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A POLITICAL PERSPECTIVE OF TORT LAW

*by Robert H. Sulnick**

With all of the force of an idea whose time has come, the concept of no-fault insurance has confronted the legal community. Articles appear suggesting that the law of torts is incapable of responding to contemporary society's accident problem and should therefore be replaced with no-fault, pay off mechanisms.[1] Law schools facing the advent of no-fault legislation are discussing cutting the hours allotted to the first-year torts class.[2] Perhaps most revealing, many members of the plaintiff's bar are seeking to diversify their practices.[3]

Those advocating no-fault legislation conceptualize the purpose of the law of torts as a crude attempt to allocate losses.[4] A typical ex-

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1. *See, e.g.*, Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 716-21 (1965); Farris, *Possible Reforms in Civil Justice Procedure*, 3 CAN. B.J. 126, 133-34 (1960); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1478-485 (1966); James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 424 (1959); Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 134, 136-38 (1954); O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299, 311-13 (1963). The entire literature discussing no-fault proposals and the tort law relates to one tort—negligence. Thus, references to the "fault system" do not encompass the entire body of tort law, they encompass only the tort of negligence. Indeed, the no-fault tort discussion is relevant to only one facet of tort litigation—automobile accidents.

2. *See* York, *The Law School Curriculum Twenty Years Hence*, 15 J. LEGAL ED. 160 (1962), in which the reduced unit credit for the required torts class is advocated.

3. *See, e.g.*, Auerbach, *The Trial Bar: Secret Weapon for Highway Safety*, TRIAL, Dec./Jan., 1968-1969, at 58; Haring, *The Profession after No Fault: What Grist for the Mill?*, 44 N.Y. ST. B.J. 145 (1972). *See also* M. MAYER, THE LAWYERS 269-71 (1966); Comment, *On Stage Automobile Insurance*, TRIAL, Feb./Mar., 1968, at 26; *A Timid Step Toward Reform*, NEWSWEEK, Mar. 29, 1970, at 82-83.

4. The two principal sources responsible for the creation of this perspective are: G. CALABRESI, THE COSTS OF ACCIDENTS (1970) [hereinafter cited as CALABRESI]; R. KEETON & J. O'CONNELL, BASIS PROTECTION FOR THE TRAFFIC VICTIM (1965) [hereinafter cited as KEETON and O'CONNELL]. *See also* J. FLEMING, THE LAW OF TORTS 9-14 (3d ed. 1965); Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 LAW & CONTEMP. PROB. 429 (1968); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Ehrenzweig, *Negligence without Fault*, 54 CALIF. L. REV. 1422 (1966); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

pression of this view was enunciated by John G. Fleming:

> The toll on life, limb, and property exacted by today's industrial operations . . . has reached proportions so staggering that the economic cost of accidents represents a constant . . . drain on the community's human and material resources . . . . The principal, nay paramount, task of the law of torts is to play an important regulatory role in the adjustment of these losses and the eventual allocation of their cost.[5]

Those advocating no-fault often set up the following hypothetical example of Peter and Dover. Peter is driving south on a major boulevard. He has both hands on the wheel, and he is watching the road and observing the speed limit. Dover is driving north on the same boulevard. He too has both hands on the wheel and is watching the road and observing the speed limit. But as the cars pass, Dover's car swerves and crashes into Peter's vehicle. As a result, Peter incurs property damage of $2,500 to his car and $3,000 worth of personal injuries. Dover's car sustains $1,500 damage, and Dover himself sustains injuries of $2,500.

Having established a factual situation, the proponents of no-fault proceed to assault the present fault system. They argue that the system makes little economic sense by pointing out that the present system places the loss on one or two persons (Peter and/or Dover), or their respective insurance companies;[6] and by emphasizing the built-in potential for a long delay between injury and compensation, they correctly urge that such a delay is both economically inefficient and inhumane.[7] Additionally, they point out that the system is administered at great public expense,[8] while failing either to spread the losses among the masses (reducing the cost to very little per individual) or to distribute losses on a progressive scale (insuring that those who have more pay more).[9] Further, they contend, the system makes no human sense.[10] The courtroom and the lawyer are placed between the plaintiff and the money needed to pay for the cost of the accident.[11] An individual is

5. J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 1 (1967).

6. W. MEYER, DOLLARS, DELAY AND THE AUTOMOBILE VICTIM 79-131 (1968) [hereinafter cited as MEYER].

7. *Id.*

8. *Id.* at 3-26. *See also* KEETON & O'CONNELL, *supra* note 4, at 1-5.

9. The various methods of loss spreading are analyzed in CALABRESI, *supra* note 4, at 46-50. For a critique of a socialized system of loss spreading, see Note, *Compensation for Personal Injury in New Zealand*, 18 INT'L COMP. L.Q. 196 (1969).

