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Exit, Adversarialism, and the Stubborn Persistence of Tort

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1 Introduction

The tort system is much maligned—for the unpredictability of its judgments, the stinginess (or, some say, profligacy) of its awards, and the slow pace, exorbitant cost, and adversarial nature of its operation.[1] But what to do? Reformers have debated that question for over a century.

Suggestions, not surprisingly, abound—so many, in fact, they can be mapped on a continuum. On the one end, we may situate modest reform ideas such as the "discouragement" reforms so popular and prevalent in recent decades. Premised on the notion that there is "too much" tort litigation, these reforms—such as caps on contingency fees, limits on punitive or noneconomic damages, and modifications to joint and several liability and the collateral source rule—are aimed at dampening plaintiffs' desire and capacity to sue, thus reducing litigation's volume and intensity.[2] In so doing, these reforms offer not a fundamental reorientation of the tort liability system, but more

1 *See, e.g.*, Robert E. Keeton & Jeffrey O'Connell, Basic Protection for the Traffic Victim 67 (Little, Brown & Co., 1965) ("[O]ur system for compensating traffic victims is inadequate—rife with undercompensation or complete lack of compensation of many victims and overcompensation of others, as well as hardship, waste, and delay."); Stephen D. Sugarman, Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business 38, 40 (Quorum Books, 1989) (faulting tort law for its "extravagant administrative costs" and for the fact it compensates too slowly "in an arbitrary, perhaps whimsical, way").

2 For more on discouragement initiatives, see Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society 18–19, 27–35 (Univ. of California Press, 2002).

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accurately, "less of the same."[3] Next, moving somewhere toward the continuum's midpoint, we might situate somewhat more fundamental reforms, such as increased reliance on contract or a push toward enterprise liability, particularly in the medical malpractice realm.[4] Then, on the far end of the continuum, we would locate undeniably ambitious no-fault ideas.

Unlike those favoring discouragement mechanisms, those favoring no-fault or "replacement" regimes do not necessarily believe there is "too much" litigation. Rather, they believe that the litigation we *do* have, for at least particular kinds of claims, is misdirected, taking too long, costing too much, and compensating too few. As such, reformers seek to shuttle various categories of claims away from the tort system and into (typically) freestanding, newly minted administrative tribunals.[5] There, it is assumed, with the fault obstacle gone, procedures simplified, and damages curtailed (and often paid not on an individualized basis, but pursuant to strict schedules), compensation can be more easily, cheaply, quickly, amicably, consistently, and predictably delivered.[6]

The no-fault idea is surely attractive, and nearly a half-century after Professor Jeffrey O'Connell's publication of *Basic Protection for the Traffic Victim*—which, with the stroke of a pen, kicked off the modern no-fault movement—the idea's allure endures.[7] Indeed, in recent years, tailored no-fault plans have been proposed dozens of times, for everything from airline accidents, to those who contract HIV after transfusion with tainted blood, to those hurt in

3 Laurence R. Tancredi & Randall R. Bovbjerg, *Rethinking Responsibility for Patient Injury: Accelerated-Compensation Events, A Malpractice and Quality Reform Ripe for a Test*, 54 Law & Contemp. Probs. 147, 148 (1991) ("less of the same"); *see* Jeffrey O'Connell & David F. Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 U. Mich. J.L. Reform 443, 449 (1998) ("Such reform gives a legislature the appearance of responding to a crisis … yet in fact leaves the common law a little enfeebled.").

4 For a call to base liability on contract rather than tort principles, see, for example, Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 Am. Bar Found. Res. J. 87 (1976). For enterprise liability, see, for example, Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 Harv. L. Rev. 381, 398 (1994).

5 The word "typically" is used because automobile no-fault legislation does not employ specialized tribunals.

6 *See* Sugarman, *supra* note 1, at 102 ("[P]roposed compensation alternatives are meant to be simpler, faster, and far cheaper to administer."); Jeffrey O'Connell, The Injury Industry and the Remedy of No-Fault Insurance 8 (Univ. of Illinois Press, 1971) (suggesting that no-fault systems offer payments that are "much prompter, much surer, much more efficient and infinitely less abrasive than under the fault criterion"); Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. Cin. L. Rev. 53, 65, 71 (1998) (recognizing that no-fault plans seek to offer "faster" compensation, limit administrative costs, and "greatly reduce[]" the "need for attorney representation").

7 Keeton & O'Connell, *supra* note 1.

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schoolyard play, to those injured in athletic competition, to victims of medical malpractice, to those harmed following contact with (variously) prescription drugs, medical devices, contraceptives, asbestos, lead paint, cigarettes, and firearms.[8] It seems, in fact, that someone takes to the airwaves to suggest that a no-fault scheme be created whenever a truly vexing mass tort comes along.

Still, the no-fault idea has not been *everywhere* accepted. Indeed, for nearly as long as they've been championed, no-fault plans have been subject to harsh, sometimes scathing, criticism. Some of these critics seize on the notion that no-fault mechanisms run counter to Americans' individualized conception of justice or, relatedly, permit "guilty" tortfeasors to dodge responsibility for their misdeeds.[9] Others question the wisdom or humanity of eliminating or significantly curtailing compensation for pain and suffering, especially for those victims whose economic loss might be comparatively insubstantial.[10] Still others raise constitutional objections, charging that no-fault mechanisms run afoul of state right-to-trial and open-court provisions or violate bedrock Seventh and Fourteenth Amendment guarantees.[11] Applying law and economics principles, others contend that no-fault plans sacrifice tort's deterrent function, resulting in more accidents, more injuries, and higher social costs.[12] Finally, still others complain that existing no-fault reforms, focusing as they do on particular litigation "hot-spots," do not go nearly far enough. Thus, rather than our existing, piecemeal mechanisms—which carve various categories of claims out

8 *See* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. Pa. L. Rev. (forthcoming 2015) (manuscript at 8–9) (on file with author).

9 *E.g., Auto Insurance Reform: Hearings Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 30 (1999) (statement of Ralph Nader, Consumer Advocate, Center for Responsive Law, and Harvey Rosenfield, President, Foundation for Taxpayer and Consumer Rights) [hereinafter Nader & Rosenfield statement] ("No-fault systems explicitly contradict the fundamental principle of American justice that wrongdoers are responsible for the harm they cause.").

10 *E.g.*, Walter J. Blum & Harry Kalven, Jr., Public Law Perspectives on a Private Law Problem 34–36 (Little, Brown & Co., 1965); Nader & Rosenfield statement, *supra* note 9, at 31 ("By taking away the right of injured motorists to seek compensation for their human pain and suffering, *no-fault depersonalizes the human being, treating injured people as the equivalent of damaged property*." (emphasis in original)).

11 *E.g.*, Maxwell J. Mehlman, *Bad "Bad Baby" Bills*, 20 Am. J.L. & Med. 129, 141–42 (1994) (raising constitutional objections to birth injury legislation).

12 *E.g.*, ABA, Automobile No-Fault Insurance: A Study by the Special Committee on Automobile Insurance Legislation 27 (1978) (suggesting that automobile no-fault legislation reduces deterrence). Many have sought to assess this assertion empirically. Results have been mixed. For context in the auto context, see James M. Anderson et al., RAND, The U.S. Experience with No-Fault Automobile Insurance: A Retrospective 79–82 (2010).

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of the civil justice system while leaving the remainder intact—these commentators champion far more encompassing, often government-funded, reform.[13]

Much ink has been spilled adjudicating these important, and fundamental, disputes. My aim here is in some ways more modest. Tabling the question of whether existing or imagined no-fault mechanisms are constitutional, as well as the broader question of whether they are (or would be) on balance beneficial, sensible, or equitable, in the pages that follow, I take our current replacement regimes on their own terms.

I note that, at enactment, these reforms set out to divert certain claims from the tort system, and they also sought to deliver payment to qualifying claimants simply, expeditiously, and predictably, without adversarial processes or significant attorney involvement.[14] Against that ambition, I then evaluate four of the boldest experiments with no-fault compensation in the United States.[15] Part 2 explores workers' compensation, enacted in the early years of the last century. Part 3 assesses Jeffrey O'Connell and Robert Keeton's master handiwork, automobile no-fault legislation, enacted in more than a dozen states in the 1970s. Part 4 considers the Vaccine Injury Compensation Program (VICP), enacted by Congress in 1986, in response to price hikes and sudden shortages in vaccine supply. Finally, Part 5 trains attention on neurological birth injury funds, enacted in Virginia and Florida in 1987 and 1988, respectively, as a medical malpractice insurance crisis gripped both states.

This investigation reveals that all four of our most ambitious no-fault experiments have, in certain respects, failed.[16] Seepage from no-fault regimes

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13 *E.g.*, Sugarman, *supra* note 1; Eli P. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations (Praeger Publishers, 1980); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774 (1967); *cf.* Blum & Kalven, *supra* note 10, at 37 (suggesting that it is "absurdly *ad hoc*" to "singl[e] out" only certain categories of victims for relief).

14 *See supra* note 6 and *infra* notes 18, 25, 26, 89, 134, 173, 177 and accompanying text.

15 These, of course, are not the only replacement regimes so far enacted. A few others include the James Zadroga 9/11 Health and Compensation Act, which provides benefits to those who fell ill following their involvement in the 9/11 rescue and recovery effort; the September 11th Victim Compensation Fund, which provided compensation to the immediate victims of the 9/11 attacks; the Black Lung Benefits Act, which provides benefits to injured coal miners; the Price-Anderson Act, which provides coverage for nuclear energy-related accidents; and the Radiation Exposure Compensation Fund, which offers payments to, or on behalf of, certain individuals who fell ill following radiation exposure.

16 This is not to suggest all have been failures when judged along all dimensions. Nor is it to suggest, even, that when it comes to delivering compensation simply and expeditiously, these mechanisms offer no improvement over the traditional tort liability system. The more subtle point, instead, is that these no-fault reforms have fallen markedly short of their architects' and proponents' expectations.

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and into the tort system has been a persistent problem, substantially diluting no-fault's ostensible advantages. And, even when compensation has been provided *within* our existing regimes, that compensation has only infrequently been delivered as amicably, as expeditiously, or as easily as reformers anticipated.

Furthermore, interrogating these struggles, I find that there is a heretofore unidentified commonality between the problems plaguing America's no-fault mechanisms. I call these the problems of *exit* and *adversarialism*. Across substantive areas, that is, no-fault mechanisms have become plagued by the problem of *exit*, as claimants seeking full compensation make end-runs around no-fault, either to evade the regime entirely or to supplement no-fault's comparatively meager benefits with more generous payments, available only within traditional tort. Or, they have become bogged down by *adversarialism*, marked by longer times to decision and increased combativeness, attorney involvement, and utilization of formal adjudicatory procedures. Some regimes, including auto no-fault and the VICP, display just one of these afflictions. Others, like workers' compensation and neurological birth injury funds, display traces of both.

Interestingly—and suggesting a fertile ground for future inquiry—these problems do not seem to appear in the reforms' early years.[17] With time, across substantive areas, however, the problems do show up. And, with broad implications for our design and deployment of future no-fault mechanisms, these problems ultimately impair no-fault's effectiveness.

This insight complicates conventional wisdom, which posits that moving from a tort-based system to a no-fault system will markedly streamline procedures, promote predictability, speed payments, limit court congestion, quell combativeness, and reduce the need for attorney involvement.[18] And, more

17 This might help to explain why the September 11th Victim Compensation Fund, by all accounts, escaped the dynamics recounted herein: In existence for only 33 months—and created only to compensate those injured by a discrete event—it simply was not around long enough to become dragged down by exit or adversarial impulses. *See* Kenneth R. Feinberg, Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, at 1 (2004) (reporting that the Fund "was conceived, implemented and concluded within a 33–month period"); *see also* Robert L. Rabin, *The Renaissance of Accident Plans Revisited*, 64 Md. L. Rev. 699, 710 (2005) (distinguishing between ex post schemes, like the September 11th Victim Compensation Fund, that respond to a singular event and prospective schemes, such as those chronicled herein, devised to compensate a continuing stream of claimants going forward).

18 *See supra* note 6; *see also, e.g.*, Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 Harv. J. on Legis. 59, 76 (2008) (cataloging advantages assumed to accompany the enactment of health courts); Randall R. Bovbjerg & Laurence R. Tancredi, *Liability Reform Should Make Patients Safer: "Avoidable Classes of Events" Are a Key Improvement*, 33 J.L. Med. & Ethics 478, 489–90 (2005) (suggesting that, if medical malpractice cases were simplified using so-called

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fundamentally, it suggests that tort law exerts a more powerful gravitational pull than scholars and policymakers have previously recognized. The urge to return to the tort system is strong. It is difficult to resist. And even when claims *are* effectively cordoned off and handled within a self-contained no-fault regime, over time, those regimes tend to acquire an adversarial cast that make them resemble, to a surprising extent, none other than their tort law ancestor.

