 9.B1 (1992).

[9] *Id.* at 119 tbl. 3.A3. The figure given represents the benefits paid under short-term disability insurance, which employers in California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island are required by state law to provide to their employees. Short-term disability insurance covers wage loss of employees unable to work because of nonoccupational injuries and illness. *See* C. ARTHUR WILLIAMS, JR. ET AL., ECONOMIC AND SOCIAL SECURITY: SOCIAL INSURANCE AND OTHER APPROACHES 255-67 (5th ed. 1982) (explaining these insurance plans in more detail); P.R. LAWS ANN. tit. 11, § 203 (Supp. 1991).

[10] SOCIAL SEC. ADMIN., *supra* note 8, at 119 tbl. 3.A3. The figure given represents benefits provided under insurance which railroads are required by federal law to provide to their employees to protect them in the case of short-term disability caused by nonoccupational injury or illness. *See* WILLIAMS ET AL., *supra* note 9, at 434-35 for a further explanation of this coverage.

[11] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 934-36.

[12] *See* AMERICAN COUNCIL OF LIFE INSURANCE, 1992 LIFE INSURANCE FACT BOOK 46, 119-120. Total death benefits from private insurance companies, veterans' life insurance, and fraternal life insurance were $27,285 million, of which $10,281 million came from group insurance policies and $17,004 million came from other plans. *Id.* Under plans other than term insurance, death benefits include a return of savings roughly approximated by the amount of reserves released by death in insurance company accounts. In calculating the figure presented in this Appendix, we assume, for the sake of consistency with earlier articles, that the ratio of reserves released by death-to-total death benefits was 20.3%. So: $17,004 million-(17,004 × 20.3%) = $13,552 million. For a fuller explanation, see N.Y. (STATE) INSURANCE DEP'T, 1984 ANNUAL REPORT OF THE SUPERINTENDENT OF INSURANCE, STATISTICAL TABLES FROM ANNUAL STATEMENTS 12, 15 tbl. 4, 21 & tbl. 10.

[13] HEALTH INSURANCE ASS'N OF AMERICA, SOURCE BOOK OF HEALTH INSURANCE DATA 28 tbl. 2.7 (1992).

[14] *Id.*

[15] AMERICAN COUNCIL OF LIFE INSURANCE, *supra* note 12, at 46. Group policies provide almost entirely for loss-shifting, with very low transaction costs. *See* CONARD-MORGAN, *supra* main text note 46, at 50 n.58. Accordingly, no adjustment for transaction costs is provided.

[16] HEALTH INSURANCE ASS'N OF AMERICA, *supra* note 13, at 27 tbl. 2.5.

[17] *See id.* at 26-28 tbls. 2.4, 2.5, 2.7. This figure was calculated by reducing the total benefit payment by all insurers for medical expenses ($212,400 million, *id.* at 26 tbl. 2.4) by the amount of benefits paid for individual policies ($8,200 million, *id.* at 28 tbl. 2.7), loss of income payments ($5,200 million, *id.* at 27 tbl. 2.5), and duplicative administrative costs ($1,300 million, *id.* at 27 tbl. 2.6). So: $212,400 million – $8,200 million – ($5,200 million – $1,300 million) = $200,300 million.

[18] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 936-38.

[19] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1993 STATISTICAL ABSTRACT OF THE UNITED STATES 380 tbl. 603. Of the total figure, $10,835 million was provided in sick leave for government employees and $8,442 million was provided in sick leave for workers in private employment. *Id.*

[20] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 938-46.

[21] SOCIAL SEC. ADMIN., *supra* note 8, at 148 tbl. 4.A5. OADSI means Old Age, Survivors', and Disability Insurance.

[22] *Id.* at 149 tbl. 4.A6.

[23] SOCIAL SEC. ADMIN., *Current Operating Statistics*, SOC. SECURITY BULL., Winter 1992, at 74, 113 tbl. 4.A1. The table used in earlier studies is no longer available. This figure was calculated by estimating the amount of Railroad Retirement benefits that were paid for disability. Between 1985 and 1988, 38% of the total Railroad Retirement benefits paid were disability payments. *See* U.S. RAILROAD RETIREMENT BOARD, STATISTICAL TABLES DATA THROUGH FISCAL YEAR 1990 tbls. B1, D1 (Product of number of awards and amount of average award for each period = total amount of disability awarded, $18,198,000. *Id.* at tbl. B1. The total compensation for the entire period is $48,550,000. *Id.* at tbl. D1. The quotient of total disability and total compensation is 38%.). Thus, for 1990, $7,258 million × 38% = $2,758 million.