10. *See* W. BLUM & H. KALVEN, PUBLIC PERSPECTIVES ON A PRIVATE LAW PROBLEM 55-58 (1965).

11. *See* notes 4-10 *supra* and accompanying text.

trapped between the long delay of the courtroom[12] and the tender mercies of the insurance adjuster.[13] This is particularly true of the poor,[14] for whom the world of legal procedure and judicial ritual is most foreign.[15]

On the other hand, there stands the adherents to a school of thought which points to the moral concept of fault as the basis of the law of negligence.[16] The history of the fault concept is familiar. Its heyday was in the nineteenth century when it (through the tort of negligence) was used to justify the denial of recovery to workers in developing industries, such as the railroad industry. The defenses to negligence—assumption of the risk, contributory negligence, the fellow servant rule —were effectively employed to defeat recovery.[17] The maimed and the disabled frequently went uncompensated because of their own fault or the fault of a fellow worker. Thus the fault concept insured that the law would serve as a protector of the industrial revolution.

Perhaps this use of the fault concept can be historically justified.[18] Perhaps the untrampled development of the modern industrial state was more important than concern for its victims. Certainly accidents were bound to occur, and developing industries were inevitably lax in the application of safety standards scarcely yet developed. Any need to explain away or justify the existence of a host of uncompensated workers and consumers could be achieved with the quasi-religious concept of fault. Much of the durability of the fault concept is clearly related to its religious origin in the Judeo-Christian value system which has historically dominated Anglo-American thought. This can be seen

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12. The leading work on the courtroom delay is H. ZEISEL, H. KALVEN, AND B. BUCHOLTZ, DELAY IN THE COURT (1959). *See also* Kalven, *The Bar, the Court, and the Delay*, 328 ANNALS OF CONG. 37 (1960); Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959).

13. MEYER, *supra* note 6, at 42-43.

14. *E.g.*, Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370 (1966). *See* D. CAPLOVITZ, THE POOR PAY MORE 170-78 (1967); J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 63-70 (1970).

15. *See* note 4 *supra*; Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961).

16. A typical example of the moral fault argument is: Mancuso, *Fault—A Basic Requirement of Sound Public Policy*, 38 INS. COUNSEL J. 397 (1971).

17. J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 138-41, 145-47 (1967); F. HARPER & F. JAMES, THE LAW OF TORTS 1191-92, 1199-1200 (1956); W. PROSSER, LAW OF TORTS 450, 550-54 (3d ed. 1964).

18. See note 17 *supra*.

19. *See* A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 236-37 (1966).

20. *See* K. ERIKSON, WAYWARD PURITANS 47-64 (1966).

with but a glance at the historical thought of the English speaking peoples,[19] with influences such as Puritanism[20] and, indeed, with the very concept of a righteous God rewarding good works and punishing every fault.[21] Thus, the concept's success in justifying workers' and consumers' injuries is quite apparent when one considers its place in the religious underpinnings of American society.

As I pointed out above, the advocates of no-fault schemes criticize the current fault based system as both inhumane and inefficient.[22] I would join with those who could also criticize it as based on the untenable concept of free will. The religious foundation of the fault system assumes that individuals have a free will which they are capable of exercising responsibly. While this assumption can be neither proven nor rebutted, I would argue that mechanization and institutionalization have rendered the whole concept of fault primitive. Statistically, one out of every twenty motorists will be involved in an automobile accident.[23] Consumers, motivated by advertising rather than by knowledge of quality or design, buy products which appeal to their psychological needs.[24] In short, individuals have little chance to exercise their "free will."

The proponents of fault assert the existence of a quasi-religious "free will," while the proponents of no-fault assert that the present system is a crudely inefficient and inhumane system of loss allocation.[25] Their debate is intellectually diverting and philosophically stimulating and brings into play one's deepest philosophical and, even religious, beliefs. However, despite its diversionary power, the entire fault/no-fault debate misconceives the historical purpose and present service of the law of torts. Tort law was not intended to be a philosophical exercise, nor was it originated as a method of loss allocation. Its historical purpose was social control.

I. THE POWER TO CONTROL BEHAVIOR—AN HISTORICAL VIEW

Tort law has been used to control behavior for over 2,000 years.

21. *See, e.g.*, 2 *Thessalonians* 2:8; 2 *Peter* 3:17; *Psalms* 19:7; *Romans* 7:7, 7:12, 8:2. *See generally* J. ELLUL, THE THEOLOGICAL FOUNDATION OF LAW 37-60 (1960).

22. *See* note 7 *supra* and accompanying text.