2 Workers' compensation

The investigation starts, as it must, with workers' compensation, the first, the most ambitious, and by far the biggest no-fault compensation mechanism in the United States.

2.1 Background

In the early years of the last century, there was no shortage of workplace injury,[19] but the law's treatment of those injured was, as Gary Schwartz has put it, "singularly complex, ungenerous, and troubling."[20] The "unholy trinity" of employer defenses (contributory negligence, the fellow-servant rule, and assumption of risk) formally stymied many injured employees' recovery attempts, while informal barriers, including reluctant witnesses (comprised mostly of fellow workers none too eager to testify against their employer), alongside an outgunned and mostly unskilled plaintiffs' bar, also imposed formidable obstacles. Not surprisingly given this stacked deck, under-compensation was endemic. Illustrating this reality, Crystal Eastman's classic study of industrial accident compensation demonstrated that, of 222 breadwinners who died on the job during the 12-month period between 1906 and 1907, only 48 of the decedents' families (just over 20%) recovered more than $500, while 59 families (more than 25%) received nothing at all.[21]

"avoidable classes of events," compensation could be offered more quickly, via non-adversarial processes, and typically without legal representation).

19 *See* John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law 26–27 (Harvard Univ. Press, 2004); Lawrence M. Friedman, A History of American Law 467 (Simon & Schuster 2d ed., 1985).

20 Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1775 (1981).

21 Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 43 (Harvard Univ. Press, 2008) (citing Crystal Eastman, Work-Accidents and the Law 120–21 (William F. Fell Co., 1910)).

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Nor was the situation particularly satisfactory from the employers' perspective. True, employers weren't paying often or much. But, the lack of generosity, some believed, impeded worker rehabilitation, stoked workplace animosity, and, in any event, was not sustainable. On the last point, by 1910, union membership was rapidly growing; Progressive Era politics were subtly shifting the public's perception of, and tolerance for, occupational injury; and nearly half of the states had repealed or scaled back the "unholy trinity," exposing more employers to significant—and uncertain—liability.[22]

In sum, the table was set for fundamental reform, and it came quickly. Between 1910 and 1921, nearly all states jettisoned the tort system for workplace accidents, in favor of a freestanding no-fault administrative mechanism.[23] Called "workmen's" compensation at the time, the scheme was very much a compromise. The employee was guaranteed compensation for any personal injury or death "arising out of and in the course of employment," irrespective of the employer's negligence—or the employee's own contributing carelessness. But this compensation, while assured, was strictly limited. The legislation extinguished the worker's ability to sue in tort. And recoveries, which would come from the employer or the employer's insurer, were to be partial, consisting of full medical expenses, limited lost wages (typically two-thirds of the employee's weekly lost earnings, up to a fixed cap), and essentially no payment for noneconomic loss, no matter how catastrophic the injury.[24] It was thought that entitlement decisions would be so cut-and-dry, and benefit determinations so preordained, that disagreements concerning the employee's entitlement to relief would be rare. But, when they did arise, those disagreements were to be handled by dedicated adjudicators within specialized, self-contained, agencies.[25]

So structured, workers' compensation was thought to confer great benefits on workers, employers, and society more generally. It would, its proponents suggested, eliminate a substantial source of workplace antagonism; promote injured workers' swift recovery and rehabilitation; cushion the bruising financial blow otherwise occasioned by the death or disability of the family's sole wage

22 *See id.* at 51–53.

23 Witt, *supra* note 19, at 127.

24 These days, modest sums are typically paid for designated permanent injuries, such as the loss of sight or hearing, even if the impairment does not affect the worker's earning capacity (thus, in some respect, relaxing the ban on noneconomic damages), while medical costs are often kept in check with fee schedules or by ceding to the employer control over physician selection. For further detail, see Abraham, *supra* note 21, at 56–57, 66.

25 Philippe Nonet, Administrative Justice: Advocacy and Change in a Government Agency (Russell Sage Found., 1969) ("Compensation would be automatic and it was felt probable that nearly all disabling accidents would be compensated without question or controversy" (internal quotation marks omitted)).

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earner; induce employers to take more care, thereby reducing the frequency and severity of accidents; and deliver adequate, consistent, and predictable benefits, pursuant to a "simple procedure, whereby the recovery may be prompt, cheap, and non-litigious."[26]

In existence for roughly a century, how has workers' compensation fared? Answering the question is difficult, as the workers' compensation "system" is really a tangle of dozens of state and federal programs, each with its own procedures and challenges.[27] Still, it is fair to conclude that the system (writ large)—which today covers some 126 million Americans and doles out each year a whopping $60 billion in benefits—has been a success, at least when judged along certain dimensions.[28] Far more victims receive payment via workers' compensation, than would obtain payment for workplace illness or injury in the system's absence. There is some evidence that the system has, as anticipated, promoted accident prevention, at least in certain fields.[29] From the employers' financial perspective, the system is currently in check—as benefits per $100 of payroll have fallen dramatically since 1990.[30] And, transaction costs, though frequently criticized for being too high, are still a fraction of those within

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26 Eugene Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 Harv. L. Rev. 129, 131–32 (1911); *see* E.H. Downey, Workmen's Compensation 66 (Macmillan Co., 1924) ("The ends sought in the administration of a compensation law are the prompt and full payment of uncontested claims and the cheap, speedy and equitable determination of disputes."); *see also* Witt, *supra* note 19, at 3–4; Price V. Fishback & Shawn Everett Kantor, A Prelude to the Welfare State: The Origins of Workers' Compensation 77 (Univ. of Chicago Press, 2000); Orin Kramer & Richard Briffault, Workers Compensation: Strengthening the Social Compact 3 (Ins. Info. Inst. Press, 1991).

27 Further clouding any clear assessment, even the *same* system may change from one year to the next, as states frequently alter procedures or expand or contract compensation criteria. *See* Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 Am. J. Indus. Med. 487, 498 (2012) (discussing significant legislative activity between 1989 and 1997); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 80 (1967) ("Few, if any statutory programs have been so frequently tampered with."). Additionally, gaps in available information are huge: We do not necessarily have reliable data about a given program in a given year, much less anything resembling accurate countrywide, time-series data.

28 Nat'l Acad. of Soc. Ins., Workers' Compensation: Benefits, Coverage, and Costs, 2011, at 1, 5 (2013), available at http://www.nasi.org/sites/default/files/research/Workers_Comp_Report_2011.pdf (providing coverage statistics).

29 Fishback & Kantor, *supra* note 26, at 77–82 (amassing evidence); Abraham, *supra* note 21, at 59–60 (same).

30 Spieler & Burton, *supra* note 27, at 495 (noting that benefits per $100 in payroll declined from $1.65 in 1990 to $1.03 in 2009). Of course, this good news for employers is greeted less enthusiastically by injured workers.

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the tort system—roughly 21% within workers' compensation, as compared to roughly 50% in tort.[31] Still, alongside these advantages exist serious problems—many of which, I suggest, have exit or adversarialism at their root.[32]

2.2 Exit

Workers' compensation denies injured employees the right to sue employers for negligence, on the theory that exclusivity is a fair quid pro quo for the benefits the scheme provides.[33] This exclusivity is at the core of the workers' compensation compromise. Notwithstanding this restriction, however, over the years, injured workers have doggedly and ever more creatively sought to escape workers' compensation to enter the tort system, where more generous benefits (namely, undiminished lost wages, as well as payment for pain and suffering) may be on offer.[34]

Some injured on the job have (with mixed success) sought to evade workers' compensation entirely.[35] Such efforts have taken any number of forms. For example, seizing on the fact that the system covers only "accidental" injuries,

31 For workers' compensation, see George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1560 (1987). For tort, see Deborah R. Hensler et al., RAND, Trends in Tort Litigation: The Story Behind the Statistics 27–29 (1987) (reporting that, in auto cases, transaction costs (including plaintiffs' and defendants' time) consume roughly 48% of monies paid and that costs rise as case complexity grows); David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 New Eng. J. Med. 2024, 2031 (2006) (reporting that, in medical malpractice cases, transaction costs equal roughly 54% of monies paid).

32 Of course, the system is susceptible to criticism along other fronts as well—chiefly that benefits have diminished on a cost-adjusted basis over time and now fail to cover workers' even basic needs.

33 Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 Wake Forest L. Rev. 1083, 1084 (1999) ("Essential to this quid pro quo is the 'exclusive remedy doctrine,' which holds that the state workers' compensation system must be the exclusive forum for an injured worker's redress.").

34 *See id.* at 1084 (documenting the erosion of "the exclusive remedy doctrine"); Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 516 (1988) ("The exclusive remedy rule has in recent years come under increasing pressure ...."); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 776 (1982) ("The exclusive remedy provision ... has come under mounting attack.").

35 Kramer & Briffault, *supra* note 26, at 41–43 (noting that challenges to exclusivity have been mostly rebuffed but nevertheless "remain[] an area for concern").

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scores of workers have alleged that their injury was not accidental and resulted instead from the employer's intentional, willful, or reckless misconduct.[36] Grasping at the qualifier "injury," others have sought to evade exclusivity by claiming damage to things other than bodily integrity, including damage to property or to dignity, privacy, or psychic interests.[37] Workers' spouses, children, parents, and other relations have gotten in the act—bringing loss of consortium or *Dillon v. Legg*-style bystander emotional distress claims for the loved one's on-the-job impairment.[38] Recognizing that, in some states, only the employer *qua* employer is shielded from suit, still others have sought to assert tort claims against coworkers, firm executives, or supervisory personnel.[39] And finally, creating what is now called the "dual capacity doctrine," certain workers have asserted that, at the time of injury, the employer was not acting as an "employer" but was instead acting in another capacity—as, for example, a product manufacturer or an owner or occupier of land.[40]

Meanwhile, others have sought not so much to escape from the workers' compensation system, as to augment its rather meager benefits. Namely, exploiting the fact that the exclusivity bar immunizes only the employer from suit, some injury victims have become adept at obtaining payments from the workers' compensation system while simultaneously identifying, and commencing litigation against, alternate targets, whose behavior contributed, however tangentially, to the workplace injury.[41] Indeed, though only a rare occurrence

36 *See* Gabel, *supra* note 33, at 1092 ("Intentional tort claims are the most common dilution of the quid pro quo ….").

37 *See* King, *supra* note 34, at 467–68 (collecting cases involving property damage); *id.* at 459–71 (same concerning dignity, privacy, and psychic interests).

38 Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (permitting recovery for psychic distress caused by witnessing a family member's serious injury). *See* Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 Ohio St. L.J. 825, 831 (1989) (amassing authority).

39 *See* A. S. Klein, Annotation, *Right to Maintain Direct Action Against Fellow Employee for Injury or Death Covered by Workmen's Compensation*, 21 A.L.R. 3d 845 (1968) (compiling authority).

40 *See* Michael A. DiSabatino, Annotation, *Modern Status: "Dual Capacity Doctrine" as Basis for Employee's Recovery from Employer in Tort*, 23 A.L.R. 4th 1151 (1983) (assembling authority).

41 O'Connell was no fan of these suits, concluding: "[I]f one wishes to augment workers' compensation benefits … doing so by the dilatory, wasteful, haphazard lottery of common law claims is about as bad a way one could find." Jeffrey O'Connell, *Transferring Injured Victims' Tort Rights to No-Fault Insurers: New "Sole Remedy" Approaches to Cure Liability Insurance Ills*, 1977 U. Ill. L.F. 749, 766 [hereinafter O'Connell, *Sole Remedy*]. Accordingly, in a series of articles, he advocated a reform to extinguish workers' suits against third parties (including product manufacturers), in exchange for increasing workers' compensation benefits and granting employers a limited right to recover against third parties otherwise liable to the

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elsewhere, in the United States, these suits against third parties—principally product manufacturers—have, some say, become "routine."[42] Further, evidence suggests that these lawsuits are not only relatively common, they are high-stakes: Although only 10% of all tort lawsuits arise on the job, these lawsuits reportedly account for over 60% of all tort recoveries in excess of $100,000.[43]

In short, many workers have sought to make end runs around workers' compensation. These exit attempts have, in turn, substantially affected the system's operation, raising not only horizontal equity concerns, as one injured worker may be consigned to receive workers' compensation's comparatively stingy benefits, while another seemingly similarly situated worker may be able to obtain a comparatively generous recovery via the tort system. But the compensation process itself, as a single injury may be adjudicated twice along parallel tracks—or, along the tort track, only to be shunted back to the workers' compensation track—also compromises many of the system's ostensible administrative advantages. When a double recovery (against a product manufacturer, say) is obtained, vexing issues of subrogation, apportionment, contribution, and comparative responsibility come to the fore.[44] These parallel or—when the tort case is thrown out—halting, adjudications are extremely costly, cumbersome, and time consuming. Throughout, lawyer utilization is high. And, predictability, consistency, and certainty suffer, as neither the employee nor the employer can know ex ante whether tort law, and its attendant offer of full compensation, will be available.

