The Wrong Way to Protect Small Business

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**Abstract**: *This is the first in a series of essays exploring a range of philosophical issues that arise in ordinary life that will ultimately be revised for publication in a book that will also include a broadly diverse set of essays and reflections, e.g. including philosophical methodology, the nature of representation and fidelity in audio systems. The book will also include music and audio reviews.*

*Subsequent essays in this series explore philosophical issues that arise from the major league baseball sign stealing scandal, the disqualification of Maximum Security in the Kentucky Derby, the morality and legal impact of waivers being required by Trump rally-goers and College and University boarders during COVID-19 pandemic. Another essay treads on somewhat more familiar ground – the Trolley Problem—as seen through a very different lens, however, as I identify three distinct sets of trolley problems that arise from the fact pattern of the original one, but that appear to have gone unnoticed to this point.*

*The current essay explores the legislation currently contemplated in the US Senate designed to immunize small business owners from lawsuits brought by customers alleging to have been infected with the virus while on the premises. I argue that this is the wrong way to subsidize small business.*

 I.

Mandated lockdowns and shelter in place orders have taken their toll on small businesses, especially those that rely on customer traffic for the majority of their revenue. With lockdown requirements lifted or expiring, these businesses face new challenges as they open their doors to customers, old and new, healthy and otherwise. Among the new challenges is the risk of potential litigation initiated by customers alleging to have been infected with COVID-19 after shopping or dining on the premises.[[1]](#footnote-1) A percentage of these suits will be frivolous; others will not be. Lawsuits, both frivolous and legitimate alike, impose costs on the small businesses whether they choose to defend against them or not; and if they do, whether or not they succeed. Additional litigation costs arising from the pandemic can only make a bad situation for small businesses worse.

In contrast, there is a growing sense in Congress and elsewhere that kick starting small businesses will create a much-needed return to ‘normalcy’ (or a reasonable facsimile thereof) while contributing to every neighborhood’s and city’s collective mental health. Additionally, a robust economic recovery in a country whose economy is largely consumer demand driven relies on the retail, restaurant and entertainment sectors. Finally, the predicament in which small businesses find themselves is not of their own making, and government lockdown and ‘shelter-in-place’ orders are at least partially responsible for the dramatic reduction in revenue they have experienced

To the extent the financial hardships small businesses have endured have been created by government actions, it is appropriate that the government seriously consider providing relief that would help small businesses re-emerge on more solid footing.[[2]](#footnote-2)

With the goal of providing help to small businesses as they re-emerge post lockdown, Senate Majority Leader McConnell, among others, is contemplating introducing legislation designed to prohibit customers from suing the proprietors of small businesses on whose premises they claim to have been infected with the virus.[[3]](#footnote-3) In effect the legislation would immunize small business owners from legal liability for medical and other costs their customers allege to have incurred as a result of shopping or dining on their premises. [[4]](#footnote-4)

II.

Obviously, a negative reputation adversely affects business (or anyone for that matter). Successful lawsuits against a small business brought by customers who have been stricken with the virus can adversely affect a business’s reputation. Maintaining a good reputation, therefore, depends in part on reducing one’s vulnerability to successful lawsuits. Absent a prohibition against initiating lawsuits of the sort the contemplated legislation proposes, the natural way to reduce one’s vulnerability to successful lawsuits is to take precautions to guard against exposing potential victims to infection in the first place. Thus, we would expect small business owners to take appropriate steps to mitigate the risk of spreading the virus, by, for example, imposing distancing rules, having employees and customers wear masks and so on. These ex-ante risk mitigation actions would reduce the proprietor’s exposure to potential liability in the event of its occurrence while also having the salutary effect of reducing the virus’s spread.

Taking steps to mitigate risk rarely, if ever, eliminates all the risk our actions impose on others (and ourselves). Those of us who drive automobiles do not do so expecting to injure others. Indeed, the vast majority of drivers do what they can to reduce the extent to which their driving exposes pedestrians, other drivers, their passengers and themselves to unnecessary risk.

Notwithstanding our intention to drive safely, we sometimes fall short. We can fall short in a number of ways, from inadequately servicing our vehicles to experiencing momentary lapses in attention or judgment. In that case, ex-ante risk mitigation efforts may fall short. Or our capacity to execute even the best plans to reduce risk may falter. Whatever the reason – fault in planning or in execution – failing short of satisfying the duty of care increases the danger others face and alters the normative relationship between us and those who our conduct threatens.

If the risk we create leads to harm as a result of our failure adequately to mitigate it, those injured as a result have a right in both law and morality to seek redress for the harms we have caused them. The right to demand redress creates a corresponding duty to make repair or to annul the losses our mischief has imposed on others.[[5]](#footnote-5) Typically, in order to protect our assets while compensating our victims we purchase liability insurance.[[6]](#footnote-6)

This is what we expect of one another. Small business owners are similarly bound, and we would expect them to react accordingly. To mitigate the risk of spreading the virus among customers we would expect them to enforce mask wearing and social distancing rules. Recognizing that the steps they have taken may fall short of what a jury would judge reasonable, or that their execution of otherwise reasonable strategies might come up short, they would purchase third-party insurance to compensate victims or to facilitate settlements while protecting the bulk of their own assets.

The contemplated legislation changes all that. Immunity from potential lawsuits does not eliminate the reasons for taking precautions, but it does eliminate some of the most important incentives to act on those reasons. That is because the contemplated legislation shifts costs to shopping from shop owning; to dining from restaurant ownership; and from owning a theater or concert venue to attending a rave or sleeping through a movie.