23. Every year 10,000,000 people are injured in automobile accidents; 100,000 of these injuries are fatal. One out of every twenty Americans will be injured in auto accidents in a given year. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 3 (1958), *cited in* Franklin, Chanin & Marx, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961).

24. V. PACKARD, THE HIDDEN PERSUADERS (1957).

25. *See* note 7 *supra* and accompanying text.

Civilizations such as the Babylonian developed an elaborate system of civil law which detailed the exact amount of compensation for the torts of assault and battery.[26] Indeed, even less developed African[27] and North American Indian[28] tribal societies used a similar form of tort system to redress personal injuries. The purpose of these civil law systems was to minimize blood feuding which literally threatened societal survival, or, in other words, to control behavior.[29] Tribal units, threatened by nature and hostile tribes, were dependent upon a communal effort to obtain food and could not afford in-house fighting. Thus "money," as a symbolic form of retribution, was dispensed through a tort, *i.e.*, a civil system of law.[30] It is important to note that the civil law system was the only alternative to a lawless society. The criminal remedies of death, incarceration, or monetary penalty were unacceptable: they either depleted the chief resource necessary to the survival of the society—man; or they lacked the symbol of retribution by giving the "money" to the state rather than to the injured victim.[31]

The historical antecedents to our present tort system clearly suggest that it too developed as a mechanism to control behavior.[32] Examin-

26. The following laws are from the code of Hammurabi:

If a Seignor has destroyed the eye of a commoner, he shall pay one mina of silver.

If he has knocked out a commoner's tooth, he shall pay one-third mina of silver.

If he has destroyed the eye of a seignor's slave or broken the bone of a seignor's slave, he shall pay one-half his value.

P. ALEXANDER, THE ANCIENT WORLD TO A.D. 300 2-5 (2d ed. 1968) [hereinafter cited as ALEXANDER].

27. *See, e.g.*, E. HOEBEL, THE LAW OF PRIMITIVE MAN 216-21 (1954) [hereinafter cited as HOEBEL]. *See also* A. DIAMOND, PRIMITIVE LAW PAST AND PRESENT 393-94 (1971) [hereinafter cited as DIAMOND].

28. HOEBEL, *supra* note 27, at 133-40, 155-56, 172-74; K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY 47-48 (1941) [hereinafter cited as LLEWELLYN & HOEBEL].

29. *See* J. BIGGS, THE GUILTY MIND 8-9 (1955); DIAMOND, *supra* note 27, at 94-95; E. HARTLAND, PRIMITIVE LAW 48-85 (1924); HOEBEL, *supra* note 27, at 232; LLEWELLYN & HOEBEL, *supra* note 28, at 47-48. *See also* R. POUND, PHILOSOPHY OF LAW 33-34 (1922).

30. ALEXANDER, *supra* note 26, at 2-5; DIAMOND, *supra* note 27, at 194; LLEWELLYN & HOEBEL, *supra* note 28, at 114.

31. *See* LLEWELLYN & HOEBEL, *supra* note 28, at 47-48. For an account of this process in the early Anglo common law, see J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 1-4 (1967).

32. ALLEN, THE QUEEN'S PEACE 17-19 (1953); J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 1-4 (1967); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 44-45 (1927); H. HOGUE, ORIGINS OF THE COMMON LAW 15-17 (1966); F. POLLOCK, ANGLO-SAXON LAW 97 (1957). Under the Roman law system, the damage remedy was used to control behavior. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962). The Anglo legal system extensively borrowed from the Roman system. Woodbine, *The Origins of the Action of Trespass,* 33 YALE L.J. 799 (1924). The writ of trespass (the first tort

ing the tort of negligence, one can conceptualize the institutional forces of the nineteenth century which both stimulated its development[33] and restricted its breadth. The emerging industrialization of that period necessarily left a trail of dead and injured workers and consumers.[34] While a remedy to redress these wrongs was certainly required to minimize social discontent, industrial expansion could not be sacrificed in the process. Thus, the law of negligence was shaped to insure that only the most meritorious claims would succeed by requiring the claimant to overcome the conditions and defences that the industrial establishment would assert to bar recovery.[35] In short, the tort of negligence was used to control behavior—to limit the number of suits which could be successfully brought against a growing industrial complex.

The use of the negligence tort to protect industrial expansion indicates that tort law responds to the survival needs of society. The automation and accumulation of capital which emerged from the industrial revolution were necessary to the survival of a modernized society. The industrial revolution, however, is over, and once again the term "survival" has taken on another meaning. It can no longer be viewed in terms of the protection of industrial development. Survival today refers to the control of malfunctioning institutions, to preventing exploitation of the masses which these institutions service. The irony of the decline of tort popularity is that it has never been in a better position to respond to the institutional malfeasance which pervades American society.

