

Tort as a Litigation Lottery: A Misconceived Metaphor

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ABSTRACT

For over forty years, tort reform proponents have disparaged the tort system as a lottery, arguing that it produces arbitrary outcomes. The tort system, on this account, is both unfair and unpredictable. These criticisms have often served as justification for reform proposals that would replace the tort system with some form of no-fault accident insurance in order to provide fairer and more reliable compensation to accident victims.

In this short essay, we make three claims intended to discredit the lottery metaphor as applied to the tort system. First, it obscures the tort system's shortcomings more than it clarifies them. We agree, of course, that tort outcomes produce horizontal inequities among accident victims with similar injuries, and that outcomes can also be unpredictable. Our initial point is that the comparison to random selection by lottery both misrepresents how the tort system decides cases and exaggerates its unpredictability.

Second, no-fault accident insurance plans fail to resolve the problem of arbitrariness, and this is true regardless of how carefully the plan is designed. Such schemes do eliminate the fault requirement, which reform proponents blame for creating unfair distinctions between accident victims with similar injuries and for making outcomes unpredictable. But a no-fault system's provision that claimants need only prove that their injuries are accident-related simply reproduces, by drawing different boundaries, the very problems of horizontal inequity and unpredictability that reform proponents observe and denounce in the tort system.

Third, arbitrariness is endemic in compensation systems. Of necessity, all compensation schemes set coverage limits that inevitably create horizontal inequities among claimants with similar injuries and reduce predictability in the many borderline cases. While addressing one kind of arbitrariness, no-fault alternatives cannot escape creating other kinds of arbitrariness and having to make pragmatic tradeoffs among them that cannot be justified by any uncontroversial principle. These structural necessities will entail some unpredictability and horizontal inequity.

We emphatically do not oppose no-fault alternatives to tort. The merits of one or another such scheme are not before us in this essay. Quite the contrary; our point is that reformers must engage in more careful analysis and comparison of the nature and sources of arbitrariness in all compensation systems before embracing one or another of these systems. Doing so will discourage the kind of oversimplification that the lottery metaphor encourages.

Tort as a Litigation Lottery: A Misconceived Metaphor

“[T]he fault system is little more than an immoral lottery for both plaintiffs and defendants...”

–Marc A. Franklin, “Replacing the Negligence Lottery: Compensation and Selective Reimbursement” (1967)¹

“The operation of the tort system is akin to a lottery.”

–Jeffrey O’Connell, *The Lawsuit Lottery: Only the Lawyers Win* (1979)²

“Our current personal injury law system is not a system of justice; it is a lottery.”

–Stephen D. Sugarman, *Doing away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business* (1989)³

“[T]he [tort] system is about as fair as a lottery. In fact, it is not too much to say that it is a lottery, a lottery by law.”

–P.S. Atiyah, *The Damages Lottery* (1997)⁴

The nature of a litigation lottery is that the availability of potentially huge damages justify bringing a meritless claim, so long as there is some small chance that the combination of an outlier judge and an outlier jury will produce a jackpot that compensates for the risk that the judge/jury combination will get it right.

–Ted Frank, “Thoughts on the Litigation Lottery” (2005)⁵

For over forty years, tort reform proponents have disparaged the tort system as a lottery, arguing that it produces arbitrary outcomes. Tort doctrine, they allege, awards compensation and imposes liability based on considerations unrelated to what the parties deserve. Moreover, they assert, litigation outcomes are determined by adventitious, contingent factors—the availability of evidence, the quality of counsel, the limits of insurance coverage, the financing of the litigation,

¹ Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778.

² JEFFREY O’CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 8 (1979).

³ STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* xviii (1989).

⁴ P.S. ATIYAH, *THE DAMAGES LOTTERY* 143 (1997).

⁵ Ted Frank, *Thoughts on the Litigation Lottery*, <http://www.pointoflaw.com/archives/001307.php> (July 11, 2005).

the caprices of judges and juries, and many other factors that are not conducive to the consistent application of law. The tort system, on this account, is both unfair and unpredictable.

These criticisms have often served as justification for reform proposals that would replace the tort system with some form of no-fault accident insurance in order to provide fairer and more reliable compensation to accident victims.⁶ Under these proposals, negligent conduct would be deterred by insurance premiums paid directly into compensation funds by risk creators or public agencies, by subrogation actions brought against injurers by insurers seeking reimbursement for paid claims, and by criminal sanctions and administrative penalties.⁷

In this short essay, we make three claims intended to discredit the lottery metaphor as applied to the tort system. First, it obscures the tort system's shortcomings more than it clarifies them. We agree, of course, that tort outcomes produce horizontal inequities among accident victims with similar injuries, and that outcomes can also be unpredictable. Our initial point is that the comparison to random selection by lottery both misrepresents how the tort system decides cases and exaggerates its unpredictability.

Second, no-fault accident insurance plans fail to resolve the problem of arbitrariness, and this is true regardless of how carefully the plan is designed. Such schemes do eliminate the fault

⁶ While scholars have developed a rich variety of proposals to replace tort with no-fault insurance, the thrust of tort reform in the last four decades has been less ambitious efforts to tinker with the existing system, particularly by setting caps on recovery. For an introduction, see Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990). See also Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475 (2002); Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation* 54 CATH. U. L. REV. 703 (2005); Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009). Our analysis in this essay focuses on the use of the lottery metaphor as a justification for no-fault insurance, and we argue that no-fault insurance is similarly vulnerable to claims of arbitrariness. While we do not discuss other forms of tort reform here, it is worth noting that damage caps, in particular, and other related incremental reform efforts can also be regarded as arbitrary limitations. See Mark Geistfeld, *Placing a Price on Pain and Suffering*, 83 CAL. L. REV. 773, 789–96 (1995).