In addition, by protecting small businesses against lawsuits, the contemplated legislation reduces the amount of available, readily accessible information about the safety of various businesses, shops and restaurants. The absence of information is unfortunate as it may have either of two unwanted consequences. First, lacking appropriate information about the safety of various businesses, we would expect that many risk-neutral but inadequately informed customers will frequent shops with poor safety conditions. This could have an unfortunate impact of creating worse public health outcomes. Or, in the absence of good information, risk averse individuals (just about everyone in a pandemic) will shy away from putting themselves at risk that would adversely affect economic activity. Neither outcome is desirable.

The intention of the legislation is to reduce the costs that small businesses face upon reopening. In that sense, it constitutes a subsidy to them. Subsidizing small businesses may well be warranted, but this form of subsidy is entirely indefensible.

III.

The costs associated with the virus spreading as a result of reopening small businesses – especially retail, restaurants and indoor entertainment facilities – can be borne either by (1) shop owners; (2) customers; (3) all of us independent of our status as shop owners or customers; or (4) some subset of (3).

The proposed legislation shifts risk from proprietors to customers and does so through an intervention in the existing legal regime. Because the government could in principle subsidize small businesses in any number of ways, a good reason for providing a subsidy *is not for that reason alone a good reason for intervening in the existing legal liability regime in order to do so*. Even if it were, it would not necessarily be a good reason for shifting risks from shop owners to customers. After all, shifting costs from proprietors to customers forces potential victims of wrongdoing to subsidize potential wrongdoers!

In fact, there are several compelling objections to any proposed legislation that immunizes small businesses from lawsuits. (1) Subsidizing potential wrongdoers produces worse direct public health outcomes than the existing legal regime. (2) Preventing lawsuits eliminates the possibility of victims pursuing legitimate claims to repair warranted by the principle of corrective justice. (3) By forcing potential victims to subsidize potential injurers it unfairly imposes the costs of the virus for which no one is to blame on victims, (4) and leaves it to victims to spread the risk maximally over persons and time, when there is no reason to think that they are in the better position to do so. The proposed legislation not only fails on its own terms but (5) constitutes an inappropriate kind of response to the problem it seeks to address.

Let’s take up each of these objections in turn.

1. The contemplated legislation produces worse direct public health consequences than does the existing legal regime.

From a public health perspective, the proposed legislation simply makes a bad situation worse. Making this argument persuasively requires significant table setting, introducing several distinctions and explaining a bit of the existing legal regime.

In order to compare the two liability regimes, we need first to draw a distinction between ‘one-party’ and ‘two-party’ harms, injuries or accidents. A two-party accident is one in which the activities of both parties contribute to the likelihood of the accident’s occurrence and optimally reducing the probability of its occurrence requires that both parties take appropriate safety or risk reduction measures. In a one-party accident, optimal deterrence can be achieved by having only one of the parties to it take appropriate safety measures. Reducing the likelihood of most, if not all, accidents requires the parties whose behavior impacts the likelihood of harm to take appropriate precautions to reduce risk, and are, therefore, two-party accidents.[[7]](#footnote-7)

In order optimally to reduce the risks of COVID-19 infections, both parties – proprietors and customers – must take appropriate precautions. Shop owners need to insure a clean and safe environment in which their employees wear masks and are socially distanced. At the same time customers must also maintain distance, wear masks and remain disciplined in their hygiene; and more. The existing legal regime organizes incentives optimally to reduce the risk of infection, whereas the proposed legislation is incapable of doing so.

It is a commonplace among torts theorists and instructors to adopt the following framework when organizing their research and explaining the nature of tort law. That framework is organized around the principle that losses should lie where they have fallen unless there is a compelling reason for shifting them to someone else. The thought is that shifting losses from where they have fallen to someone else is costly and therefore that doing so calls for a justification. In other words, letting losses lie where they fall is in effect a rebuttable presumption. The burden of rebutting the presumption that losses should be addressed by victims falls to particular victims.[[8]](#footnote-8)

In the current context this means that the costs of being infected fall initially to victims who then have the burden of presenting a compelling reason for making those costs someone else’s problem. Within this framework, tort law is conceptualized as providing victims with an opportunity to shift their costs to someone else. In order to do so, they must initiate litigation and at trial present what the law recognizes as a compelling reason for shifting their costs to the defendant/shop owner. Most likely, she would argue that her costs are the shop owner’s fault insofar as being at fault for the victim’s loss is among the reasons the law recognizes as appropriate for relieving the victim of the burden of bearing the costs of her injury or ill health.[[9]](#footnote-9)

In order to establish that her loss is the shop owner’s fault, the victim/customer would need to establish it is more probable than not that: (1) she was infected with the virus; (2) the shop owner had a duty to take reasonable precautions to protect her (and others similarly situated) from becoming infected; (3) the proprietor failed to do so; (4) the harm for which she seeks redress was caused by that failure; and (5) her infection is a foreseeable consequence of the breach.

The duty of care expresses the regard for the well-being of others tort law requires of those whose activities put them at risk. The content of the duty – the stringency of the demands it imposes – varies by context. Common carriers – for example, railroads and hotel proprietors -- face a more demanding standard of care than is ordinarily imposed on the rest of us. In principle, a shop keeper could be called upon to take reasonable care or, like common carriers, be required to take extraordinary care to protect the health of his customers. Or, like those who engage in ultrahazardous activities, he could be required to protect customers from any exposure to the infection. Reasonable care is less stringent than extraordinary care; and both are less demanding than the standard of strict or absolute liability.[[10]](#footnote-10) For the remainder of the argument, let’s make the plausible assumption that under existing law, a shop owner would be required to take reasonable preventive measures to protect the health and safety of customers.

With this in hand, we can turn our attention to the next set of issues. First, how in a particular context can we determine what level of care is reasonable? Second, what normative role does the duty of care play in framing the relationship between those at risk and those who put them at risk? What are the normative and practical (legal and moral) consequences of someone’s discharging or failing to discharge the relevant duty?