Negligence, the specific tort attacked by the loss-allocation/no-fault proposals, is today developing into a people's remedy. It allows for an expanded class of persons, irrespective of their status,[36] to have

writ) evolved during the reign of Edward I as a mechanism to control internal feuding which threatened English unity. *See* W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 357-69 (1927). Trespass on the case developed partly in response to commercial pressures, pressures which envisioned a threat to commercial development if injuries went unredressed and self-help remedies were employed. *See id.* at 455-57.

33. *See* Winfield, *The History of Negligence in Torts*, 42 LAW Q. REV. 184, 195 (1926).

34. *Id.*

35. *See* note 17 *supra* and accompanying text. These conditions and defenses were clearly related to the concept of "fault"—only those who had not "sinned" would be "rewarded" by the industrial establishment. *See* text accompanying notes 16-25 *supra.*

36. *See, e.g.*, Jones v. United States, 362 U.S. 257, 266 (1959); Kermarec v. Compagnie Generale, 358 U.S. 625, 630-31 (1958); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Beard v. Atchison, T. & S.F. Ry. Co., 4 Cal. App. 3d 130, 84 Cal. Rptr. 449 (1970); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 LAW Q. REV. 182, 359 (1953); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

standing to sue[37] the institutional giants.[38] Other torts—products liability;[39] nuisance;[40] invasion of privacy;[41] assault, battery, false impri-

37. Standing to sue for the tort of negligence has revolved around the concept of foreseeability and the landmark cases of Polemis v. Furness, Withy & Co., [1921] 3 K.B. 560, and Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928). American jurisdictions following Justice Cardozo's opinion in *Palsgraf* have held that the test for whether or not an injured person has standing to sue for the tort of negligence was to be determined by the court as a matter of law. The specific test employed was whether or not the defendant owed the plaintiff a duty of due care, the duty being determined by whether or not the plaintiff was foreseeable. Mrs. Palsgraf was held not to be foreseeable, and, therefore, she had no standing to raise the tort of negligence. The net effect of this ruling was to limit the potential class of plaintiffs by excluding third-party bystanders. The analogy here is to the concept of privity as applied in contract law. *See generally* F. DICKERSON, PRODUCT LIABILITY AND THE FOOD CONSUMER 163-69 (1951).

The California Supreme Court has recently expanded the class of plaintiffs by establishing standing to sue for third-party bystanders. *See* Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Conner v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In other words, the class of plaintiffs to which Mrs. Palsgraf belonged is today foreseeable in California.

In addition to expanding the class of foreseeable plaintiffs, California tort law has evolved to the point where plaintiff's problems of proof have been *greatly* reduced. This has come about principally through an expanded use of res ipsa loquitur (Bedford v. Re, 9 Cal. 3d 593, 510 P.2d 724, 108 Cal. Rptr. 364 (1973); Fowler v. Seaton, 61 Cal. 2d 681, 394 P.2d 697, 39 Cal. Rptr. 881 (1964); Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Albers v. Greyhound Corp., 4 Cal. App. 3d 463, 84 Cal. Rptr. 848 (1970)) and the rewriting of the California jury instructions on proximate cause effectively reducing the proximate cause argument to a "but for" presentation. *See* CALIFORNIA JURY INSTRUCTION, CIVIL § 3.75-76 (P. Richards 5th ed. 1969); *see also* Greenfield v. Insurance Inc., 19 Cal. App. 3d 803, 97 Cal. Rptr. 164 (1971); Majetich v. Westin, 276 Cal. App. 2d 216, 80 Cal. Rptr. 787 (1971); Gordon v. Strawther Enterprises, Inc., 273 Cal. App. 2d 504, 78 Cal. Rptr. 417 (1969); Goodwin v. La Turco, 272 Cal. App. 2d 475, 77 Cal. Rptr. 305 (1969); Mosley v. Arden Farms Co., 26 Cal. App. 2d 213, 157 P.2d 372 (1945).

38. *See, e.g.*, Clary v. Fifth Ave. Chrysler Center, 454 P.2d 244 (Alas. 1969) (automobile manufacturer); Shannon v. City of Anchorage, 429 P.2d 17 (Alas. 1967) (municipal government); Cameron v. State, 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972) (state government); Baldwin v. State, 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972) (state government); Ramos v. County of Madera, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971) (state agencies); Jiminez v. Sears Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971) (large corporate retail chain); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (heavy machinery manufacturer); Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (savings & loan); Briggs v. State, 14 Cal. App. 3d 489, 92 Cal. Rptr. 433 (1971) (state government); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967) (airline industry).