⁷ See, e.g., Franklin, *supra* note 1, at 781 (criminal & administrative sanctions); *Id.* at 805 (subrogation actions); Terence Ison, *THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION* 89–94 (1967) (administrative sanctions); O'Connell, *supra* note 2, at 187 (subrogation actions); Atiyah, *supra* note 4, at 174 (criminal sanctions); SUGARMAN, *supra* note 3, at 160 (administrative sanctions).

requirement, which reform proponents blame for creating unfair distinctions between accident victims with similar injuries and for making outcomes unpredictable. But a no-fault system's provision that claimants need only prove that their injuries are accident-related simply reproduces, by drawing different boundaries, the very problems of horizontal inequity and unpredictability that reform proponents observe and denounce in the tort system.

Third, arbitrariness is endemic in compensation systems. Of necessity, all compensation schemes set coverage limits that inevitably create horizontal inequities among claimants with similar injuries and reduce predictability in the many borderline cases. While addressing one kind of arbitrariness, no-fault alternatives cannot escape creating other kinds of arbitrariness and having to make pragmatic tradeoffs among them that cannot be justified by any uncontroversial principle. These structural necessities will entail some unpredictability and horizontal inequity.

We emphatically do not oppose no-fault alternatives to tort. The merits of one or another such scheme are not before us in this essay. Quite the contrary; our point is that reformers must engage in more careful analysis and comparison of the nature and sources of arbitrariness in all compensation systems before embracing one or another of these systems. Doing so will discourage the kind of oversimplification that the lottery metaphor encourages. This illustrates the cognitive problem with metaphorical thinking in legal analysis about which Justice Cardozo cautioned: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."⁸

⁸ *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926).

I. THE LOTTERY METAPHOR'S TWO CONCEPTIONS OF ARBITRARINESS

Those who use the lottery metaphor to disparage the tort system contend that the system is arbitrary in two distinct ways. First, they contend, tort doctrine arbitrarily *discriminates among similarly situated parties*. Consider Marc Franklin's critique:

One is immediately struck by the spectacular legal lottery into which the fault system thrusts the plaintiff. We may posit several identical victims suffering identically disabling injuries, yet one may recover thousands of dollars under the fault rules while an equally innocent victim may recover nothing

. . . .

. . . Two defendants who commit identical careless acts may find themselves liable for vastly different amounts depending solely on the fortuitous nature of the harm that results.

This is the defendants' lottery.⁹

On this account, tort doctrine inevitably creates horizontal inequities among accident victims with similar injuries and among injurers who commit similar acts of negligence. We agree with Franklin that the tort system sometimes discriminates among similarly situated victims. The question, however, is whether alternative systems also engender horizontal inequities. We maintain that they invariably do; Franklin and other users of the tort lottery metaphor elide that question.

Reformers assert that tort litigation is also arbitrary in a second sense: *outcomes are based on chance rather than principle*. Consider Jeffrey O'Connell's use of the lottery metaphor:

⁹ Franklin, *supra* note 1, at 785, 790. For a similar view, see SUGARMAN, *supra* note 3, at 37 (“[T]ort law refuses compensation to many victims who, from the perspective of their need, are as deserving as those who succeed through the system.”). Franklin asserts that “the lottery charge applies equally to strict liability.” Franklin, *supra* note 1, at 785, 790.

Most crucial criteria for payment are largely controlled by chance: (1) whether one is ‘lucky’ enough to be injured by someone whose conduct or product can be proved faulty; (2) whether that party’s insurance limits or assets are sufficient to promise an award or settlement commensurate with losses and expenses; (3) whether one’s own innocence of faulty conduct can be proved; and (4) whether one has the good fortune to retain a lawyer who can exploit all the variables before an impressionable jury, including graphically portraying whatever pain one has suffered.¹⁰

Jury verdicts, continues O’Connell, are no better than the “flip of a coin.”¹¹ Like a game of chance, he contends, “whenever a case goes to a jury, the jury can decide the case *either way* and be right!”¹² For him, the tort system is an unpredictable “gamble.”¹³ We consider this claim, and the implicit comparison it makes with other compensations systems, at greater length in Part II.

For now, it is enough to observe that the tort system might be arbitrary in the first sense (i.e., horizontal inequity) but not in the second sense (i.e., unpredictability). The system might unfairly discriminate among similarly situated parties but do so consistently—that is, in a perfectly predictable manner. For example, a consistently applied rule that allowed tort recovery

¹⁰ O’Connell, *supra* note 2, at 8. While O’Connell characterizes these factors as the products of chance, they are analytically distinct. The non-availability of evidence may—for example in cases of spoliation—be deliberate and relevant to the fairness of outcome. The quality of lawyering is likely to be a function, at least in part, of what parties can afford, making it not the product of chance but rather of a structural bias in favor of those with greater ability to pay for legal representation. By contrast, jury composition is, at least in principle, random. We argue below in Part II that the lottery metaphor obscures these significant distinctions in its analysis of the determinants of tort outcomes.

Atiyah similarly argues that the tort system is a lottery insofar as it is “pure chance whether [a person’s injuries] were caused by someone else’s fault or not,” and it is “a matter of sheer luck whether witnesses are available, and therefore whether the cause of the accident can be proven.” Atiyah, *supra* note 4, at 147

¹¹ O’Connell, *supra* note 2, at 77, 82

¹² *Id.* at 82.

¹³ *Id.*

only for brown-eyed accident victims would be arbitrary in this first sense but not in the second. A system based on such a doctrine would be unfair yet highly predictable.¹⁴

Note also that arbitrariness-as-unpredictability is simply a subcategory of arbitrariness-as-horizontal inequity. Resolving tort claims on the basis of chance circumstances, such as a coin toss, would also arbitrarily discriminate between similarly situated parties.

These two senses of arbitrariness may also coincide in another way. One might believe that tort doctrine relies on considerations such as fault and the extent of damages that promote horizontal inequity but that are, in practice, further distorted by chance circumstances that determine litigation outcomes. On this account, the tort system's potential to produce unfair outcomes based on the application of inappropriate doctrinal considerations is exacerbated by the influence of chance circumstances that also produce unpredictable outcomes.