Is there a principle for determining the duty of care that is general in its application yet responsive to particular contexts? Proponents of an economic approach to the law of torts, following Guido Calabresi’s landmark, The Costs of Accidents, have fashioned just such a principle.[[11]](#footnote-11)

Accidents (or more generally, harms or injuries) create at least three kinds of costs: primary, secondary and tertiary. Primary costs, are for example, the costs of the injuries, damage to property, illness from infection, hospital costs, etc. Secondary costs are those that arise in bearing the primary costs. So, for example the burden of bearing hospital costs and injuries can be significantly greater on those with limited means than the burden borne by those of significant means – though the absolute dollar amounts may be the same. Tertiary costs include the costs of administering whatever system is put in place in order to determine who should bear the primary and secondary costs and to enforce the judgments reached.

Economic rationality requires that we do what we can to minimize all of these costs while securing the system’s benefits. In other words, it makes good sense to deter harms or accidents as best we can and to spread losses so as to minimize their disproportionate and otherwise harmful impact on those who have to bear them. And we would want to make sure that whatever system we put in place to address the question of who should bear the costs employs the resources we allocate to it efficiently.

It is natural to characterize the law of torts as the legal regime primarily devoted to addressing these issues. The prevalent view of torts is that it is concerned primarily with the costs associated with injuries and harms more generally and that it is a mechanism for allocating those costs – at least, doing so between the party on whom the loss has fallen (the plaintiff) and the party she alleges whose mischief has caused it (the defendant). The distinctive virtue of the tort system is that it can impose the costs it allocates to incentivize targeted parties to reduce accidents by increasing the costs of engaging in the activities that result in harm. While we should allocate costs so as to increase deterrence, it would be counterproductive to impose more costs to promote deterrence than the deterrence we purchase is worth. Thus, we need to add together the costs of accidents and the costs of avoiding them; and then we would want to minimize that sum.

The *general principle* then is to **minimize the sum of the costs of accidents and the costs of avoiding them**.

The only question that remains is how to apply that principle in particular contexts and cases. Whether it makes (economic) sense to incentivize someone to take precautions depends on the costs of the precautions and the extent to which those precautions reduce the risk. Consider two cases. In one case it would cost $4 in precautions in order to reduce the risk of harm 50%; in the other it requires an investment of $6 to secure the same level of risk reduction. By reducing the risk of harm to 50%, the expected cost of a $10 harm in both cases is $5.

From a social perspective, we would want to incentivize potential injurers to take the relevant precautions in the first case, but not in the second. Investing $4 to reduce the expected costs of the harm to $5 is the rational thing to do, whereas investing $6 to do the same is not. Economists would say that the precautions in the first case are ‘cost-justified’ whereas those in the second case are not. The content of the duty of care then can be expressed as follows: each of us has a responsibility to take reasonable precautions to protect the safety (well-being more generally) of those who are endangered by what we do. Reasonable precautions are those that are cost-justified. Cost-justified precautions are those that purchase (ex ante) more in the way of risk reduction than they cost. Fault is the failure to discharge the duty of care. Thus, fault is the failure to take all cost-justified precautions.

So understood the duty of care expresses a social judgment about which precautions are worth taking that is designed to induce the relevant parties to particular harms to invest in precisely those precautions. How?

The answer requires that we understand first the normative structure of the current liability regime: the scheme of rights, duties and powers that it creates. Let’s illustrate in the context of shop owners and their customers. The argument to this point suggests that each shop owner owes his customers a duty of care which amounts to his taking all cost-justified precautions to protect their safety. That duty is correlative of a right that each customer has to demand that the owners of shops they frequent invest in precautions adequate to reflect appropriate regard for customer safety.[[12]](#footnote-12) The shop owner can either comply with the duty by taking appropriate precautions or he can fail to do so. If the shop owner satisfies his duty of care, he has fully met the demands customers have against him and no further duties arise in the event that harm ensues.[[13]](#footnote-13) The interesting cases are those in which he fails to do so.

There are two possibilities. In some cases, the failure to discharge a duty of care to his customers causes harm to no one. If no harm ensues, the law offers those he has unreasonably endangered no form of relief. Morality is nowhere near as silent as the law is. One who fails to discharge his duty but causes no consequent harm remains subject to reprimand, disapprobation, to being shunned, even to having his moral failing shared in ways that may adversely impact his business.

If, on the other hand, the shop owner’s failure to provide adequate protection leads to harm, those who have been harmed are provided an avenue to seek repair through the courts. It bears emphasis that the victim has, under the law, *a power* to seek redress, not a duty to do so. Victims of another’s mischief may decline to pursue redress. If they do seek a remedy, they have the burden of establishing that their losses are owed to the shop owner’s fault. If they succeed, they are entitled to repair. Once again, they needn’t take the repair they are owed. They are under no duty to do so. They are free not only to decline the compensation but also to gift it or assign it to others. Indeed, in some cases, the law arranges for victim compensation to be assigned to others (for example, their insurance company).[[14]](#footnote-14)

With these preliminaries in place, we can now show how the existing legal regime coordinates the behavior of both potential injurers and victims which it must do if risks are to be optimally reduced. We can then compare this result with the likely outcomes of the proposed intervention.

Consider the situation of the potential injurer first. He can either take the mandatory precautions or not. If he does not, he runs the risk of being liable for the full costs of all foreseeable customer infections. On the other hand, if he takes appropriate precautions, he frees himself from liability for the costs of infections and those costs fall to the victims. In other words, potential injurers can shift all the costs of the harms likely to occur simply by taking the precautions specified by the relevant duty of care.