39. *See, e.g.*, Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr.

sonment and 42 U.S.C. § 1983;[42] etc.—provide the same opportunity. Tort law, then, provides a means of responding to the individual's dilemma in an institutionalized society. Thus, it is not tort law which has had its day, but the respective theories of loss allocation and fault as explanations for the purpose of the tort law which are dated.

II. The Role of Tort Law: Social Problems and the Control of Institutional Behavior

The present utility of tort law lies in the *power* it can exert to control institutional behavior. Power, however, cannot be discussed in a vacuum; it is relational to social problems facing American society—problems of a mass society.

> C. Wright Mills has defined his perception of the mass society:
> Far fewer people express opinions than receive them. The communications that prevail are so organized that it is difficult or impossible for the individual to answer back immediately or reply with any effect. The realization of opinion in action is controlled by authorities who organize and control the channels of such action, and the mass has no autonomy from institutions.[43]

Mills, when he wrote of the mass society, said it had not yet come about in the United States. Now is clearly the time to challenge such an assertion.[44]

First, is not contemporary American society dominated by bureaucratic institutions? Second, is not American society literally subject to the dictates of the institutions? For example, do we not, as a people, consume opinion via the news and electronic media in far greater propor-

178 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 454 P.2d 34, 75 Cal. Rptr. 652 (1969); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Products Co., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

40. *See, e.g.*, Reynolds Metals Co. v. Martin, 337 F.2d 784 (9th Cir. 1964); Renken v. Harvey Aluminum, 226 F. Supp. 169 (D. Ore. 1963); Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

41. *See, e.g.*, Dietman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Rugg v. McCarthy, 476 P.2d 753 (Colo. 1970); Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. 1970).

42. *See, e.g.*, Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 168 (1960); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969).

43. Mills, *The Mass Society*, in Man Alone: Alienation in Modern Society 207 (E. & M. Josephson eds. 1962) [hereinafter cited as Man Alone].

44. Bell, *America as a Mass Society: A Critique*, in The Sociological Perspective 294 (S. McNall ed. 1968).

tion to expressions of opinion given by citizens constituting the mass? Is not the communication network, both electronic and printed, heavily organized and controlled,[45] to the point that it is extremely difficult to respond effectively? (How effective is a letter to the editor published two weeks after the article to which it responds?) Do not certain vested interests control and dictate the channels of opinion?[46] (How many independent newspaper or radio or television channels are utilized by unorganized members of the mass?[47]) Finally, where in modern, urbanized America can one escape the institutions? (Can we feed, clothe, protect, or service ourselves?) In other words, are we not living in the midst of the mass society?

Human relationships are fundamentally different in the institutional[48] and modernized[49] society. While pre-industrial society emphasized individual prowess (man providing for himself), the coming of industrialization changed this, gathering masses of people into relatively small areas to service the needs of industrialization. What followed was the evolution of bureaucratic institutions,[50] to service both the industrial needs of the community and the social needs of the masses. Emphasis shifted from man's caring for himself to man being cared for. (For example, education became institutionalized; a bureaucracy was needed to administer it.) Industrialization, then, revolutionized human relationships by shifting to the bureaucracy the responsibility for one's well-being that had originally belonged to the individual.

When these bureaucratic institutions malfunction—when they serve their own needs rather than those of the people—social problems occur; problems which are not individual, but rather are best attributed

45. J. ELLUL, PROPAGANDA 57 (1965). *See generally* J. COONS, FREEDOM AND RESPONSIBILITY IN BROADCASTING (1961); W. RIVERS & W. SCHRAMN, RESPONSIBILITY IN MASS COMMUNICATION (1969); H. SCHILLER, MASS COMMUNICATIONS AND AMERICAN EMPIRE (1970); W. SCHRAMM, MASS MEDIA AND NATIONAL DEVELOPMENT (1964); T. SHIBUTANI, IMPROVISED NEWS (1966).

46. *See* Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098, 5100-01 (June 25, 1974).

47. *Id.*

48. *See, e.g.*, S. EISENSTADT, MODERNIZATION: PROTEST AND CHANGE 22-23 (1966) [hereinafter cited as EISENSTADT]; G. SYKES, SOCIAL PROBLEMS IN AMERICA 20-21 (1971). For an example of institutional malfeasance, see T. WOLFE, RADICAL CHIC AND MAU MAUING THE FLAK-CATCHERS (1970).

49. Modernization is a term used to explain the phenomenon of society changing from individualistic to institutionalized. The most complete explanation of the term is found in EISENSTADT, *supra* note 48.

50. For a discussion of the process of institutionalization, see M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947); M. WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196-244 (1946).

to institutional malfeasance. Consider, for example, power companies that pollute the environment in order to provide more convenience to the electrically equipped household; manufacturers of consumer items that produce defectively designed and manufactured goods at the expense of the health and safety of the consuming public; and social service institutions which police instead of service their clientele.