II. THE LOTTERY METAPHOR OBSCURES THE NATURE, AND EXAGGERATES THE EXTENT, OF ARBITRARINESS IN THE TORT SYSTEM

Reformers are right to express serious concerns about horizontal inequity among both plaintiffs and defendants within the tort system. Plaintiffs with similar injuries are treated differently on the basis of both doctrinal and administrative considerations which are unrelated to the nature of their injuries. By the same token, defendants who commit similar wrongs are treated differently on the basis of considerations that are unrelated to the character and injurious tendency of their actions. Reformers are also accurate in noting the variability of outcomes due

¹⁴ What we mean by predictable is that given a set of facts asserted in a claim, one can predict the outcome of the claim in the torts process. This is distinguishable from the predictability of liability prior to the occurrence of an accident. A brown-eyed victim rule would be highly predictable in the first sense (once everyone knows the eye-color of the victim) but not predictable for potential injurers in the second sense (since the potential injurer would not know the chances of injuring a brown-eyed victim). O'Connell and the reform advocates who employ the lottery metaphor seem concerned with addressing what they see as the post-accident unpredictability of litigation outcomes, not the pre-accident unpredictability of liability.

to differences in factors like the availability of evidence, financial differences, the quality of counsel, and jury composition.¹⁵

Unfortunately, the lottery metaphor in no way advances understanding of these problems. To the contrary, it mischaracterizes and exaggerates them. Although both a lottery and the tort system discriminate among similarly situated participants, a lottery does so entirely on the basis of random selection, whereas the tort system does so, both in principle and in practice, on the basis of doctrinal principles like fault and damages, procedural and evidentiary requirements, and less formal “rules of thumb”¹⁶ that make tort outcomes considerably more consistent and predictable than a lottery or O’Connell’s coin toss. In dismissing the role of doctrine, procedural requirements, and informal rules that make tort outcomes more consistent and predictable than lottery results or coin tosses, the lottery metaphor obscures the true nature and extent of arbitrariness in the tort system.

According to Franklin, arbitrariness—differential treatment of similarly situated parties—results from attempting to accommodate two competing goals within a single institution. The fault principle, which aims to condemn and deter negligent conduct, creates horizontal inequity between accident victims with similar injuries. The doctrinal principle that negligence liability is based on the extent of the resulting harm, which serves the goal of compensating victims, arbitrarily distinguishes between actors who commit similar acts of negligence but inflict

¹⁵As we noted above, while factors like these contribute to variability of outcomes, they are not all matters of chance. See note 10 *supra*. See David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive Damage Amount*, 57 M.D. L. REV. 174 (1998); Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from the Three Data Sets*, 32 J. LEGAL STUD. 27 (2003).

¹⁶See generally, H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (2d ed. 1980) (use of informal norms in the processing and settlement of tort claims).

different amounts of harm.¹⁷ When we add to compensation and deterrence additional goals or constraints—such as administrative cost, procedural and evidentiary rules, the division of labor between judge and jury based on institutional competence—the effect of such distinctions is multiplied.

Nonetheless, the tort process of determining outcomes is fundamentally different from that of a lottery. Of course, lotteries discriminate between winners and losers without regard to their individual circumstances or conduct. But these outcomes are based on random selection; that is their very nature and purpose. By contrast, what Franklin describes in the tort system is a more consistent, predictable pattern of discrimination among victims and injurers based on the application of principles. Tort law treats those injured by *wrongful* conduct as deserving recourse unavailable to those harmed either by “Act of God” or an “innocent” human actor. And, in contrast with criminal sanctions, which generally focus on intent and conduct per se, tort links the injurer’s responsibility to the damage caused. One can plausibly object to both of these rules, but not on the ground that they produce random outcomes.

The kind of arbitrariness that Franklin describes gives losers in tort grounds to challenge outcomes as unfair. Those denied compensation can point to the unfairness of compensating others with similar injuries. Moreover, as O’Connell asserts, they can also claim that the doctrinal rules were wrongly applied. Lottery losers have no such grounds for complaint—indeed, lottery outcomes *must* be randomly generated in order to be fair. Thus, the tort system’s arbitrariness highlighted by Franklin’s critique results from the more or less consistent (i.e. non-

¹⁷ While distinctions between negligent actors on the basis of the harms they cause may be arbitrary from the point of view of what they “deserve,” such distinctions are not arbitrary from the point of view of an efficiency theory of tort law which sees the function of liability as internalizing costs in order to promote optimal risk reduction.

random) application of doctrinal rules that can be criticized as unfair, whereas a lottery's arbitrariness is random and thus fair.¹⁸

O'Connell's assertion that tort outcomes, like lottery results, are based on chance rather than principle obscures a fundamental difference between the unpredictability of tort and lottery outcomes. At the same time, he exaggerates the former. As O'Connell points out, recovery in tort depends upon contingent circumstances such as whether the plaintiff's injury was caused by a negligent actor and whether the defendant is capable of satisfying a judgment. Similarly, winning a lottery depends on chance circumstances such as whether an entrant was able to purchase a ticket that day. But the comparison ignores an important difference. In the tort system, these chance circumstances provide the factual basis for determining the outcome of a claim. Judges and juries adjudicate claims by applying a system of doctrinal rules to these facts, and attorneys settle claims by applying less formal rules of thumb to the facts.¹⁹ By contrast, in a lottery, chance circumstances determine only eligibility to participate in the lottery. The lottery then selects at random among eligible participants. Once eligibility to participate in the lottery is settled, chance circumstances that determine an individual's eligibility play no further role within the process of random selection. At the decision-making stage, the tort system in principle and often in practice is based on judgments about how rules apply to facts, quite unlike the process of random selection in lotteries.

We harbor no illusions that the tort system is perfectly consistent and predictable. Far from it. Judgments about how to interpret rules or how rules apply to facts will often vary among individuals for many reasons, including ambiguity in the rules, facts that are incomplete or can

¹⁸ We say "more or less" consistent application of doctrinal rules in recognition of irreducible uncertainties in application.