The rational injurer will compare the costs he incurs by taking the precautions against those he would face should infection occur suitably discounted by the likelihood that it will. If the law requires him to take precautions that are greater than the cost of the harm discounted by its probability of occurrence, then it is not rational for him to invest in required safety measures. Provided he is risk neutral, he will invariably take those precautions (judged from the ex-ante perspective) that are less costly than the expected costs of the harm.[[15]](#footnote-15) By doing so he discharges his duty of care, and in so doing shifts all consequential costs to the victim. (It is worth noting that this is the mechanism by which the existing legal regime induces potential injurers to invest in the precautions that, from the collective or social point of view, are precisely the ones we would want him to invest in. Thus, within the economic framework, this is how the existing legal regime aligns individual with collective rationality.)

But the victim already knows that the potential injurer will take cost-justified precautions. After all, the above argument is really just an elucidation of what rationality calls for in the circumstances. Therefore, rational potential victims can count on rational potential injurers to take all cost-justified precautions and they can take some comfort in that. On the other hand, they also know that by investing in cost-justified precautions, the potential injurer frees himself of liability for subsequent harms. Optimally reducing risk does not ensure that no subsequent harm will occur. Thus, risk remains, and if it is realized, the costs will be the victim’s to address.

If there are steps that the victim can take to reduce those costs – defensive steps to guard against her being harmed, she will surely consider them. How much of an investment in those precautions she make? Again, the answer is straightforward. She will invest in safety up to the point at which the next investment in safety is more costly than the reduction in risk it purchases. The victim will thus take all cost-justified precautions! She does so not to avoid the charge of being at fault. She does so instead to optimally reduce her exposure to harm and its costs.

Thus, the existing fault liability rule incentivizes all the parties to an accident who could take steps to reduce risks to do so. The net effect is an optimal reduction in accident costs, which includes the costs of the accidents and the costs of avoiding them.

It is nevertheless important to note an asymmetry between both the normative and practical situations of the injurer and victim under the fault rule. If the injurer takes appropriate precautions he is not at fault and he thereby shifts all remaining costs to the victim. Just like the injurer, the victim will also take all justified precautions, and so escape any attribute of fault. But his acting faultlessly does not have the effect of shifting costs to the injurer or anyone else. It simply reduces his net costs.

It is thus an interesting feature of so-called fault liability that the victim will bear the costs of harm whenever the injurer is free from fault, even when the victim is as well. Under the fault rule, faultlessly caused injuries are always the responsibility of victims. In effect, this means that we can reconceptualize the fault rule in what would strike most of us as a very different kind of liability rule. The fault liability rule is really the rule that victims are strictly liable for the losses they suffer unless they can demonstrate that the injurer is at fault for them. Understood in this way, it sounds like the fault standard represents a defense that the victim has to what is in fact a form of strict liability imposed upon him.

It is also easy to see that one would achieve the same level of deterrence by adopting the following liability rule: namely, injurers are strictly liable unless they can establish the fault of the victim. In both cases establish the fault of the other party is a defense against what is otherwise a form of strict liability. Both rules lead to optimal deterrence. They differ only in their distributional consequences. Under the injurer fault rule, the costs of faultless injuries fall to the victim. Under the rule of injurer strict liability with the defense of victim fault, those very same losses fall to the injurer. We will see in a bit why this difference matters.

To return to the matter at hand and in sum: under the existing common law fault liability rule the shop owner takes reasonable precautions to guard against infection -- thus avoiding liability. The customer assumes that the shop owner will take such precautions and thus takes steps to further reduce risk since the risk that remains are hers to bear. The result is that both parties take steps to reduce risk optimally which is exactly what is required in a two-party accident case.

In contrast, the proposed legislation eliminates the incentive of potential injurers to take precautions. The injurer never bears the risk, so the victim is strictly liable for them. All she can do is minimize her costs. Because these are two-party accidents, optimal deterrence requires both parties to take precautions, but only the victim has incentive to do so. On the modest assumption that taking precautions curtails the spread of the virus, it follows that legislation eliminating a powerful incentive to take precautions increases the damage the pandemic is likely to cause. This is both unfortunate and ironic. Unfortunate because one would hope that policies designed to cope with the full measure of the pandemic, even those designed primarily to confer a subsidy on small businesses, would be sensitive to their health consequences; ironic in so far as the reason for shuttering businesses in the first place was to curtail the spread of the virus. It makes little sense to adopt a strategy designed to help us emerge from lockdowns and shelter in place orders that is likely to put us right back in the situation that warranted lockdowns and shelter in place orders in the first place![[16]](#footnote-16)

 IV.

In addition to creating worse public health consequences, the proposed legislation potentially undermines rather than enforces claims to repair supported by considerations of justice while also imposing the burden of spreading risks through insurance coverage entirely on potential victims.

1. The proposed legislation denies claims to repair that are called for by the principle of corrective justice

Most of the activities we engage in are likely to impose some risks on others. The question is what does morality call upon us to do given this fact of life? It depends. In the first place, morality distinguishes among the kinds of risks to which we subject others. Risks of being annoyed are less worrisome most of the time than are risks of suffering bodily harm or mental anguish. Holding the nature or kind of risk constant, morality requires that we judge athe likelihood that harm ensues. The more likely the risk materializing in harm, the greater the moral concern. On the other hand, morality has something to say about the value of the activity in which we are engaged as well. Some expressions of our autonomy in action are more valuable than others. To be sure, we may hold a different view about their importance to us, and that too is something that morality considers; and different moral theories – accounts of what morality requires, prohibits and permits – may well assess those considerations differently.[[17]](#footnote-17)

Generally, morality requires that we display in our actions appropriate regard for the interests of others. In this regard, law approaches the value of what we do, the value of it being our decision what we do, and the likely consequences – both favorable and untoward – on others in the same way that morality does. Sometimes this will mean forgoing activities likely to cause great and imminent harm to others; more so when there is little if any value in the activity itself. Other times it will mean that those we put at risk will be required, morally speaking, to simply grin and bear it; more so when the risks are minimal, the ‘harm’ of little consequence and the activity in which we are engaged of great importance.

