FRENCH MEDICAL MALPRACTICE LAW AND POLICY THROUGH AMERICAN EYES: WHAT IT REFLECTS ABOUT PUBLIC AND PRIVATE ASPECTS OF AMERICAN LAW

Marc A. Rodwin[*] [†]

TABLE OF CONTENTS

INTRODUCTION

When examining law outside our native country, we often learn as much about our own legal and social system. This Article seeks to illuminate medical malpractice law and policy in the United States

* Marc A. Rodwin, J.D., Ph.D., Edmond J. Safra Research Lab Fellow 2011–2012, Harvard University, and Professor of Law, Suffolk University Law School. I am grateful for the help of my French colleagues who helped me explore French law and health policy. These include: Dominique Thouvenin, Philippe Pierre, Brigitte Feuillet, Cristina Corgas-Bernard, Jöel Moret Bailey, and Monika Steffen. My thanks for the comments on drafts from Dominique Thouvenin, Eric Feldman, Michael Rustad, and Philippe Pierre.

† Translations are the author's unless otherwise noted. Some of the sources cited in this Article were unavailable for review by the *Drexel Law Review* but have been verified by the author.

as well as in France.[1] To this end, I analyze a major reform that France began in 2002, and situate it in relation to American law and policy.

The French reform followed more than a decade of growing dissatisfaction with medical malpractice law and policy. Physicians believed France was drifting toward a litigious American approach to medical problems. They also believed that they were made responsible for compensating injuries when they were not at fault.[2] On the other hand, patients complained that they lacked effective remedies because the high cost of litigation prevented many patients injured due to negligence from filing claims, and the long time required for a court decision also led to injustice. Lawyers and policy makers recognized that the legal system was too complex. Patients had to file claims in different courts and were subject to different liability rules based on whether they were treated in publicly owned medical facilities or in private practice. As a result, there were disparities in how the legal system resolved similar claims, which clashed with France's concern for equality. Furthermore, the public and policy makers felt that something should be done to compensate individuals with serious injuries who bore a heavy burden when no party was legally at fault.[3] In recent years, there were about 2000 medical malpractice suits filed each year. The exposure of insurers has increased over time. Average damage awards were about $180,000 in 2002 but increased to $384,000 by 2007.[4]

---

1. For an introduction to French law, see JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW (2d ed. 2008). The leading American analyses of studies on French and civil law are JOHN P. DAWSON, THE ORACLES OF THE LAW 263–431 (1968), and JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 40, 44 (1969). *See also* MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY, CONTROL, DEBATE AND LEGITIMACY (2004). Several French legal codes (including the civil code and penal codes) can be viewed in English. LEGIFRANCE, http://195.83.177.9/code/index.phtml?lang=uk (last visited Dec. 12, 2011).

2. DIDIER TABUTEAU, *Déclaration du 14 octobre 1992 des médecins libéraux sur le risque médical* [*Declaration of October 14, 1992 of Private Practioners on Medical Risk*], *in* RISQUE THÉRAPEUTIQUE ET RESPONSABILITÉ HOSPITALIÈRE [THERAPEUTIC RISK AND HOSPITAL LIABILITY] 132–34 (1995).

3. CLAUDE EVIN ET AL., RAPPORT FAIT AU NOM DE LA COMMISSION DES AFFAIRES CULTURELLES, FAMILIALES ET SOCIALES SUR LE PROJET DE LOI RELATIF AUX DROITS DES MALADES ET À LA QUALITÉ DU SYSTÈME DE SANTÉ, TITRES III ET IV [REPORT MADE ON BEHALF OF THE COMMITTEE OF CULTURAL AFFAIRS, SOCIAL AND FAMILY ON THE BILL ON THE RIGHTS OF THE SICK AND OF THE QUALITY OF THE HEALTH SYSTEM, TITLES III AND IV], Ass. Nat. No. 3263 [National Assembly No. 3263], Sept. 19, 2001, p. 7.

4. Nicolas Gombault, *La situation de l'assurance de responsabilité médicale* [*The Situation with Medical Liability Insurance*], 2010 REVUE DE DROIT ANITAIRE ET SOCIAL [R.D.S.S.] [L. REV. HEALTH & WELFARE] 51, 53.

Two problems galvanized public attention. First, a court decision in the famous *Perruche* case held a clinical laboratory and physician liable for negligently failing to inform a pregnant woman that, due to her exposure to rubella, her fetus would be born with congenital defects—thereby depriving her of the opportunity to terminate her pregnancy.[5] Physicians objected to being held liable for wrongful birth because they were not responsible for the cause of the infant's congenital defects. Moreover, malpractice premiums were already much higher for obstetricians than for other practice specialties. Second, the rising incidence and cost of nosocomial infections began to be perceived as a public health problem, yet hospitals and private insurers believed that they lacked sufficient resources to bear the cost of liability for nosocomial infections.

The first part of the French reform created a public fund designed to compensate patients experiencing bad outcomes in the absence of fault and to assume some financial responsibility for medical negligence. The second part of the reform created an option through which patients could seek compensation for certain serious bad outcomes under a state-supervised, non-adversarial process.

I will briefly describe these reforms and then make observations about the American and French legal systems that affect medical malpractice law and policy. My focus is on the interaction between what is considered public and what is deemed private. I organize my comments around several key themes: (1) the relationships among public law, private law, and social solidarity; (2) the relation between civil and criminal law; (3) access to justice and the public nature of expertise; and (4) alternatives to courts and torts.

I. FRENCH REFORMS: A PUBLIC COMPENSATION FUND AND ALTERNATIVE DISPUTE RESOLUTION

Parliament enacted major reforms in 2002, with the Act of March 4, 2002 (Kouchner Act). The reforms had two main parts: one part financed public compensation for certain disabilities and medical injuries, while the second part created an alternative to obtaining

5. *See* Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., Nov. 17, 2000, Bull. civ. 2000, No. 99-1370115; Brigitte Feuillet, *The* Perruche *Case and French Medical Liability*, 4 DREXEL L. REV. 139, 139–45 (2011); *see also* John Cerullo, *The Legal Subject and the Judicialization of French Civic Culture*: *Fin de Siècle Roots of Contemporary Controversies*, 33 PROCEEDINGS W. SOC'Y FRENCH HISTORY, 433, 433–49 (2005); Julia Field Costich, *The* Perruche *Case and the Issue of Compensation for the Consequences of Medical Error*, 78 HEALTH POL'Y 8, 8–14 (2006) (discussing the history and legal theory of the case).

compensation by tort lawsuits.[6] These reforms were modified by the Act of December 30, 2002 (Revised Kouchner Act).[7]

The first part of the reform created the National Compensation Medical Office (ONIAM, or the "Public Guarantee Fund") to compensate certain patient injuries when no party is legally liable, as well as to accelerate and guarantee payment when liability exists. The legislation shifted responsibility for certain risks from private parties to the Public Guarantee Fund.[8] The Act required that all medical providers obtain liability insurance.[9] However, it ended professional liability for wrongful birth, and a government decree subsidized liability insurance for obstetricians by having social security pay a portion of their premiums.[10] The law also reduced the du-

6. David Corbé-Chalon & Martin A. Rogoff, *Tort Reform à la Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 257–59 (2007); *see generally* Evelyne Serverin, *The Negotiation of Disputed Rights or How the Law Comes to Economics*, *in* LAW AND ECONOMICS IN CIVIL LAW COUNTRIES 43–60 (Thierry Kirat & Bruno Deffains eds., 2003) (finding negotiation to be an acceptable alternative to the court system in light of the French legal system and economic theory).

7. CODE DE LA SANTÉ PUBLIQUE [C. SANTÉ PUB.] [CODE OF PUBLIC HEALTH] arts. L. 1142-1, L. 1142-29; Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-203 of March 4, 2002 on the Rights of the Sick and the Quality of the Health System], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2002, p. 4118; Loi 2002-1577 du 30 décembre 2002 relative á la responsabilité civile medicale [Law 2002-1577 of December 30, 2002 on Medical Civil Liability], J.O., Dec. 30, 2002, pp. 22100–21102.

8. EVIN ET AL., *supra* note 3, at 14–15. The official name of the office (Office National d'Indemnisation des Accidents Médicaux, Affections Iatrogènes, et Infections Nosocomiales (ONIAM)) literally translates to the National Fund for Compensation of Medical Accidents, Iatrogenic Injuries, and Nosocomial Infections. Some translations refer to it as the National Compensation Medical Office. I refer to ONIAM throughout this Article as the Public Guarantee Fund. Subsequently, legislation has expanded the scope of the fund to cover other medical injuries including AIDS and Hepititis C. *See* Loi 2004-806 du 9 août 2004 relative à la politique de santé publique [Law 2004-806 of August 9, 2004 on Public Health Policy], J.O., Aug. 11, 2004, p. 14277; Loi 2010-1594 du 20 décembre 2010 de financement de la sécurité sociale pour 2011 [Law 2010-1594 of December 20, 2010, for Financing of Social Security for 2011], J.O., Dec. 21, 2010, p. 22409; Cass. 1e Mar. 11, 2010, Bull. civ. I, No. 09-11270 (holding that the right to compensation is extended to injuries that stem from a physician's failure to disclose risks of treatment).

9. C. SANTÉ PUB. art. L. 1142-2. *See* Feuillet, *supra* note 5, at 188–90; Philippe Pierre, *The Role of Insurance in Compensation for Medical Injuries Since the Kouchner Act*, 4 DREXEL L. REV. 151, 151–54, 159–61 (2011); Dominique Thouvenin, *French Medical Malpractice Compensation Since the Act of March 4, 2002: Liability Rules Combined with Indemnification Rules and Correlated with Several Kinds of Proceedings*, 4 DREXEL L. REV. 165, 172–75 (2011).