Thus, mass society places human beings in a situation where they, as a mass, are dependent upon social, political, and economic institutions for their daily subsistence. Such dependence increases the importance of *symbols*.[51] Man takes more seriously than ever money, rank, material possessions, clothing, etc., all of which place him in a relative position of "good" or "bad," "esteem" or "disclaim," in the mass society.[52] For many people, the symbols are of special importance because they are the avenues into the various institutional social structures; they are both the vehicle to and the reward of achieving the status of institutional elites. Net profit is important. Competitive rank with other institutions is taken seriously. Workers to run the institutions are selected by means of symbolic scores. Symbols, then, are the key stimuli to which mass society responds.

A. Frustration of Institutional Behavior

Tort law also has its symbols—money, injunctive orders, and the stigma of having engaged in illegal behavior. These are all symbols which can influence institutional behavior. Money, while a symbol,[53] is also the lifeblood of an institutionalized society. Funds are essential to buy bureaucrats; bureaucracies cannot be run without bureaucrats.[54] If one can force an institution to expend funds, one can curtail its ability to function according to its internal policy. Thus, forcing an institution to pay out funds, through the instrument of a damage award, creates institutional frustration[55]—frustration which becomes the catalyst to coerce policy changes.

51. *See* White, *The Symbol: The Origin and Basis of Human Behavior*, in THE SOCIOLOGICAL PERSPECTIVE 98 (S. McNall ed. 1968). "A symbol is a thing the value or meaning of which is bestowed upon it by those who use it." *Id.* at 100.

52. V. PACKARD, THE STATUS SEEKERS 103 (1959); R. BERGER, MAN-IN-ORGANIZATION 25-26 (1968). *See generally* W. WHYTE, THE ORGANIZATION MAN (1956); P. BLAU, THE DYNAMICS OF BUREAUCRACY (1963).

53. For a discussion of the power of money as a symbol, see J. KNIGHT, FOR THE LOVE OF MONEY 11-46 (1968).

54. *See* L. BOGRET, THE AGE OF AUTOMATION (1965). For a functional account of an automated society, see K. VONNEGUT, PLAYER PIANO (1956).

55. *See* P. BLAU, THE DYNAMICS OF BUREAUCRACY 231-46 (1963); S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 271-86 (1949).

In response to this argument, some commentators suggest that institutions have circumscribed the power of the tort suit by their ability to pass increased cost, including tort damage awards, to consumers.[56] This reply, however, cannot withstand careful examination. First, at some point it becomes more profitable to change behavior than to continue present policy. A systematic and persistent use of tort suits could present corporate management with precisely this dilemma.[57] (One example of this process is the change in inspection procedure made by the airline industry subsequent to a series of successful negligence suits against them.[58]) Secondly, most consumer institutions are not economically structured to withstand a consistent barrage of tort suits,[59] especially when the amounts recovered are substantial.[60] Third, these commentators completely ignore the reality of governmental institutions. They not only have fiscal ceilings,[61] but must ultimately go to the voter to increase their operating budgets.[62] Finally, there is the power to enjoin tortious conduct[63]—a remedy backed by the contempt power.

Thus, it is clear that the law of torts, with its remedies of injunction and money damages, has the power to frustrate bureaucratic decision-making, thereby forcing institutional change. For at some point

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56. *See* J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 1-8 (1967).

57. *See* MACHINERY & ALLIED PRODUCTS INSTITUTE, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, PRODUCTS LIABILITY AND RELIABILITY: SOME MANAGEMENT CONSIDERATIONS 1-11 (1967); PRODUCT AND ALLIED PRODUCTS INSTITUTE, LIABILITY AND SAFETY 1-5, 57-71, 79-91 (1971).

58. *See* Lobel v. American Airlines, 192 F.2d 217 (10th Cir. 1951); United States v. Kesinger, 190 F.2d 529 (10th Cir. 1951); Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959); Capital Airlines v. Barger, 341 S.W.2d 579 (Tenn. 1960); Newberger v. Pokrass, 148 N.W.2d 180 (Wis. 1967); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951).

59. *See* M. MACINTYRE, COMPETITIVE PRIVATE ENTERPRISE UNDER GOVERNMENT REGULATION 14-19 (1964).

60. Because of pain and suffering and because of punitive damages, recovery can be exceptionally high. *See, e.g.*, Beagle v. Vasold, 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966); KEETON & O'CONNELL, *supra* note 4, at 358-62 (1965); MORRIS, PUNITIVE DAMAGES IN PERSONAL INJURY CASES 21 (1960); Annot., 29 A.L.R.3d 1021 (1970).