Most of the time, showing appropriate regard for the interest of others requires that when we engage in various activities, we should take precautions that ensure that we not impose unreasonable risks of harm on others. As a result of each of us having a duty not to impose unreasonable risks of harm on others, the rest of us may navigate the world expecting that others are not exposing us to unreasonable risks. The expectation is normative, not epistemic. Although others are bound to look after our interests, sometimes they fail to do so. If that failure leads to our being harmed, morality holds that we are entitled to redress for the wrong done and perhaps compensation for the harm that results and the costs we incur as a result. We can demand of those whose failure to meet the duty of care to us has led to our suffering injury or harm that they satisfy a duty or repair for the wrong that is their fault. The duty to repair the wrong and its consequences, I have long argued, is a matter of corrective justice.

By immunizing shop owners from liability, it is obvious that the contemplated legislation undermines rather than enforces the moral right to repair grounded in corrective justice. For when the shop owner fails to take precautions and that failure results in a customer falling victim to the virus, the customer has a right to repair in both morality and under the current tort law that proposed legislation would nullify.

To be sure, there may well be practices and institutions that could be put in place that would otherwise repair the wrongs and annul their consequences, but the legislation offers none. In their absence and given the role of tort law as the primary instrument for doing so, the proposed legislation writes off significant and substantial matters of personal and social justice.[[18]](#footnote-18)

1. The burden of spreading risk through insurance falls to customer/victims

Let’s turn now to the impact of the contemplated legislation on risk spreading. Where the injurer is at fault for the loss the victim suffers, both morality and existing tort law would hold that it is the faulty party’s responsibility to see to it that amends are made. The law permits those at fault to protect their assets while making repair by purchasing third party insurance. The burden, then, of spreading risk to minimize its overall impact is normally borne by the party whose fault the loss is. Yet, by immunizing shop owners, the proposed legislation makes doing so the burden of faultless victims rather than faulty injurers.

The situation is no better when neither party is at fault nor is it better when both are at fault. In both circumstances, the burden of spreading costs falls to the victim. In such cases, fault provides no basis for choosing between potential victims and injurers. One would think that the burden should therefore be allocated according to some other plausible criterion, for example, which of the parties is in the best position to spread risk maximally over persons and time. It is reasonable to assume that shop owners, rather than individual customers can spread risk at the lowest cost, but perhaps not. In any case, we should want to explore which of the parties is in the best position to spread risk and at what cost. The contemplated legislation simply precludes any such inquiry. Once again, the legislative intervention not only imposes all the costs of risk-mitigation on the customers, it places all responsibilities for spreading risk on her as well.

V.

Fit is a relational concept. Things fit with one another or they do not. Fit has quantitative and qualitative dimensions and admits of degrees. The concept of ‘fit’ has figured in the theory of punishment, but has otherwise received too little attention in moral, political and legal philosophy more generally. Much of the discussion around fit and punishment has focused moreover on the relationship between crime and punishment. Penalties that are too severe or not harsh enough are said not to fit the offense. And they do not. The death penalty for parking violations would clearly be too harsh and would not fit the offense.

1. Intervening in existing liability regimes is not an ‘appropriate’ form of subsidy

Because the concept of fit is so closely associated with the criminal law and in particular with the relationship between crimes and punishments, I prefer the concept of ‘appropriateness.’ In general, we can ask, for example, whether a solution is appropriate to the problem it seeks to address, or whether our emotional reactions to various events are appropriate; and so on.

Appropriateness is not a ‘success’ term. Laughing at a wildly inappropriate joke can make comedian and audience alike pleased with themselves. Similarly, a subsidy may succeed at kick-starting a sector of the economy, without the form of subsidy being appropriate to the problem it addresses. The appropriateness of a response is governed by norms and does not depend on its success or failure. An appropriate response may succeed in securing a legitimate goal or it may fail to do so.

Events, problems or challenges ground or provide reasons for some responses to them but not for others. Philosophers are familiar with these issues in the context of the reactive attitudes. Guilt, shame and remorse are potentially appropriate responses to one’s own wrongdoing. Anger, resentment, indignation, as well as blame, mercy and forgiveness are potentially appropriate responses to another’s wrongdoing. There are times when guilt or shame is an appropriate response and other times when it is not. There are likewise occasions when resenting someone for what she has done is called for; other times when doing so is inapt. And so on.

Wrongs warrant responses to them, though it is often an open question what precise response is called for. In the case of torts, redress is an appropriate response, though it need not be the only appropriate response. Even when redress is appropriate, it is an open question whether redress is mandatory or simply justifiable, whether the victim of the wrong must demand it or whether instead she is free to waive her claim. The form redress takes is not fully settled by the nature of the wrong done. Considerations of appropriateness are only one kind of factor in determining whether a particular response is called for or justified, but it is an important one. For example, I am not convinced that considerations of appropriateness bear on whether the victim of another’s wrong should be required to seek or demand redress or whether instead she can decline to do so. On the other hand, considerations of appropriateness do bear on whether redress can take the form of compensation and whether the duty to provide compensation can be discharged by third parties.