10. Loi 2006.909 du 21 juillet 2006, relatif à l'accreditation de la qualité de la pratique professionnelle des médecins et des équipes médicales exercant en etablissements de santé [Law 2006.909 of July 21, 2006 on the Accreditation of the Quality and of Professional Practice of Doctors and Medical Teams Working in Health Facilities], J.O., July 23, 2006, p. 11029; CODE DE LA SÉCURITÉ SOCIALE [C. SÉC. SOC.] [SOCIAL SECURITY CODE] art. D. 185-1.

ration during which private firms insure negligence and shifted some of their risk to the Public Guarantee Fund.[11] The Act also transferred financial responsibility from medical facilities to the Public Guarantee Fund for nosocomial infections resulting in the loss of 25% or more of bodily capacity.[12] The Public Guarantee Fund, financed mainly by an annual Parliamentary appropriation as part of national health insurance, also funds Conciliation Commissions, created by the second reform.

The second part of the reform created an alternative to using courts to obtain compensation for certain grave medical injuries. It instituted an alternative dispute resolution (ADR) process overseen by twenty-five Regional Commissions for Conciliation and Compensation for Medical Accidents, Iatrogenic Diseases, and Nosocomial Infections (CRCI or "Conciliation Commissions").[13] The ADR process is voluntary. Patients can use it before, after, or at the same time they seek compensation through the judicial process. Patients can seek compensation through Conciliation Commissions whether they were treated in public hospitals or in the private sector; however, the courts and rules are different based on whether patients received medical services in publicly or privately owned medical facilities.[14]

A. The Role of Conciliation Commissions

Each Conciliation Commission, chaired by a magistrate, includes twenty-one representatives from patient associations, insurers, providers, and medical facilities. The Conciliation Commission selects a panel of experts or a single expert from a list of specialists certified by the National Commission on Medical Damages (CNAMed), based on their practice specialty and training in the evaluation of bodily impairment or disability.[15] These experts describe the level of

11. *See* CODE DES ASSURANCES [C. ASSUR.] [INSURANCE CODE] art. 251-2 (4); C. SANTÉ PUB. art. L. 1142-15; Philippe Pierre, *Assurance, responsabilité, santé: réflexions sur une trilogie en devenir* [*Insurance, Liability, and Health: Reflections on a Trilogy in the Making*], 2010 REVUE DE DROIT ANITAIRE ET SOCIAL [R.D.S.S.] [L. REV. HEALTH & WELFARE] 7 (Hors-série [Special Issue]).

12. C. SANTÉ PUB. art. L. 1142-1.

13. The French name for these Conciliation Commissions is *Commissions Régionales de Conciliation et d'Indemnisation*.

14. *See* Thouvenin, *supra* note 9, at 169–72.

15. COMMISSION NATIONALE DES ACCIDENTS MÉDICAUX, RAPPORT ANNUEL AU PARLEMENT ET AU GOUVERNEMENT [NATIONAL COMMISSION ON MEDICAL ACCIDENTS, ANNUAL REPORT TO PARLIAMENT AND GOVERNMENT] 9–10 (2009–2010), *available at* http://www.cnamed.sante.gouv.fr/IMG/pdf/CNAMed_09-10.pdf.

disability and, since 2006, use an official list of disability categories that describe different levels of impairment.[16]

The Conciliation Commission first decides if it has jurisdiction by determining whether the disability meets the severity threshold and other certain conditions. If the Conciliation Commission has jurisdiction, it investigates whether the injury is due either to negligence or to "an inherent therapeutic risk," a key term that I will discuss below. If these conditions are met, then the Conciliation Commission offers an opinion on responsibility only for cases in which the patient (1) dies, (2) suffers permanent disability that reduces their bodily capacity by 25% or more, (3) experiences a disability lasting over six months that reduces their income by more than 50%, or (4) experiences a serious life difficulty.[17]

If the claimant's injuries meet the threshold, the Conciliation Commission determines if a provider or facility caused the disability through negligence and is thus legally responsible. If the Conciliation Commission finds that *no* medical provider or institution is liable, it determines whether the injury is due to a nosocomial infection or an inherent therapeutic risk, in which case the Public Guarantee Fund is responsible for compensation.[18] Inherent therapeutic risks include injuries stemming from medical services for diagnosis, treatment, or prevention, when the injuries are not an anticipated consequence of these medical acts and are not the result of the individual's underlying medical condition or its natural evolution.[19]

---

16. This system is called the *Dintilhac nomenclature*. Loi 2006-1640 du 21 décembre 2006 de financement de la sécurité sociale pour 2007 [Law 2006-1640 of December 21, 2006, Financing for Social Security in 2007], J.O., Dec. 22, 2006, art. 25; JEAN-PIERRE DINTILHAC, RAPPORT DU GROUPE DE TRAVAIL CHARGÉ D'ELABORER UNE NOMENCLATURE DES PRÉJUDICES CORPORELS [REPORT OF TASK FORCE TO DEVELOP CLASSIFICATIONS FOR BODILY INJURY] 30–46 (2005), *available at* http://lesrapports.ladocumentationfrancaise.fr/BRP/064000217/0000.pdf.

17. The statute does not define what constitutes a serious life difficulty, and there is often debate within Conciliation Commissions regarding what problems fall within this category. About 19% of patients compensated by the Public Guarantee Fund are suffering with serious life difficulties. *See* FLORENT BLANCO, LA LOI DU 4 MARS 2002 ET LES CRCI [THE LAW OF MARCH 4, 2002 AND THE CRCI] 148 (2005); COMMISSION NATIONALE DES ACCIDENTS MÉDICAUX, *supra* note 15, at 24.

18. C. SANTÉ PUB. art. L. 1142-1. The Kouchner Act made medical facilities liable for harm due to nosocomial infections unless the facilities produced evidence of a foreign cause. Hospitals and insurers complained that they could not bear that risk and, in response, the Revised Kouchner Act transferred risk for the most serious injuries to the Public Guarantee Fund. Furthermore, the Revised Kouchner Act allowed the Public Guarantee Fund the right of subrogation against the medical facilities.

19. The definition of inherent therapeutic risk comes from a report of the General Inspector of Social Affairs and the General Inspector of judicial services. *See* INSPECTION GÉNÉRALE DES AFFAIRES SOCIALES ET INSPECTION GÉNÉRALE DES SERVICES JUDICIAIRES [INSPECTOR GENERAL OF

B. The Relation of Conciliation Commissions to Courts and the Public Guarantee Fund

Patients continue to have access to courts to obtain compensation. They can ignore the ADR option and seek compensation by suing potentially liable parties, the Public Guarantee Fund, or both. In that case, the court decides if a provider or medical facility is liable, and if not, whether the patient sustained an injury that the Public Guarantee Fund must compensate. If the Conciliation Commission has jurisdiction over the patient's claim, it issues an opinion as to the patient's level of physical incapacity, whether the patient is entitled to compensation, and if so, from whom. But Conciliation Commission findings do not bind claimants or parties that it designates responsible for making payment.

The patient can reject the Conciliation Commission opinion and seek compensation through the judicial tribunal that has jurisdiction. If the patient accepts the Conciliation Commission opinion regarding his or her impairment level, the party designated responsible has four months to either reject the recommendation or to accept it and offer the patient a settlement payment. If the party deemed responsible offers the patient a settlement, the patient can accept the offer or reject it and seek compensation through the judicial process. However, if a patient rejects a settlement offer and files suit, that patient cannot later accept the previous offer.[20]

Injured patients have an incentive to use the ADR process because it is less expensive and quicker than litigation. The patient does not need to have a lawyer and can rely on the Conciliation Commission to investigate the case. Moreover, patients that use the ADR process and are dissatisfied with the result can always reject the settlement offer and seek compensation through a lawsuit.

Individuals and institutions designated as responsible by a Conciliation Commission have an incentive to offer a patient a settlement payment.[21] However, if they do not, the Public Guarantee Fund can compensate the patient and seek reimbursement from the designated party through a lawsuit. Furthermore, if the court agrees that the designated party is responsible, it can also add a 15% penal-

---

SOCIAL AFFAIRS AND INSPECTOR GENERAL OF JUDICIAL SERVICES], RAPPORT SUR LA RESPONSABILITÉ MÉDICALE ET L'INDEMNISATION DE L'ALÉA THÉRAPEUTIQUE [REPORT ON MEDICAL LIABILITY AND COMPENSATION FOR THERAPEUTIC HAZARDS] 68 (1999). The Kouchner Act incorporates this definition. *See* C. SANTÉ PUB. art. L. 1142-1.

20. Trib. gr. inst. Rodez, May 19, 2005 [T75].

21. Serverin, *supra* note 6, at 43–60.

ty and the costs of expert witnesses paid by the Conciliation Commission.[22] The Public Guarantee Fund usually pays compensation when a Conciliation Commission designates it as financially responsible, but the Fund can contest the Conciliation Commission finding. In that case, the patient can sue the Public Guarantee Fund. Courts can order the Public Guarantee Fund to pay compensation but cannot penalize it for not following the Conciliation Commission opinion.[23]

In 2010, patients filed 4117 claims for compensation with Conciliation Commissions.[24] In 54% of cases, Conciliation Commissions found no basis for recommending compensation. When Conciliation Commissions found that the patient was entitled to compensation, they designated a provider or medical facility as legally liable in about half of cases and found that that the patient was entitled to compensation by the Public Guarantee Fund in the other half. Between 2006 and 2009, Conciliation Commissions resolved slightly over 4000 closed cases in which the Conciliation Commission recommended settlement payment. In these cases, the average payment per case was 115,000€.[25]

My colleagues, Professors Dominique Thouvenin, Philippe Pierre, and Brigitte Feuillet, analyze these reforms further in articles that are part of this Symposium.[26] To supply context for these reforms, I will now contrast selected aspects of the French and American legal systems.