¹⁹ See ROSS, *supra* note 16, at 239; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1589–1628 (2004).

be interpreted in various ways, differences in expertise or access to witnesses, and cultural or ideological diversity among judges and juries.²⁰ We recognize also that factors highlighted by critics of the tort system—the availability of evidence, the limits of insurance coverage, the quality of counsel, and jury composition—exacerbate variability. Nevertheless, the outcome variability produced by such factors does not equate the tort process to random selection by lottery. There is evidence that despite this variability, “[c]ourt awards are a highly predictable process” and “attorneys . . . seem able to substantially anticipate how courts dispense those awards.”²¹

Some critics suggest that this general predictability notwithstanding, the tort system produces random errors that result in large lottery-like payouts to fraudulent claimants. Ted Frank claims that “[t]he nature of a litigation lottery is that the availability of potentially huge damages justify bringing a meritless claim, so long as there is some small chance that the combination of an outlier judge and an outlier jury will produce a jackpot that compensates for the risk that the judge/jury combination will get it right.”²²

Yet outlier decisions do not make tort litigation a lottery. The possibility that a judge will misapply the law or a jury will misconstrue the facts is not even remotely like random selection in a lottery. It makes no sense to argue that a lottery winner should not have won. By contrast,

²⁰ See RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 211 (2008) (suggesting that the variability in pain and suffering and punitive damage awards makes the tort system like a lottery).

²¹ Evan Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 J. LEGAL STUD. 187, 203 (1999). See also Neil Vidmar & Jeffrey Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 897 (1993) (finding that juries provided more stable estimates of noneconomic damages in medical malpractice cases than would be obtained from a single arbitrator or judge); Stephen Daniels & Joanne Martin, *CIVIL JURIES AND THE POLITICS OF REFORM* 238 (1995) (analyzing orderly patterns that account for variation in jury awards); NEIL VIDMAR & MIRYA R. HOLMAN, *THE FREQUENCY, PREDICTABILITY, AND PROPORTIONALITY OF JURY AWARDS OF PUNITIVE DAMAGES IN STATE COURTS: A NEW AUDIT* (2010), available at http://works.bepress.com/mirya_holman/10; Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

²² Frank, *supra* note 5.

one can coherently characterize litigation outcomes as erroneous because litigation outcomes, unlike a lottery, are determined by judgments about rules and facts, and most of the litigation rules are designed—not exclusively but in large part—to increase accuracy.²³ Indeed, this is the rationale for an appellate process, which would play no re-evaluative role in a lottery system.

Moreover, suggesting that a decision procedure's error rate makes it a lottery is a category mistake: the very possibility of identifying an outcome as erroneous logically renders the procedure non-random and therefore not a lottery. To be sure, the error rate of a decision procedure could be so high as to render outcomes so unpredictable and unsystematic that they would seem random. But tort critics offer no persuasive evidence that high damage awards based on erroneous findings of liability are anything but statistical outliers.

One might argue that there is a randomness as to whether an individual who files a spurious tort claim will be lucky enough to draw the rare judge or jury who will produce an erroneous judgment in his or her favor.²⁴ But a random distribution of errors does not make a flawed process into a random one. Although bank depositors stand a random chance of an accounting error in their favor, this does not make depositing one's money in a bank tantamount to playing a lottery. While errors in the banking system may be randomly distributed, they are rare enough that depositors do not consider the system either unpredictable or unreliable. Similarly, as long as they are relatively rare, random errors do not make the tort system a lottery.

²³ Some litigation rules reduce accuracy but promote other values. For example, the marital confidences privilege may prevent disclosure of information relevant to the adjudication of a tort claim in order to protect marital privacy.

²⁴ Note that the distribution of erroneous outcomes is not really random since it predictably varies with the impartiality of the judge and jury. Variability due to bias is a problem that should be minimized, consistent with other goals and constraints, but it is not random. For an example of recent attempts to address this problem by restricting forum-shopping, see S.B. 213, 79th Leg., 2d Sess. (WV 2003) (provides for stricter parameters for non-residents to establish venue in state courts, specifies that a substantial portion of the cause of action had to have occurred in the state, and provides that each plaintiff has to establish venue independently); H.B. 13, 1st Special Sess. (Miss. 2004) (Amended Miss. Code Ann. § 11-11-3) (numerous venue reforms to prevent forum shopping); H.B. 755, 79 Leg. Sess. (TX 2005) (gives trial court judges discretion to dismiss lawsuits with little or no connection to Texas); H.B. 1603, 52d Leg., 1st Sess. (Okla. 2009) (allows the court to move a case which should be more properly heard somewhere else in the state, thus restricting forum shopping).

Of course, at some point, all of the factors that contribute to the variability in tort outcomes and the frequency of errors could be so influential that taken together they would create sufficient arbitrariness to render the tort system tantamount to a lottery. Our argument is premised on the belief that the system is far from reaching this point. But we concede that this is, to a considerable extent, a matter of judgment. In addition to the studies we have cited concerning the predictability of tort outcomes, our judgment relies on the fact that hard-eyed parties, their lawyers, and liability insurers bet huge amounts of money on the assumption that the system is more or less predictable.

Critics of the tort system invoke the lottery metaphor to suggest that tort is arbitrary in ways that justify replacing it with alternative compensation schemes and administrative penalties for deterrence purposes. So far, we have argued that the lottery metaphor obscures the nature of arbitrariness in the tort system and exaggerates its unpredictability. That being so, the metaphor is primarily a rhetorical strategy aimed at undermining public confidence in the tort system in order to strengthen popular support for one or another reform.²⁵ Such rhetoric does not advance careful analysis of tort reform. Nor does it illuminate whether alternative systems of compensation and deterrence would invariably address these concerns in a satisfactory fashion. The section that follows addresses this latter question.