Let me provide one more example. I am on record as a critic not only of the economic analysis of law in general, but of the economic analysis of tort law in particular. Though I have not said as much explicitly, the norms of appropriateness have been central to two important strands of my argument. The most general failure of fit between tort law and economic analysis is the following. On the economic analysis of torts, the main point of tort litigation is to allocate costs so as to minimize the sum of the costs of accidents and their avoidance. And we have relied upon this claim to show that even when measured by the theory of law most congenial to it, the proposed legislation fails because it produces worse public health outcomes.

But, as I have made clear already, I am no supporter of the economic analysis on its own terms. Part of the reason for that is that I do not believe that tort law serves a public end beyond the collective interest we have in institutions that protect the rights of individuals to seek remedies for the wrongs they have suffered and the costs they have incurred as a result. In other words, torts are private actions – a tort is a private wrong – and that makes it a poor fit, or an inappropriate response to the issue of securing a socially optimal expenditure of resources on avoiding harm.

First, the kind of response that wrongs call for is redress or making amends. Period. Minimizing costs going forward does nothing to make amends or redress a wrong, however, admirable a goal it may be. Secondly, the economic account misconceives the issue presented in tort litigation as primarily one of *allocating costs*. In fact, the entire economic approach to tort law would not get off the ground without this assumption. To be sure, costs are an important element of torts, but litigation is torts is not framed by the question of how the costs should be allocated. Instead, the central issue that tort litigation presents is one of *accountability*: who, if anyone, must answer for the wrong. In other words, the normatively most important feature of wrongs in torts is not the costs they create, but the person who must answer for them and to whom they owe that answer.

There is a second problem of fit or appropriateness that bedevils the economic analysis of torts.

If we follow economic analysis by holding that liability for a wrong in torts is best understood in terms of accident cost avoidance, then we would expect that the issues at trial would be designed to determine which party is in the best position optimally to reduce costs. But the facts that trials in torts seek to uncover are very different than what we would expect them to be from an economic perspective. The evidence at trial is designed to uncover whether the plaintiff has suffered harm, whether the defendant owed the plaintiff a duty of care, whether the defendant breached that duty and whether, if she did, the breach caused the harm of which the plaintiff complains and for which she seeks redress. All this evidence is designed to ensure that there is a connection between the wrongdoing and the appropriate response to it. The structure and content of inquiry in a torts case is the best evidence we have of the fit or appropriateness of the response to the underlying character of the wrong.

Though laughing at racially inappropriate ‘jokes’ may have the effect on the jokester or would-be comedian of kick starting or ‘subsidizing’ his career, such jokes are not funny and laughing at them is inappropriate. Prohibiting lawsuits may likewise kick start or subsidize car manufacturing, but in both cases, the solution does not answer or respond to the character of the problem it is meant to address. The solution does not ‘fit’ the problem, not because it provides too little or too much help financially. It is the wrong kind of solution because it is unrelated to the issue it is designed to solve, for all the reasons we have just presented. Subsidizing small businesses is about giving them additional resources or saving them from bearing certain costs. Liability in torts is primarily about wrongs, accountability and redress and only collaterally about costs.

VI.

One might respond to the argument to this point that we have simply missed the point of the proposed legislation. The aim is not to provide a subsidy to small businesses, but to address the worry that the current legal regime opens the floodgates to baseless claims to compensation brought in bad faith. If doing so provides a de facto subsidy to small businesses, so much the better.

Proponents of the contemplated legislation don’t need to deny that the current legal regime provides a mechanism for enforcing meritorious claims to repair any more than they need to deny that there are likely to be many such claims. The problem is not the extent of meritorious claims, it is the specter of an avalanche of baseless ones, pursued in bad faith, with the primary intention of forcing financial settlements to avoid incurring litigation costs.

On this view, proponents of the legislation do not assert that shop owners are unfairly burdened by meritorious claims. Rather, it is that in order to enforce meritorious claims the existing legal regime runs an unacceptable risk of incentivizing the plaintiff bar to pursue claims initiated in bad faith with the sole purpose of forcing settlements. The view is that the number of meritless claims is too large to risk allowing any suits to go forward. If that means preventing legitimate claims from proceeding, so be it. If real victims have a gripe, it is not with the legislation that prevents their taking action. Rather, the gripe is with those who would pursue bad faith claims, the net effect of which is to lead the government to banning all claims – both good and bad, well-grounded and groundless alike.

As long as there are tort claims, there will be a subset of them that are brought with little merit designed primarily to force a settlement. It hardly follows that to stave off the fraudulent ones, legitimate claims should be blocked. The better response would be to consider the tools the tort system already has or which it could incorporate to reduce questionable claims, while providing remedies for the meritorious ones; or one might consider abandoning the tort system in favor of some mixed approach that incentivizes customers and store proprietors alike to take appropriate precautions while providing compensation to victims with legitimate claims to repair.

If subjecting businesses to legitimate and illegitimate lawsuits imposes an undue or unfair burden on them, surely shifting the costs to customers likewise imposes an undue or unfair burden on them. Legitimate lawsuits against shop owners that have taken inadequate precautions hardly imposes an unfair burden on them. Subjecting them to baseless lawsuits may well be unfair. But customers are in an analogous situation. Those who are forced to bear the costs of infection owed to their own negligence may have no claim to being unfairly treated. On the other hand, those forced to bear the same costs who have been the victims of a merchant’s failure to take appropriate precautions are.

Finally, if this line of argument proves anything, it proves too much. If persuasive in this case, it is persuasive in all similar cases. In other words, whenever there is a substantial risk of baseless claims being brought against a group of defendants, the defendant class should be immunized against lawsuits being brought against them.

VII.