II. PUBLIC LAW, PRIVATE LAW, AND SOCIAL SOLIDARITY

France distinguishes between private civil law (which concerns the relations between and among private parties) and public law

22. C. SANTÉ PUB. art. L. 1142-15. Judges are authorized to impose the penalty only if the offer was manifestly insufficient, if the insurer refused to make an offer, or if the liable party was uninsured. *Id.*

23. Cass. 1e civ., May 6, 2010, Bull. civ. I, No. 105. For selections of the jurisprudence, see ONIAM, http://www.oniam.fr (last visited Dec. 12, 2011). *See also* Conseil d'état [CE] [Council of State], Oct. 10, 2007, Rec. Lebon 306590, *available at* http://www.oniam.fr/bases-de-donnees/jurisprudence.

24. OFFICE NATIONAL D'INDEMNISATION DES ACCIDENTS MÉDICAUX [NATIONAL OFFICE FOR COMPENSATION FOR MEDICAL ACCIDENTS], RAPPORT D'ACTIVITÉ 2010 [2010 ACTIVITY REPORT] 5 (2011), *available at* http://www.oniam.fr/IMG/rapportsoniam/rapport2010.pdf.

25. *See* OBSERVATOIRE DES RISQUES MEDICAUX [OBSERVATORY OF MEDICAL RISKS], RAPPORT 2010 [2010 REPORT] (2010), *available at* http://sitetest.oniam.fr/IMG/orm/rapportorm2010.pdf.

26. Feuillet, *supra* note 5; Pierre, *supra* note 9; Thouvenin, *supra* note 9.

(which concerns the relations between the State and private parties).[27] There are different rules and courts for each.

The nature of the relationship between litigants determines whether there is civil or administrative law jurisdiction. Patients treated by a private practitioner or in a private medical facility have a contractual relationship with the physician or the medical facility, and civil law governs this relationship. Patients treated in a public hospital are users of public services. Their legal relationship is only with the public hospital, not with the physician, and administrative law governs relationships between individuals, public authorities, and institutions. Consequently, different rules—including liability rules—apply depending on whether patients receive medical care in a private or public hospital.

Patients treated by private practitioners and facilities seek compensation through judicial courts under civil law. Patients treated in public hospitals (which employ about 28% of physicians and include about 75% of hospitals beds) have their rights defined by public administrative law. They must first request compensation directly from the hospital administration. If the hospital turns down the request or does not reply within four months, patients can then seek compensation through the administrative law courts.[28]

The public–private distinction, however, runs deeper and informs the idea of a Public Guarantee Fund. As in Roman law, which was its main influence, modern French law views public law as concerning the public good, which is a separate sphere from the good of private individuals. In the Medieval Era, the Catholic Church was the center of moral authority and a powerful institution with its own legal system that developed from Roman law. The Church clothed the monarchy with moral legitimacy by promoting the idea that the monarchy should serve the public good. Jean-Jacques Rousseau's

27. See DOMINIQUE THOUVENIN, COURS RELATIF À LA RESPONSABILITÉ MÉDICALE [COURSE ON MEDICAL LIABILITY] 32–50 (2005), for a discussion regarding private and public law. *See also* ELISABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY 15–21 (2008); Tribunal des conflicts [TC] [Tribunals of Conflict] Feb. 8, 1873, D.C. Jur. 1873.3.17, *translated in* DUNCAN FARGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW 287 (2003) (establishing jurisdiction in the administrative courts to hear actions by private parties brought against the State).

28. A rule of administrative law procedure prohibits users of public services from directly bringing lawsuits against administrative agencies. They must first give the agency a chance to address their claim without litigation. Claimants can only sue the agency if the agency has rejected their claim or not responded to it. This approach resembles the American administrative law practice that requires individuals to exhaust their administrative remedies before initiating a lawsuit.

1762 book, *On the Social Contract*, also influenced French political and legal thinking. He conceived of the public interest as distinct from the sum of individual interests.[29] This conception differs from that of the liberal state model, exemplified by the United States, which views the public interest as the sum of individual interests reconciled through competition and negotiation among interest groups.[30]

French conceptions of public law, public sphere, and public good affect the role of the state. They contributed to France embracing *social solidarity* as an important value. The concept of *solidarity* has its roots in the French Revolution's fraternal ideal articulated in the motto: "Liberty, Equality, and Fraternity." Solidarity articulates an alternative basis for social support than charity or benevolence, both remnants of inequality, caste, and social status that characterized the Old Régime. In the late nineteenth and early twentieth centuries, Léon Bourgeois linked *solidarism* to mutual aid and insurance, making it a key political ideal in France.[31] It became the basis for extending medical care and pensions to World War I veterans and the elderly, and for the Mutual Insurance Act of 1928 that covered industrial workers.[32]

After World War II, France built its social security system—which includes health insurance—on principles of social solidarity. The 1946 Constitution "proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities" and "guarantees to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure."[33] The Social Security Code explains that national solidarity

29. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 65 (G.D.H. Cole trans., Dover Publ'ns 2003) (1762).

30. *See* STEVEN KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 265–70 (1987) (exploring competing conceptions of the public interest). See Marc A. Rodwin, *Patient Data: Property, Privacy and the Public Interest*, 36 AM. J. L. & MED. 586, 587–90 (2010), for a discussion of the public interest, public ownership, and related issues.

31. LÉON BOURGEOIS, SOLIDARITÉ [SOLIDARITY] (3d ed. 1902); LÉON BOURGEOIS & ALFRED CROISET, ESSAI D'UNE PHILOSOPHIE DE LA SOLIDARITÉ [TEST OF A PHILOSOPHY OF SOLIDARITY] (Félix Alcan ed., 1902); *see* J.E.S. Hayward, *The Official Social Philosophy of the French Third Republic: Léon Bourgeois and Solidarism*, 6 INT'L REV. SOC. HIST. 16, 19 (1961); DICTIONNAIRE CULTUREL EN LANGUE FRANÇAISE [FRENCH LANGUAGE CULTURAL DICTIONARY] 865 (Alain Rey ed., 2005).

32. See MARC A. RODWIN, CONFLICTS OF INTEREST AND THE FUTURE OF MEDICINE: THE UNITED STATES, FRANCE AND JAPAN 27–74 (2011), for an introduction to the French health care system and policy.

33. 1946 CONST. pmbl. This principle is continued in the current Constitution of 1958, which makes reference to the 1946 constitution. "The French people solemnly proclaim their

requires all individuals to contribute to funds based on their income, not their risk, in order to finance benefits available to everyone needing medical care under equal terms.[34] Benefits individuals receive are not a function of how much they contribute. Funds are redistributed among all socially insured individuals. The ideal of social solidarity inspired France to create a system to compensate certain bad medical outcomes that are the result of negligence. The absence of a similar American commitment to social solidarity helps explain why the United States has not developed a similar compensation system.

III. THE RELATION BETWEEN CIVIL AND CRIMINAL LAW

Several aspects of French law clash with American lawyers' common understanding of medical malpractice and tort law.[35] Americans typically think of civil liability in tort as distinct from criminal liability. Criminal acts constitute an affront to the public order, while civil liability concerns harm to a private individual. In contrast, in France, negligent and imprudent action can give rise to both civil and criminal liability. Unlike in the United States, where medical malpractice is almost exclusively a matter of civil tort law, individuals have the option of initiating medical malpractice lawsuits through the criminal law process.[36] Yet, in France, as opposed to the United States, tort law does not allow punitive damages.

The overlap of civil and criminal liability in France arises because both codes impose liability for negligence. Civil Code Article 1383 states, "Everyone is liable for the damage he causes not only by his

---

attachment to the Rights of Man and the principles of national sovereignty as defined by the declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 and to the duties as defined in the Charter for the Environment of 2004." 1958 CONST. pmbl.

34. C. SÉC. SOC. art. 111-1 ("It guarantees workers and their families *against the risks* of any kind *which can reduce or eliminate their earning capacity*. It also covers the costs of maternity and family responsibilities. It provides *for all other persons and for family members residing on French territory*, covering the expenses of sickness and maternity.") (emphasis added).

35. For background on damages under French tort law, see Suzanne Galand-Carval, *Damages Under French Law*, *in* UNIFICATION OF TORT LAW: DAMAGES 77–88 **(**U**.** Magnus ed., 2001); Ruth Redmond-Cooper, *Aspects of the French Law of Damages*, *in* DAMAGES FOR PERSONAL INJURIES: A EUROPEAN PERSPECTIVE 51–63 (Frederick J. Holding & Peter Kaye eds., 1993).