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injured worker. *E.g.*, Jeffrey O'Connell, *Supplementing Workers' Compensation Benefits in Return for an Assignment of Third-Party Tort Claims—Without an Enabling Statute*, 56 Tex. L. Rev. 537, 542 (1978); O'Connell, *Sole Remedy, supra*, at 746–75; Jeffrey O'Connell, *An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties*, 1976 Ins. L.J. 683.

42 Gerhard Wagner, *Tort, Social Security, and No-Fault Schemes: Lessons from Real-World Experiments*, 23 Duke J. Comp. & Int'l L. 1, 54 (2012) (for "routine"); *id.* (making the comparative point).

43 Abraham, *supra* note 21, at 67; *see also* Am. Law Inst. II Reporters' Study: Enterprise Responsibility for Personal Injury 183–84 (1991) (suggesting that at least 40% of payments by product liability insurers are made to injured workers, already covered by workers' compensation).

44 The worker is generally barred from pocketing a double recovery, though complex issues arise concerning whose payment should be reduced and by how much. Furthermore, some "solutions" to the problem require a jury to determine the nature, extent, and consequences of the employer's breach, which, of course, are precisely the determinations workers' compensation sought to eliminate. *See* Am. Law Inst., *supra* note 43, at 183–98; *Restatement (Third) of Torts: Apportionment Liab.* § B19, cmt. l (2000); *see generally* Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 Berkeley J. Emp. & Lab. L. 65 (2005).

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2.3 Adversarialism

Meanwhile, workers' compensation has not only been less of an exclusive remedy than initially envisioned, it has also become far more adversarial in operation than many had hoped, frequently replacing litigation over who is at fault with spirited battles over what is at fault and the extent of the worker's physical or mental impairment. Thus, to quote researchers who have led a major task force studying the system: "Measured against the aims of their early advocates for 'a simple, speedy, efficient, equitable remedy that would reduce litigation over industrial injuries,' workers' compensation laws and systems of adjudication are a pale reflection of original aspiration and intent."[45]

45 Ronald W. Conley & John H. Noble, Jr., Research Report of the Interdepartmental Workers' Compensation Task Force, Workers' Compensation Reform: Challenge for the '80's, at 37 (1979). For original intent and expectation, see *supra* notes 25–26. Many have remarked on the rise of adversarial processes. *See, e.g.*, Kramer & Briffault, *supra* note 26, at 7–8, 35–36 (discussing an uptick in attorney involvement and concluding that current rates are "incompatible with the effective and efficient functioning of the system"); Policy Group, Interdepartmental Workers' Compensation Task Force Report, Workers' Compensation: Is There a Better Way? 18 (1977) (dubbing workers' compensation, in operation, "an adversary, third party system"); Bernzweig, *supra* note 13, at 21–22 ("Although the system is described as a no-fault system, it is in fact an adversary system that consumes a high percentage of the premium dollars collected from employers in the friction costs incident to the payment of payments and other purposes entirely alien to the reparation of injured workers."); William D. Hager, *Capitalizing on the New Stability in Workers' Compensation*, 27 Compensation & Benefits Rev. 33, 36 (1995) (observing that "[t]he workers' compensation system is increasingly plagued by litigation, especially when it comes to the more serious claims" and that this litigation "fosters the very kind of animosity the system was supposed to replace"); Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease*, 49 Law & Contemp. Probs. 151, 157–58 (1986) ("[T]he system that was supposed to provide speedy compensation as the workers' quid pro quo to relinquishing tort actions has taken on many of the trappings of common law litigation—retention of lawyers, delays, cost, and compromise."); *see generally* Nonet, *supra* note 25 (tracing the evolution of the California Industrial Accident Commission from an informal agency organized to provide for the needs of injured workers to a "judicial body").

To be sure, states have sought to counter these trends by restricting attorneys' fees and also modifying claims processes. *See* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 Rutgers L. Rev. 657, 960–67 (1998). Some of these reforms have, it appears, had a salutary effect. *E.g.*, Michael D. Greenberg & Amelia Haviland, RAND, Issues and Performance in the Pennsylvania Workers' Compensation System 46–50 (2008) (discussing Pennsylvania's heavy use of mandatory mediation and "compromise and release" agreements and suggesting that these reforms have expedited claim processing). Other reforms, meanwhile, have been ineffectual or one-sided, protecting employers at injured workers' expense. *E.g.*, Phil Hardberger, *Texas Workers' Compensation: A Ten-Year Survey—Strengths, Weaknesses, and Recommendations*, 32 St. Mary's L.J. 1, 52–54 (2000) (describing the "overwhelming obstacles" Texas claimants face in the "post-reform era").

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Though a concern throughout the system, these dynamics are most apparent (1) whenever the cause of injury is debatable, and (2) whenever stakes are high. Debatably inflicted injuries exist and frequently trigger adversarial claims processes in a number of contexts, including claims for occupational disease, mental stress, hearing loss, persistent pain, and repetitive motion injuries (including carpal tunnel syndrome).[46] Of those, the first claim category—for occupational disease—is the most comprehensively studied. Now compensable in all states, occupational disease cases compel adjudicators to ascertain whether *this* disease was caused by *that* workplace contaminant, which is challenging, especially when the disease is non-signature, latent (i.e., exposure and manifestation are separated in time), and can arise synergistically from the interaction of several substances.[47] Not surprisingly given this factual uncertainty, occupational disease cases have been insusceptible to easy resolution, generating significant under-compensation for claimants, alongside high rates of formal contestation.[48] On the latter point, according to one study, a full 62.7% of occupational disease claims proceed to a formal hearing, 65.5% involve lawyers, and, though "prompt" payments were thought to be a hallmark of the workers' compensation system, an employee disabled by an occupational disease must generally wait more than a year before receiving benefits.[49]

Grievous injury claims exhibit similar dynamics. These claims—which seek compensation for permanent partial disability (PPD), permanent total disability (PTD), and death—are vitally important: Though they account for only a minority of claims on a numbers-basis, owing to their size, they account for the vast majority of cash benefits distributed through the workers' compensation system each year.[50]

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46 *See* Spieler & Burton, *supra* note 27, at 488, 500 (noting that all these claims frequently result in "litigation, delays, battling experts, and confusion for the claimant").

47 Peter S. Barth & H. Allan Hunt, Workers' Compensation & Work-Related Illnesses and Diseases 62–89 (MIT Press, 1980) (identifying factual impediments).

48 Spieler & Burton, *supra* note 27, at 499 ("There is no question that most occupational diseases are never compensated."); J. Paul Leigh & John A. Robbins, *Occupational Diseases and Workers' Compensation: Coverage, Costs, and Consequences*, 82 Milbank Q. 689, 709 (2004) (estimating that, at most, workers' compensation covers 20% of the costs of occupational disease).

49 Barth & Hunt, *supra* note 47, at 163, 168; *accord* Am. Law Inst., 1 Reporters' Study: Enterprise Responsibility for Personal Injury 120 (1991) (reporting that 90% of occupational disease cases are contested and that 65% of occupational disease claimants retain counsel). The underlying factual uncertainty also undermines decisional accuracy and consistency. Barth & Hunt, *supra* note 47, at 62.

50 *See* John F. Burton, Jr., *Workers' Compensation*, *in* 2 Labor and Employment Law & Economics 235, 254–56 (Kenneth G. Dau-Schmidt et al. eds., Edward Elgar Publ'g, 2009) (reporting that PPD, PTD, and death claims account for 73%, 9%, and 3% of all cash benefits, respectively); *accord* Philip S. Borba & David Appel, *The Propensity of Permanently Disabled Workers to Hire*

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Unfortunately though, for these claims, adjudications are, once again, a far cry from reformers' ideal. Instead, hearings are common, rates of lawyer retention run high, and battles of partisan experts not infrequently break out.[51]

Central to the compromise at the heart of workers' compensation is the commitment to a low-cost administrative mechanism equipped to provide expeditious and near-automatic (though cabined) benefits to all qualifying workers. The above suggests, however, that, especially when cause is not clear and also when stakes are high—and hence, arguably when it matters most—workers' compensation's ostensible administrative advantages dissipate. Owing to adversarialism, in other words, the system has not operated nearly as efficiently as its architects anticipated.

3 Automobile no-fault

We now turn to the second—and second most ambitious—American no-fault mechanism in the United States, automobile no-fault legislation. Beyond doubt, the American experience with auto no-fault has been bumpy. When assessing why, it is exit (as opposed to adversarialism) that has played an outsized role.[52]

Lawyers, 40 Indus. & Lab. Rel. Rev. 418, 419 (1987) ("[A]pproximately 60 percent of the losses paid through workers' compensation insurance are to workers with permanent injuries.").

51 *See* Kramer & Briffault, *supra* note 26, at 37–40 (reporting, in 1990, attorney involvement in 80% of California PPD cases, 89% of Texas PPD cases, and nearly 100% of New Jersey PPD cases and the use of partisan experts in 63% of Maryland partial disability cases and 79% of New Jersey partial disability cases); Press Release, Cal. Workers' Compensation Inst. (Feb. 5, 2014), http://www.cwci.org/press_release.html?id=374 (reporting that, from 2005 to 2010 in California, attorneys were involved in 80% of permanent disability claims).

52 Though exit has played an outsized role, adversarialism has also imposed costs. In particular, O'Connell—and others—assumed that auto no-fault would provide prompt compensation with only limited attorney involvement. *See infra* note 89 and accompanying text. In reality, however, a relatively high proportion of claimants have begun retaining counsel simply to obtain PIP benefits. *See* Ins. Research Council, Attorney Involvement in Auto Claims 3 (2014) (reporting that 36% of PIP claimants retained counsel in 2012, up from 17% in 1977); *see also* Ins. Research Council, PIP Claiming Behavior and Claim Outcomes in Florida's No-Fault Insurance System 15 (2011) (noting that, by 2007, 41% of PIP claimants in Florida retained counsel (up from 34% in 2002) and stating: "Florida's no-fault insurance system, like all no-fault insurance systems, was originally conceived as a means to deliver medical and wage-loss benefits … without attorney involvement or litigation. In fact, attorney involvement among Florida PIP claimants is extensive and growing steadily.").

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3.1 Background

Automobile accidents injure 2.5 million Americans per year, constitute the leading cause of death for those from age five to thirty-four, and account for expenditures of $255 billion annually.[53] Following these accidents, roughly half who are hurt seek third-party compensation,[54] and as they do, these car wreck victims become the 800-pound gorilla of the civil justice system, accounting for the majority of all claims and three-quarters of all injury damage payouts.[55] Not surprisingly, then, policymakers have long puzzled over how these claims could be removed from the tort system, to be more fairly, more quickly, and more generously compensated.[56]

The modern no-fault movement dates back to 1965, when Professors Robert Keeton and Jeffrey O'Connell published a book entitled *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*. In it, Keeton and O'Connell began by detailing the auto-accident status quo: Compensation for motor vehicle accidents was too infrequently awarded, and even when there was compensation, it was, especially for those suffering from catastrophic injury, too small in amount and too slow in delivery.[57] Or, as O'Connell put it in a 1971 hearing: "The present system is about the worst possible ... cruel, corrupt, dilatory, expensive and wasteful while it goes about the business of failure."[58] The tort system for auto accidents, they believed, needed to be abolished. In tort's place, Keeton and O'Connell proposed a comprehensive no-fault plan in which the burden of providing traffic victims' basic protection would fall on motorists as a cost of driving.

The Keeton–O'Connell plan was the right idea at the right time—and it quickly took off. Puerto Rico passed the first (government-administered) no-fault scheme in 1968. Massachusetts passed a no-fault law explicitly modeled on Keeton and O'Connell's proposal in 1970. Florida followed suit the following year. Then, from there, the no-fault idea steadily gained momentum, to the point

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53 *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise*," 61 DePaul L. Rev. 303, 303–04 (2012).

54 Deborah R. Hensler et al., RAND, Compensation for Accidental Injuries in the United States 120 (1991).

55 Anderson et al., *supra* note 12, at 1; National Center for State Courts, Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads 28 (2010) (estimating that, in 2008, auto cases comprised roughly 55% of the tort caseload).

56 *See* Keeton & O'Connell, *supra* note 1, at 124–89.

57 *Id*. at 43.

58 Comm. on Banking & Ins., Report to the Florida Senate, *Florida's Motor Vehicle No-Fault Law*, Report No. 2006-102 (2005), at 8, available at http://archive.flsenate.gov/data/publications/2006/senate/reports/interim_reports/pdf/2006-102bilong.pdf [hereinafter 2005 Florida Sen. Rep.].