III. NO-FAULT INSURANCE AND ADMINISTRATIVE ALTERNATIVES TO THE TORT SYSTEM

DO NOT ELIMINATE ARBITRARINESS

The lottery metaphor aside, a legitimate concern about arbitrariness in tort outcomes remains. Many reform advocates have long proposed replacing tort liability with no-fault accident

²⁵ For extended analysis of the rhetorical strategies of tort reform efforts, see William Haltom & Michael McCann, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004) and Daniels & Martin, *supra* note 21.

insurance combined with a system of risk-related premiums, assignability of tort claims to insurers, and administrative penalties to deter negligent conduct.²⁶ Arguably, replacing tort liability with no-fault accident insurance would both compensate more victims and reduce administrative costs.²⁷ While these gains might justify replacing tort liability with one or another no-fault insurance alternative, this type of reform cannot eliminate all arbitrariness.²⁸

Franklin, a leading no-fault proponent, argues that first-party no-fault accident insurance would eliminate the arbitrariness of fault-based tort liability. In replacing the tort system, explains Franklin, “[t]he focus should be upon the victims of disabling accidents, and upon providing similar treatment for similarly situated persons suffering similar injuries.”²⁹ Whereas the fault system treats accident victims with similar injuries differently based on whether the injury was negligently caused or not, first-party no-fault accident insurance would treat them similarly, promoting horizontal equity among injury victims, the argument goes.

In fact, first-party no-fault accident insurance also fails to treat like victims alike: it simply creates different boundary issues than tort. Under first-party no-fault accident insurance, only individuals whose harm was caused by *accidents* would receive compensation. That is,

²⁶ See, e.g., Franklin, *supra* note 1, at 781 (criminal & administrative sanctions); *id.* at 803 (risk-related premiums); *id.* at 805 (assignability of tort claims to insurers); ISON, *supra* note 7, at 89–94 (administrative sanctions); O’Connell, *supra* note 2, at 187 (assignability of tort claims to insurers); Atiyah, *supra* note 4, at 174 (criminal sanctions); SUGARMAN, *supra* note 3, at 160 (administrative sanctions).

²⁷ The administrative efficiency of alternative compensation systems varies widely. See United States Department of Labor, Division of Federal Employees’ Compensation (DFEC), www.dol.gov/owcp/dfec/regs/compliance/fecafact.htm (last visited August 3, 2010) (4% of workers’ compensation benefits are applied to overhead administrative costs); Furman, Jason, Policy Basics: Top Ten Facts on Social Security’s 70th Anniversary (August 11, 2005), *available at* www.cbpp.org/files/8-11-05socsec.pdf (Social Security administrative costs calculated to be 0.6 percent of total survivors benefit payments in 2005); OFFICE OF WORKERS’ COMPENSATION PROGRAMS, ANNUAL REPORT TO CONGRESS FY 2007 (2010), *available at* www.dol.gov/owcp/07owcpmx.pdf (Federal Employees’ Compensation Act administrative expenditures in 2007 were 5.59 percent of benefit payouts: \$135.1 million in administrative costs per \$2,418.8 compensation and benefit payouts); James M. Anderson, Paul Heaton, Stephen J. Carroll, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE (RAND Institute for Civil Justice, 2010)]

²⁸ As indicated earlier, the focus of tort reform in the past four decades has been incremental reforms, such as damage caps, which are also subject to charges of arbitrariness. See Geistfeld, *supra* note 6.

²⁹ Franklin, *supra* note 1, at 795.

individuals suffering identical harms fare differently depending upon what caused their harm. A person who loses a leg in an accident receives compensation; a diabetic whose leg is surgically amputated does not. Similarly, a person who suffered brain injury as a result of an accident would be compensated but one afflicted with Alzheimer's disease would not. The requirement of accidental injury would, in Franklin's terms, discriminate between individuals with similar injuries—a manifest failure to treat “like cases alike.”³⁰

A no-fault proponent might deny that first-party no-fault accident insurance arbitrarily discriminates between similarly situated individuals, arguing that the goal of such a system is to compensate accident victims, and that principles of benefit-eligibility distinguishing between accident victims and others with similar harms resulting from other causes is entirely consistent with this goal. This putative response, however, is merely a tautology. With equal logic, one could simply define the tort system's goal as compensating victims of negligence and then insist that the fault requirement is entirely consistent with this goal, so that individuals with identical injuries—one caused by negligent conduct and the other not—are not similarly situated in terms of that goal.

Of course, there are good reasons to limit no-fault insurance proposals to accident victims—for example, limited resources or special solicitude for those who have been injured by other people rather than by natural forces or illness. But these reasons nonetheless determine winners and losers arbitrarily, in Franklin's sense of the term, treating differently individuals who have similar injuries. Moreover, no-fault schemes, in practice, are arbitrary in another important respect. Common features of no-fault schemes such as ceilings on recovery for lost income, scheduled recovery for physical injuries and permanent partial disabilities, and elimination of

³⁰ This point is made by Sugarman. SUGARMAN, *supra* note 3, at 110, 113. Franklin himself was aware of this problem with regard to auto accident no-fault plans. See Franklin, *supra* note 1, at 777.

non-economic loss recovery subject all victims to identical recovery limits even where they suffer different losses.³¹ None of this means that extending compensation to all victims of accidental injury on a no-fault basis is undesirable. Rather, our point is that a concern about arbitrariness in the tort system is not itself a sufficient reason to do so: no-fault insurance alternatives to the tort system also introduce arbitrariness, but now in the form of coverage limitations.

Beyond the arbitrariness associated with boundary issues and ceilings or exclusions on recovery, internal characteristics of the schemes create the potential for uncertainty of coverage. For example, workers' compensation claims require not only a determination of whether an injury is job-related but also an assessment of the extent of worker impairment and disability.³² These issues are particularly difficult to resolve in claims involving intangible harm (such as mental stress) and toxic exposure, as well as in determinations of permanent partial disability.³³ New Zealand's no-fault accident compensation scheme similarly requires determining whether a claim falls into a category of compensable harms—for example whether a health condition is sufficiently related to medical treatment rather than merely the product of illness—and assessing the extent of an accident victim's inability to work and lost earnings.³⁴ In both systems, coverage limits and loss assessment guidelines tend to be general and difficult to apply.³⁵

³¹ See, e.g., N.Y. INS. LAW §§ 1502–04; N.Y. WORKERS' COMPENSATION LAW, §15.