In most cases the majority of the costs associated with COVID-19 are medical expenditures of one sort or another. It should be obvious, then, that our health care system and our liability regimes are inextricably interwoven. If all citizens were fully covered for their health costs, the proposed legislation would be more plausible than it is. Unfortunately, in the United States many potential victims are uninsured. This problem is exacerbated by the fact that in the United States, unlike all other industrial/first world nations, health insurance is linked to employment. In the current situation, the loss of employment owing to the pandemic has had the additional deleterious consequence of reducing both the number of individuals who are covered and the extent to which they are.

Against this background the contemplated legislation is simply cruel.[[19]](#footnote-19)

**ADDENDUM**

Since I first submitted this essay in response to various contemplated legislative proposals I had been made aware of, Senate Republics have in fact unveiled a proposal (I am sure it won’t be their last one), designed much as I indicate in this manuscript to lower the costs of re-opening small businesses and other activities that I do not discuss here (e.g. hospitals) – but am more than happy to in other circumstances – by impacting the ability of COVID-19 victims to litigate successfully against them. The actual proposed legislation creates extraordinary bars to introducing legislation, turns what is normally a burden of defendants to meet as a defense into a burden of victims who must meet it as part of their case in chief, eliminates the negligence standard in favor of a triply weaker one, changes the standard of proof and puts limits on the extent of recovery. Because this is not likely to be the last proposal we see from the Republicans, I will save extensive comments until the final proposal has been introduced.

At this point, it is enough to note the following. Instead of having blanket immunity to lawsuits, the legislation allows injurers to establish that they have met their duty of care if they have published a plan for providing for the safety of their customers. In effect this means that victims claims are only colorable if they can establish bad faith on the part of injurers. Worse, instead of a standard of reasonable care, the victim will have to establish that the displayed willful disregard, making the standard akin to recklessness. In addition, the victim would have to establish all the relevant facts to a standard of ‘clear and convincing evidence’ rather than the existing standard of ‘preponderance of evidence’ or ‘more likely than not.’ Finally, it will be a requirement of proving causation that the victim establish in effect that there was no other set of circumstances over a particular period of time that could have been the source of his illness. It is hard enough to prove that it is more likely than not that the defendant’s negligence is the cause of the harm; it is nearly impossible in most cases to show that it could not have been otherwise caused!

As I point out in the abstract, these changes have no impact on what is wrong with the legislation. For the sake of the argument, let’s set aside three points that are important to me and hopefully to others: the fact that the legislation has relatively worse public health outcomes, undermines the claims to repair in corrective justice that animates tort law in the first place, and constitutes the wrong approach to a subsidy challenge. This leaves us with two horrible outcomes that no one on the Republican side of the Senate seems to understand, or if they do understand, they don’t seem to care a wit about. First, losses that are not borne by shop owners and other small business proprietors do not evaporate or disappear. The only thing that changes is who bears those costs. In this case, the victims bear the costs. Can someone explain to me why victims should be made to suffer insult as well as injury for losses that are not their fault. The legislation renders victims insurers of wrongdoers and forces them to subsidize small businesses when the burden of doing so should fall to us all. Second, in the US, health insurance is tied to employment. Has anyone noticed what has happened to employment recently? This means that many victims are now without work and thus without insurance. So we are asking them not only to subsidize wrongdoers with money they don’t have, but to take care of their own health needs with insurance they don’t have. I’ve always been a fan of Nick Lowe’s song, ‘Cruel to be Kind,’ but I am not enamored of the thought of being cruel to be cruel.

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1. For simplicity I focus on a subset of small business, namely, those that essentially involve retail space. Thus, I set aside service industries. Though these create many of the same problems, they create additional ones that should be dealt with separately. Also, I do not define small businesses in terms of a company’s qualifying for CARES or other government programs. What counts as a small business under the law for particular purposes need not, and in this case, does not coincide with what we think of paradigmatically as small businesses. [↑](#footnote-ref-1)
2. Though not decisive, it is relevant that the impact government shelter in place and lockdown policies have had on small businesses are not risks that businesses could have insured against. It is also true that these are not risks Universities or ordinary people could have purchased insurance against either. [↑](#footnote-ref-2)
3. There is also potential legislation designed to prevent employees from bringing COVID-19 related suits against small businesses. I do not address this potential legislation here. Employer/employee relationships are legally complex and differ dramatically when employees are represented by unions or (as in sports) when many of the terms of employment are determined by collective bargaining agreements. For a fuller discussion of some of these issues see the addendum. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. The exact nature of the duty to make repair is surprisingly open-ended, and much depends on our existing moral and legal practices. Not only is the content of the duty to make repair more precisely fleshed out by existing practices, but so too is the mode of repair. So, for example, though the duty to make amends or repair is the wrongdoer’s alone, legal practice permits others to discharge that responsibility on the wrongdoer’s behalf, whether through insurance or by gift. It is an interesting point that morality prohibits our serving prison time on behalf of those found guilty of a crime but is not offended by our making good the costs others wrongdoing creates. I have discussed these points at length in Risks and Wrongs, subsequent essays and in my Clarendon Lectures published as The Practice of Principle. It is worth noting that at some points in human history it was indeed permissible for others to serve someone else’s jail time, just as it was permissible for others to go to war in my stead. While these practices have rightly fallen into disfavor and are no longer endorsed or permitted by morality, morality continues to allow me to make good the losses others suffer, whether by contract in which case I agree to serve as their insurer, or by gift, in which case I serve as their benefactor. One reason for this is the inclination to characterize the duty of repair as a kind of debt that someone incurs as a result of his or her wrongdoing. And most debts can in justice be discharged by others on one’s behalf. All very interesting to my mind, and not yet fully or adequately addressed in the existing literature. [↑](#footnote-ref-5)
6. Three points. While I have argued at length that the duty of repair can be discharged by others on our behalf compatible with the demands of morality generally and justice in particular, I have also argued more recently that the right to repair or redress can be waived but it cannot be sold in a market to others. This creates a very interesting distinction that has not been adequately appreciated between normative debits and assets. The duty to make repair is a debit: an encumbrance. The right to repair is an asset: something of value to those who have it. Why should it be that the debit is marketable or dischargeable as a gift, but the asset cannot be gifted or traded? I have some thoughts about these issues, but I encourage the reader to give it some thought. It’s a deeper issue than one might otherwise think.

