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Keynote Address

Ralph Nader

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KEYNOTE ADDRESS**Ralph Nader***

Thank you very much, Dean Uelmen, ladies and gentlemen. As you are well aware, the title of the conference is *The Future of Tort Litigation in California*. California is such a large state that one is entitled to put it in a national context because what happens here not only reflects what may happen around the country, but often initiates it.

I would like to begin by discussing the function of tort law, because I think the misconception of what it really does is at the root of many, at least theoretical, assaults on it. What we are really talking about is the use of the law to both compensate and deter violence to person and property, to widen the respect in the civic philosophy that underlies the law and is nourished by it, and to widen the respect for the physical integrity of human beings. I view a democracy based on three pillars: civil liberties, civil rights and safety or security rights. And certainly there has been a very broad theoretical development of civil rights and civil liberties—not enough of such development for safety rights. Furthermore, where there has been a theoretical development of safety rights in recent years, post-Prosser and post-Seavey, this has been a development that is notable for its empirical starvation.

As I view the evolution of public and private safety standards and the kinds of stimuli that provoke people and industry to upgrade their standards, their warnings, it is clear that the functions of the tort system are at least fourfold. The first is the one most focused on, which is a compensatory function. The second is a deterrent function. The third is as disclosure and public information, and the fourth is an ethical expansion function relating to the impact between the powerful and the weak. Most of the attention and attack on the tort system has been based on its evaluation as a compensatory mechanism, almost totally ignoring its deterrence, disclosure and ethical expansion functions. And I want to discuss briefly the last

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three functions.

You only have to speak to a corporate counsel or a safety engineer in any industrial corporation to appreciate the effect of insecurity stemming from a potential jury verdict or tort action on their sense of what is prudent. To the extent they think they are invulnerable to the reach of the tort arm, to the extent they think they will not be penetrated by the discovery procedures, they will rest on their oars. Intra-corporate memos will not be full of cautions and recommendations and urgings couched in language the corporate executives understand, rather, the unanticipated imposition of an unbudgeted cost coupled with widely expanded public scrutiny of what they have been doing.

I would like to see more studies on the deterrent function. These studies have to be funded. The sources of funding for existing studies, with few exceptions, are designed to attack and undermine the tort system, to show its weaknesses, not to show its strengths. But, based on much observation and access to internal company memos and conversations with corporate executives and corporate lawyers, I have little doubt that the greatest deterrent impact of the tort law system is what they choose not to do in terms of taking risks. That the anecdotal data which is being brought together—showing post-verdict modifications on motorcycles and motor vehicles, etcetera—that those are only a tip of the iceberg of the deterrent function of the tort system.

The argument is often made that the tort system impedes the development of new products. There is not much evidence for that, even in the celebrated beta-blocker allusions—not much evidence at all. The tort system functions the way the insurance system should function, as a screening device against products that are too risky to be brought to market and products that have to be modified and improved before their sale is continued. This is the ideal function of both of those systems. As I will note in a few minutes, the insurance function has had other orientations in recent decades.

The disclosure and information function is another very poorly understood contribution of tort law. If you look at the major headlines relating to traumas based on corporate products in the last twenty years—headlines like the Pinto fuel tank, the Firestone radial tire, the Dalkon shield and its hundreds of thousands of mutilated victims, the asbestos predation and its hundreds of thousands of casualties and many other similar celebrated, notorious products—you ask yourself, where did all that information come from that was conveyed in summary form, from time to time through television, radio,

newspapers and magazines? It did not come from the regulatory agencies, the agencies that have the ability and the authority to get this information, nor from the political will. This information came from law suits, discovery procedures, depositions, interrogatories, cross-examinations, etcetera.

As a result, millions of people were notified before being harmed of the quantitative significance of these products. They were enabled to take their precautions, demand corrective legislation or regulatory standards. They could lose their sense of innocence about what modern industry and its leaders are capable of doing or not doing. The disclosure and information function gives us a lot of data for scholarly analysis, for historical analysis, for sociological analysis. It starts a grapevine of concern throughout the country. It is a warning system, and to the extent that it has a public relations sting, it carries with it a deterrent consequence.