[24] *See* Ann K. Bixby, *Benefits and Beneficiaries Under Public Employee Retirement Systems, Fiscal Year 1990*, SOC. SECURITY BULL., Fall 1993, at 95, 96 tbl. 1 (the Sum of Disability, 6,189, and Survivor Monthly and Lump Sum, 4,629 and 70).

[25] *Id.* (the sum of Other Federal, 147, and Armed Forces, 2,356. In previous years Armed Forces figures were subsumed in Other Federal).

[26] *Id.* (the sum of Disability, 2,517, and Survivor, 1,799, *id.*).

[27] SOCIAL SEC. ADMIN., *supra* note 8, at 294 tbl. 8.B2.

[28] *Id.* at 293 tbl. 8.B1.

[29] *Id.* at 294 tbl. 8.B2.

[30] *Id.* at 293 tbl. 8.B1.

[31] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 946-48.

[32] BUREAU OF THE CENSUS, *supra* note 19, at 113 tbl. 162.

[33] This category of data is no longer available. For the sake of consistency with earlier articles, the figure given is 3.69% of the total figure for public assistance, which is the same proportion used in earlier studies. *See* O'Connell & Guinivan, *supra* main text note 59, at 768 n.27; O'Connell & Barker, *supra* main text note 47, at 924 tbl. E.

[34] SOCIAL SEC. ADMIN., *supra* note 8, at 271 tbl. 7.A4. SSI means Supplemental Security Income. The figure given includes federal and state SSI payments for general disability ($12,521 million) and for blindness ($334 million), but does not include SSI old age payments. So: $12,521 million + $334 million = $12,855 million.

[35] Office of Research and Demonstrations, U.S. Dep't of Health and Human Services, *National Health Expenditures, 1990,* HEALTH CARE FINANCING REV., Fall 1991, at 29, 53 tbl. 13.

[36] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 948-49.

[37] SOCIAL SEC. ADMIN., *supra* note 23, at 113 tbl. 4.A1. This figure represents a combination of survivors and disability benefits.

[38] DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT 7, S-48 tbl. 22 (1990). This figure excludes expenditures for service-connected diseases and injuries. It was computed by reducing the cost of VA-provided medical care ($11,500 million, *id.* at 7) by the percentage of veterans who received medical and surgical treatments that were service related (25.6% (quotient of veterans who received service-related medical treatment, 250,887, and total number of patients, 981,887) *id.* at S-48 tbl. 22). CONARD-MORGAN, *supra* main text note 46, at 51 n.62 similarly excluded service-connected expenditures with this method of calculation.

[39] Office of Research and Demonstrations, *supra* note 35, at 53 tbl. 13. This figure includes $14.1 billion reported for expenditures by "state and local hospitals" (not offset by other revenues) and $6.2 billion reported for "other public programs for personal health care," including "program spending for maternal and child health; vocational rehabilitation medical payments; temporary disability insurance medical payments; Public Health Service and other Federal hospitals; Indian health services; alcoholism, drug abuse, and mental health; and school health." *Id.*

[40] For a description of this category, see *supra* main text note 55.

[41] Office of Research and Demonstrations, *supra* note 35, at 49 tbl. 10.

APPENDIX B
BENEFITS PAID FOR INJURY AND ILLNESS BY THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1988
(DOLLARS IN MILLIONS)