61. Penniman, *The Politics of Taxation*, in POLITICS IN THE AMERICAN STATES 520-22, 536 (H. Jacob & K. Vines eds. 1971). For an excellent description of how government officials on the federal level have historically sought to conform government expenditures to government income, thereby creating a fiscal ceiling, see H. STEIN, THE FISCAL REVOLUTION IN AMERICA (1969).

62. *See* A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964).

63. *See* Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 14 (1968).

it becomes the "prudent" course for large institutions to switch rather than to fight. Legal resistance is replaced by institutional compliance.

B. Stigmatization of Institutional Behavior

Tort suits, in addition to frustrating institutional policy, also stigmatize, and this stigmatization can be effectively utilized to communicate dissatisfaction with institutions. Attaching the stigma of "unlawful" to institutional action can clearly threaten managerial control.[64] Neither private sector management nor government leaders can survive in a climate which seriously erodes constituency support.[65]

Tort suits can only function in this capacity if used as a form of propaganda.[66] Propaganda by definition is any method of communication which uses folk characterizations prevalent in society to affect attitudes and behavior. As the Klu Klux Klan uses the characterization of racial inferiority to foster racist behavior[67] and as commercial advertisers use the characterization of sexuality to sell products,[68] the law suit can use the characterization of illegal activity to control institutional behavior.

Characterizations are an imposition of values, usually for the purpose of achieving conformity and, therefore, harmony amongst a group. It is important to note that not only do these folk characterizations exist in any society, but also that the success achieved in using them is dependent upon the values of the group or class or persons at which they are aimed. In American society, the characterization of "illegality" can be quite successful because of the negative connotations it produces.[69] Thus, tort suits can exploit this connotation to affect attitudes and behavior.[70]

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64. *See* S. ALINSKY, REVEILLE FOR RADICALS 132-54 (1969) [hereinafter cited as ALINSKY]. For an example of how organized public pressure, the stigma of illegal and improper behavior, and the initiation of litigation have induced U.S. Steel Corporation to change its Clariton plant, see *Showdown at Clariton*, NEWSWEEK, Feb. 21, 1972, at 89-90 [hereinafter cited as *Showdown*].

65. *See* ALINSKY, *supra* note 64, at 132-54; C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974); J. MACGRUDER, AN AMERICAN DREAM: ONE MAN'S ROAD TO WATERGATE (1974); M. ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 114-26 (1971); THE WHITE HOUSE TRANSCRIPTS (1974).

66. The leading work on propoganda is J. ELLUL, PROPAGANDA (1965).

67. *Id.* at 244.

68. M. MCLUHAN, THE MECHANICAL BRIDE: THE FOLKLORE OF INDUSTRIAL MAN (1951); V. PACKARD, THE HIDDEN PERSUADERS (1957).

69. This negative connotation is largely attributed to Judeo-Christian values, values which are held by many members of society. *See* R. KAHN, THE TEN COMMANDMENTS FOR TODAY (1964); K. ERICKSON, THE WAYWARD PURITANS (1966).

70. It must be stressed that it is the *public* characterization of the activity that will

Propaganda, of course, can only be successful if it generates publicity, *i.e.*, if it communicates the characterization.[71] The Klan achieves its publicity by word of mouth, by visual aid of hooded figures, and by such symbols as the burning cross. The advertising industry uses the media to portray beautiful women or handsome men in conjunction with their products, all of which are aimed at the sexual identity crisis prevalent in modern society. Utilizing the law suit as a propaganda mechanism is also dependent upon publicity, publicity which characterizes a certain activity as illegal.

C. Avoiding the "Flak-Catcher"

One cannot successfully challenge institutions on a literal person-to-person level. They cannot be petitioned. They are beyond an appeal to reason. The confrontation which takes place on a literal level has an effect only on the confrontor and, what Tom Wolf has so aptly identified as, the institutional flak-catcher,[72] *i.e.*, the person set up by the institution to endure the indignities and abuses of outraged clientele. The flak-catcher serves as an invaluable aid to the discouragement of institutional complaints. One meets the flak-catcher and expends energy only to find that nothing has been accomplished.[73] The flak-catcher, of course, is the institutional shield, a mechanism which gives the illusion of confrontation, but in reality insures the status quo.[74]

A tort suit completely avoids the flak-catcher. There is no way to keep a lawsuit away from management's attention. A lawsuit is a symbol which[75] is intelligible to those who are in decision-making positions in bureaucratic institutions and is taken seriously because it ultimately represents the potential to have money (damage awards), court orders (injunctions), and the stigma of illegal behavior directed at the institution. These forces constitute the power of the tort law—forces to which institutional decision-makers understand and relate. They are therefore capable of producing a change in institutional behavior.[76]

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be effective. If it is thought that the activity can be successfully accomplished in secret, the fact that it is "illegal" will not necessarily act as a deterrent. *See* THE WHITE HOUSE TRANSCRIPTS (1974).