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that, by 1975, every state had considered at least one of the more than 600 no-fault bills then in existence, and more than a dozen states had followed Massachusetts down some version of the no-fault path.[59]

Though the plans differed on the specifics, the broad strokes of the legislation were more or less the same: All motorists were to be covered by mandatory first-party protection known as Personal Injury Protection, or PIP. PIP would cover the driver's and passengers' pecuniary losses (including medical expenses, lost wages, and replacement services) "arising out of the operation of a motor vehicle," automatically, irrespective of the driver's own negligence. But this PIP coverage, while broad, was also shallow. PIP did not compensate for noneconomic loss, and most states capped PIP benefits at fairly modest sums.[60] The groundbreaking Massachusetts plan, for example, capped PIP benefits at $2,000 (roughly $12,238 today).[61] Meanwhile, recognizing PIP's limits—and also cognizant that the complete elimination of tort would be a political non-starter—policymakers created, for "seriously injured" claimants, an exit ramp into the tort system.[62] Thus, if a claimant qualified as "seriously injured," she could obtain PIP benefits and also file a traditional third-party lawsuit against an at-fault motorist; if a claimant sustained a *non*-serious injury, by contrast, PIP supplied her sole source of payment.[63]

States identified "seriously injured" claimants in one of two ways. Some, notably Michigan, Florida, and New York, enacted "verbal" thresholds, policing tort access using a descriptive statutory definition. In Michigan, then, a claimant could pierce the tort threshold only if he "suffered death, serious impairment of body function, or permanent serious disfigurement."[64] Meanwhile, the balance of no-fault states imposed less rigid "monetary" or "dollar" thresholds, keyed to

59 *See* Engstrom, *supra* note 53, at 319.

60 *Id.* at 320.

61 *Id.* at 321–22. The figure is adjusted for inflation (from 1970 values to 2014 values) using the inflation calculator available at http://data.bls.gov/cgi-bin/cpicalc.pl.

62 Keeton & O'Connell, *supra* note 1, at 164 (recognizing that an exclusive-remedy no-fault plan would be "doomed to founder as unable to muster the necessary widespread political support").

63 In some states, tort awards were reduced by the amount of the PIP payment to prevent "double dipping." Richard A. Derring et al., *Behavioral Factors and Lotteries Under No-Fault with a Monetary Threshold: A Study of Massachusetts Automobile Claims*, 61 J. Risk & Ins. 245, 251 (1994). In others, reductions were not automatic, creating complications. *See* 2005 Florida Sen. Rep., *supra* note 58, at 10.

64 Mich. Comp. Law Ann. § 500.3135(1) (providing Michigan's verbal threshold). New York and Florida initially enacted laws with monetary thresholds but switched to verbal thresholds in 1977 and 1976, respectively. U.S. Dep't of Transp., Compensating Auto Accident Victims: A Follow-up Report on No-Fault Auto Insurance Experiences 100–01 (1985) [hereinafter DOT 1985, Follow-up].

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the injured motorist's medical bills—meaning claimants could seek compensation in tort if and only if their medical bills exceeded a particular sum.[65]

Once enacted, how did these no-fault plans fare? Interestingly, at least initially, they performed exceptionally well. In 1971, for example, Massachusetts's Insurance Commissioner described his state's early experience as "[e]xcellent, extraordinary, incredible, unbelievable," while the *Boston Globe* reported "convincing evidence" that the state's no-fault legislation had "worked better than even its most optimistic advocates had expected."[66] Nor was this good news confined to Massachusetts. In 1975, O'Connell boasted that "no-fault auto insurance is one ... proposal that seems to be working as well as the professors said it would."[67] In 1976, Michigan's Insurance Commissioner reported that "I am pleased to report to you that no-fault has in fact fulfilled your hopes and the hopes of its many other supporters."[68] In 1977, Pennsylvania's Insurance Commissioner declared that the plan in his state was a "smashing success."[69] And that same year, the United States Department of Transportation conducted a study of the various plans in operation and approvingly concluded that "no-fault automobile insurance accomplishes in practice what it was designed to do in principle."[70]

Early on, in fact, no-fault plans seemed to succeed along every relevant dimension. Soon after no-fault was adopted, for example, auto insurance premiums, which had been spiraling upward, dipped sharply.[71] Courts, which, prior to no-fault's adoption, had been "chok[ed]" by an onslaught of auto cases,

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65 States with dollar thresholds also tended to have verbal thresholds to allow tort access in cases of serious injury, regardless of monetary loss. Taking an even more partial approach, some states enacted "add-on" plans, which provided limited no-fault benefits without restricting access to the tort system. During the drive to enact no-fault, some derided these plans as cop-outs or in Robert Keeton's words, "corruptions of the no-fault principle." *No-Fault Motor Vehicle Insurance (Part I): Hearing on H.R. 10 and Others Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 408 (1974) (statement of Robert E. Keeton, Professor of Law, Harvard Law School).

66 *Farnam Ecstatic over Early Results of Massachusetts No-Fault Program*, Bus. Ins., Apr. 26, 1971, at 10, 10 (for the Commissioner); Editorial, *The No-Fault Rate*, Bos. Globe, Nov. 29, 1971, at 10 (for the *Boston Globe*).

67 Jeffrey O'Connell, Ending Insult to Injury: No-Fault Insurance for Products and Services 95 (Univ. of Illinois Press, 1975).

68 Letter from Thomas C. Jones, Commissioner of Insurance, to William G. Milliken, Governor (Oct. 6, 1976), *in* Ins. Bureau, Mich. Dep't of Commerce, No-Fault Insurance After Three Years (1976).

69 Louise Cook, *No-Fault Insurance Has Faults, but Main Goal Succeeds*, Winona Daily News, Oct. 31, 1977, at 8.

70 U.S. Dep't of Transp., State No-Fault Automobile Insurance Experience, 1971–1977, at 31 (1977).

71 *See, e.g.*, Editorial, *No-Fault Is Coming*, Wall St. J., Aug. 4, 1972, at 6 (reporting on steep drops in Massachusetts); *Faultless Victory*, Newsweek, May 13, 1974, at 119, 120 (same in New York).

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became noticeably less congested.[72] And, the number of phony, feigned, or fabricated claims also appeared to diminish.[73]

Yet, suffice it to say, the above enthusiasm subsequently cooled. In part this cooling is reflected in legislative activity: No new state has enacted auto no-fault legislation since 1976, while the legislation has been repealed in a handful of states, including Colorado, Connecticut, Georgia, Nevada, New Jersey, and Pennsylvania.[74] This cooling can also be seen in scholarly commentary, where no-fault is variously described as "fundamentally broken," "a dead letter," or as an idea that's "breathed its last breath."[75] The reasons for no-fault's loss of momentum are complicated and in some ways contested, as I and others have discussed elsewhere at length.[76] But one thing seems clear: At the root of much of no-fault's difficulty is the fact that, over time, more and more injured individuals—unsatisfied with partial PIP benefits—have pierced monetary and verbal thresholds in a quest for full compensation in traditional tort. As they have done so, the advantages assumed to accompany automobile no-fault legislation have largely dissipated.

3.2 Exit

Nationally, the percentage of injured motorists to pierce no-fault thresholds—and thus exit automobile no-fault to enter the tort system—increased from 17%

72 For the fact courts had been "choking" on automobile litigation, see Keeton & O'Connell, *supra* note 1, at 15. For the steep drop immediately following no-fault's adoption, see DOT 1985, Follow-up, *supra* note 64, at 113–17.

73 *See No-Fault Catches Fire*, Time, Mar. 6, 1972, at 64; Michael S. Dukakis & Stephen Kinzer, *Auto Accidents: Blame Is Not the Principal Issue*, L.A. Times, Apr. 9, 1972, at C1.

74 Engstrom, *supra* note 53, at 306 & n.18 (discussing repeals). New Jersey and Pennsylvania have replaced their no-fault laws with "choice" systems, which give motorists the option of choosing between less expensive limited tort insurance (which restricts recovery for non-economic loss) and more expensive full tort insurance (which retains such recovery). *See* Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 Va. L. Rev. 61 (1986); Stephanie Owings-Edwards, *Choice Automobile Insurance: The Experience of Kentucky, New Jersey, and Pennsylvania*, 23 J. Ins. Reg. 25 (2004).

75 *See* Abraham, *supra* note 21, at 100 ("breathed its last breath"); Rabin, *supra* note 17, at 725 ("a dead letter"); Trevor M. Gordon, *To Reform or Repudiate? An Argument on the Future of No-Fault Auto Insurance*, 17 Quinnipiac Health L. 63, 104 (2014) ("fundamentally broken").

76 *See generally* Anderson et al., *supra* note 12; Abraham, *supra* note 21, at 97–100; Engstrom, *supra* note 53.

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in 1977 to 29% in 1997.[77] In some states, increases were even more dramatic. In Connecticut, for example, 19% of injured motorists were judged eligible for a tort claim in 1977, compared to 63% in 1992.[78] Or, in Massachusetts, 26% of injured motorists were judged eligible for a tort claim in 1977, compared to 52% in 1997.[79]

Both the cause and the consequences of this uptick are troubling and have ultimately compromised no-fault's legitimacy and success. Considering first *why* more individuals have been able to pierce tort thresholds, some of the answer is mundane and uncontroversial: All but a few states limited access to the tort system using monetary thresholds, and these monetary thresholds were typically not indexed for inflation. As years passed, the real value of the thresholds declined, and thresholds became progressively easier to pierce. Fair enough. Yet, that explanation, while powerful, remains incomplete. For instance, Hawaii did index its monetary threshold for something akin to inflation.[80] But between 1977 and 1997, it nevertheless saw a rising tide of motorists able to access the tort system: Only 3% of injured motorists exited no-fault in 1977, compared to 21% in 1997, an increase of 700%.[81] Further, some *verbal*-threshold states have exhibited similar trends. In 1977, for instance, only 31% of injured claimants were eligible for a tort claim in Florida, compared to 50% in 2005.[82]

This suggests that when it comes to explaining why there's been a rise in threshold-piercing claims, some additional variables are at play. One such variable is particularly well documented: Auto no-fault, which, in most states, conditions one's ability to obtain a complete recovery on their ability to rack up medical bills sufficient to pierce the dollar threshold, tempts some individuals to do just that—in the words of one lawyer, to "Keep taking X-rays till you jump the

77 David S. Loughran, RAND, The Effect of No-Fault Automobile Insurance on Driver Behavior and Automobile Accidents in the United States 9 (2001).

78 *Id.* at 10. Connecticut abandoned no-fault in 1994.

79 *Id.*

80 For more on Hawaii's system, see DOT, 1985 Follow-up, *supra* note 64, at 30. Hawaii substantially revised its no-fault law in 1997, citing no-fault's intolerably high cost. *See* Derek R. Kobayashi & Mihoko E. Ito, *Hawaii Motor Vehicle Insurance Law Update*, Haw. B.J., Aug. 2005, at 5–6.

81 Loughran, *supra* note 77, at 10.

82 *Compare id.*, *with* Comm. on Banking & Ins., Report to the Florida Senate, *The Effect of Repealing the Florida Motor Vehicle No-Fault Law*, Report No. 2008-102 (2007), at 16, available at http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-102bilong.pdf. Likewise, Michigan, which boasts the country's most robust no-fault law, witnessed more than a doubling of threshold-piercing claims from 1977 to 1997, from 6% to 15%. Loughran, *supra* note 77, at 10.

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threshold or you glow in the dark."[83] Illustrating this dynamic, in 1989, when Massachusetts's monetary threshold jumped from $500 to $2000, injury victims' visits to chiropractors and physical therapists more than doubled.[84] Or, in Hawaii, where the threshold was a relatively high $7000 in 1990, claimants who visited chiropractors did so a median of fifty-eight times.[85] Even verbal-threshold states are not immune: In 2000, a Statewide Grand Jury in Florida uncovered a symbiotic relationship between some doctors and lawyers, whereby "[u]nethical lawyers will often refer clients to a doctor or chiropractor they know will make a finding that their client has been permanently injured."[86]

The above suggests that one *explanation* for the uptick in threshold-piercing claims is not entirely benign. It's that no-fault—or more precisely, claimants' efforts to *exit* no-fault in order to return to the tort system—has incentivized a certain level of wasteful and ethically questionable gamesmanship. The *consequence* of the uptick in threshold-piercing claims is, if anything, more troublesome. Indeed, the fact that so many claimants make end-runs around no-fault in order to pursue tort claims has, over time, erased most of the benefits no-fault was supposed to confer.

For proof, we need only look at (1) the cost of insurance, and (2) litigation rates in tort versus no-fault states. First, in terms of cost, no-fault insurance was supposed to compensate far more people, but those expenditures were supposed to be *more* than offset by eliminating noneconomic damages except in cases of

83 Patrick Bedard, *Auto Insurance Pays Off Big for Crooks and Trial Lawyers*, Car & Driver, Jan. 1998, at 20 (quoting an unidentified lawyer). Soon after the Massachusetts plan was adopted, Keeton and O'Connell worried about just this possibility, recognizing that "under the Massachusetts act there will be a strong temptation to inflate medical expenses in order to exceed the $500 limit and thereby become entitled to make a separate claim for pain and suffering." Robert E. Keeton & Jeffrey O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 Colum. L. Rev. 241, 254 (1971).

84 Sarah S. Marter & Herbert I. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Claims*, 10 J. Ins. Reg. 462, 463, 487 (1992).