The ethical evaluation is even less recognized. We ask ourselves where in our society is there a reservoir for authoritative advancement of proper ethical relationships between corporations and consumers, corporations and workers, corporations and communities, between the technology of industry and the rights of future generations? It's difficult to find a reservoir that is more consistent and more productive than the appellate decisions in tort law over the last hundred years or so.

Where is the other reservoir? One may say religion—how authoritative is that in terms of changing the behavior of General Motors? From many a pulpit comes the elucidation of the golden rule. I don't think it reaches Roger Smith and other G.M. executives in terms of altering their behavior.

Where else—government safety standards? Yes, to some degree. These are often very attenuated by the time they are issued, very late by the time they are issued, and very obsolete in a few years. The tire safety standard issued in 1968 is twenty-two years old. It was a consensus standard, incomplete at the time, and has not been updated since. Almost all the tires bought now attain standards beyond it. In other words, it doesn't even function as a lowest common denominator in terms of having evidence of a few tires falling at or underneath that standard. So, it is basically an historical exhortation, rather than a safety standard.

Congressional hearings? They do something like that; they try to widen the ethical ambit of proper relationships between perpetrators and victims. But they are not very authoritative either because they deliver their message to an incentive system that changes behav-

ior, priorities, investment allocations and the like.

Consider the decision by Learned Hand in the T.J. Hooper case, which repudiated the state of the art argument by tugboat operators who didn't have radios and couldn't receive warnings of approaching storms, and they said, "Well, all the tugboat operators don't have radios, or most of them don't." Learned Hand said, "Well, most of them should." That started a whole train of judicial decisions that stripped the negligent company of its comfortable rationalization, that they could continue to be negligent because the rest of the industry behaves similarly. Some of the most venerable and wisest establishments of proper relationships in the critical area of physical integrity of human beings and their property have come from these appellate decisions. And I must say, as far as I can see, the common law that emanates from these decisions and affirmations is the greatest single reservoir trying to cope with the complexities and the impacts of modern technology, the health, safety, and property rights of individuals. That is a very important public asset.

In an alternative no-fault workman's compensation scheme, the compensation doesn't reflect community values. It begins to reflect political values. The jury is out of the equation. Workman's compensation is no longer a deterrent system; it's frozen. Workman's compensation doesn't disclose much in terms of internal corporate behavior, memos or cover-ups. Workman's compensation is an ethical dead end. It doesn't attract the most imaginative minds or the most intense endeavors of advocacy.

We should always keep in mind when we evaluate the tort system and consider how it can be improved, its infirmities and place it in the proper historical context so that more than law students and law professors and lawyers can begin to understand it. I am being charitable when I assume that law students understand it, because they often take that first year course and never look back. And they are increasingly taught by professors whose minds have become monetized by the Chicago School and who have been so empirically starved for so long that it is one of the wonders of the academic world that they are still physically articulating themselves in front of a classroom.

Now, in terms of the management of violence, either industrial, commercial or governmental, that we call torts, there are other systems. There is the criminal law—we know how widely that is applied—which in our country is still based on the individual behavioral model of street crime. It has very, very little application to corporate crime. Crime in the streets—yes, it applies in some fash-

ion. Crime in the suites—there just aren't any prosecutorial resources available. The prosecution of Ford Motor Company in a small town in Indiana on a Pinto incineration case a few years ago was launched with \$21,000, the largest budget to date by that prosecutor. Ford spent over 2 million dollars including retaining the former law partner of the judge in that small town. It was hardly a contest.

I recommend a new book written by the sociologist, Donald Black called *Sociological Law*, Oxford University Press, 1989. It is a small book; he always writes small books—very, very analytic, distilled books in terms of showing that like cases are not treated in like fashion and the very important factors that decide judicial outcomes depending on whether individuals sue individuals or individuals sue organizations or organizations sue individuals or organizations sue other organizations, not to mention economic, ethnic and other statuses that are cranked into the equation.

There are also the regulatory agencies. These, as I have noted, are too little and too late. Sometimes they perform rather single accomplishments, usually right after the legislation is passed in the first flush years of the regulatory agency, and certainly regulation has something to do with the final victory which will lead to the installation of air bags in cars and prevent hundreds of thousands of casualties. I think litigation had a little bit to do with it too, but it was the technology of the air bag that was most effective and its superb performance in the models in which it has been installed over the years.