³² EVANGELOS FALARIS, CHARLES LINK & MICHAEL STATEN, CAUSES OF LITIGATION IN WORKERS' COMPENSATION 11–12 (1995); Leslie Boden & Richard Victor, *Models for Reducing Workers' Compensation Litigation*, 61 J. RISK & INS. 458, 460 (1994).

³³ See SUGARMAN, *supra* note 3, at 131–32 (discussing the difficulty of evaluating workers' compensation claims for permanent partial disability).

³⁴ Peter Schuck, *Tort Reform Kiwi Style*, 27 YALE L. & POL'Y REV. 187, 197 (noting the difficulty of assessing a victim's inability to work and lost earnings); *id.* at 199 (noting the difficulty of determining causation in medical injury claims).

³⁵ For example, in many jurisdictions, statutes and regulations do not provide clear guidance about how to assess permanent impairment and disability. Boden & Victor, *supra* note 31, at 460; FALARIS, LINK & STATEN, *supra* note 31, at 12–13; Schuck, *supra* note 33, at 197. Moreover, changes in statutes and regulations governing workers' compensation that effect that scope of coverage and the level of benefits create professional uncertainty among attorneys and judges, which is an additional source of unpredictability that is more frequent in workers'

Moreover, factual disputes and conflicting evidence add to the unpredictability of outcomes in workers' compensation and the New Zealand scheme.³⁶ Thus, a shift from tort to no-fault insurance eliminates neither arbitrariness nor unpredictability but relocates its sources from fault and the measure of non-economic damages to coverage and the assessment of impairment and disability.³⁷

Products liability and medical malpractice—areas that critics of the tort system have singled out as especially in need of reform—illustrate other sources of unpredictability in the administration of no-fault schemes. No-fault compensation for product-related injuries must determine the role of victim contribution—for example, whether an individual who falls off a bicycle or a ladder suffered injury “arising out of” the product and is thus eligible for compensation. No-fault compensation for medical injury, as referred to in the New Zealand example, requires a determination in some instances of the contribution of preexisting conditions to an injury and the compensability of post-treatment distress where medical treatment produces results short of a perfect cure. In contested cases with limited evidence, adjudication of these issues can make outcomes unpredictable.

compensation than in tort. Telephone conversation with Les Boden, Professor of Environmental Health, Boston University (January 12, 2010) (notes on file with author).

³⁶ We have focused here on workers' compensation and the New Zealand no-fault accident compensation scheme because they seem most closely analogous to the type of no-fault accident insurance that O'Connell has in mind. O'Connell himself relies on workers' compensation to argue that no-fault accident insurance is likely to reduce unpredictability. O'Connell, *supra* note 2, at 191–93. O'Connell also relies on no-fault auto insurance. While he surveys evidence that no-fault auto insurance expands coverage and reduces administrative costs, he does not offer any evidence that outcomes are more predictable than in tort. *Id.* at 157–75. Moreover, modified no-fault laws make no-fault insurance an exclusive remedy only for a subset of auto-related injuries. Thresholds beyond which a victim is exempted from mandatory no-fault and can file a lawsuit are defined in general terms such as “serious injury” or dollar amounts. These thresholds create unpredictability in terms of coverage and valuation just as they do in tort, workers' compensation, and the New Zealand scheme.

³⁷ O'Connell himself notes the persistence of these types of uncertainty in no-fault insurance alternatives to tort for medical injury and product injury. *Id.* at 181–82.

One might argue in defense of O'Connell that at least his proposal to replace tort with first-party no-fault accident insurance eliminates the unpredictability in the tort system created by compensation for pain and suffering and other non-pecuniary losses. O'Connell's proposal for first-party no-fault accident insurance removes this source of unpredictability by simply eliminating recovery for non-economic loss. But one need not abandon tort liability in order to accomplish this. If one were interested in greater predictability, recovery for non-pecuniary losses could be based on a fixed schedule.

Of course, no-fault accident insurance might nevertheless be more predictable than tort in certain respects, such as risk manageability. O’Connell seems to imply that litigation makes tort outcomes unpredictable and that no-fault accident insurance would make compensation more predictable by reducing litigation.³⁸ Litigation rates, however, are not an indicator of unpredictability. As noted earlier, some researchers find that court awards in tort cases are in fact highly predictable.³⁹ In addition, it bears emphasis that tort is not synonymous with litigation. The overwhelming majority of tort claims settle prior to trial and are frequently resolved on the basis of predictable rules of thumb.⁴⁰ Moreover, these considerations stand apart from the filtering out of potential claims that are never brought, which may also reflect predictability in the system.⁴¹ The predictability of both litigation and settlement outcomes in fact varies among different categories of tort claims and is a salient factor in drawing any reliable conclusions about the comparative predictability of tort and no-fault alternatives.⁴²

³⁸ While comparing the litigation rates of tort and workers’ compensation claims would be complicated, we do know that workers’ compensation claims do give rise to a great deal of litigation. For example, in 1990, almost half of all workers’ compensation claims in California were litigated. FALARIS, LINK & STATEN, *supra* note 31, at 4. Litigation rates for cases involving permanent partial disability can be even higher. Boden & Victor, *supra* note 31, at 459. A proper comparison would compare the rates of litigation for tort and workers’ compensation claims involving similar injuries or amount of claim.

³⁹ Osborne, *supra* note 21, 203. Similarly, litigation rates in workers’ compensation—which is significant in many jurisdictions—are not an indication of uncertainty. A study of workers’ compensation claims found that workers’ compensation litigation outcomes are highly predictable in some jurisdictions. This is because adjudicators regularly “split the difference” between the parties’ assessments of worker impairment. The lack of clear guidance in state workers’ compensation regulations about how to assess permanent impairment leads parties to obtain expert medical opinions that maximize or minimize the claim and then pursue litigation in order to obtain a judgment that, predictably, splits the difference between the parties. Pursuing litigation thus makes outcomes *more* predictable. Boden & Victor, *supra* note 31, 460.