36. The use of criminal prosecution for medical malpractice also occurs in other civil code law jurisdictions, such as Japan. *See* Futosh I. Iwata & Robert B. Leflar, *Medical Error as Reportable Events and Torts as Crime: A Transpacific Comparison*, 12 WIDENER L. REV. 189, 206 (2005); Robert B. Leflar, "*Unnatural Deaths," Criminal Sanctions, and Medical Quality Improvement in Japan*, 9 YALE J. OF HEALTH POL'Y, L. & ETHICS 1, 8 (2009); Robert B. Leflar, *Public and Private Justice: Redressing Health Care Harm in Japan*, 4 DREXEL L. REV. 243, 247–51 (2011).

intentional act, but also by his negligent conduct or by his imprudence."[37] The Penal Code of 1810 holds individuals liable for unintentionally causing death or bodily injury due to their imprudence, negligence, lack of attention, failure to take precautions, or failure to follow regulations.[38]

The relation between civil and criminal liability has evolved. In the nineteenth century, attorneys and legal scholars debated whether the standard for finding liability for "imprudence" and "negligence" were the same under the civil and penal codes and also whether each code penalized different acts of imprudence and negligence. In 1912 and 1914, the *Cour de cassation* held that legally sanctionable fault is identical under civil and criminal law.[39] Because of this decision, if a criminal law judge held that an individual's conduct made him criminally liable, the individual was also liable under civil law and responsible for compensating any damages. Similarly, if a judge held that an individual's conduct did not make him criminally liable, then the individual was not liable under civil law for the same conduct. Consequently, judges sometimes found criminal fault but did not impose criminal penalties in order to allow individuals to seek civil damages in a separate lawsuit.

As can be seen from these examples, the initial interpretation of the unity of criminal and civil fault gave rise to several problems. To resolve these problems, the *Cour de cassation* later limited the unity of criminal and civil fault to unintentional actions. This reform allowed courts to treat contractual faults as matters of civil law liability without giving rise to criminal liability. This interpretation was firmly established in 1936 in the *arrêt Mercier*, which held that responsibility for monetary damages should be treated as a matter of contract law.[40] In 2000, the legislature amended the civil and criminal codes. Now, criminal courts can impose civil liability in the absence of criminal fault. Moreover, individuals can pursue a civil

37. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1383.

38. CODE PÉNAL [C. PÉN] [PENAL CODE] arts. 319–20 (holding, respectively, that whoever by imprudence, inattention, negligence, or failure to follow regulations, commits an involuntary homicide, or who is the involuntary cause of a homicide, shall be punished by imprisonment for a term of three months to two years and be subject to a fine of 50₣ to 600₣; anyone whose fault or lack of caution results in a person being wounded, shall be imprisoned for six days to two months, and be subject to a fine of 16₣ to 100₣).

39. Cass. 1e civ., Dec. 18, 1912, Bull. civ. I, 1914, No. 231, note Reynaud; Cass. 1e civ., May 20, 1936, Bull. civ. I, D.1936, II, 88, note Josserand.

40. Cass. 1e civ., May 20, 1936, Bull. civ. I, S. Jur. I, 321, note Breton.

claim to seek compensation, even if they have lost a criminal case for the same event.[41]

Today, the code of criminal procedure provides both a public and private route to initiate prosecutions (except for when it involves acts of publicly employed physicians). Regarding the public route, Article 1 authorizes prosecutors and public servants to initiate prosecutions. Victims can also stand in place of public officials and initiate the proceedings by filing a complaint with the investigating magistrate.[42] However, reforms in 2007 made it harder for victims to initiate public prosecutions. Since then, victims must file a complaint with the prosecutor or a police official under the prosecutor's authority and allow the public officials to take action. Only if public officials have not acted within three months can a victim then initiate a criminal prosecution.[43]

Regarding the private route, Article 2 authorizes individuals who suffer damages due to a penal offense to bring civil suits for reparation of the damages.[44] In addition, when the public prosecutor initiates the prosecution, victims can join the suit as a civil party to obtain compensation for damages.[45]

---

41. CODE DE PROĆÉDURE PÉNALE [C. PR. PÉN] [CRIMINAL PROCEDURE CODE] art. 4-1, *available at* http://www.legifrance.gouv.fr ("The absence of a non-intentional criminal liability within the meaning of Article 121-3 of the Criminal Code does not bar the exercise of an action before the civil courts with a view to obtaining compensation for damage pursuant to article 1382 of the Civil Code where the existence of civil liability under that article is established, or under that of article L.452-1 of the Code of Social Security where the existence of a strict liability under this article is established."). C. PR. PÉN. art. 470-1 ("A court sei[z]ed by the public prosecutor or by an investigatory jurisdiction of proceedings for an unintentional offence as meant by the second, third, and fourth paragraphs of article 121-3 of the Criminal Code, and which orders a discharge, *remains competent to grant compensation, at the civil party's or his insurer's request*, filed before the conclusion of the proceedings, for any damage resulting from the matters in respect of which the prosecution was brought, pursuant to the rules of civil law.") (emphasis added).

42. C. PR. PÉN. art. 1 ("Public prosecution for the imposition of penalties is initiated and exercised by the judges, prosecutors, or civil servants to whom it has been entrusted by law. This prosecution may also be initiated by the injured party under the conditions determined by the present Code.").

43. *Id*. art. 85 ("However, the complaint with a civil party is admissible only . . . on the condition the person justifies what the prosecutor has made known, following a complaint filed before him or a service from the judicial police, that they would not prosecute, or that a period of three months has passed since he filed a complaint before the magistrate.").

44. *See id*. art. 2 ("Civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanor or a petty offence is open to all those who have personally suffered damage directly caused by the offence.").

45. *Id.* art. 3 ("Civil action may be exercised at the same time as public prosecution and before same court.").

When plaintiffs use the criminal complaint process to seek damages, they benefit from the magistrate's investigative power. Frequently, the plaintiff's lawyer asks the prosecutor to bring the criminal suit, and the plaintiff only brings the civil suit. However, filing criminal complaints is less typical in medical malpractice cases.

A. The View from the United States

The conventional American wisdom is that multiple factors distinguish tort law from criminal law.[46] At first blush it appears bizarre to address medical malpractice through criminal law. Yet upon further reflection, the French mix of civil tort and criminal law is understandable and illuminates American debates about medical malpractice and tort law, particularly the public and punitive functions of tort law.[47]

Criminal negligence has a long history in Anglo-American law.[48] Common law included criminal liability for gross negligence. Drawing on common law criminal negligence, the drafters of the American Model Penal Code—published in 1962—included criminal negligence, defined as a "gross deviation from the standard of care" that involves "substantial and unjustified risk."[49] More recently, some environmental legislation includes penalties for criminal neg-

46. *See, e.g.*, Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719–25 (2008) (discussing the differences between criminal law and tort law as well as the issue of "moral luck").

47. For an overview of medical malpractice law and policy in the United States, see TOM BAKER, THE MEDICAL MALPRACTICE MYTH 22–67 (1978); SILVIA A. LAW, PAIN AND PROFIT: THE POLITICS OF MALPRACTICE (1978); FRANK A. SLOAN & LINDSEY M. CHEPKE, MEDICAL MALPRACTICE 46 (2008); *see generally* BARRY WERTH, DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE (1998) (illustrating the conflict between lawyers and physicians in a medical malpractice case through real characters and events that were recreated from interviews letters, memoranda, medical records, card documents, and deposition transcripts); James C. Mohr, *American Medical Malpractice Litigation in Historical Perspective*, 283 JAMA 1731, 1731–37 (providing an overview of medical malpractice law and policy in the United States). See DOMINIQUE THOUVENIN, LA RESPONSABILITÉ MÉDICALE [MEDICAL LIABILITY] (1995), for the classic empirical study of medical malpractice in France.

48. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59–61 (1996); *see also* Alexander McCall Smith, *Criminal or Merely Human?: The Prosecution of Negligent Doctors*, 12 J. CONTEMP. HEALTH L. & POL'Y 131, 138–41 (1995) (discussing how the criminal justice system punishes negligence).

49. MODEL PENAL CODE § 2.02(2)(d) (2010) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

ligence.[50] Today, prosecutors sometimes charge managers and firms with criminal negligence when their reckless behavior causes injury or death.[51]

Still, Anglo-American law employs criminal negligence infrequently: only when there is recklessness, gross negligence, or wanton negligence.[52] Typically, prosecutors only bring criminal suits for unintentional acts that result in death or bodily injury. Even so, some legal scholars object to any criminal negligence.[53] Writing in 1963, Jerome Hall criticized the newly drafted Model Penal Code rule for criminal negligence. He argued that criminal law and punishment are appropriate only when an individual intended to cause harm.[54]

Medical malpractice law reflects this tort law doctrine and practice. Prosecutors infrequently charge physicians with criminal negligence. Writing in 2001, James Filkins found only fifteen appellate decisions between 1809 and 1981 in which prosecutors pursued criminal charges against physicians for their medical conduct.[55] He found about nine reported appellate court cases since 1981 and about fifteen other cases that did not result in appellate court decisions.[56] Some of these criminal prosecutions were uncontroversial

---

50. Ronald A. Sarachan & Steven P. Solow, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of* Hanousek *and* Hong, 32 ENVTL. L. REP. 11153, 11153 (2002).

51. Justin Blum & Alison Fitzgerald, *BP Is Said to Face U.S. Review for Manslaughter Charges*, BLOOMBERG, Mar. 29, 2011, http://www.bloomberg.com/news/2011-03-29/bp-managers-said-to-face-u-s-review-for-manslaughter-charges.html.

52. George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 401–04 (1971).

53. Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 643 (1963).

54. *Id.* at 634.