Besides the criminal law and the regulatory standards in the tort system, there are many informal sources of feedback. There are some managers who take ethics seriously and perform a little differently and better. Sometimes there is private marketplace feedback that sends a particular message. I suppose now the apple crop and the apple growers are experiencing reduced sales following the Meryl-Streep-supported report and all the publicity dealing with alar and apple juice, apples and applesauce and the exposure of infants to that carcinogen. But, taking these all together, I think we still see a big vacuum that I am particularly pleased to see is being filled to some degree or another by the torts system.

Now, having said that, let's ask a quantitative question. Of all the people in this country who are killed, injured or exposed to disease due to the negligence or worse behavior of perpetrators, how many of them get compensation under the tort system? This has often been misinterpreted as a reason for the no-fault system. The

reason why most of them don't get compensated, such as in medical malpractice, is: first, they don't know that medical malpractice exists because the doctor isn't likely to tell them immediately—especially with a wrongfully prescribed antibiotic or an unnecessary operation or what have you. Secondly, even if they do know, there are certain personal deterrents here. They don't want to sue the family doctor; they don't want to go through the anguish; and they are told in many ways that the percentages are against them. Third, when they finally reach a lawyer, the lawyer will look at the case and decide what are the probabilities and what are the possible damages. So, many smaller cases don't get adequately represented in the presently structured system, and as the expense of litigation increases, the smaller cases don't get lawyers. And then when they go to trial, and they go to a jury, the system is also stacked. Where are the experts coming from? How many doctors can the doctor get compared to how many doctors you can get as expert witnesses? What about the command of the data? What actually went on in the hospital room is not easy to obtain.

We also have to look at the economies of the tort system and see how we can become more efficient, present more store-front representation of victims with smaller levels of damages, various products liability and malpractice actions in other areas. There is nothing that says the tort system's present mode of representation cannot come into the modern age with an expanded proliferation of efficiencies and service working on a volume of smaller cases. And there's no reason why the costs of negligence or criminal behavior should not be more widely imposed on the perpetrators so that these costs are internalized and they generate their own corrective behavior. The anesthesiologist, I think, now will admit that malpractice cases over the past generation have worked wonders in improving the safety of the practice of anesthesiology. And, indeed, the data show this in terms of the decline in fatalities and other injuries due to the application of anesthesia prior to an operation.

Now we come, of course, to the problem of the tort system under attack and why it is under attack. The insurance companies are attacking it because they have ceased to be engineering underwriting institutions, and they have become financial institutions, or as I like to put it colloquially, financial cash cows feeding the public a lot of bull.

In years past, some chapters of their underwriting successes have included the Lloyds of London requirements in the 17th and 18th century that ships to the Orient be equipped with life boats and

that lighthouses be constructed to reduce the likelihood of ships sinking to the spectacular improvement in industrial boiler safety due to the rigorous standards and pre-conditions set by the insurance companies for underwriting policies purchased by factories. But, in recent decades, a new orientation has beset the insurance industry: they are now more attuned to trying to invest money in order to expand their investment income than they are to loss prevention. They would rather get a \$1,000 premium from you and pay you \$500 than get a \$500 premium and pay you \$250 because there is more money to put away for investment income. There is almost a reverse incentive now. One gets the impression that as long as there is an ever escalating ceiling of permissible rate increases, the casualty insurance industry would not care at all about efforts to prevent injuries, death, disease and property damage. Now that this escalating ceiling is not escalating as rapidly, because of public resistance, you're seeing an extraordinary expansion of lip service in recent months by the insurance companies for loss prevention.

Where were they? Where were they when we were trying to get a motor vehicle safety law through in the sixties, which finally was enacted and has saved over 170,000 lives and millions of injuries? Where were they when the speed limit went up to 65 m.p.h., even though their own studies and reports showed thousands of additional casualties? Where were they when Mr. Reagan acceded to the will of G.M. in the early eighties and reduced the bumper standard from a mere 5 m.p.h. protective level to 2.5, instead of advancing it to 7 or 8 and preventing billions of dollars of fender bender collision expenses, which now the insurance companies tell us is one of the reasons for their need to expand rates? Where were they when the states were repealing motorcycle helmet laws and creating legions of paraplegics, quadraplegics? Where were they when groups would beg them to be active in fire prevention and they'd look the other way, causing one Harvard scholar to observe that they need a certain number of fires in order to create the economic demand for more comprehensive and expensive fire insurance?