85 Ins. Research Council, Automobile Injury Claims in Hawaii 26 (1991).

86 Statewide Grand Jury Report on Insurance Fraud Related to Personal Injury Protection, Second Interim Report of the Fifteenth Statewide Grand Jury, Case No. 95,746 (2000) (on file with author). Verbal-threshold states have also been afflicted with definitional problems, as courts have been forced to referee numerous disputes concerning whether a given impairment satisfies the operative standard. *See* Pommells v. Perez, 830 N.E.2d 278, 280–81 (N.Y. 2005) (discussing the "vexing" issues that have arisen concerning what qualifies as a "serious injury" in New York); David Perlow, *It's Time for a Tune Up: Torquing Michigan's "Faulty" Automobile-Insurance System*, 23 T.M. Cooley L. Rev. 281, 289 (2007) ("The numerous and inconsistent opinions [defining 'serious impairment of body function'] have clogged Michigan's courts since 1982. … Since the No-Fault Act was passed, the only consistency as to the meaning of this threshold … is that there has been no consistency.").

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serious injury and also slashing spending on lawyers, post-accident investigation, and litigation. That was, in O'Connell's words, the "miracle" of no-fault insurance: More people would be compensated, but at likely lower and certainly at no higher cost.[87] In reality, however, owing to claimants' frequent exits which have dissipated the above advantages, the opposite is true. Now, auto insurance is cheaper in tort states—and even bodily injury insurance (essentially liability insurance) is more expensive in no-fault states, as compared to those states where claims sound in traditional tort.[88]

So, too, no-fault legislation was supposed to sharply limit litigation concerning motor vehicle accidents—and, with it, the cost, delay, uncertainty, reliance on legal services, antagonism, and court congestion that typically attend such litigation. Indeed, O'Connell took to calling no-fault insurance "no lawyer" insurance and boasted that it would make "the litigable issues largely vanish."[89] In time, however, as exit ramps have become increasingly well-traveled, litigation concerning automobile accidents has become just as prevalent in no-fault states as it is in non-no-fault states—or, as a RAND report recently concluded: "No-fault has shifted over time from a system with better medical benefits but reduced access to the courts to a system that simply offers more-generous medical benefits."[90]

Illustrating these trends, the graph below compares automobile lawsuit filing rates in three states with verbal thresholds (Florida, Michigan, and New York), with automobile lawsuit filing rates in three tort states (California, Arizona, and North Carolina).[91] It reveals that, though the former three states have strict verbal thresholds limiting access to the tort system, Florida, Michigan, and New York actually have *more* per capita auto filings than three states where auto claims sound in traditional tort. Upending all expectations, in other words, exit has taken its toll.

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87 O'Connell, *supra* note 67, at 10 (for "miracle"); *see also* Engstrom, *supra* note 53, at 333–34 (discussing the "promise of rate reductions").

88 Anderson et al., *supra* note 12, at 68–70.

89 O'Connell, *supra* note 67, at 10, 66.

90 Anderson et al., *supra* note 12, at xv–xvi.

91 The authors say this about the selection of California, Arizona, and North Carolina: "This set of states does not represent any selection on our part, but rather includes all of the no-fault and tort states that consistently reported auto case data to the National Center for State Courts." *Id.* at 94 n.16.

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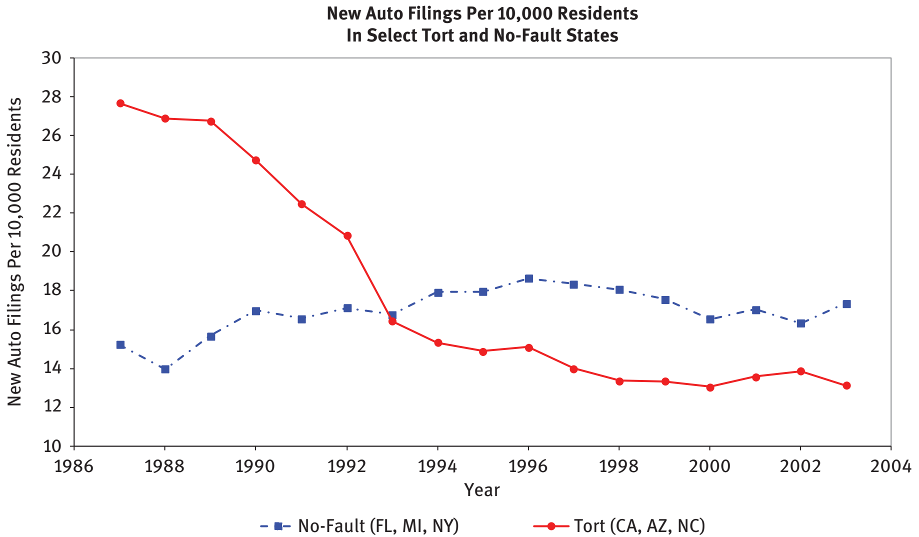

Source: Anderson et al., *supra* note 12, at 95 fig.5.2 (amended to reveal only tort and no-fault filing rates), reprinted with permission. For information about the underlying data, see *id.* at 95.

4 Vaccine Injury Compensation Program

We now turn to perhaps the federal government's boldest experiment with no-fault, the VICP. Beginning its fourth decade, this Program, too, has in many ways been a disappointment. This time, problems have adversarialism (rather than exit) at their root.[92]

92 Exit has not been much of a problem. This is surprising because the VICP is not an exclusive remedy. After proceeding through the Program, claimants are free to reject the special master's judgment and file a traditional, albeit cabined, tort claim against the vaccine manufacturer or healthcare provider in state or federal court. Owing to this non-exclusivity, at the time the Vaccine Act was enacted, officials worried whether the Act would, as intended, reduce vaccine manufacturers' exposure to liability. Lainie Rutkow et al., *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 Penn St. L. Rev. 681, 702–03 (2007). They needn't have. In reality, fewer than 0.5% of successful VICP claimants have rejected their award in order to seek compensation within the traditional tort system, and even unsuccessful claimants typically acquiesce to the rejection, rather than filing claims in state or federal court. Engstrom, *supra* note 8, manuscript at 37–38.

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4.1 Background

Responsible for saving the lives of thousands of Americans each year, vaccines are, by all account, a triumph of modern medicine.[93] Yet, while conferring immunity on millions, vaccines will also harm "a small but significant number" of those inoculated.[94] These side effects received little attention until the mid-1980s, when, for the first time, those harmed by vaccines started to file lawsuits against vaccine manufacturers in significant number, triggering a steep increase in vaccine costs and, as some manufacturers fled the market, an alarming reduction in vaccine supply.[95] In response, Congress enacted the National Childhood Vaccine Injury Act, which President Reagan signed into law on November 14, 1986.

The Vaccine Act had two parts. Part one sought to upgrade the nation's immunization program, by perfecting vaccines and monitoring adverse reactions thereto. Part two, meanwhile, sought to reduce vaccine-related litigation—thereby shielding manufacturers from liability—while providing "simple justice" to vaccine-injured children.[96] Toward that end, Congress established the VICP, a no-fault regime run out of the U.S. Court of Claims and financed by a 75-cent excise tax on each vaccine dose administered.[97]

On paper, compensation procedures within the VICP are commendably straightforward. To recover, a person injured by a covered vaccine must file a petition in the U.S. Court of Claims naming the Secretary of Health and Human Services (HHS) as the respondent. Dedicated special masters within the Claims Court then evaluate the petition to determine whether the claimant's injury was, in fact, caused or significantly aggravated by the vaccination. If it was, the claimant will be entitled to compensation. The claimant need not show that the doctor erred in the vaccine's administration or preparation, that the vaccine was accompanied by an inadequate warning, or that the vaccine itself was defectively manufactured or designed.[98]

Causation is thus key—and it can be established in one of two ways. The claimant, that is, can either assert an "on-Table" or an "off-Table" injury.

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93 H.R. Rep. No. 99-908, at 4 (1986).

94 *Id.*

95 For the increase in costs, see *id.* For the drop in supply, see *id.* at 6–7.

96 For more on the Act, see Engstrom, *supra* note 8, manuscript at 25–31. For "simple justice," see *Hearing on S. 2117 Before the S. Comm. on Labor & Human Res.*, 98th Cong. 290–91 (1984) (statement of Sen. Paula Hawkins); Martin H. Smith, *National Childhood Vaccine Injury Compensation Act*, 82 Pediatrics 264, 269 (1988).

97 *See* Engstrom, *supra* note 8, manuscript at 26–30.

98 *See id.* at 27.

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Initially created by Congress and periodically amended by the Secretary of HHS, the "Table" lists all covered vaccines, as well as the injuries widely recognized as caused thereby, alongside the specific timeframe for each injury's onset.[99] If a claimant can show that she suffered an injury listed on the Table within the prescribed time period (so, for example, anaphylaxis within four hours after receipt of the DTP vaccine), she will have suffered an "on-Table" injury. If so, her harm will be presumed to have been caused by the vaccine. HHS, as respondent, may rebut the presumption, but it will bear the burden of doing so.[100] Alternatively, if the claimant sustains an "off-Table" injury (so, for example, anaphylaxis *five* hours after receipt of the DTP vaccine), the claimant can show that the vaccine caused the injury by a preponderance of the evidence, much as she would in traditional tort.[101] Either way, if causation is proved, compensation—consisting of standardized lost wages, limited payment for pain and suffering, and actual past and future medical and rehabilitation expenses—is automatic.[102]

Throughout VICP proceedings, the guiding principle is simplification.[103] This is very much by design. With the goal of resolving claims "quickly, easily, and with certainty and generosity," Congress crafted numerous procedures—and fashioned various shortcuts—to streamline relevant procedures.[104] Four such innovations have already been noted: The VICP eliminates any finding of fault; the Table simplifies causation questions; damage calculations are subject to various presumptions and limits; and decisions are made by "expert" special masters who, theory suggests, should more efficiently and reliably resolve cases than their generalist counterparts.[105] There are others as well: By statute, the Federal Rules of Civil Procedure and Rules of Evidence do not apply.[106] Neither

99 For more on the Table's creation, see Molly Treadway Johnson et al., Federal Judicial Center, Use of Expert Testimony, Specialized Decision Makers, and Case-Management Innovations in the National Vaccine Injury Compensation Program 13–14 (1998). For the Table itself, see http://www.hrsa.gov/vaccinecompensation/vaccinetable.html.

100 42 U.S.C. § 300aa-13(a)(1)(B).

101 *See* Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005).

102 *See* 42 U.S.C. § 300aa-15(a). Compensation for a vaccine-related death is set at $250,000. *Id.* § 300aa-15(a)(2).

103 Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 Ohio St. L.J. 387, 394 (1987) ("The overriding guideline of these proceedings is simplification.").

104 H.R. Rep. No. 99-908, at 3 (1986).

105 For the fact that special masters are "experts," see Munn v. Sec'y of Health & Human Servs., 970 F.2d 863, 871 (Fed. Cir. 1992). For the efficiency advantage thought to accompany specialized adjudicators, see Lawrence Baum, Specializing the Courts 32–33 (Univ. of Chicago Press, 2011).

106 42 U.S.C. § 300aa-12(d)(2)(B).

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discovery nor cross examination is permitted as of right.[107] Decisions can be rendered on a written record, without the burden of a trial. To help with the science, parties and the special master are guided, at least formally, by neutral experts' evaluations.[108] Rather than sitting passively on the sidelines, special masters are empowered to take an active, inquisitorial role—to question witnesses, demand additional documentation, and inform parties what further proof is necessary to promote case resolution.[109] Claims are defended, not by the ostensibly culpable party (such as the erring physician or maker of the errant vaccine) but by theoretically less partisan lawyers from the Department of Justice (DOJ). And, most importantly, by statute, decisions *have to* be made promptly. By law, decisions approving or denying compensation "shall" (with certain exceptions) be "issued as expeditiously as practicable but not later than 240 days … after the petition was filed."[110]

So, how has the VICP in operation fared? Once again, the picture is mixed. The Program has, without question, done certain things well. For example, it has succeeded admirably in shielding vaccine manufacturers from liability and that, in turn, has revitalized the vaccine marketplace. Since the VICP's creation, several new vaccines have been approved for use, research has flourished, and vaccine prices have (partly) stabilized.[111] Transaction costs are another success story. Mostly owing to strict limits on payments to claimants' counsel, transaction costs within the VICP are far lower than they are in traditional tort.[112] Finally, the VICP is on a firm financial footing. Actually, that's putting it mildly. With a balance of some $3.3 billion, if payments continue at the current clip, the Program could operate another quarter century with no new revenue.[113]

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107 *Id.* § 300aa-12(d)(3)(B)(v) (concerning discovery); H.R. Rep. No. 99-908, at 16–17 (concerning cross-examinations).

108 Engstrom, *supra* note 8, manuscript at 28.

109 Guidelines for Practice Under the National Vaccine Injury Compensation Program 26 (revised May 18, 2014); H.R. Rep. No. 101-247, at 513 (1989) (Conf. Rep.).