	Survivors	Disability	Medical	Total	% of All Benefits
Tort Liability[1]					
Auto Personal Injury					
Insured	—	—	—	29,020[2]	
Uninsured	—	—	—	348[3]	
Other Personal Injury Insurance Claims					
Medical Malpractice	—	—	—	4,278[4]	
Other	—	—	—	16,311[5]	
Railroad & Motor Carriers	—	—	—	3,020[6]	
Total Tort Liability				52,977	9.0%
Workers' Compensation[7]	1,602	17,613	11,518	30,733[8]	
Other: (State)	—	2,754	—	2,754[9]	
(Railroad)	—	18	—	18[10]	
Total Workers' Compensation				33,505	5.7%
Private Loss Insurance[11]					
Individual Policies	11,653[12]	1,800[13]	4,700[14]	18,153	
Group Policies	9,346[15]	4,600[16]	160,800[17]	174,746	
Total Private Loss Insurance				192,899	32.6%
Sick Leave[18]	—	17,029	—	17,029[19]	2.9%
Social Insurance[20]					
OASDI	44,787	21,692	—	66,479[21]	
Railroad Retirement	1,763	777	—	2,540[22]	
Fed. Civil Service	3,805	4,016	—	7,821[23]	
Other Federal	830	1,479	—	2,309[24]	
State and Local	1,129	1,961	—	3,090[25]	
Medicare A	—	5,436[26]	45,703[27]	51,139	
Medicare B	—	3,544[28]	27,196[29]	30,740	
Total Social Insurance				164,118	27.8%
Public Assistance[30]					
Medicaid	—	—	48,710	48,710[31]	
General Assistance	—	—	2,417	2,417[32]	
SSI	—	10,479	—	10,479[33]	
Other	—	—	3,900	3,900[34]	
Total Public Assistance				65,506	11.1%
Veterans[35]	3,499[36]	11,347[37]	7,724[38]	22,570	3.8%
Public Health	—	—	18,000	18,000[39]	3.0%
Private Health[40]	—	—	24,300	24,300[41]	4.1%
TOTAL ALL SYSTEMS				$590,904	100.0%

[1] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 928-30, 933-34. Because of the lump-sum nature of tort awards, these benefits cannot be separated into the survivor, disability, and medical benefits components. Note also that the figure for tort awards includes compensation for noneconomic loss (such as pain and suffering, which does not fall under any of the three subcategories), and does not include certain tort payments (such as product liability or medical malpractice damages paid by self-insuring institutions).

[2] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1991 STATISTICAL ABSTRACT OF THE UNITED STATES 521 tbl. 859. This figure was arrived at by assuming that 33% of automobile liability payments are paid toward property damage and therefore should not be included as benefits paid for injury and illness. The 33% figure comes from NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 1993 AUTOMOBILE INSURANCE DATABASE 26 tbl. 8, 37 tbl. 9. So: $43,313 million × 67% = $29,020 million. The 33% figure is used for 1988 versus the 35% for 1982 and 1984 to reflect a declining percentage for property damage liability. *See* note 2 to Appendix A.

[3] This figure was computed by assuming that the personal injury payments made by motorists themselves, apart from liability coverage or from uninsured motorist coverage, amounted to 1.2% of the insured personal injury payments. This formula was used in CONARD-MORGAN. *See supra* main text note 46, at 50 n.54. So: 29,020 million × 1.2% = $348 million.

[4] BEST'S AGGREGATES AND AVERAGES: PROPERTY-CASUALTY 128 (50th ed. 1989). This figure was calculated by multiplying Net Premiums Written for Medical Malpractice ($4,028 million) by a combination of the Pure Loss Ratio (74.1%) and the Loss Adjustment Expense (32.1%). So: $4,028 million × 106.2% = $4,278 million.

[5] *Id.* at 130. The same formula was used as in *supra* note 4. So: $19,077 million × 85.5% = $16,311 million.

[6] This category of data is no longer available. Therefore, for the sake of consistency with earlier studies, we have used 5.7% of total tort liability, whicb represents a slight increase in the percentage of 1960 tort awards paid by railroads and motor carriers. *See* CONARD-MORGAN, *supra* main text note 46, at 48 tbl. 1-2.

[7] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 931-33.

[8] SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 313 tbl. 9.B1 (1992).

[9] *Id.* at 119 tbl. 3.A3. The figure given represents the benefits paid under short-term disability insurance, which employers in California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island are required by state law to provide to their employees. C. ARTHUR WILLIAM ET AL., ECONOMIC AND SOCIAL SECURITY: SOCIAL INSURANCE AND OTHER APPROACHES 255 (5th ed. 1982). Short-term disability insurance protects employees unable to work because of nonoccupational injuries and illness. *See id.* at 255-67 (explaining these insurance plans in further detail).