The industry was a cost plus business until Proposition 103 was enacted—exempt from the state and federal antitrust laws, exempt from federal regulation, subordinated to the weakest type of state regulation, and, until 1986, exempt in reality from federal tax laws. The Government Accounting Office noted that the property casualty insurance companies made 81 billion dollars in the decade between 1975 and 1986, paid not a cent in federal income tax, and received a 1.2 billion dollar credit. This is a highly pampered and a highly

exempted industry which has allowed its worst commercial instincts to dominate its orientation toward the world of injury, sickness and property damage. And so, it was not surprising that every time the insurance cycle comes around, following a period of high interest rates, suddenly beginning to decline that they have never lost money, but a decline in their rate of return. This reached rock bottom in 1984, about a 3.2% rate of return. Then they had to suddenly increase rates to start that upward scale of that decade long cycle and, in order to increase the rates, they had to find someone to blame.

They, of course, did not want to blame themselves, their inefficiency, their waste, their hierarchical managements, their wrong-headed actuarial practices. The actuarial practices are designed to maximize their revenue, not to reflect actuary reality, such as the low credit they give to good driving records compared to territorial presence, so they started blaming judges, juries, lawyers, and those nasty, determined victims who wanted to bring them to justice.

Aetna, which has always been the first in the mad dog race attacking the tort system and the civil jury system, unleashed a series of characterizations, or shall we say caricatures, of the civil justice system that even the most adept Kremlin propagandist would have been proud. They are continuing to do that now with wild misstatements of cases, cases that were reversed, set aside by the judges, the verdicts caricatured. Indeed, in the mid-seventies there was even a case, attributed of course to California, in which they said a man picked up a power lawn mower and started cutting his shrubbery—strong man—cut himself and got a nice big verdict. When I wrote to the insurance executives asking them for the citation for this remarkable case, they finally wrote to me saying there was no such case. It was fictitious. And yet these phony anecdotes found their way into the repertoire of the master of phony anecdotes, Ronald Reagan, when in 1986 he commended to Congress that Congress preempt common law products liability, codify it and put a \$100,000 lifetime cap for pain and suffering. I read his message carefully. I noted he did not ask for any cap on insurance executives' salaries, it was just a cap on a lifetime of pain and suffering. Now this attack made some headway, and legislators rushed to their desks to pass tort reform legislation.

It is an interesting phrase—tort reform. I wish they were trying to prevent torts, as Harvey Levine said, "Is it proper: 'tort reform'?" And the contest was on all over the country. Now, mind you, we were in a period of corporate prosperity, record corporate profits year after year, record corporate executive bonuses and salaries, and

this is the way they chose to deal with the most vulnerable people in our society. It is not enough they destroy the regulatory performance in Washington, which prevents death and injury by having stronger and more up to date safety standards. After destroying the regulatory part of the law's respect and safeguard of the health and safety of individuals, they turned around to try to make it even more difficult for those who were injured and the next of kin of those killed to have their day in court. And they did it on the most pernicious of realms.

They did not do it on the basis of quantitative data, because the quantitative data contradicted them, including the Rand Institute studies out of Santa Monica. In 1985, Rand estimated that the million tort cases filed that year would have a cost of twenty-seven to thirty-four billion dollars. That's twenty-seven to thirty-four billion for all the tort cases filed in all the courts of law in the United States. Let's put that in perspective. Here is a cluster of dollars which is being transferred between different parties. That twenty-seven to thirty-four billion included not only settlements and verdicts but claims processing costs by the insurance companies, the fees of the lawyers on both sides and a per hour estimate of the litigant's time. Now, that is a pretty important area of American society to spend money on compensating injured and sick people. And we can all find ways for how it can be done more efficiently, more expeditiously. But even taking that twenty-seven to thirty-four billion, let us compare that with other clusters of expenditures: thirty-three billion on cosmetics, forty billion on soft drinks, sixty-two billion on alcohol, one hundred and four billion on General Motors products, not to mention the Defense Department, which rounds off its contracts to the nearest billion dollar.