110 42 U.S.C. § 300aa-12(d)(3)(A)(ii). If a special master fails to enter judgment within the prescribed period, the claimant may withdraw the petition and file the action in state or federal court. *Id.* § 300aa-12(g).

111 *See* Engstrom, *supra* note 8, manuscript at 76.

112 *See* Detailed Information on the Vaccine Injury Compensation Program Assessment, ExpectMore.gov, http://georgewbush-whitehouse.archives.gov/omb/expectmore/detail/10003807.2005.html (reporting that, between FY 2001 and FY 2004, 86% of compensation within the Fund went directly to claimants "rather than attorneys or administrative entities").

113 Jeryl Bier, *House to Consider Tax on New Flu Vaccines*, Weekly Standard, June 18, 2013, available at http://www.weeklystandard.com/blogs/house-consider-tax-new-flu-vaccines_736725.html.

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At the same time, the VICP has, in other respects, failed. As in auto no-fault, the causes of that failure are bounteous and complicated, as I have discussed previously at great length.[114] Nevertheless, when one boils down why the VICP has fallen short of expectations, the problem of adversarialism looms large.

4.2 Adversarialism

Part of this is evident in the VICP's time-to-decision. As noted above, when Congress enacted the VICP in 1986, it baked many procedural shortcuts into the Program to facilitate the rapid resolution of claims—and even topped off its desire for speed with a hard 240-day deadline. These procedural innovations, contemporaneous commentators predicted, would "assure … just compensation, at low transaction costs for those who have sustained vaccine-related injuries,"[115] while guaranteeing that "[i]n no case should a petitioner have to wait more than a year to receive compensation."[116]

Yet, as the U.S. General Accounting Office (GAO) has bluntly explained: "While [the Program] was expected to provide compensation for vaccine-related injuries quickly and easily, these expectations have often not been met."[117] That study found that between 1988 and 1999, of 5,355 claims that had been filed, only 14% were decided within one year, 39% took between two and five years, and 18% dragged on for five years or more.[118] The following year, things got

114 When assessing why the VICP has stumbled, it is worth noting that the VICP has been buffeted by at least three external forces, which have contributed to the problems recounted herein. First, in 1995 and again in 1997, the Secretary of HHS modified—and limited—the Vaccine Injury Table, and in so doing, dramatically increased the proportion of off-Table claimants, who must prove actual cause by reference to traditional tort principles. Because these claims are exponentially harder to adjudicate than on-Table claims, the Secretary's Table amendments significantly complicated VICP processes. Second, in the Program's early years, it was hit with thousands of "retrospective" claims, seeking compensation for injuries sustained prior to the Act's 1988 effective date. Third, starting in 1998, the Program was again inundated, this time with some 5,500 claims alleging a link between vaccines and autism. Both the retrospective and autism claims created sizable backlogs, which consumed scarce resources and slowed adjudications. *See generally* Engstrom, *supra* note 8, manuscript at Parts IV & V.

115 Barbara J. Connolly, Note, *The Necessary Complement to Mandatory Immunizations: A National Vaccination Compensation Program*, 8 Cardozo L. Rev. 137, 155 (1986).

116 Mary Beth Neraas, Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 Wash. L. Rev. 149, 165 (1988).

117 U.S. Gen. Accounting Office, Vaccine Injury Compensation Program: Program Challenged to Settle Claims Quickly and Easily 19 (1999).

118 *Id.* at 8.

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temporarily worse. For 2,000, the average adjudication time was 2,437 days, 81 months, or six-and-a-half-years![119] And, though there has been some recent improvement, a 2014 GAO report found that the majority (51%) of claims filed between 1999 and 2014 required more than five years to resolve,[120] while another comprehensive study conducted by the Associated Press recently concluded that "[h]undreds" of cases have "surpassed the decade mark."[121]

Critically, it takes more time, on average, to process claims within the Program than it does to process claims, *through judgment*, within the traditional tort system: approximately 65 months within the VICP, as compared to 25.6 months for tort cases that terminate in a judgment or verdict.[122] VICP proceedings take longer than consumer class actions (which take approximately 32 months).[123] And, VICP petitions appear to take, on average, years longer to resolve than medical malpractice claims, which, in terms of injury severity and scientific complexity, probably offer the closest comparator.[124]

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119 Transcript of the Advisory Comm'n on Childhood Vaccines (ACCV) Meeting and Conference Call, Mar. 7–8, 2007, at 18 (statement of Mark Rogers, Deputy Director, Torts Branch, Civil Division, DOJ), available at http://www.hrsa.gov/vaccinecompensation/accvminutes3707.pdf.

120 U.S. Gen. Accounting Office, Vaccine Injury Compensation: Most Claims Took Multiple Years and Many Were Settled Through Negotiation 10 (2014) [hereinafter 2014 GAO Report]. In terms of improvement, since 2009, the average time-to-adjudication has been 587 days (about 1.6 years). It is too soon to draw firm conclusions about improved speed, however, as some post-2009 claims are still pending; gains may erode once those pending claims are resolved and factored in. *Id*. at 10–12.

121 Mitch Weiss et al., *AP Impact: "Vaccine Court" Keeps Claimants Waiting*, Associated Press, Nov. 17, 2014, http://bigstory.ap.org/article/de5b2e83c45a4b6f816c8bed47610f78/ap-impact-vaccine-court-keeps-claimants-waiting.

122 *Compare* 2014 GAO Report, *supra* note 120, at 9 ("VICP claims filed since fiscal year 1999 took an average of about 5 and a half years to adjudicate ...."), *with* Thomas H. Cohen & Steven K. Smith, Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 2001*, at 8 (2004) (reporting that the average tort case processing time from filing to verdict or judgment was 25.6 months).

123 Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 820 tbl.2 (2010) (reporting that, in 2006–2007, federal consumer class actions took an average of 963 days to reach settlement).

124 According to a recent study of closed medical malpractice claims, the average time from filing with the insurer to closure either with or without payment was roughly 20 months, with claims involving pediatricians (arguably, the *most* analogous to VICP claims) averaging 24 months. Seth A. Seabury et al., *On Average, Physicians Spend Nearly 11 Percent of Their 40-Year Careers with an Open, Unresolved Malpractice Claim*, 32 Health Aff. 111, 113, 116 (2013). Meanwhile, the Bureau of Justice Statistics reports that medical malpractice claims resolved by actual judgment or verdict take roughly 33.2 months, from the date of filing. Cohen & Smith, *supra* note 122, at 8.

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A study of combativeness reveals a similar (and, no doubt, closely related) story. By statute, special masters are "to provide for a less-adversarial, expeditious, and informal proceeding."[125] Soon after the VICP was created, however, Congress expressed regret that, notwithstanding this directive, "all participants ha[d], to some degree, maintained their traditional adversarial litigation postures," while the DOJ lawyers representing HHS had "mounted defenses incompatible with a nofault system of compensation."[126] In that 1989 report, Congress implored all VICP participants to "re-dedicat[e]" themselves "to the creation of an expeditious, less adversarial, and fair system."[127]

Notwithstanding this admonition, however, when the Federal Judicial Center conducted a survey of VICP special masters in the mid-1990s, their chief complaint was that the DOJ lawyers were "behaving like … adversar[ies]" and "over-litigating" various claims.[128] Congressional leaders, who have held numerous hearings to examine the VICP's operation, have concluded that the Program engenders "avoidable, protracted and adversarial litigation."[129] And a medical expert, who has long participated in the Program, has observed: "What should be a quiet, civil, deliberative discussion of facts and medicine too frequently degenerates into a contentious, vituperative, decibel-escalating exchange."[130]

Remarkably, parties sometimes maintain their antagonistic postures even after the vaccine-injured child has been found eligible for relief, and it is time to calculate his or her compensation. Of these determinations, one former special master has complained: "It's a game. I had people arguing over the cost of the thing you put in the bottom of the bathtub so people don't slip."[131] Similarly, the *Los Angeles Times* reported in 2004:

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125 42 U.S.C. § 300aa-12(d)(2)(A).

126 H.R. Rep. No. 101-247, at 510 (1989) (Conf. Rep.).

127 *Id.* at 509; *see id.* at 515 (reiterating Congress's "desire that the Court make vaccine proceedings as swift and uncomplicated as possible").

128 Johnson et al., *supra* note 99, at 44.

129 H.R. Rep. No. 106-977, at 2 (2000). *But see The National Vaccine Injury Program: Is It Working as Congress Intended? Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 69 (2001) (statement of Paul Clinton Harris, Sr., Deputy Assistant Attorney General, Civil Division, DOJ) ("I simply cannot agree with any suggestion or accusation that the program has become more litigious. It simply has not. Rather, I think it has become less so.").

130 *Compensating Vaccine Injuries: Are Reforms Needed? Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform*, 106th Cong. 63 (1999) (statement of Dr. Arnold Gale, Medical Expert, Stanford University); *see id.* at 63 ("Ad hominem attacks on physicians by all attorneys are common.").

131 Louise Palmer, *Government Can't Meet Vaccine Injury Claims*, N.Y. Times, Apr. 25, 1993, at 6, 7 (quoting Denis Hauptly, Special Master, VICP).

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> Even when families do win compensation, officials have sometimes battled them over just a few dollars. In one case, government representatives argued that $150 a year was too much to spend on wheelchair maintenance. They have haggled over how much to allow for replacement shoes and braces for people with polio. Another time, they recommended rubber sheets for the bed of an incontinent person because they were cheaper, although less comfortable, than disposables costing $135 a year.[132]

More recently, disputes have arisen concerning: whether a fourteen-year-old girl with profound mental retardation and severe spastic quadriplegia is or is not entitled to a $40 pair of high-topped tennis shoes; whether a child, injured when ten years old by the Hepatitis B vaccination, is entitled to have the help of an assistant for either five, or alternatively eight, hours per day; and whether the services of a licensed practical nurse can be obtained for $50, or alternatively $60, per hour.[133]

Further, though it is impossible to say whether this is the cause or the consequence, the VICP has also exhibited an unexpectedly heavy reliance on lawyers. Early on, some anticipated that VICP procedures would be straightforward enough to render counsel superfluous. As Representative Patsy Mink explained in a 1999 hearing: "[W]hen we established this program, we envisioned a system in which citizens would be able to file claims without assistance from attorneys."[134] Contrary to this expectation, however, over time, it has become clear that claimants need counsel to successfully navigate the Program. Illustrating this reality, in 1992, HHS's Inspector General reported that 20% of all claimants (who had filed petitions as of August 1991) proceeded without the assistance of counsel. The same report found that "all of [*pro se* claimants'] cases have been dismissed for lack of

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132 Myron Levin, *Vaccine Injury Claims Face Grueling Fight: Victims Increasingly View U.S. Compensation Program as Adversarial and Tightfisted*, L.A. Times, Nov. 29, 2004, at A1.

133 *See* Wilkerson v. Sec'y of Health & Human Servs., 1998 WL 106132, at *12 (Fed. Cl. Feb. 24, 1998) (concerning the high-tops, which would need to be purchased annually); I.D. v. Sec'y of Health & Human Servs., 2013 WL 2448125, at *7 (Fed. Cl. Apr. 19, 2013) (concerning the assistant); Ku v. Sec'y of Health & Human Servs., 2012 WL 6879061, at *8–9 (Fed. Cl. Feb. 9, 2012) (involving the nurse).

134 *Compensating Vaccine Injuries: Are Reforms Needed? Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform*, 106th Cong. 13 (1999) (statement of Rep. Patsy T. Mink); *see also* Telephone Interview with Gary J. Golkiewicz, VICP Chief Special Master from 1988 to 2010 (Sept. 23, 2014) (noting that, when the Program was created, "it was expected that pro se's could handle their cases"); Transcript of the Meeting of the ACCV, Dec. 5, 2001, at 43–44 (statement of Timothy Westmoreland, House Comm. on Gov't Reform) (on file with author) (suggesting that, at enactment, congressional leaders anticipated that at least on-Table claimants would be able to navigate the Program without attorney assistance).

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evidence."[135] Indeed, it is not just that counsel is needed. It is that massive attorney inputs may be required: These days, according to the Program's longtime Chief Special Master, some cases pit experts against experts, require voluminous, technical briefing, and generate legal fees on the claimants' side of $700,000 to $800,000, calculated on an hourly basis.[136]

As a result, Jeffrey Schwartz, who in 1986 led the parents' group instrumental in the Vaccine Act's passage, has concluded that the VICP in operation bears little resemblance to the system he and other reformers endeavored to create. "I don't think there's anybody anymore who believes that the vaccine compensation system reliably dispenses 'simple justice' for children," he says. "There's nothing simple about the system. And there's not much justice that results from it."[137] Adversarialism, it appears, has taken its toll.