[10] SOCIAL SEC. ADMIN., *supra* note 8, at 119 tbl. 3.A3. The figure given represents benefits provided under insurance whicb railroads are required by federal law to provide their employees to protect them in tbe case of short-term disability caused by nonoccupational injury or illness. *See* WILLIAMS ET AL., *supra* note 9, at 434-35 (explaining this coverage in more detail).

[11] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 934-36.

[12] *See* AMERICAN COUNCIL OF LIFE INSURANCE, 1991 LIFE INSURANCE FACT BOOK 19, 57-58. Total death benefits from private insurance companies, veterans' life insurance, and fraternal life insurance were $23,967 million, of whicb $9,346 million came from group insurance policies and $14,621 million came from other plans. In calculating the figure presented in this Appendix, we assumed, for the sake of consistency with earlier articles, that the ratio of reserves released by death-to-total death benefits was 20.3% (for a fuller explanation of this term, see *supra* Appendix A note 12). So: $14,621 million − ($14,621 × 79.7%) = $11,653 million.

[13] HEALTH INSURANCE ASS'N OF AMERICA, SOURCE BOOK OF HEALTH INSURANCE DATA 29 tbl. 2.9 (1991).

[14] *Id.*

[15] AMERICAN COUNCIL OF LIFE INSURANCE, *supra* note 12, at 19. Group policies provide almost entirely for loss-shifting, with very low transaction costs. *See* CONARD-MORGAN, *supra* main text note 46, at 50 n.58. Accordingly, no adjustment for transaction costs is provided.

[16] HEALTH INSURANCE ASS'N OF AMERICA, *supra* note 13, at 28 tbl. 2.7 (1991).

[17] *See id.* at 27-29 tbls. 2.6, 2.7, 2.8, 2.9. This figure was calculated by reducing the total benefit payments by all insurers for medical expenses ($171,100 million, *id.* at 27 tbl. 2.6) by the amount of medical expenses that were paid for individual policies ($6,600 million, *id.* at 29 tbl. 2.9), loss of income payments ($4,600 million, *id.* at 28 tbl. 2.7), and duplicative administrative costs ($900 million, *id.* at 28 tbl. 2.8). So: $171,100 million − $6,600 million − ($4,600 million − $900 million) = $160,800 million.

[18] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 936-38.

[19] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 STATISTICAL ABSTRACT OF THE UNITED STATES 368 tbl. 589. Of the total figure, $9,472 million was provided in sick leave for government employees and $7,557 million was provided in sick leave for workers in private employment. *Id.*

[20] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 938-46.
[21] SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 132 tbl. 4.A5, 133 tbl. 4.A6 (1991). OASDI means Old Age, Survivors', and Disability Insurance.
[22] SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL SATISTICAL SUPPLEMENT 106 tbl. 3.C1 (1990).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 266 tbl. 7.B2.
[27] *Id.* at 265 tbl. 7.B1.
[28] *Id.* at 266 tbl. 7.B2.
[29] *Id.* at 265 tbl. 7.B1.
[30] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 946-48.
[31] BUREAU OF THE CENSUS, *supra* note 19, at 103 tbl. 150.
[32] This category of data is no longer available. For the sake of consistency with earlier articles, the figure given is 3.69% of the total figure for public assistance, which is the same proportion used in earlier studies. *See* O'Connell & Guinivan, *supra* main text note 59, at 768 n.27; O'Connell & Barker, *supra* main text note 47, at 924 tbl. E.
[33] SOCIAL SEC. ADMIN., *supra* note 21, at 286 tbl. 9.A4. SSI means Supplemental Security Income. The figure given includes federal and state SSI payments for general disability ($10,177 million) and for blindness ($302 million), but does not include SSI old age payments. So: $10,177 million + $302 million = $10,479 million.
[34] Office of Research and Demonstrations, U.S. Dep't of Health and Human Services, *National Health Expenditures 1988*, HEALTH CARE FINANCING REV., Summer 1990, at 38 tbl. 22.
[35] For a description of this category, see O'Connell & Barker, *supra* main text note 47, at 948-49.
[36] SOCIAL SEC. ADMIN., *supra* note 22, at 106 tbl. 3.C1.
[37] *Id.*
[38] *See* DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT 7, 131 tbl. 22. This figure excludes expenditures for service-connected diseases and injuries. It was computed by reducing the cost of VA-provided medical care ($10,230 million, *id.* at 7) by the percentage of veterans who received medical and surgical treatments that were service related (24.5%, *see id.* at 131 tbl. 22 (262,407 of 1,071,147 total patients)). *See also* CONARD-MORGAN, *supra* main text note 46, at 51-52 n.62 (similarly excluded service-connected expenditures with this method of calculation).
[39] *See* Office of Research and Demonstrations, *supra* note 34, at 38 tbl. 22. This figure includes $11.6 billion reported for expenditures by "state and local hospitals" (not offset by other revenues) and $6.4 billion reported for "other public programs for personal health care," including "program spending for maternal and child health; vocational rehabilitation medical payments; temporary disability insurance medical payments; Public Health Service and other Federal hospitals; Indian health services; alcoholism, drug abuse, and mental health; and school health." *Id.*.
[40] For a description of this category, see *supra* main text note 55.
[41] Office of Research and Demonstrations, *supra* note 34, at 30 tbl. 15.