Breaking it down in a more micro way creates all this uproar about too much money being paid out for medical malpractice—it was less than two billion dollars in 1986. The premium itself for hospitals and doctors was about three or three point five billion dollars. How much is two billion dollars? There are over 400,000 serious cases of malpractice, probably much more, but let's make it easy. When you talk about unnecessary hysterectomies, unnecessary caesarean sections, and other unnecessary operations, you are way over 400,000. Let us take 400,000. In 1986, 18,000 victims of medical malpractice did not receive any money whatsoever by verdict and settlement. How much is less than two billion dollars? We spent two point seven billion dollars in 1986 on cat food. I don't see any social attack on that expenditure. How about products liability, where there is almost as big of an uproar. At the most, the best estimates

we have—extrapolating from a number of the data collection centers such as jury verdicts research, etcetera—is less than two billion dollars in verdicts and settlement transfers in products liability cases. They are very hard to bring, very hard to win, and very few lawyers know how to handle them. The information is very cloistered.

So, put the malpractice and the products liability together, and you have a total compensation transfer to injured people that is less than the post-tax profits of Ford Motor Company that year—one company. So, why the outcry? Why the outcry when the National Industrial Conference Board, an industry-funded representative board for pursuing studies on the economy, came out with a report over two years ago, based on a poll of risk reduction officers of corporations, concluding that there was no real serious product liability crisis. This was, of course what *Business Week* was reporting all along: that the main impact of products liability laws was to make the products safer. These are the people in the company who know. Why the outcry?

It isn't because of the compensation burden. It's because of the other three functions of the tort system. It's because of deterrence in the sense of reaching the board of directors and restructuring corporations like John Manville and A.J. Robbins. The arm of the tort law is reaching up, up, up into the principal segments of the board and officer corps of these corporations. Some of them have to leave, a lot of them have to be deposed, and they don't like that kind of interference. They would rather have these messy things handled by some lower functionaries: out of sight, out of mind, out of public glare, out of any analysis of how the corporate structure diffuses responsibility and covers up. They are also very concerned about unloading their internal files for public review and media promotion.

They also don't like the idea of expanding their obligations. They now have a duty to warn—got to put it on the label, got to expose yourself. They have to check their scientists; they have to check their chemicals. These executives like routine. They use the word "predictability." They don't like to have their golf game disturbed on weekends. Litigation upsets them in that way and the economic cost is trivial. It is, in fact, too trivial, given the compensation transfer needs of victims who get nothing. That is why the insurance industry, among others, needs to be re-structured toward loss prevention, toward putting its rating function, its political and economic muscle behind regulatory standards, behind conditioning the insurance of the workplace or of a particular model car or a pharmaceutical in terms of levels of safety. That is what we are trying to do.

That is what we are going to succeed in doing, and already the insurance companies are trying to nestle up to consumer groups in Washington and California in order to develop joint statements on loss prevention and concern for safety. We have reached the rhetorical state now. And the next one will be the commitment of political and economic resources.

The ethical growth that comes from the expansion of the common law of torts is currently, given the political complexion of our country, the only opportunity we have to control the unbridled production and commercial technologies, many arising with no controls whatsoever. For example, genetic engineering—no regulatory controls whatsoever. What is the relation of the tort system to the insurance system? Until recently, it has been primarily a very, very adversarial one. The insurance system is built on the premise of charging consumers more and making sure that they collect less. That is not a very creative use of the insurance function.

The re-insurance function, represented by Lloyds of London as the leader in the re-insurance market, is even more indifferent and callous. Our tort system is being subjected to a bombardment by foreign based re-insurance companies that are the lead in developing policies for re-insurance and are followed by U.S. re-insurance companies. The tort system is being bombarded to depress its protection of the rights of victims down to the lowest British common denominator and then who knows from then on—maybe to the lowest Korean common denominator.

Lloyds of London's legal representatives made no secret of this in statements they have made at conferences and hearings since 1985. In Alaska, at a conference on the tort system, the representative of Lloyds submitted a list of twenty-seven reform items, substantive and procedural, which would have corroded and undermined 100 years of common law progress and would have brought our system closer to the British system, a system that forgets about the jury, forgets about pain and suffering, compensation, forgets about punitive damages, forgets about the contingent fee. It is best illustrated by the Oroxolone or Oprex cases—a drug produced by Eli Lilly which damaged thousands of people in Britain, horrible skin and liver damage. A year ago they settled the first batch of cases after five years of litigation. The average settlement figure was \$3,100. In the United States there were settlements and verdicts ranging from \$250,000 to \$6,000,000. Livers are the same in England and the United States. Skin vulnerability is the same, pain and suffering is the same. So we are dealing here with a multinational battering ram

under the pretext of curtailing our legal rights to keep up with the global competition, to depress some of the most precious advances in the American democratic system of law. We should always keep that in mind.