⁴⁰ See generally ROSS, *supra* note 19? and Issacharoff & Witt, *supra* note 19.

⁴¹ See Richard Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y. REV. 525, 544 (1980-81) (describing the resolution of most tort grievances prior to filing a lawsuit).

⁴² See BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 4 (2005) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ttvlc01.pdf> (examining tort verdicts in general jurisdiction courts in the 75 largest counties of the United States during 2001 and finding the median verdict in medical malpractice case to be \$422,000 compared to the median verdict for automobile cases of \$16,000); HAVING TROUBLE FINDING SETTLEMENT DATA. Settlements can vary in the same tort category. See David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENGL. J. MED. 2024, 2024 (2006) (finding in an examination of 1,452 medical malpractice claims that claims in which there was no medical error payments averaged significantly less, \$313,205, compared to claims where errors occurred \$521,560).

In sum, no-fault initiatives do not eliminate the need to draw distinctions that treat individuals with similar needs differently, and they require difficult, sometimes unpredictable assessments of causation, impairment, and disability. While no-fault alternatives offer advantages over tort in terms of expanded coverage and lower administrative costs, they do not put to rest concerns about horizontal equity and unpredictability.

In addition to no-fault accident insurance, reform advocates propose administrative penalties for negligent conduct as an alternative to tort liability.⁴³ Stephen Sugarman argues that tort liability is frequently unnecessary to deter unreasonably dangerous conduct, which is substantially discouraged by a combination of self-preservation instincts, market forces, personal morality, and governmental regulation (criminal and administrative).⁴⁴ As part of his plan to do away with personal injury law, Sugarman proposes greater reliance on administrative agencies, like the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) to regulate risk, along with reforms that would allow for greater citizen participation in prompting investigations and compelling agency action.⁴⁵

Sugarman argues that agencies are better equipped than courts to regulate risk from a variety of perspectives.⁴⁶ Whereas courts merely respond to whatever cases come before them, agencies can set their own risk management priorities. In addition, agencies, unlike courts, have powers to investigate risks and the expertise to evaluate the tradeoffs of different risk management strategies. And finally, while courts are limited to awarding damages and granting

⁴³ See, e.g., Franklin, *supra* note 1, at 781; ISON, *supra* note 7, at 89–94; SUGARMAN, *supra* note 3, at 160.

⁴⁴ SUGARMAN, *supra* note 3, at 4–6. Unlike Franklin and O’Connell, Sugarman is not proposing a no-fault accident plan but rather a broader first-party social insurance coverage for injury and disease irrespective of source and type of harm.

⁴⁵ *Id.* at 154–60.

⁴⁶ *Id.* at 156–59.

injunctions (rarely in tort), agencies have a wider array of risk management tools, such as recalls and the power to impose civil penalties.⁴⁷

While there is merit in Sugarman's analysis, administrative risk regulation, whatever its advantages over tort, would not eliminate arbitrariness. To begin with, limited resources lead administrative agencies to be selective in monitoring and enforcement: because of limited resources for inspection and enforcement, federal agencies like the CPSC, OSHA, and EPA inspect each year only a fraction of the regulated entities under their jurisdiction and sanction only a small proportion of the violations they are charged with policing.⁴⁸ This type of selective enforcement—particularly when it is minimal and/or unsystematic—treats similarly situated wrongdoers differently and makes it difficult to predict whether wrongdoing will be penalized.

There are other important sources of arbitrariness in administrative risk regulation as well. The influence of certain regulated entities on agencies may lead to arbitrary differences in penalizing negligent behavior based on political considerations.⁴⁹ Critics of the regulatory system have also argued that professional risk regulators in administrative agencies at times tend to simplify risk in terms of expected mortality and morbidity, ignoring features of risk that resist quantification but that are important to lay people when they assess risk—considerations such as

⁴⁷ For additional analysis of the comparative advantages of administrative regulation as a regulatory tool over tort litigation, see PETER SCHUCK, *THE LIMITS OF LAW* 363–73 (2000); ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 126–58 (2001); W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION* (W. Kip Viscusi ed., 2002).

⁴⁸ See U.S. GEN. ACCOUNTABILITY OFFICE, *BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC'S OVERSIGHT OF IMPORTED PRODUCTS* 22–23 (2009) (finding that the agency's ability "to inspect shipments for potential violations at ports of entry is limited . . ."); U.S. GEN. ACCOUNTABILITY OFFICE, *OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED* 2 (2005) (noting that "OSHA can only inspect a small fraction of all worksites each year"); OFFICE OF INSPECTOR GENERAL, U.S. ENVTL. PROT. AGENCY, *LIMITED KNOWLEDGE OF THE UNIVERSE OF REGULATED ENTITIES IMPEDES EPA'S ABILITY TO DEMONSTRATE CHANGE IN REGULATORY COMPLIANCE* 11 (2005) (explaining that the EPA's "monitoring activities focus on major and large entities or sources, which represent only a small fraction of the total universe . . .").

⁴⁹ For a general introduction to the relationship between agencies and regulated entities, see KENNETH MEIER, *REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS* 9–36 (1985).

the voluntariness, latency, distribution, irreversibility, origin, and concentration of risk.⁵⁰ This simplification leads professional risk regulators to value risk differently than lay people.⁵¹

Administrative risk regulation tends to favor professional valuation of risk while tort allows for lay people—injury victims—to price risk in their decisions to file claims, settle, or litigate to final judgment. While there may be reasons to prefer administrative risk regulation, the tendency of risk regulators to ignore hard-to-assess features of risk can appear arbitrary, as critics of cost-benefit analysis have long maintained.⁵² Thus, neither no-fault insurance nor administrative sanction alternatives to tort eliminate the problem of arbitrariness.