55. James A. Filkins, *"With No Evil Intent": The Criminal Prosecution of Physicians for Medical Negligence*, 22 J. LEGAL MED. 467, 472 n.51 (2001). For other recent articles on criminal prosecution of physicians, see Kara M. McCarthy, *Doing Time for Clinical Crime: The Prosecution of Incompetent Physicians as an Additional Mechanism to Assure Quality Health Care*, 28 SETON HALL L. REV. 569, 569–619 (1997); Edward Monico et al., *The Criminal Prosecution of Medical Negligence*, 5 INTERNET J.L. HEALTHCARE & ETHICS 1, 7 (2007), *available at* http://www.ispub.com/ostia/index.php?xmlPrinter=true&xmlFilePath=journals/ijlhe/vol5n1/criminal.xml; Smith, *supra*, note 8 at 131–46; Paul R. Van Grunsven, *Medical Malpractice or Criminal Mistake?: An Analysis of Past and Current Criminal Prosecutions for Clinical Mistakes and Fatal Errors*, 2 DEPAUL J. HEALTH CARE L. 1, 6–35 (1997).

56. United States v. Wood, 207 F.3d 1222, 1226 (10th Cir. 2000); Klvana v. California, 911 F. Supp. 1288, 1291 (C.D. Cal. 1995); United States v. Billig, 26 M.J. 744, 746–47 (N-M. Ct. Crim. App. 1988); People v. Verbrugge, 998 P.2d 43, 44 (Colo. App. 1999); State v. Naramore, 965 P.2d 211, 212–13 (Kan. Ct. App. 1998); People v. Einaugler, 618 N.Y.S.2d 414 (N.Y. App. Div. 1994); Commonwealth v. Youngkin, 427 A.2d 1356, 1359 (Pa. Super. Ct. 1981); State v. Warden, 813

because the physicians engaged in criminal fraud or violated criminal laws by prescribing drugs that are controlled.[57] However, the remaining cases involved reckless conduct.

Return now to the Anglo-American distinction between tort and crime in which civil tort law concerns private wrongs while criminal law involves an affront to the public order. This idea was not always accepted. In early English common law, the crime/tort distinction "was not . . . between criminal acts and tortuous acts, nor . . . between intentional wrongs and negligent injuries, nor . . . between private actions and public prosecutions. . . . The actions that formed our categories of crime and tort . . . were different ways for a victim to pursue justice for the same wrongful act."[58] In short, it resembled France's current dual avenues to initiate suits for compensation and other forms of redress.

The interaction of tort and criminal law helps explain American punitive damage awards. Today, many American legal scholars argue that the award of punitive damages in tort suits distorts traditional functions of tort and lacks justification.[59] They state that legislatures should prohibit punitive damages or at least cap the amount of damages that juries can award.[60] In 1975, the California legislature capped the awarding of non-economic damages in medical malpractice cases for physicians, hospitals, nursing homes, and other li-

---

P.2d 1146, 1147–48 (Utah 1991); David Doege, *Company Charged with Reckless Homicide*, MILWAUKEE J. SENTINEL, Apr. 13, 1995, at 1A.

57. People v. Klvana, 15 Cal. Rptr. 2d 512, 512–15 (Cal. Ct. App. 1992) (illegally prescribing controlled substances and exhibiting reckless conduct in performing obstetrics); Nigro v. United States, 117 F.2d 624 (8th Cir. 1941).

58. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83 (1996).

59. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735 (2003). *See, e.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 576 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1655 (2002) (reviewing politics of tort reform through legal scholarship); Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1465–1517 (2007).

60. Proponents of caps on awards also argue that they are necessary to reduce the cost of liability insurance premiums, which have risen so high that they make it difficult for physicians to continue to practice medicine. However, the best empirical evidence shows that malpractice premiums are not high for most physicians and that they have risen and fallen in cycles. Moreover, the physicians practicing in the specialties with the highest malpractice premiums (obstetrics and neurosurgery) have net practice income that is higher than the mean for physicians. *See* Marc A. Rodwin et al., *Malpractice Premiums in Massachusetts: A High-Risk State: 1975 to 2005*, 27 HEALTH AFF. 835, 835 (2008) [hereinafter Rodwin, *A High-Risk State*]; Marc A. Rodwin, et al., *Malpractice Premiums and Physician Income: Perceptions of a Crisis Conflict with Empirical Evidence.*, 25 HEALTH AFF. 750, 757 (2006) [hereinafter Rodwin, *Perceptions of a Crisis Conflict*].

censed health care facilities.[61] Several states have enacted similar legislation since then. Today, twenty states have capped punitive damages, and five states do not permit any punitive damages.[62] Thirty-seven jurisdictions have capped awards for non-economic losses, such as pain and suffering or loss of consortium.[63]

However, the use of punitive damage awards appears more reasonable if we think of tort law as serving public functions. Can tort law serve a public function? Professor Leon Green argues that decisions in tort cases concern more than the parties to the lawsuit since they bear on "other parties who may have similar cases, and all the rest of us who may have a stake in what we call a just decision."[64] Green concludes that tort law involves the public good and is "public law in disguise."[65]

My colleague, Michael Rustad, argues that tort law often serves not only a private function, but public law functions, such as deterrence of corporate wrongdoers. In contrast to France, where courts cannot award punitive damages, U.S. courts uphold punitive damage awards based upon gross negligence or reckless conduct. Michael Rustad coined the term *crimtorts* to refer to the intersection of criminal and tort law when courts impose punitive damages for gross negligence, recklessness, or intentional misconduct.[66] Rustad

---

61. California's Medical Injury Compensation Reform Act (MICRA) of 1975, CAL. CIV. CODE § 3333.2 (West 1975).

62. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1339–46 (2005).

63. NAT'L CONFERENCE OF STATE LEGISLATURES, *Medical Liability/Malpractice Law*, (Aug. 15, 2011), http://www.ncsl.org/?tabid=18516. For a discussion of this trend, see Amanda Edwards, *Recent Development: Medical Malpractice Non-Economic Damages Caps*, 43 HARV. J. ON LEGIS. 213, 213 (2006); Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 516–18 (2005); Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 124 (2006). For analysis of the effect of damaged caps, see David A. Hyman et al., *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003*, 4 J. EMPIRICAL LEGAL STUDIES 3, 56–57 (2007).

64. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 257, 269 (1960).

65. *Id.*

66. Thomas Koenig & Michael L. Rustad, "*Crimtorts*" *as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 331 (1998); Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 443, 525–27 (2011) [hereinafter Rustad, *Torts as Public Wrongs*]; *see* Symposium, *Crimtorts*, 17 WIDENER L.J. 705 (2008); Michael L. Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1039–42 (1995) [hereinafter Rustad & Koenig, *Reconceptualizing Punitive Damages*]; *see also* Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 947–48 (2008); Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, WIDENER L.J. 733, 734–42 (2008); Jeffery O'Connell, *The Large Cost Savings and Other Advantages of an Early Offer*

and Thomas Koenig marshal evidence that punitive damages are a longstanding function of tort,[67] rebutting individuals who claim that punitive damages distort traditional tort law.[68] They argue that "while the manifest function of tort law is civil recourse or compensation, its latent function is vindicating public wrongs."[69] Rustad believes that by seeking damages, "private litigants serve the public good" when they "expose and financially punish entities that commit torts causing 'group injuries' that are not rectified on the criminal side of the docket."[70] Rustad also reminds us that compensatory damages cannot deter negligence or provide just compensation when plaintiffs suffer little or no economic loss.[71] Most nursing home patients, for example, are unemployed. If abused or killed, they or their heirs cannot claim lost income. Punitive damages can compensate these patients and deter gross negligence while liability for economic loss cannot.[72]

Other scholars also argue in favor of allowing public law functions. Judge Guido Calabresi, whose seminal book on the cost of accidents still influences tort scholarship, argues that punitive damag-

---

"Crimtorts" Apporach to Medical Malpractice Claims, 17 WIDENER L.J. 835, 872 (2008); Christopher J. Robinette, *Crimtorts*, 17 WIDENER L.J. 705, 705–06 (2008); Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 812–15 (2008); Sheila B. Schwerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 953 (2008); Simons, *supra* note 46, at 726.

67. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1290–97 (1993).

68. *See, e.g.*, JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2004); John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 6 (2004); John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1517–18 (2002); John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 407–08 (2005); Zipursky, *supra* note 55, at 735 (2003); Goldberg, *supra* note 55, at 626.

69. Rustad, *Torts as Public Wrongs*, *supra* note 66, at 443; *see also* Koenig, *supra* note 66, at 765–80. *See generally* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001) (discussing both manifest and latent functions of American tort law).

70. Rustad, *Torts as Public Wrongs*, *supra* note 66, at 525–26 (quoting Koenig, *supra* note 66, at 736–37). Rustad and Koenig's study of thirty years of medical malpractice lawsuits uncovered 270 cases in which punitive damages were awarded. The vast majority of these cases involved aggravated misconduct beyond ordinary negligence. Rustad & Koenig, *Reconceptualizing Punitive Damages*, *supra* note 66, at 995–96 (describing aggravating misconduct leading to punitive damages in medical liability cases).

71. *See generally* Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331 (2006) (examining the effects of non-economic damages caps in California, Florida, and Texas from 1990 to 2004).

72. Michael L. Rustad, *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Noneconomic Damages*, 35 N.M. L. REV. 337, 350–56 (2005).

es deter misconduct—a traditional function of tort.[73] Richard Posner, a founder of law and economics scholarship and now a judge on the U.S. Court of Appeals for the Seventh Circuit, writes that a "function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes."[74] Richard Posner also argues that "criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law."[75] And Professor Richard Epstein argues that, from a utilitarian perspective, tort and criminal law can be combined to maximize social welfare, taking into account problems from *both* under– and over–enforcement.[76]

IV. ACCESS TO JUSTICE AND THE PUBLIC NATURE OF EXPERTISE

A. Access to Justice

Let us explore the idea of the public functions further. The judicial system is a public function, yet the cost of legal representation can compromise access to justice. The means we use to finance lawsuits can facilitate or restrict access to justice.