There are larger fish to fry in the global strategies of multinational corporations than simply to deal with the collateral source rule. And you see now the attack on the tort system is coming piecemeal because it cannot come as a major assault. It is coming piecemeal in the sense of eliminating or restricting joint and several liability, getting rid of the collateral source rule, mandatory periodic payments, capping pain and suffering, and curtailing contingent fees. Defense lawyer fees are absolutely outrageous—the biggest single cost to the insurance companies are defense lawyer fees. This kind of chipping away continues; for example, punitive damages are slated for abolition or curtailment, curtailing or ending bad faith cases.

I just collected the recent legislation in your state legislature. There are something like fifty-one statutes and major judicial decisions all in the direction of limiting liability, providing immunity, and/or curtailing victim rights. Let me just read you a few of these quickly.

AB 3992 expands the immunity of local elected officials. AB 3694 (these have been enacted) expands public entity immunity for land failures. AB 3473 immunizes physicians from liability for obstetrical negligence when on call. AB 1530 permits corporations to immunize directors and officers from liability to the corporation for their negligence. I guess Willie Brown, who supported this bill, has been overly impressed with the recent probity of American corporations and their peccadillos.

AB 1912 immunizes public entities for injuries to third parties caused by police hot pursuits. That means, if a hot rod police officer, three years removed from teenagerdom, takes off after three kids in a car who have not been coming out of a bank with a flaming gun, but just look a little suspicious, and the kids take off down the street at 70, 80, 90 m.p.h. and smash into a family in a car stopping for a red light, that family, or what is left of it, cannot sue the municipality. Chipping away. Constantly chipping away. There is even a bill that passed that eliminated liability on the part of public entities for police dogs' bites in your state. Another is eliminating most strict liability for injuries caused by prescription drugs—a restrictive statute of limitations to bar D.E.S. suits. On and on and on. That is strategy number one, like termites eating into the foundations of this edifice.

Strategy number two is to go after more mackerel. For example,

a state of the art defense becomes more flexible and permissible. They are all negligent, therefore, no one is negligent. Compliance with government safety standards is a defense against liability. They will set up all these phony, little regulatory standards along with the others, and they will say, "Look, we adhere to this 1967 or 68 tire standard." This is a defense against products liability eventually destroying or eliminating the role of the civil jury and putting the whole process in a kind of compensatory board; there is the end of the tort law system in its multiple and functional contributions to justice in our society.

Let me say this. There is often a society that has a lot of injustice and no rebellion. The rebellion comes when the injustice is perceived. It is not enough just to have injustice. It has to be perceived. The perception of injustice is rising in this country, and I feel that pulse around the nation, against industrial malice and negligence, against toxic chemicals in the workplace, in the environment, against the choking and corrosive effects of urban air pollution, the children who are now in schools, fifteen million of them, with asbestos exposure, the kind of indoor pollution and harm that is coming to chemically sensitive people whose roles are growing by leaps and bounds, the injustice felt when people are damaged by sudden acceleration in the vehicle, and the company says it is their fault that they hit the wrong pedal. They have said this to a number of police officers who are not known to hit the wrong pedal. Then they see how difficult the state legislatures and the courts are making access to justice after the blood is spilled. It is bad enough that access to justice for deterrence and prevention is being blocked by deregulation. And this anger is building and building, you saw part of it in Proposition 103.

The plea has to be that generation of Americans ruling this country, corporate and government, all three branches, become more statesmanlike, become more far-seeing, to recognize that the best type of economic demand to cultivate in a society is the economic demand for justice. They must know that the concentration of power and wealth, the ossification of bureaucracy, the domination of our economy by global multinationals is not being lost among the people. The biggest mistake rulers can make in this country, whether they have robes, political action committees, money or executive suites, is to think that these injustices are not being registered in the minds of people. They are not cumulative, and they are not waiting for an explosion to occur—a very modest example of which was Proposition 103, where less than two million dollars defeated 80 million dollars and a massive apparatus behind the propositions that failed as well.