71. J. ELLUL, PROPAGANDA 102-05 (1965).

72. T. WOLFE, RADICAL CHIC AND MAU MAUING THE FLAK-CATCHERS (1970).

73. *Id.*

74. *Id.*

75. See note 51 *supra.*

76. For examples of situations in which damage awards, court orders, and the stigma of improper behavior have induced behavioral changes by institutions, see *Ticklish*

CONCLUSION

Institutions which produce consumer goods are today meeting and planning how to build safety into their products as a direct response to products liability and negligence litigation. General Motors settled and vacated a case involving a design defect for over $500,000 rather than have the case reported into the case law.[77] Police departments have begun to study the potential impact on morale and efficiency of civil suits against the department. Public utilities have agreed to pollution controls rather than fight tort suits in the courts. In short, there appears to be an institutional awareness which perceives civil litigation as a threat.

The phrase "the power is in the people" has special significance in relation to tort law. The courts have become the major political arena in which people's rights are being redressed and protected. Legislative activity has been successfully stifled by the size, cumbersomeness, and inability of legislators to obtain information. The courts, however, remain as a primary source of governmental power which people can directly use on their own behalf. Tort law is a very big part of the people's courtroom power.[78] Theoretically, the state,

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Treatment, NEWSWEEK, July 30, 1973, at 74-75 (the California Board of Medical Examiners revoked a doctor's license to practice on grounds of gross negligence as the result of a $170,000 judgment against him); *Showdown, supra* note 64 (how public pressure and the initiation of litigation have induced U.S. Steel Corporation to change its Clariton plant); Note, *Legal Limitations on Miranda*, 45 DENVER L.J. 427 (1968) (how Miranda v. Arizona, 384 U.S. 436 (1966), has altered police behavior); Note, *Wisconsin Juvenile Rights after Gault*, 1968 WIS. L. REV. 1219 (how *In re* Gault, 387 U.S. 1 (1967), affected the behavior of the juvenile court process). *See generally* R. NADER, UNSAFE AT ANY SPEED 1-34 (1972).

77. Badorek v. General Motors Corp., 90 Cal. Rptr. 305 (1970).

78. The literature describing and defining alienation is legion. There is, however, a consensus which runs through it: that the essence of alienation is man being divorced from his humanity. *See* MAN ALONE, *supra* note 43; R. LANG, THE POLITICS OF EXPERIENCE (1967). Karl Marx, preoccupied with the effect of industrialization on the worker, described alienation as the "de-humanization of work [which] goes so far that the worker is reduced to the point of starving to death." Marx, *Alienated Labor*, in MAN ALONE, *supra* note 43, at 95. Eric Fromm defended alienation in terms of man's relationship to a society which has become

> so powerful that it has usurped man's humanity; Man has created a world of man-made things as it never existed before . . . the more powerful and gigantic the forces are which he unleashes the more powerless he feels as a human being.

Fromm, *Alienation under Capitalism*, in MAN ALONE, *supra* note 43, at 63. Both definitions visualize man as dehumanized because of an institutionalized and technologically sophisticated society.

Man in mass society is, of course, alienated. *See* Bell, *America as a Mass Society: A Critique*, in THE SOCIOLOGICAL PERSPECTIVE 294, 295 (S. McNall ed. 1968). The significance of the sociological phenomenon alienation to this discussion is that it has pro-

through the criminal law, represents the people; yet in recent times how many state initiated law suits have we seen directed against social problems? People, then, must act for themselves, on their own behalf. To abdicate or transfer the individual's ability to represent his or her own interest is to insure a repressed, and possibly a rebellious, society. Tort suits are an avenue which groups and classes of people can use to have an input into the behavior of institutions which in turn necessarily and unavoidably affect the quality of their lives.

vided, and will continue to provide, the fuel to feed the fire. In order to motivate institutional response, a continuous volume of cases is essential, for it will take repeated attacks of damage awards, injunctions, and stigmatization to teach bureaucracies that it is more "profitable" to alter behavior than to continue present policy. Alienated man has found a way of responding to the frustration of dealing with the institutional structure—law suits. There exists a circle of energy which to date has made some remarkable inroads into altering institutional behavior. *See, e.g.*, note 76 *supra*. These inroads have all been made in an unorganized and ad hoc way. If an organized effort were made, this circle of energy could be used to insure dramatic and far reaching participatory input from the masses in mass society.