5 Florida and Virginia birth injury funds

The Florida Birth-Related Neurological Injury Compensation Association and the Virginia Birth-Related Neurological Injury Compensation Program (NICA and BIP, respectively) offer two further exemplars of reforms that have, to some extent, become stymied by problems of both exit and adversarialism.[138]

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135 Dep't of Health & Human Servs., Office of Inspector General, The National Vaccine Injury Compensation Program: A Program Overview 16, App. B-1 (1992); *accord* Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. of Health Pol., Pol'y & L. 59, 76 (1999) ("The hope that applicants in a no-fault program would not require specialized legal expertise has not been fulfilled ....").

136 Golkiewicz Interview, *supra* note 134.

137 Telephone Interview with Jeffrey Schwartz, Former President of Dissatisfied Parents Together (Aug. 25, 2014); *see also* Golkiewicz Interview, *supra* note 134 ("There was a desire for a simple system, but the Program has never achieved that in reality."); Brief for National Vaccine Information Center et al. as Amici Curiae Supporting Petitioners, Bruesewitz v. Wyeth, 562 U.S. 223 (2011) (No. 09-152), 2010 WL 2256131, at *15 ("By Congress' measure, [the] vaccine court has failed."); Brandon L. Boxler, *Fixing the Vaccine Act's Structural Moral Hazard*, 12 Pepp. Disp. Resol. L.J. 1, 2 (2013) (observing that the VICP is "mimicking the adversarial nature of traditional tort litigation").

138 Unsurprisingly, Jeffrey O'Connell was involved in BIP's creation, though, consistent with his later leanings, he advocated an early-offer approach. Jeffrey O'Connell, *Pragmatic Constraints on Market Approaches: A Response to Professor Epstein*, 74 Va. L. Rev. 1475, 1475, 1477 (1988). Of course, this proposal did not win the day. Still, O'Connell supported the Virginia legislation, pragmatically reasoning that it "was surely more preferable than the certainly bad present tort system." *Id.* at 1482.

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5.1 Background

In the mid-1980s, confronting an uptick in the number of birth injury claims, escalating damage awards, spiraling malpractice insurance premiums, and a sharp reduction in insurance supply, both Virginia and Florida created no-fault funds to compensate infants who sustained severe and lasting neurological impairments in the course of labor or delivery.[139] Enacted in 1987 in Virginia and in Florida the following year, these so-called "bad baby bills" represented the first—and still only—legislation of its kind.[140] The ultimate goal of both plans was to divert birth-injured infants' claims away from the tort system into a standalone, simplified no-fault mechanism. In the process, policymakers sought to provide infants certain (though partial) compensation, while shielding physicians and hospitals from liability.

Florida's NICA and Virginia's BIP share a number of key design features. In terms of coverage, both NICA and BIP capture only a narrowly delineated class of infants—those catastrophically and permanently injured during labor or delivery.[141] Meanwhile, unlike the three no-fault mechanisms above, participation in NICA and BIP is optional rather than compulsory, at least ex ante. Healthcare providers signal their intent to participate via payment of $5,000 per year into the no-fault fund. (These payments are also the plans' primary source of funding.[142]) Then, on the patient side, the decision to participate is

139 For background on the Act's passage in Virginia, see Peter H. White, Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487, 1487–89 (1988); JOINT LEGISLATIVE AUDIT & REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, REVIEW OF THE VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM 1–7 (2003) [hereinafter VIRGINIA AUDIT]. For similar information concerning Florida, see FLA. STAT. § 766.301; Thomas R. Tedcastle & Marvin A. Dewar, *Medical Malpractice: A New Treatment for an Old Illness*, 16 FL. ST. U. L. REV. 535, 582–90 (1988). Though the Virginia legislation came first, the Florida program now eclipses the Virginia program in size, scope, and significance. David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 AM. J.L. & MED. 225, 240 (2001).

140 The term "bad baby bills" was apparently coined when one insurer was asked what it would take to get his employer to return to the malpractice insurance market in Virginia. He replied: "Take the 'bad babies' out of the tort system ...." Mehlman, *supra* note 11, at 129 n.2.

141 FLA. STAT. § 766.302(2) (requiring that the infant be "permanently and substantially mentally and physically impaired"); VA. CODE ANN. § 38.2-5001 (requiring that the infant be "permanently in need of assistance in all activities of daily living").

142 FLA. STAT. § 766.314(1), (4)(c); VA. CODE ANN. § 38.2-5020(A). Participating hospitals also contribute, and both states also compel non-participating providers to chip in, in modest amounts. FLA. STAT. § 766.314(4)(a)-(b); VA. CODE ANN. § 38.2-5020(C)-(D). For more on funding, see Gil Siegal et al., *Adjudicating Severe Birth Injury Claims in Florida and Virginia: The*

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made via physician selection: If a patient, after receiving notice of the healthcare provider's participation, seeks care from a participating provider, she and her infant have relinquished their rights under the tort liability system, except in cases of serious misconduct.[143]

Moreover, compensation procedures within NICA and BIP are, at least on paper, straightforward. In both, in order to recover, all the claimant must show is that the injury (1) is sufficiently serious, and (2) was sustained in the course of labor and delivery, or in the immediate post-delivery period. He or she need not establish any error or fault on the part of any physician, hospital, or other medical personnel. So, too, in both (as in the VICP), those two questions are answered by specialized adjudicators. In Florida, decisions are made by one specialized Administrative Law Judge (ALJ), who is an expert in and is devoted to NICA cases.[144] Piggybacking on Virginia's existing workers' compensation program, claims within the Commonwealth are adjudicated by the state's Workers' Compensation Commission.[145]

Additional procedures are also intentionally circumscribed: Discovery is limited.[146] Evidentiary rules are relaxed.[147] Physicians do not formally participate in—and have no financial responsibility for—the claim's resolution, eliminating, at least in theory, the involvement of a defendant with a dog in the fight.[148] Adjudicators are guided by neutral experts' evaluations.[149] And, compensation is largely standardized. In Florida, prevailing parents of the birth-injured infant

Experience of a Landmark Experiment in Personal Injury Compensation, 34 Am. J.L. & Med. 489, 497–99 (2008).

143 For the notice requirement, see Fla. Stat. § 766.316; Va. Code Ann. § 38.2-5004.1(A). For the carve-out for serious misconduct, see *infra* note 158 and accompanying text.

144 In Florida, the ALJ works within the Division of Administrative Hearings. Fla. Stat. § 766.309(1)(a).

145 Va. Code Ann. § 38.2-5003.

146 Ann LaCroix Jones, *The Virginia Birth-Related Neurological Injury Compensation Program: A Lifetime of Care?*, 20 J. Va. Trial Lawyers Ass'n, no. 1, 2008, at 26, 30–31; *cf.* Randall R. Bovbjerg et al., *Administrative Performance of "No-Fault" Compensation for Medical Injury*, 60 Law & Contemp. Probs. 71, 83 (1997).

147 Jones, *supra* note 146, at 31.

148 David G. Duff, *Compensation for Neurologically Impaired Infants: Medical No-Fault in Virginia*, 27 Harv. J. on Legis. 391, 418–19 (1990); *cf.* Virginia Audit, *supra* note 139, at 78 (stating that, in practice, participating physicians are permitted to "be a party to the hearing"). In addition, payments from NICA and BIP are not recorded in the National Practitioner Data Bank, a database that monitors medical malpractice judgments and settlements. Non-Participating OBGYN's, http://www.nica.com/nonprt_obgyns/index.html (last visited Dec. 4, 2014); Virginia Audit, *supra* note 139, at 33.

149 *See* Siegal et al., *supra* note 142, at 521–25; Duff, *supra* note 148, at 420–21.

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are entitled to a modest payment ostensibly for noneconomic loss, up to a $100,000 cap, while the infant is entitled to compensation for necessary and reasonable medical and custodial care (but not lost wages).[150] In Virginia, meanwhile, there is typically no compensation for parents' noneconomic loss, though prevailing petitioners *are* entitled to lost wages (scheduled at 50% of average wages within the state), alongside payments for medical and custodial care.[151]

So, NICA and BIP have been in effect for nearly three decades. How have they fared? Echoing assessments of previous mechanisms, the picture is mixed. By many measures, the plans have succeeded. Soon after NICA and BIP were enacted, shortages of medical malpractice insurance eased, while there is some evidence that malpractice premiums, which had been ascending, started a decline.[152] On the provider side, there has been ample demand, in that the majority of qualifying physicians have elected to participate.[153] Transaction costs are substantially lower than the tort law alternative; one study, for example, has estimated "that NICA's administrative costs account for only 10.3% of total NICA spending."[154] And, there is evidence that both NICA and BIP cut claims' time-to-resolution substantially.[155] Still, NICA and BIP are susceptible to criticism, the thrust of which should by now be familiar.[156]

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150 Fla. Stat. § 766.31(1)(a)-(b).

151 Va. Code Ann. § 38.2-5009(A)(1)-(2). The word "typically" is included above because if an infant dies within 180 days of birth, the infant's family may be awarded up to $100,000, presumably for their anguish. *Id.* § 38.2-5009.1. In addition, both plans offset all collateral sources and offer payments as expenses are incurred. *See* Bovbjerg et al., *supra* note 146, at 81.

152 Bovbjerg & Sloan, *supra* note 6, at 99–100 (suggesting that NICA and BIP reduced obstetrical insurance premiums); Virginia Audit, *supra* note 139, at iv (same for Virginia); *but cf.* Office of Program Policy Analysis & Gov't Accountability, Special Report, *NICA Eligibility Requirements Could Be Expanded, But the Costs Would Increase Significantly* (2004), at 6 (reporting that 47% of surveyed "stakeholders asserted that NICA has not fulfilled its statutory goal of lowering malpractice premiums for physicians practicing obstetrics"); David M. Studdert et al., *The Jury Is Still In: Florida's Birth-Related Neurological Injury Compensation Plan after a Decade*, 25 J. Health Pol. Pol'y & L. 499, 500 (2000) (recognizing the difficulty in tracing rate drops to the plans' creation).

153 *See* Siegal et al., *supra* note 142, at 510; *see also* Virginia Audit, *supra* note 139, at 32.

154 Bovbjerg et al., *supra* note 146, at 93. For tort costs, see *supra* note 31.

155 Bovbjerg et al., *supra* note 146, at 92, tbl.4; Virginia Audit, *supra* note 139, at 28, 90–91.

156 Both NICA and BIP are, of course, susceptible to criticism on other grounds too. For example, back when BIP was enacted, many assumed it would boost physician supply in rural areas. It hasn't. *See* Virginia Audit, *supra* note 139, at 25. BIP has experienced financial shortfalls and threats to its solvency. *Id.* at v–vi. And finally, "many fewer" children have been served by BIP than legislators anticipated. In fact, only 137 infants—total—were adjudged eligible for compensation within BIP from 1988 through 2008. *Compare id.* at 27, *with id.* at 10; Jones, *supra* note 146, at 26.

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5.2 Exit

One problem to plague NICA and BIP has been the problem of exit.[157] In enacting NICA and BIP, Florida and Virginia sought to divert all, or nearly all, qualifying claims away from common law courts by making the plans the "exclusive remedy" for eligible injuries involving participating providers, at least in the absence of "clear and convincing" evidence that the infant's injuries were intentionally, maliciously, or willfully inflicted.[158] Notwithstanding this exclusive remedy provision, however, especially in Florida (which is the far bigger and better studied program), many claimants have managed to claw their way back into the tort system.[159]

The best study of exit within the Florida system was undertaken in 2000, by Professor David Studdert and coauthors. In that study, the researchers examined the annual incidence of serious birth injury lawsuits in Florida courts in the years immediately before and after NICA took effect. Comparing lawsuit filing rates in 1984–1998 (pre-NICA), as against 1989–1993 (post-NICA), remarkably, the researchers found no statistically significant change.[160] "Implementation of the no-fault plan certainly did not extinguish high-cost 'bad baby' cases from the tort system," they concluded. "[T]hese actions have persisted, occurring almost as frequently in the years after the Plan's introduction as before."[161]

Claimants, motivated by the allure of higher damages, and plaintiffs' attorneys, motivated by the possibility of far higher attorneys' fees, have circumvented

157 O'Connell actually warned about this problem prior to BIP's passage, cautioning that claimants might "try[] to come within the definition if tort claims were weak, or fall outside the definition if tort claims were strong." O'Connell, *supra* note 138, at 1479.

158 Fla. Stat. § 766.303(2); Va. Code Ann. § 38.2-5002(C).

159 Virginia has not been as substantially afflicted, perhaps because it subjects medical malpractice awards to strict caps, which makes the tort option comparatively less attractive. *See* Va. Code Ann. § 8.01-581.15. Even so, it has not been immune to the above dynamics. *See* Frank A. Sloan et al., *The Road from Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, 60 Law & Contemp. Probs. 35, 48 (1997) (finding that 14% of the Virginia families studied initially filed a tort claim); Cent. Va. Obstetrics & Gynecology Assocs. P.C. v. Whitfield, 590 S.E.2d 631, 635 (Va. Ct. App. 2004) ("[I]n cases where litigation may be more promising, a claimant may seek to *defeat* the application of the Act to his claim.").