APPENDIX C
BENEFITS PAID FOR INJURY AND ILLNESS BY THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1984
(DOLLARS IN MILLIONS)

	Survivors	Disability	Medical	Total	% of All Benefits
Tort Liability					
Auto Personal Injury					
Insured	—	—	—	17,239[1]	
Uninsured	—	—	—	207[2]	
Other Personal Injury Insurance Claims					
Medical Malpractice	—	—	—	2,572	
Other	—	—	—	7,827	
Railroad & Motor Carriers	—	—	—	1,683[3]	
Total Tort Liability				29,528	7.4%
Workers' Compensation	1,590	11,569	6,370	19,529	
Other: (State)	—	1,800	—	1,800	
(Railroad)	—	42	—	42	
Total Workers' Compensation				21,371	5.3%
Private Loss Insurance					
Individual Policies	8,803	1,253	4,841	14,897	
Group Policies	7,655	3,907	98,879	110,441	
Total Private Loss Insurance				125,338	31.3%
Sick Leave	—	12,858	—	12,858[4]	3.2%
Social Insurance					
OASDI	33,917	17,779	—	51,696	
Railroad Retirement	1,679	681	—	2,360	
Fed. Civil Service	2,963	4,080	—	7,043	
Other Federal	536	1,446	—	1,982	
State and Local	903	1,987	—	2,890	
Medicare A	—	4,189	33,418	37,607[5]	
Medicare B	—	2,490	16,034	18,524[6]	
Total Social Insurance				122,102	30.5%
Public Assistance					
Medicaid	—	—	33,891	33,891	
General Assistance	—	—	1,658	1,658	
SSI	—	7,392	—	7,392	
Other	—	—	2,000	2,000	
Total Public Assistance				44,941	11.2%
Veterans	3,230	10,578	6,375[7]	20,183	5.0%
Public Health	—	—	13,000	13,000	3.2%
Private Health	—	—	11,200	11,200	2.8%
TOTAL ALL SYSTEMS				$400,521	100.0%

Sources: This table is taken from O'Connell & Guinivan, *supra* main text note 59, except for corrected figures as noted in the following footnotes for any changes made necessary by such corrected figures. Complete source information can be found in the original.

[1] This figure is corrected from $26,521 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 766. In that earlier study, the authors erroneously included benefits paid for property damage. The figure reported is based upon an assumption that 35% of automobile liability payments are paid for property damage (the percentage applicable in 1985, the earliest year for which such information was readily available), which therefore should not be included in the listing for benefits paid for injury and illness. *See* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 1993 AUTOMOBILE INSURANCE DATABASE 26 tbl. 8, 37 tbl. 9. So: $26,521 million × (100% − 35%) = $17,239 million.

[2] This figure is corrected from $318 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 766. This figure was computed by assuming that the personal injury payments made by motorists themselves, apart from liability coverage or from uninsured motorist coverage, amounted to 1.2% of the insured personal injury payments, *see supra* note 1 and accompanying text. The 1.2% figure was used in CONARD-MORGAN, *supra* main text note 46, at 50 n.54. So: $17,239 million × 1.2% = $207 million.

[3] This figure is corrected from $2,251 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 766. The correction was necessitated by changes to the Automobile Personal Injury payment category, as Railroad & Motor Carriers is calculated as 5.7% of Tort Liability generally. *See id.* at 767 n.6. So: 5.7% × $29,528 million = $1,683 million.