Since the 1960s, the United States Supreme Court has interpreted the U.S. Constitution to require the state to pay for legal representation of individuals charged with violating criminal law who lack means to pay for an attorney.[77] However, the Supreme Court has not required state-funded legal representation for most civil cases.[78] Congress has appropriated some funds for legal services for the

73. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 123–28 (1970); Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, *in* EXPLORING TORT LAW 337–38 (M. Stuart Madden ed., 2005).

74. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003).

75. *See* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204–05 (1985).

76. Richard Epstein, *The Tort Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 10 (1996). Epstein's concern with the problem of under– and over–enforcement follows the thinking of Richard A. Posner, who cautions that we should consider the costs and benefits of criminal penalties and use them as a means to promote social welfare. *See* Posner, *supra* note 75, at 1201.

77. Gideon v. Wainwright, 372 U.S. 335, 335 (1963). See Andy Court, *Poor Man's Justice: Is There a Crisis?*, AMER. LAWYER, Jan.–Feb. 1993, at 46–47 (1993), for a discussion of the right to counsel in the years following *Gideon*.

78. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) ("Cases directly concerning a right to counsel in civil cases have found a presumption of such a right '*only*' in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases.").

poor.[79] However, it excluded funding for tort suits because the tort bar lobbied to ensure that public lawyers did not encroach on their turf, because business interests opposed such funding, and because lawmakers assumed there was no need for such funding because of the American contingency fee system.

In the United States, attorneys can represent plaintiffs in tort suits for a contingency fee, namely, no out-of-pocket fee in return for one-third or more of any settlement payment or court award. Defenders of contingency fees say that they promote access to courts and fund representation for individuals who lack resources.[80] Contingency fees, however, do not remove all financial barriers. American lawyers typically ask plaintiffs to pay out-of-pocket expenses, including fees for experts to evaluate the medical issues and testify, deposition transcription fees, and court reporter fees. These costs can preclude a lawsuit.[81]

In France, as in most civil law jurisdictions, plaintiffs pay lawyers out of pocket. Unlike in the United States, attorneys in France cannot charge contingency fees. Since 1991, however, lawyers can have fee agreements that include a bonus if they achieve certain results.[82]

---

79. *See generally* Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980) (discussing the inclusion of legal assistance for the poor in the Office of Economic Opportunity's War on Poverty); Allen W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213 (2001) (discussing the history and reform of programs providing legal assistance for the poor in the United States); Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223 (1997) (comparing programs providing legal assistance for the poor in Britain and the United States).

80. Critics charge that contingency fees fuel litigation and that lawyers should not reap higher fees for the same amount of work merely because a plaintiff suffers higher damages.

81. A new trend in the United States is for investors to make loans to fund litigation. They receive a high rate of return in exchange for no payment if the plaintiff loses the case. For more information, see the series of articles in the New York Times: Binyamin Applebaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES, Nov. 14, 2010, http://www.nytimes.com/2010/11/15/business/15lawsuit.html; Binyamin Applebaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 16, 2011, http://www.nytimes.com/2011/01/17/business/17lawsuit.html; Binyamin Applebaum, *Lobby Battle Over Loans for Lawsuits*, N.Y. TIMES, Mar. 9, 2011, http://www.nytimes.com/2011/03/10/business/10lawsuits.html.

82. Loi 1971-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques [Law 1971-1130 of December 31, 1971 on Reforming Certain Judicial and Legal Professions], modifiée en 1991 et par la loi 2011-331 du 28 mars 2011 [amended by Law 2011-331 of March 28, 2011], J.O., Jan. 5, 1972, art. 10. Article 10, section 3 prohibits establishing fee agreements based on legal results, but it allows fee agreements to include a complementary honorarium based on results. *See* Florent Ladouce, *La convention d'honoraires de résultat conclue âpres service rendu* [*Agreement on Honoraria for Results of Services Rendered*], Gaz. Pal. 2004 (Mar. 20), No. 80; YVONNE LAMBERT-FAIVRE & STÉPHANIE PORCHY-SÍMON, DROIT DU DOMMAGE COR-

Reportedly, these bonuses can range from 8% to 20% of the fee set. But France facilitates access to justice by funding expenses for experts for compensation claims initiated as a criminal complaint. Furthermore, when plaintiffs use criminal law proceedings, the court investigates the case, relieving the injured party from bearing those costs, as well as the cost of expert evaluation.[83] In addition, the French reforms in 2000 discussed in this Article created a means to seek compensation outside of courts without incurring any legal expenses for some patients suffering severe medical injuries.

B. The Public Nature of Expertise

Courts in France and the United States serve as neutral arbiters and decide cases based on evidence. Yet the French inquisitorial system gives judges a larger oversight role than judges in the American adversarial system. In France, judges have an investigative role, allowing them to select experts who can assess facts or technical issues and offer opinions to the judge that the judge can accept or reject.[84] The use of court-appointed experts avoids bias that exists when each conflicting party chooses an expert. In contrast, in the United States, judges rely on the parties to develop the facts, and litigants find and pay experts to testify in support of their case and to rebut the testimony of their opponent's expert witnesses. The American system creates an incentive for experts to support the party who pays them. Moreover, lawyers often pay an expert to evaluate an issue and review the expert's report before they decide whether to offer it as evidence, which allows lawyers to withhold expert testimony that is not helpful to them and to search for another expert with a more favorable assessment.[85] Supporters of the adversarial system believe that relying on a court-appointed expert is risky.

POREL: SYSTÈMES D'INDEMNISATION [PERSONAL INJURY LAW: COMPENSATION SCHEMES] 55 (5th ed. 2004).

83. In civil cases, the plaintiff pays legal fees, but if the plaintiff wins, the defendant usually reimburses the plaintiff. The plaintiff must request that the court order the defendant to pay the plaintiff's legal fees, and the court decides whether or not to order the payment. Similarly, if the plaintiff loses the case, often the defendant asks for the plaintiff to pay his or her attorney fees.

84. The court pays the experts in criminal proceedings, and the parties pay for court-appointed experts in civil cases.

85. *See* David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 453–56 (2008); Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAV. 451, 451–52 (1991); Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253, 257–60 (2001).

Some say it is fairer to allow each side to make the best case for their client and to rebut the opponent's case. Others claim that the clash of competing views, arguments, and information will help uncover the truth.[86]

These different French and American approaches raise questions about the public nature of knowledge, evidence, and expertise. Senator Daniel P. Moynihan reportedly said, "Everyone is entitled to his own opinion, but not his own facts."[87] However, the use of expert opinions in court has a different status from individual opinions, as Moynihan used the term. Expert opinions in French courts have a public aspect, akin to public knowledge or facts. Should not the public nature of the judicial system and access to justice extend to the facts and expertise upon which courts rely? In any event, French law displays greater confidence than American law in the idea of independent and neutral experts on whom courts can rely to decide key factual issues.

V. ALTERNATIVES TO COURTS AND TORTS

A. Alternative Dispute Resolution

States create courts, the law the courts adjudicate, and the public authorities that enforce court judgments. Courts embody the public sphere.[88] But there are alternatives to court adjudication in the United States and France.

In the United States, often these alternatives arise from the choices of private parties.[89] Individuals and firms frequently resolve dis-

86. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80–102 (1949) (3d ed. 1973), for a classic discussion of the adversary system.

87. Daniel Patrick Moynihan, Editorial, *Diary of a Tax Reformer: Senator Moynihan Tells How-It Happened—But Almost Didn't*, CHI. SUN TIMES, Aug. 24, 1986, at 51.

88. Owen M. Fiss, *Against Settlement*, YALE L.J. 1073, 1085–87 (1984) (arguing that one of the benefits of litigation is that court decisions proclaim public values, while settlement outside of court does not).

89. The United States has a long tradition of mediation and ADR dating from the growth of the organized labor movement in the late nineteenth-century. By the 1920s, courts in several cities had programs to use mediation in many civil cases. After World War II, reformers promoted the use of mediation for family disputes and divorce. Critics of the courts in the 1970s furthered interest in mediation, particularly for neighborhood disputes, family disputes, and divorce. In the 1980s, litigators and courts expanded the use of mediation in other areas, and business firms turned to mediation to reduce legal costs. Approximately 4000 companies pledged to consider ADR before litigation. In 1990 Congress mandated that all federal district courts incorporate ADR to control litigation delays. In addition, state governments employed mediation to resolve public disputes. By the end of the decade, over 2000 state statutes mentioned mediation. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE AND LAW 7–10

putes through mediation, arbitration, or other alternatives to courts. Individuals opt for ADR because, under certain conditions, it can be quicker, less expensive, or more flexible than litigation; it may also give parties greater control. Sometimes when parties contract for a business transaction, the contract even specifies that they will resolve any disputes arising under the contract using these alternatives.[90]

Over the last twenty-five years, French legislation, usually spurred by European Union law, has created new structures that allow individuals to resolve disputes in specialized areas outside of courts.[91] In contrast to the United States, these developments were initiated by States rather than private actors. These new forums typically share several features. They render advisory opinions rather than make decisions that bind the disputants. The individuals that review the disputes are specialized in the subject matter. These reviewers work as a collective body and include representatives from the disputing groups.

(2010); *see also* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION, 4–7 (1984).