160 Studdert et al., *supra* note 152, at 508–09. To be sure, these statistics should be viewed with caution as, inter alia: (1) the researchers were unable to separate claims against participating as opposed to nonparticipating providers; and (2) the data could not account for fluctuations in the underlying rates of obstetrical injury. *Id.* at 509.

161 *Id.* at 523.

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NICA via two paths.[162] First, claimants have exploited NICA's narrow statutory definition. NICA's preemption provision only kicks in, that is, if the infant has actually sustained a *qualifying* "birth-related neurological injury." If the infant hasn't (because, for example, the impairment is insufficiently serious or was inflicted too long after delivery), the infant remains free to seek compensation in tort. Much thus turns on whether the claim is—*or would be*—covered by NICA. This, in turn, raises the "who decides" question: Must NICA's ALJ, in the first instance, decide whether the infant is entitled to compensation through NICA? Or can a court make that determination? In Florida, at claimants' urging, courts have held that *they* are empowered to rule on these entitlement decisions, and when exercising that authority, have frequently ruled that infants' claims fall outside NICA's statutory definition.[163] Unhappy with this development, in 1998, the Florida legislature amended NICA to re-assert the ALJ's authority.[164] But, though some signs are positive, it is not entirely clear whether this door to the tort system is shut, or remains ajar.[165]

The matter of "notice" has presented a second exit opportunity. Here, claimants have capitalized on a series of court rulings holding that, in order to be subject to NICA's exclusive remedy provision, mothers must be furnished adequate notice of the physician's NICA participation prior to the infant's birth—and further clarifying that, when it comes to what's "adequate," the bar is quite high.[166] In response to these rulings, the Florida legislature has, once again,

162 Within NICA and BIP, attorneys' fees—available only to prevailing petitioners—are calculated on an hourly basis and subject to sometimes searching administrative review. FLA. STAT. § 766.31(1)(c); VA. CODE ANN. § 38.2-5009(A)(3); VIRGINIA AUDIT, *supra* note 139, at 6. *See, e.g.*, Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So. 2d 1103 (Fla. Dist. Ct. App. 1994).

163 *See* Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974 (Fla. 1996); *see also* Sandy Martin, *NICA—Florida Birth-Related Neurological Injury Compensation Act: Four Reasons why This Malpractice Reform Must Be Eliminated*, 26 NOVA L. REV. 609, 638 (2002) (observing that, after *McKaughan*, "NICA was squarely open for the courts to second-guess the administrative law judge's compensability decisions, making things somewhat of a free-for-all").

164 Medical Malpractice—Torts Amendments, 1998 Fla. Sess. Law. Serv. ch. 98–113 (clarifying that ALJs have "exclusive jurisdiction to determine whether a claim filed under this act is compensable").

165 *Compare* Studdert et al., *supra* note 152, at 518 (stating that, as of May 2000, "[n]o obvious diversion of claims from the courts has occurred"), *with* HOUSE OF REPRESENTATIVES COUNCIL FOR HEALTHY COMMUNITIES COMM. ON HEALTH PROMOTION, A REVIEW OF THE LEGISLATIVE HISTORY AND FINANCIAL STATUS OF THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION (NICA) 6 (2001) (reporting that "since the 1998 legislation was passed [NICA] claims have increased 48 percent").

166 *E.g.*, Galen of Fla., Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997). Evaluating these decisions, David Studdert and Troyen Brennan have charged that higher courts have given trial courts

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stepped in to try to shore up NICA's role.[167] But even so, notice questions continue to plague the system.[168]

Furthermore, as in other contexts, the problem of exit is no small thing. When tort liability remains an option, that possibility frustrates horizontal equity, as some claimants will receive full recovery in tort, while others similarly situated will receive only partial payments in the no-fault alternative. It creates a lack of certainty and predictability, as physicians and hospitals cannot know, ex ante, in what venue—and by what rules—they'll be judged. The *possibility* of exit spurs time-consuming, costly, and potentially duplicative litigation, as parties fight to stay in or, as the case may be, get in, the court system.[169] The fact that cases *may* end up in court blunts advantages that are conventionally thought to accompany no-fault legislation, stoking distrust and animosity between doctor and patient, encouraging defensive medicine, and chilling physicians' and nurses' incentives to reveal mistakes.[170] The constant specter of tort liability compels physicians to pay twice—to retain medical malpractice liability insurance, while also paying annual assessments into state no-fault funds.[171] And finally, all the above squanders considerable societal and party resources, as lawyers continue to work, courts continue to be called in to referee disputes, and the slow, creaky gears of adversarial justice continue to turn.

5.3 Adversarialism

As is clear from the above, exit has marred especially NICA's success. Adversarialism has taken a similar toll. As NICA and BIP were created, it was widely assumed that they would offer simpler and more certain compensation to

"essentially … a right of first refusal over claims ostensibly covered by NICA." Studdert & Brennan, *supra* note 139, at 240.

167 *See* Medical Malpractice—Torts Amendments, 1998 Fla. Sess. Law. Serv. ch. 98–113 (clarifying that "[s]ignature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met").

168 *See, e.g.*, Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992 (Fla. 2010) (holding that a hospital's failure to provide notice defeated NICA's exclusivity).

169 *See* Martin, *supra* note 163, at 639–40; Bovbjerg et al., *supra* note 146, at 107.

170 Studdert et al., *supra* note 152, at 523 ("NICA's experience suggests that antagonisms may persist in a replacement system that is unable to foreclose tort options authoritatively.").

171 *Id.* at 522 n.25 (raising this concern).

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qualifying claimants "without adversary litigation."[172] Said the Virginia General Assembly's Joint Legislative Audit and Review Commission:

> The expectation was that the family would not need to hire a lawyer to gain entry into the program, as the application process would be straightforward and objective decisions would be made based solely on whether the child met the definition of birth-related neurological injury.[173]

Those predictions, it turns out, were unduly optimistic.

The problem, at the bottom, is that causal determinations have been far more vexing than many anticipated because, in many instances, there is simply no foolproof way to know whether a given infant's neurological impairment arose naturally (in which case the infant would not be entitled to compensation) or arose from labor and delivery (in which case compensation should be forthcoming). In particular, most neurological birth injury claims involve cerebral palsy.[174] Most cases of cerebral palsy (perhaps as many as 90%) are attributable to genetic or other conditions; relatively few are iatrogenic. But, it is near impossible to know into which box a particular infant's injury falls.[175] As a consequence, NICA and BIP operate in a sea of scientific indeterminacy. This scientific indeterminacy has bred legal uncertainty. And that legal uncertainty has—just as it has for occupational disease claims within workers' compensation and for many vaccine injury claims within the VICP—bred adversarialism.

This adversarialism manifests itself in small ways, such as the difficulty some parents face while seeking to obtain even basic medical records from

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172 Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So. 2d 1103, 1106–07, 1109 (Fla. Dist. Ct. App. 1994).

173 Virginia Audit, *supra* note 139, at 6; *see* White, *supra* note 139, at 1500, 1515. Breaking with conventional wisdom, some commentators expressed doubts early on. *See, e.g.*, James A. Henderson, Jr., *The Virginia Birth-Related Injury Compensation Act: Limited No-Fault Statutes as Solutions to the "Medical Malpractice Crisis," in* 2 Medical Professional Liability and the Delivery of Obstetrical Care 194, 210 (Victoria P. Rostow & Roger J. Bulger, eds. 1989) (predicting that BIP's reliance on causation "may present intractable problems of proof"); Richard A. Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 Va. L. Rev. 1451, 1469 (1988) (recognizing the impossibility of distinguishing "serious injuries caused at or before birth from those caused by birth defects").

174 Frank A. Sloan et al., *No-Fault System of Compensation for Obstetric Injury: Winners and Losers*, 91 Obstetrics & Gynecology 437, 439 (1998) (reporting that the vast majority of successful NICA claimants have cerebral palsy).

175 Siegal et al., *supra* note 142, at 502 (underscoring the difficulty in "[d]etermining which ten to twenty percent of [cerebral palsy] cases are birth-related").

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physicians and hospitals.[176] It also, and more crucially, manifests itself in the need for high-quality counsel. At the time of enactment, recall, many assumed that claimants would be able to seek compensation for birth-related injury "without the hassle and expense of obtaining legal representation."[177] In reality, however, claimants have reached the opposite conclusion. The majority retain counsel.[178] And, they are wise to do so. Though this is an area where it is notoriously difficult to untangle correlation from causation, evidence suggests that claimants who hire counsel enjoy significantly higher odds of success.[179]

Further, as is true elsewhere, it appears that lawyer utilization has gone hand-in-hand with an uptick in other indicia of adversarialism. Specifically, a 2008 study reported on interviews with those who administer NICA and BIP. Researchers discovered that "Virginia informants unanimously perceived that attorney involvement has caused the claim process there to become much more adversarial, leading to higher legal expenses, longer waits until disposition, and consequently, delays in getting coverage to eligible families."[180] Worse, informants suggested that, as processes became more dependent on high-priced counsel, injustices resulted, as "those claimants who can afford expensive representation and expert testimony have a higher chance of prevailing than those who cannot."[181] Indeed, the researchers uncovered a particularly damning detail: Though BIP reimburses claimants' "reasonable" legal expenses, cognizant that higher-priced (and thus, presumably, higher-quality) counsel leads to better outcomes, some Virginia claimants have started to augment fund-provided attorneys' fees with personal monies, in an effort to maximize their chances of success.[182]

In sum, it is almost certainly true that, as compared to the tort system, NICA and BIP supply compensation at faster speed, at lower cost, and with fewer procedural entanglements. But, it is also true that, when it comes to simplifying

176 Virginia Audit, *supra* note 139, at 87–88 (describing the obstacles parents sometimes face while seeking to obtain basic information concerning their infant's birth).

177 Siegal et al., *supra* note 142, at 528–29; *see supra* note 173 and accompanying text.

178 Sloan et al., *supra* note 159, at 54–55 (reporting that 93% of surveyed NICA and BIP claimants who filed only a no-fault claim retained counsel); Virginia Audit, *supra* note 139, at 88 (reporting that, as of 2002, 55% of BIP claimants retained counsel).

179 Virginia Audit, *supra* note 139, at 88 (reporting that 74% of represented BIP claimants were deemed eligible for compensation, as compared to 49% of unrepresented claimants). As suggested in the text, these numbers should be interpreted with caution, as it may be that those with stronger claims are more likely to find attorneys willing to accept their claim.

180 Siegal et al., *supra* note 142, at 525.

181 *Id.*; *see also id.* (noting that "informants acknowledged that … the expensive lawyers had a higher success rate in getting infants accepted into the program").

182 *Id.* & n.168.

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adjudications, just like workers' compensation and the VICP, the Florida and Virginia birth-related neurological injury funds have fallen markedly short of reformers' expectations.

6 Conclusion

This essay has canvassed four of the most ambitious no-fault mechanisms within the United States to show that these mechanisms have all, in certain respects, failed. Further, it has sought to show that there are two common threads linking the mechanisms' afflictions, which I dub exit and adversarialism. Seeking full compensation available only within the traditional tort system, scores of claimants have fled—or sought to flee—workers' compensation, auto no-fault schemes, and the Florida birth injury fund, thus compromising those regimes' operation and integrity. Meanwhile, procedures within workers' compensation, the VICP, and both Florida and Virginia's birth injury funds have become remarkably adversarial—mimicking, to a surprising extent, the procedures of their tort law ancestors.

This insight, I suggest, is critically important. Most notably and concretely, it ought to temper our expectations as we debate whether to deploy no-fault reforms in future years. In the past, when forecasting a proposed scheme's costs and benefits, it might have been reasonable to assume that boundaries demarcating where tort ends and no-fault begins could be easily drawn and efficiently policed—and also that adversarial processes would invariably and radically subside, as cases were cordoned off and relocated to freestanding administrative tribunals.[183] This essay challenges those assumptions. Second, and more broadly, this essay seeks to follow (however modestly) in Jeffrey O'Connell's proud footsteps. Professor O'Connell has taught us patiently, persistently, and by vivid example, that only by endeavoring really to understand a regime's frailties can we begin the arduous work of effecting its repair.[184] Following in O'Connell's legacy, I suggest, only by truly understanding what ails our existing systems of no-fault compensation—and learning the sometimes bitter lessons

183 *See supra* notes 18, 26, 89, 134, 173, 177 (advocating changes to the tort system, predicated, in part, on achieving these administrative advantages).

184 After all, *Basic Protection for the Traffic Victim* begins not with a description of auto no-fault, but rather with an incisive summary of what ails the tort system. Keeton & O'Connell, *supra* note 1, at 1–5. So, too, in later work, O'Connell offered imaginative proposals to shore up workers' compensation's exclusivity, only after studying the system in great detail. *See supra* note 41.

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that come from those experiences—can we *possibly* begin the difficult work of designing better, more equitable, and more durable reforms.

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