Let me put it another way. I have just been meeting with young canvassers all over the state of California, who are determined to make sure that Proposition 103 is implemented, who are determined to make sure that the multi-billion dollar juggernaut called the insurance industry becomes the sentinel for health and safety on the front lines dealing with toxics, product safety, and condition safety in the workplace/marketplace. And I can say this, that if those men and women in their sixties do not reflect the wisdom that they are capable of, then those men and women in their twenties are going to reflect the outrage of which they are fully capable. We are not being led by sufficient people of stature but by those who have more power than they can responsibly exercise, and who have such a shallow understanding of history. How even in corporate pragmatic terms the proliferation of justice, access, voice, and the decentralization of power have proven that they are the principal contributors to an expanding economy and prosperity compared to those countries who have none of these expansions. While they sit on great natural resources, they have wallowed in misery, poverty and brutality for centuries. The awareness level of people vis-a-vis these physical assaults on their security and their children is increasing, and it is not just street crime.

As this awareness increases, what are we seeing? California going backwards. Having once led the country in the evolution of the common law of compassion and distributive justice, it is now going backwards in terms of legislation, restricting the rights of victims to have their day in court, going backwards in terms of one judicial decision after another. What could possibly be the justification for the rampant misuse of the decertification process by the Supreme Court of California? No opinion? What is a court without an opinion? It is a court that rules by fiat.

There is also regression in terms of too many professorate and scholarly courts. I have a test for intellectual sincerity, even though it expansively disagrees with my own position. It is composed of two parts. Does the professor who stands up before the tort law class exercising the Socratic method, which is a game only one can play, and starts injecting the fertile minds of the law students with the ridiculous, mythical doctrines of the Chicago School of Economics—does that professor have an alternative proposal to prevent death, injury and property damage under the rule of law? Or is that professor mostly interested in excoriating the Prossers, the Seaveys, the Cardozos, the Brandeises, and more judges of late?

The second part of the test is, has that professor ever actually

spent time with victims? Has he or she gone into the wards? Have they seen what has happened to the victims of Murr 29 and to the barely breathing victims of asbestos—probably the biggest industrial criminal coverup in our history? Have they walked ever so slowly with the quadraplegics to listen how they have to get up in the morning and what they have to do before they are functioning?

Perhaps there is a third part of the test, and that is, how does that law professor spend his or her moonlighting time? Are they consulting with these corporations? Or are they consoling and advising victims? Are they representing perpetrators or are they defending victims? I am almost at the outer reach of my disgust with the monetized minds that I see in the halls of academe and on too many benches. They are empirically starved and therefore their empathy is at a very low ebb. And when you are empirically starved and your empathies are at a very low ebb, the intellect can carry you into the most wild of orbits.

The tort system is not the only institution that can be devised by the minds of human beings to deal with these issues. But in a period of our history when so many doors are closed to the voices, the compensations, and the participation of victims, we should be very glad that we still have the decentralized common law of torts reflecting experience and not reflecting political action campaign monies the way the legislatures do. Indeed, the courtroom is the most decentralized form of decision making in our legal system. And while many doors may be closed to a point of view, against expanding the common law of liability, one door may be open, and that one door leads to many other doors.

What I think we need to recognize is that human beings are not chattels, so that when they are damaged all they are paid is out-of-pocket expenses. The worst part of an injury is not your medical bills, is it? It is not your lost wages, is it? It is your pain and suffering. That is the worst part. Any form of alternative sets of rights and remedies to eliminate the right to compensation for pain and suffering dehumanizes that human being and turns that human being into a comparative chattel, like so many damaged cars or damaged homes.

Whenever we evaluate the tort system and its alternatives we must start with the victims and get a good quantitative grasp on them and then work from there. We should not start from some highly abstracted theory with phony cost assumptions, with dismissed benefit appraisals, and try to replace the common evolution of the transfer of human experience into principles of applied justice.

Just for your references, on loss prevention I had an article in the *Suffolk Law Journal* about a year ago, which goes through the insurance company's history on loss prevention and what is needed. The compilation of state statutes is in my testimony before the California State Legislature two days ago, for those of you who want that list. And finally, I would focus your attention on the volumes of Congressional hearings, both the House and the Senate, which have many good sources of information and citations and should be in your University library. Thank you very much.