[4] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 STATISTICAL ABSTRACT OF THE UNITED STATES 368 tbl. 589. This figure represents the sum of sick leave for government employees ($7,218) and sick leave for workers in private employment ($5,640), *id.*; it is corrected from $11,389 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 768 n.16. That earlier study used data from 1983, because the data for 1984 was unavailable; we have now included the actual 1984 data. *Id.*

[5] *See* SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 283 tbl. 7.B1, 284 tbl. 7.B2 (1988). This figure was computed as follows: $4,189 million (Disability) + $33,418 million (Medical) = $37,607 million (Total Medicare A). This is a correction from $33,050 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 768 n.23. That earlier study used the wrong data source.

[6] *See* SOCIAL SEC. ADMIN., *supra* note 5, at 283 tbl. 7.B1, 284 tbl. 7.B2. This figure was computed as follows: $2,490 million (Disability) + $16,034 million (Medical) = $18,524 million (Medicare B). This is a correction from $17,854 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 768 n.24. That earlier study used the wrong data source.

[7] *See* DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT 9, 202 tbl. 28 (1984). This figure excludes expenditures for service-connected diseases and injuries. It was computed by reducing the cost of VA-provided medical care, $8,301 million, *id.* at 9, by the percentage of veterans who received medical and surgical treatments that were service related, 23.2%. *See id.* at 202 tbl. 28 (231,670 of 996,973 total patients). CONARD-MORGAN, *supra* main text note 46, at 51 n.62, similarly excluded service-connected expenditures with this method of calculation. This figure is corrected from $6,973 million, as originally reported in O'Connell & Guinivan, *supra* main text note 59, at 766 n.33. The authors of that earlier study mistakenly reduced the cost of VA-provided medical care by the percentage of patients receiving care for a service-connected disability on the *census day* (September 30, 1984), 16.0%, which was not an adequate representation of the average makeup of the hospitals' patients. *Id. See also* DEPARTMENT OF VETERANS AFFAIRS, *supra*, at 70.

APPENDIX D
BENEFITS PAID FOR INJURY AND ILLNESS BY THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1982
(DOLLARS IN MILLIONS)

	Survivors	Disability	Medical	Total	% of All Benefits
Tort Liability					
Auto Personal Injury					
Insured	—	—	—	14,175[1]	
Uninsured	—	—	—	170[2]	
Other Personal Injury Insurance Claims					
Medical Malpractice	—	—	—	1,994	
Other	—	—	—	5,467	
Railroad & Motor Carriers	—	—	—	1,318[3]	
Total Tort Liability				23,124	6.7%
Workers' Compensation	1,500	9,825	4,820	16,145	
Other: (State)	—	1,568	—	1,568	
(Railroad)	—	56	—	56	
Total Workers' Compensation				17,769	5.1%
Private Loss Insurance					
Individual Policies	7,726	1,385	3,572	12,683	
Group Policies	6,953	4,144	79,082	90,179	
Total Private Loss Insurance				102,862	29.6%
Sick Leave	—	10,607	—	10,607	3.1%
Social Insurance					
OASDI	33,612	17,338	—	50,950	
Railroad Retirement	1,644	668	—	2,312	
Fed. Civil Service	2,507	3,664	—	6,171	
Other Federal	424	1,428	—	1,852	
State and Local	739	1,035	—	1,774	
Medicare A	—	3,878	29,214	33,092[4]	
Medicare B	—	2,294	12,311	14,605[5]	
Total Social Insurance				110,756	31.9%
Public Assistance					
Medicaid	—	—	29,399	29,399	
General	—	—	1,442	1,442	
SSI	—	6,126	—	6,126	
Other	—	—	2,100	2,100	
Total Public Assistance				39,067	11.2%
Veterans	3,113	10,203	5,851	19,167	5.5%
Public Health	—	—	13,200	13,200	3.8%
Private Health	—	—	10,900	10,900	3.1%
TOTAL ALL SYSTEMS				$347,452	100.0%

Sources: This table was originally presented in O'Connell & Baker, *supra* main text note 47. It was reprinted in O'Connell & Guinivan, *supra* main text 59, where some corrections were made. As detailed in the following footnotes, some additional corrections were necessary. Complete source information is found in the original.