90. The health maintenance organization, Kaiser Permanente, requires disputes over negligence to be resolved out of court through the binding arbitration process. Its program illustrates problems that can arise. In a famous decision, the Supreme Court of California found that Kaiser Permanente administered the process in an adversarial manner and required changes. *See* Engalla v. Kaiser Permanente Med. Grp., 938 P.2d 903, 908, 922 (Cal. 1997).

91. Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Dispute, 1998 O.J. (L 115) 31. In order to fulfill its tasks, the European Commission for the Efficiency of Justice (CEPEJ) has assessed the impact in the states of the existing Recommendations of the Committee of Ministers concerning mediation. Eur. Comm'n for the Efficiency of Justice (CEPEJ), *Better Implementation of Mediation in the Member States of the Council of Europe - Concrete Rules and Provisions* (CEPEJ Study No. 5), *available at* http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf (providing recommendations adopted by the Committee of Ministers and guidelines drafted by CEPEJ) [hereinafter CEPEJ, *Implementation*]; Comm. of Ministers of the Council of Eur., Recommendation No. R(98)1 on Family Mediation, adopted on Jan. 21, 1998 at the 616th Meeting of the Minister's Deputies, *reprinted in* CEPEJ, *Implementation*, *supra*, at 6; Comm. of Ministers of the Council of Eur., Recommendation No. Rec(99)19 Concerning Mediation in Penal Matters, adopted on Sept. 15, 1999 at the 679th Meeting of the Ministers' Deputies, *reprinted in* CEPEJ, *Implementation*, *supra*, at 24; Comm. of Ministers of the Council of Eur., Recommendation Rec(2001)9 on Alternatives to Litigation Between Administrative Authorities and Private Parties, adopted Sept. 5, 2001 at the 762d Meeting of the Minister's Deputies, *reprinted in* CEPEJ, *Implementation*, *supra*, at 38; Comm. of Ministers of the Council of Eur., Recommendation Rec(2002)10 on Mediation in Civil Matters, adopted Sept. 18, 2002 at the 808th Meeting of the Minister's Deputies, *reprinted in* CEPEJ, *Better Implementation*, *supra*, at 10; *see also* Commission Regulation 2001/310/CE, on the Principles Applicable to the Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L 109) 56.

The alternatives to court adjudication have a public aspect in the United States as well as in France. The legal system shapes the choices of private parties outside of courts.[92] The law and courts constitute the default remedy. The parties' anticipation of what would result if they proceeded by adjudication serves as the baseline against which the parties compare alternatives. Moreover, the law and courts sometimes incorporate ADR. Statutes sometimes require that parties attempt to resolve disputes through mediation before accessing courts. In France and the United States, the state encourages the use of alternatives to courts for certain disputes.

Professor Jeffrey O'Connell has proposed legal reforms to encourage parties to settle medical malpractice claims quickly. While not technically ADR, these proposals nevertheless promote early settlement rather than full-blown litigation. One proposal, which O'Connell dubs "offers that can't be refused," consists of legislation that would allow insurers to settle all malpractice claims (except for death) within six months by paying all economic loss and reasonable attorney fees billed on an hourly basis, without compensating pain and suffering, punitive damages, or other non-economic loss. Defendants would be required to accept the offer.[93] Disputes about the amount of loss would be settled by binding arbitration.

O'Connell has developed several variations on this idea—variations he often calls *neo-no fault*.[94] One proposal would allow medical providers to contract with patients—before undertaking medical treatment—that they will promptly offer to pay any medi-

92. William L.F. Felstiner et al., *Claiming the Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 631–654 (1981).

93. Henson Moore & Jeffrey O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267, 1278–87 (1984); Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589, 601 (1982).

94. JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 98–137 (1975); Jeffrey O'Connell, *No-Fault Liability by Contract For Doctors, Manufacturers, Retailers and Others*, 1975 INS. L.J. 531, 532–33 (1975); Jeffrey O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21, 34–36 (1975); Jeffrey O'Connell, *Elective No-Fault Liability by Contract with or Without an Enabling Statute*, 1975 U. ILL. L.F. 59, 60–61; Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 520–33 (1976); Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 900–01 (1985); Jeffrey O'Connell, *Neo-No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives*, 49 LAW & CONTEMP. PROBS. 125, 125–41 (1986) [hereinafter O'Connell, *Neo-No-Fault Remedies*]; Jeffrey O'Connell & Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" as a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Law*, 15 J.L. & HEALTH 23, 23–51 (2000).

cal malpractice claims for the net economic loss. O'Connell argues that such contracts would eliminate adversarial game playing that discourages defendants from promptly making settlement offers because they fear that plaintiffs will view this as a sign of weakness and hold out for higher payments. Plaintiffs could reject the offers and pursue full compensation through litigation. But plaintiffs would be unlikely to reject it out of hand because they would know defendants did not offer the settlement merely in anticipation of a high liability risk. Moreover, plaintiffs would also have economic incentives to accept the offer. They would receive payment for full economic loss without the one-third reduction for attorneys' fees plus other litigation expenses, would be paid promptly rather than after protracted litigation, and would avoid the risk of receiving no compensation due to difficulties of proof and the contingencies of litigation.

Several American scholars advocate the use of ADR for medical malpractice disputes.[95] A few actors have pursued these ideas; for example, the University of Michigan hospital system attempts to settle malpractice claims in a non-adversarial process quickly and outside of court.[96] By and large, however, American medical malpractice cases are not resolved by ADR. In contrast, in France, reforms in 2002 created a system of Conciliation Commissions that allow patients with serious medical injuries to seek compensation outside of courts. Yet it is a hybrid system, an alternative to courts created by legislation and overseen by public authorities. The French reforms

95. *See* Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 LAW & CONTEMP. PROBS. 185, 218 (1997); Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 455 (1992); David B. Simpson, *Compulsory Arbitration: An Instrument of Medical Malpractice Reform and a Step Towards Reduced Health Care Costs?*, 17 SETON HALL LEGIS. J. 457, 463–64 (1993); Carl M. Stevens, *The Benefits of ADR for Medical Malpractice: Adopting Contract Rather Than Tort Law*, 66 DISP. RESOL. U. J. 65, 68 (1995); David Studdert et al., *Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado*, 33 IND. L. REV. 1643, 1643–86 (2000).

96. Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 137–46 (2009). ADR can be used to the disadvantage of plaintiffs. Kaiser Permanente requires individuals who seek their private insurance to agree to resolve all claims of negligence through binding arbitration. But the system was operated through the office of Kaiser's legal counsel in an adversarial manner. In fact, Kaiser often delayed resolution of suits and controlled the appointment of arbitrators. In response, a patient sued Kaiser, challenging its ability to require patients to use this alternative to courts through contracts of adhesion. Engalla v. Permanente Med. Grp., 938 P.2d 903, 916–22, 924–25 (1997) (finding arbitration evidence to support the claim that Kaiser fraudulently induced patient to assent to arbitration agreement but rejecting unconscionability claim). The suit allowed Kaiser to reform its system and place it under the control of an independent party.

and O'Connell proposals differ, yet both rely on creating incentives for parties to attempt to settle cases outside of a full trial.[97]

B. Social and Private Insurance

Another way to avoid court adjudication to compensate individuals who are injured as a result of medical intervention is through insurance. Traditional tort law assumes private responsibility in that it is based on individual liability.[98] It holds individuals and organizations accountable for harm that they cause by making them pay compensation. Typically, tort law does not compensate an individual's loss due to injuries unless a court finds that an identifiable party is at fault. However, there are alternatives to tort law, and the court adjudication on which it depends, which do not require finding a party at fault.

One alternative is social insurance, which makes compensation for loss a public responsibility. Many countries have social insurance to cover some losses, such as permanent disability. New Zealand has extended this approach further than most nations and has replaced tort liability with social insurance for nearly all injuries.[99]

As we have seen, France has a social insurance system to compensate individuals for certain medical injuries when there is no party at fault. In part, this reflects France's greater commitment to social insurance and social solidarity than exists in the United States. France also has a social insurance program to cover medical expenses for the public, while the United States has public medical insurance mainly for individuals older than sixty-five, individuals with permanent disabilities, and the poor.[100]

Private insurance is another means to compensate injuries. Individuals can purchase insurance to cover their losses when no one is liable or when those responsible lack sufficient funds. Private insurance can also help individuals held liable for injuries meet their obligations to compensate those losses. Individuals and organizations

---

97. *See supra* notes 90–91 and accompanying text.

98. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 81 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 10–11 (1992); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 13 (2003).

99. ACCIDENT COMP. CORP., Making a Claim, http://www.acc.co.nz/making-a-claim/index.htm (last visited Dec. 12, 2011); Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L.J. 223, 227 (1994).

100. PAUL V. DUTTON, DIFFERENTIAL DIAGNOSES: A COMPARATIVE HISTORY OF HEALTH CARE PROBLEMS AND SOLUTIONS IN THE UNITED STATES AND FRANCE (2007).

can purchase insurance to cover their liability. Private insurance spreads the risk of economic loss across the insured group and, in that sense, mutualizes or socializes the risk. But it does not replace liability rules based on private responsibility, and it does not make all members of the public share financial burden.

Numerous American scholars argue that courts should (or do) impose legal liability on parties that can most efficiently bear the financial risk by spreading the cost of loss through the prices they charge for their services and products.[101] This idea is a key justification for creating liability without fault (sometimes called strict liability) for certain manufactured products and is an underpinning of American product liability law. But most American tort law, including medical malpractice law, relies on finding individual fault and responsibility.