IV. CONCLUDING THOUGHTS

All compensation systems have restrictive categories that engender arbitrariness which cannot be eliminated by merely shifting among categories. Kenneth Abraham and Lance Liebman developed this point almost twenty years ago in an article categorizing compensation systems into those based on fault, cause, and loss.⁵³ Each type uses categorical restrictions to limit recoveries. In tort, a fault-based system, recovery requires proof that a loss was caused by the defendant's negligence. In no-fault, a cause-based system, recovery depends on establishing that an injury was caused by an accident. In the federal Social Security Disability Insurance (SSDI) system, compensation is based on loss, but claimants recover only if their losses qualify

⁵⁰ Clayton Gillette & James Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1075 (1990).

⁵¹ *Id.* For further discussion on the difference between popular and expert risk evaluation, see CASS SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT*, 53–77 (2002).

⁵² See, e.g., *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* (Matthew Adler & Eric Posner, eds., 2001); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2005); RICHARD REVESZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

⁵³ Kenneth A. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform*, 93 COLUM L. REV. 75 (1993).

as a permanent disability.⁵⁴ In each of these systems, the categorical limitation could be regarded as “arbitrary;” in none of these cases, however, is the randomness factor large enough that one can intelligibly regard the limitation as equivalent to a lottery or anything remotely like it.

These diverse categorical restrictions serve at least two essential purposes. First, they provide a way to ration limited public resources. Injury compensation competes for public resources with myriad other social goals. Government-sponsored systems like the New Zealand accident compensation scheme and SSDI employ such restrictions to define the scope of coverage and to compensate only certain types of losses—respectively, in these two systems, accidental injuries or permanent disabilities—while excluding others. In tort, legal doctrines such as duty and proximate cause limit liability in order to avoid over-detering socially useful activity and to prevent a “flood” of litigation that would overwhelm courts’ own limited institutional resources and impose large social costs.⁵⁵ The reality of limited resources—both in terms of funds to pay claims and institutions to adjudicate them—makes categorical restrictions on compensation a practical necessity.

⁵⁴ SSDI provides benefits to individuals who have worked in jobs covered by Social Security and who suffer permanent disability that renders them unable to work. Social Security Disability Planner, *available at* <http://www.socialsecurity.gov/dibplan/dqualify.htm>; Abraham & Liebman, *supra* note 51, at 83–4. This is not a basic premise of a loss-based system; it is simply where SSDI draws the eligibility line. *See* SUGARMAN, *supra* note 3, at 168–190 for a more expansive loss-based social welfare approach.

In addition, some systems are hybrids. No-fault automobile insurance in New York, for example, provides exclusive no-fault insurance coverage for economic loss up to \$50,000 resulting from an automobile accident and allows victims who sustain more than \$50,000 in economic loss or suffer serious injury to sue in tort for negligence, creating a system in which recovery may depend upon fault, cause, or loss, or some combination thereof. N.Y. INS. LAW §§ 1502–04.

⁵⁵ *See* Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. ? (2010). The term “flood” of litigation is another metaphor applied to tort litigation that is used in rhetorically strategic ways. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 65 (1983); Robert L. Rabin, *Emotional Distress in Tort Law*, 44 WAKE FOREST L. REV. 1197, 1198–1202 (2009).

Second, these restrictions help to build the political support needed to establish and maintain compensation systems.⁵⁶ Insofar as workplace injuries, accidents, and permanent disability are problems of widespread concern, compensation systems that focus on these sources and types of injuries are more likely to attract political support. In a similar vein, politically salient losses and events have generated support for other narrowly-focused compensation systems, including adverse reactions to childhood vaccines, black lung disease, and the 9/11 terrorist attacks.⁵⁷

These categorical restrictions inevitably generate concerns about arbitrariness. Abraham and Liebman develop the point in the context—far removed from tort—of SSDI eligibility determinations. Their analysis suggests that SSDI eligibility determinations based on a binary yes-no test arbitrarily treat individuals with similar disabilities differently and that the subjective nature of the judgments required to make determinations makes outcomes unpredictable.⁵⁸ Appreciating these problems in the SSDI system illustrates that a critic of the tort system concerned about arbitrariness must do more than simply advocate no-fault or social insurance alternatives as a solution. Instead, the tort skeptic must articulate baseline social welfare

⁵⁶ SUGARMAN, *supra* note 3, at 103 (“Political considerations also play a role in determining which sorts of accidents are addressed by compensation schemes.”)

⁵⁷ For further discussion, see Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703–13 (2005).

⁵⁸ Abraham and Liebman explain:

By imposing the requirement of total disability, SSD and most private disability insurance programs do not provide compensation for partial disabilities—those that prevent a person from engaging in a prior occupation but do not completely eliminate that person's ability to work. This requirement makes eligibility a yes-no question, with a claimant being found completely ineligible or fully eligible. A substantial percentage of all applicants are near the borderline of eligibility: something is wrong with them, perhaps they could work with difficulty or pain, and while it is reasonable for society to exempt them from further employment, others with similar difficulties continue to work.

The requirement of total disability is a major cause of the dissatisfaction with the outcomes of the vast adjudication system that labors to make SSD eligibility decisions. Because an individual's application requires such a subjective determination, and because so many of the cases are near the yes-no line, every student of the system concludes that outcomes depend on which decision maker sees a case, where in the country an application is filed, and what words a physician may have chosen to describe a condition.

Abraham & Liebman, *supra* note 51, at 110

premises and then choose among various forms of arbitrariness by justifying why some are more objectionable than others and why proposed systemic reforms will strike a better balance.

For more than forty years, proponents of tort reform have frequently invoked the lottery metaphor to emphasize the problem of arbitrariness in the tort system and to urge that tort be replaced by no-fault accident insurance and administrative risk regulation. We have argued that the metaphor is inapt because tort law, for all its flaws, is far from being a lottery-like system of random outcomes, and because the metaphor fails to recognize that arbitrariness is a characteristic feature of any compensation system that imposes categorical restrictions. As a consequence, shifting from tort to insurance cannot eliminate arbitrariness—although it may, in some respects and at some cost, reduce it. Reform must focus not on the fact of categorical restrictions in such systems but on the form, content, and number of these restrictions and the policy tradeoffs that they entail. At this point, at least one thing is certain: the lottery metaphor has obscured rather than illuminated thinking about tort reform, and it is time to retire it.