[1] This figure is corrected from $21,807 million, as given in O'Connell & Barker, *supra* main text note 47, at 924. In that earlier study, the authors erroneously included benefits paid for property damage. The figure reported is based upon an assumption that 35% of automobile liability payments are paid for property damage (the percentage applicable in 1985, the earliest year for which such information was readily available), which are not included as benefits paid for injury and illness. *See* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 1993 AUTOMOBILE INSURANCE DATABASE 26 tbl. 8, 37 tbl. 9. So: $21,807 million × (100% − 35%) = $14,175 million.

[2] This figure is corrected from $261 million, as originally reported in O'Connell & Barker, *supra* main text note 47, at 924. It was computed by assuming that the personal injury payments made by motorists themselves, apart from liability coverage or from uninsured motorist coverage, amounted to a sum equal to 1.2% of the insured personal injury payments. This figure was used in CONARD-MORGAN, *supra* main text note 46, at 50 n.54. So: $14,175 million × 1.2% = $170 million.

[3] This figure is corrected from $1,783 million, as originally reported in O'Connell & Barker, *supra* main text note 47, at 924. The correction was necessitated by changes to the Automobile Personal Injury payment category, as Railroad & Motor Carriers was calculated as a percentage (5.7%) of Tort Liability generally. *See id.* at 925 n.6.

[4] *See* SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 232 tbl. 145, 233 tbl. 146 (1986). This figure was computed as follows: $3,878 million (Disability) + $29,214 million (Medical) = $33,092 million (Total Medicare A). This is a correction from $30,875 million, as originally reported in O'Connell & Barker, *supra* main text note 47, at 924. The authors of that earlier study used the wrong data source.

[5] *See* SOCIAL SEC. ADMIN., *supra* note 4, at 232 tbl. 145, 233 tbl. 146. This figure was computed as follows: $2,294 million (Disability) + $12,311 million (Medical) = $14,605 million (Medicare B). This is a correction from $15,071 million, as originally reported in O'Connell & Barker, *supra* main text note 47, at 924. The authors of that earlier study used the wrong data source.

APPENDIX E
BENEFITS PAID FOR INJURY AND ILLNESS BY THE PRINCIPAL LOSS-SHIFTING SYSTEMS, 1960
(DOLLARS IN MILLIONS)

	Survivors	Disability	Medical	Total	% of All Benefits
Tort Liability					
Auto Personal Injury					
Insured Payments	*	*	*	1,494	
Uninsured Payments	*	*	*	18	
Other Personal Injury Insurance Payments					
Medical Malpractice	*	*	*	0	
Other				269	
Railroad & Motor Carriers				103	
Total Tort Liability				1,884	7.9%
Workers' Compensation	105	754	435		
Other: (State)					
(Railroad)					
Total Workers' Compensation	105	754	435	1,294	5.4%
Private Loss Insurance					
Individual Policies	1,761	386	446	2,593	
Group Policies	1,115	619	4,403	6,137	
Total Private Loss Insurance				8,730	36.5%
Sick Leave	—	1,209	—	1,209	5.1%
Social Insurance					
OASDI					
Railroad Retirement					
Fed. Civil Service					
Other Federal					
State/Local					
Medicare A					
Medicare B					
Total Social Insurance	2,954[1]	1,379	—	4,333	18.1%
Public Assistance					
Medicaid					
General					
SSI					
Other					
Total Public Assistance	90	876	530	1,496	6.3%
Veterans	357	882	521	1,760	7.4%
Public Health	—	—	2,251	2,251	9.4%
Private Health	—	—	965	965	4.0%
TOTAL ALL SYSTEMS				$23,922	100.0%

Sources: This table is composed of figures originally reported in CONARD-MORGAN, *supra* main text note 46, at 48 tbl. I-2. This table was originally presented in O'Connell & Barker, *supra* main text note 47, and was reprinted in O'Connell & Guinivan, *supra* main text 59. The voluminous source references used in the Conard-Morgan study are not reproduced here, but may be consulted in the original. Necessary corrections are noted below.

[1] This figure was incorrectly reported as $1,954 million, in O'Connell & Barker, *supra* main text note 47, at 926, and correctly reprinted in O'Connell & Guinivan, *supra* main text note 59, at 771. Revisiting CONARD-MORGAN, *supra* main text note 46, at 48 tbl. 1-2, revealed the necessary correction.