Several American scholars, led by Judge Robert Keeton and Professor Jeffrey O'Connell, have advocated the creation of *no-fault insurance* to replace private liability insurance that indemnifies individuals found to be liable based on their fault.[102] The key idea is to require all parties that may be held liable to purchase insurance or pay defined losses without regard to whether they are legally liable. This spreads the risk across a broad group, a method sometimes referred to as mutualization, or socializing, of risk. It assures payment even in the absence of fault. It also dispenses with the cost of identifying whether a party is liable, and if so, which parties are responsible. It thereby eliminates the high costs of litigation: for plaintiffs, one third of any court award or settlement payment to pay their attorneys, payment to expert witnesses, depositions, and other expenses; for defendants, legal fees and other litigation expenses; for the public, court costs. Thirteen jurisdictions have adopted no-fault insurance, and another eleven jurisdictions have modified no-fault insurance for automobile accidents.[103] The same idea underlies

---

101. *See, e.g.*, George L. Priest, *The New Legal Structure of Risk Control*, DAEDALUS, Fall 1990, at 207–27; Robert D. Cooter, *Economic Theories of Legal Liability*, J. ECON. PERSPS., Summer 1991, at 11–30.

102. Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 115–16 (1993); O'Connell, *Neo No-Fault Remedies*, *supra* note 94, at 128–41 (discussing neo no-fault proposals); Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908, 919–48 (1993).

103. *See generally* STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS (1991) (reporting the findings of a study intended to compile the information policymakers need to decide whether a no-fault or the traditional fault-based system is best for their state); ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC

workers' compensation, our national system of financing compensation of work-related injuries.[104]

No-fault compensation for medical claims is now used in only a few areas. Congress created a no-fault liability system to cover most bad outcomes for injuries due to vaccines.[105] Virginia and Florida have created a state-mandated system of compensation for certain birth injuries.[106] Some American scholars have advocated adopting no-fault liability for most or all medical injuries.[107] One variation, dubbed enterprise liability, would make hospitals responsible for medical injuries on their premises, regardless of whether they were caused by an employee of the institution or a physician that was not

---

PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 1–5, 11–75, (1965) (asserting that the American automobile insurance system was plagued with inadequacy, delay, injustice, waste, and corruption). Jeffrey O'Connell, *No-Fault Auto Insurance: Back by Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993, 998–99 (1989). Currently thirteen United States jurisdictions have pure no-fault automobile insurance laws (Florida, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Utah, and Puerto Rico). Eleven jurisdictions have elements of no-fault in their automobile insurance (Arkansas, Delaware, Washington, Maryland, New Hampshire, Oregon, South Dakota, Texas, Virginia, Washington, and Wisconsin) *See*, *No Fault Auto Insurance States Laws*, AUTO INS. WEB, http://www.autoinsuranceweb.com/no-fault.html (last visited, Dec. 12, 2011).

104. NAT'L COMM'N STATE WORKMEN'S COMP. LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 16–18 (1973). As to the greater efficacy of workers' compensation laws, with all their shortcomings, as compared to tort law, see COMM'N STATE WORKMEN'S COMP. LAWS, REPORT 31, 45 (1972); Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 310–20 (1998).

105. 42 U.S.C.A. §§ 300aa–1–6 *et seq.* (West 1986); Wendy K. Mariner, *The National Vaccine Injury Compensation Program*, 11 HEALTH AFF. 255, 255–65 (1992).

106. Elizabeth H. Esty & Carter G. Phillips, *A Fault-Based Administrative Alternative to Resolving Medical Malpractice Claims: The AMA-Specialty Society Medical Liability Project's Proposal and Its Relevance to the Crisis in Obstetrics*, *in* MEDICAL PROFESSIONAL LIABILITY AND DELIVERY OF OBSTETRICAL CARE VOLUME II: AN INTERDISCIPLINARY REVIEW 153–54 (1989); James A. Henderson, Jr., *The Virginia Birth-Related Injury Compensation Act: Limited No-Fault Statutes as Solutions to the Medical Malpractice Crisis*, *in* MEDICAL PROFESSIONAL LIABILITY AND DELIVERY OF OBSTETRICAL CARE VOLUME II: AN INTERDISCIPLINARY REVIEW 196 (Victoria P. Rostow & Roger J. Bulger eds., 1989); Andrew D. Freeman & John M. Freeman, *No-Fault Cerebral Palsy Insurance: An Alternative to the Obstetrical Malpractice Lottery*, 14 J. HEALTH POL'Y & L. 707, 711 (1989).

107. *See, e.g.*, Troyen A. Brennan & David M. Studdert, *Toward a Workable Model of 'No-Fault' Compensation for Medical Injury in the United States*, 27 AM. J.L. & MED. 225, 225–52 (2001); Troyen A. Brennan et al., *Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado*, 33 IND. L. REV. 1643, 1643–56 (2000); Clark C. Havighurst & Laurence R. Tancredi, *Medical Adversity Insurance—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 51 MILBANK MEMORIAL FUND Q. HEALTH & SOC'Y 125, 125–64 (1973), *reprinted in* 1974 INS. L.J. 69; Robert E. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 600–17 (1973); Laurence R. Tancredi, *Designing a No-Fault Alternative*, 49 LAW & CONTEMP. PROBS. 277, 277 (1986); Weiler, *supra* note 102, at 908–50.

a hospital employee or contractor, and even in the absence of negligence.[108]

Critics of these proposals often assume that tort litigation effectively compensates individuals harmed by negligence. In fact, the best available studies show that malpractice litigation does not compensate most individuals injured due to negligence; furthermore, it holds parties liable for bad outcomes not caused by negligence.[109]

A key obstacle to the creation of no-fault insurance, or a system to compensate medical injuries without regard to fault, is that Americans have a weak sense of social solidarity. They disfavor social insurance and mutualizing risk. They do not believe that the public should take responsibility for covering such injuries. In contrast, France has a strong sense of social solidarity, as demonstrated by its public medical insurance system.

Social solidarity made moving toward no-fault compensation easier in France than in the United States. The *Perruche* case for wrongful birth opened up the possibility of individuals suing physicians and clinical laboratories, or other medical personnel who negligent-

---

108. *See* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 381–96 (1994); Robert A. Berenson & Randall R. Bovbjerg, *Enterprise Liability in the 21st Century*, *in* MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM 219 (Rogan Kersh & William M. Sage eds., 2006); *see generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985) (discussing history of enterprise liability); William M. Sage, *Enterprise Liability and the Emerging Managed Health Care System*, 60 LAW & CONTEMP. PROBS. 159 (1997) (recognizing new ethical and legal responsibilities of health care institutions and suggesting that the attribution of liability to managed care organizations—if carefully coordinated and approached—will improve the performance of the tort system in cases of medical error); James M. Jorling & William M. Sage, *A World That Won't Stand Still: Enterprise Liability by Private Contract*, 43 DEPAUL L. REV. 1007 (1994) (asserting that reform is needed to create risk-bearing health care groups); Barry R. Furrow, *Enterprise Liability and Health Care Reform: Managing Care and Managing Risk*, 39 ST. LOUIS U. L.J. 79, 110 (1994) ("Rather than focusing on the individual agent's fault, as the courts must under the fault system, the enterprise could penalize the whole work group of which the agent is a part, restructure a work environment, or take other steps that transcend the responsibility of an individual agent.").

109. *See* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 61–110 (1993); *see also* Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 375 (1991); Russell A. Localio et al., *Relation between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 324 NEW ENG. J. MED., 245–51 (1991); David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 38: 250–60 (2000); Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261, 261–71 (2000); David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024–33 (2006).

ly fail to warn pregnant women that they have a risk of giving birth to a child with severe disabilities.[110] Policy makers disliked tort suits but objected to not compensating injuries. The legislature ended the option for infants to seek damages for wrongful birth. However, it created rules to indemnify infants with birth injuries due to medical negligence and the possibility of damages for parents for non-economic damages that they suffered as a result. It created a right to social benefits for individuals with handicaps.[111]

VI. CONCLUDING OBSERVATIONS

A popular conception of how American culture and French culture differ is that Americans are pragmatic, while the French emphasize theory, principle, and ideology.[112] When faced with a problem, according to this view, Americans stand ready to dispense with the traditional approaches, rules, or institutions and will figure out a way to get the job done. However, Americans have debated how to address the failings of medical malpractice law and policy since the 1970s, seemingly locked in ideological battles that prevent them from making the system more efficient and providing compensation for injured patients. In contrast, within a decade of when medical malpractice became a hot policy issue, France implemented reforms that increased the number of injured patients compensated—including many with grave injuries not caused by negligence—through an alternative to the traditional judicial process. The reformed French system is far from perfect. Still, it is good enough for American pragmatists to tip their hats to the French *savoir faire*.

---

110. Cass. Dec. 13, 2011, e.g., JCP 2000 II 10438. *See* Feuillet, *supra* note 5, at 139–43; Thouvenin, *supra* note 9, at 167; *see also* Cerullo, *supra* note 5, at 433–49; Costich, *supra* note 5, at 8–14.

111. Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-203 of March 4, 2002 on the Rights of the Sick and the Quality of the Health System], J.O., Mar. 5, 2002, p. 4118. Persons with handicaps are entitled to compensation for the consequences of their handicaps, regardless of age, occupation, origin, or nature of disability. *Id.* This compensation is not an indemnity payment, but rather a social insurance benefit. *See* CODE DE L'ACTION SOCIALE ET DES FAMILLES [CODE OF SOCIAL ACTION AND FAMILIES] art. 114-1-1.

112. "The genius of American politics is its ability to treat even matters of principle as though they were conflicts of interest. (It has been remarked the genius of French politics is its ability to treat even conflicts of interest as matters of principle.)" Robert Paul Wolff, *Beyond Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 3, 21 (1965).