Second point: there is a difference between first- and third-party insurance. Health insurance and certain kinds of property insurance are both first-party insurance as one who purchases either is seeking to protect themselves from the costs they bear as a result of ill health or property damage, respectively. Auto insurance is a classic case of third-party insurance because one who purchases it does so in part to cover the costs their conduct imposes on others.

Third point: There are obvious relationships between ex-ante risk mitigation and liability insurance. The costs of liability insurance to a particular purchaser depends on an assessment of her likelihood of being in an accident for which compensation is warranted. The greater the likelihood, the higher the cost – other things being equal. In general, the greater the effective ex-ante precautions one takes, the less likely one would be to be in a high-risk pool, thus lowering her premiums. The limiting case arises when a potential injurer takes no steps to reduce risk ex-ante in which case his liability premiums can be quite high, if he can purchase insurance at all. [↑](#footnote-ref-6)
7. Just extend this line of argument for multi-party accidents involving more than two persons. Trying to keep it as simple as possible. [↑](#footnote-ref-7)
8. I don’t think I am alone in rejecting the basic framework, but I am certainly in the minority. To be sure, it is costly to shift losses, but it is also costly to ensure that they remain where they have initially landed since it requires resources to prevent those upon whom the losses land from pursuing various ways of imposing those costs on others. We have to compare the reasons for shifting with the reasons for incurring the costs to ensure that those upon whom the losses initially fall are prevented from taking steps to impose those costs on others. Moreover, it is a natural fact that may even be banal that losses land on some and not others. But it is a normatively claim that we should begin theorizing about their allocation by presuming that the burden falls to those who would claim that they should be shifted to others or held in common. [↑](#footnote-ref-8)
9. Two points: first, tort law provides the option to victims to initiate litigation. They are under no burden to do so. Second, it is a very good question to ask why (and under what conditions) tort law takes fault to be a good reason for shifting losses. As we see below, economic analysts of torts have one explanation of the relevance of fault and defenders of corrective justice, like me, have another. In part, that is because we have different conceptions of both fault and of the goals of tort law. [↑](#footnote-ref-9)
10. As I use the terms, ‘strict’ liability permits the defendant various potential victim related defenses, e.g. victim fault, product misuse or assumption of risk, whereas ‘absolute’ liability permits no such defenses and is thus absolute. Under a rule of absolute liability, the defendant is de facto the insurer of the victim. This is relevant to our current discussion because legislation that immunizes proprietors from liability de facto renders potential victims absolutely liable for the losses they suffer as a result of infection thereby rendering them insurers of their injurers! [↑](#footnote-ref-10)
11. This book had the greatest influence on that part of my research career that led to the role I played in developing the field of the philosophy of tort law and ultimately to my work on corrective justice. Of course, in most of my work I disagree with Calabresi who was my teacher and mentor, but it would be a mistake to think that my disagreement with the substance of his views of torts means anything beyond the fact that I hold him and this work as the standard of excellence in the field. Written in 1970, the book was years ahead of its time and filled with more interesting ideas than most truly terrific scholars are able to muster over the course of an entire career. [↑](#footnote-ref-11)
12. Again, it is an interesting feature of the law that we do not discuss here, but which I take up in a subsequent essay, that although a customer has a right to demand (and thus expect) that a shop owner take reasonable precautions to protect her safety, she has no power under the law to prevent a shop owner who has not yet taken precautions, even one who has no intention of doing so, from opening his shop and inviting customers to enter and thus to put themselves at risk. This fact reveals something of genuine interest regarding the distinction between the ex and ex post perspective in both law and morality. [↑](#footnote-ref-12)
13. This is not the same thing as claiming that no moral or other evaluative judgments or sentiments are appropriate. After all, even doing as much as is called for does not imply that you could not have done more; and if you could have done more, perhaps you should have even though the law does not require that you do. It is also often appropriate to apologize and to offer aid – if possible – for harms that result through no fault of your own. What’s different in these cases, is that the customer has no right that you do so; but the scope of an injurer’s responsibilities are not fully determined by the rights the victim holds against him. This is just a case, as I see it, where morality can expect more from us than the law does. The law may recognize only claims to repair that are matters of justice, while morality may call for those of us who can to come to the aid of those we injure even when we do so through no fault of our own. (There are many more things to say about the demands of morality and law in these kinds of cases as well as in others; and I recognize that my position may not be the majority opinion. But we will have to save more sustained conversation for another occasion.) [↑](#footnote-ref-13)
14. The proper characterization of the wrongdoer’s moral status remains a matter of some controversy. In one view, the fact that the victim declines to pursue the case in court entails that he is under no legal duty to make repair. In the other, the wrongdoer is under a legal duty to make repair whether or not the victim declines to pursue litigation. The duty to make repair, on this characterization, can only be enforced or pressed by those who are wronged; declining to press ahead with the case does not obliterate the duty. It merely leaves it unenforced. Some of my critics have defended the first characterization and I have found their arguments plausible, but not ultimately convincing. A person who owes another an apology continues to do so even if the person she has wronged declines to ask her for it or refuses to hear it. I am inclined to characterize the legal status of the wrongdoer in the torts context analogously. Fortunately, nothing in the argument of this paper turns on the matter. [↑](#footnote-ref-14)
15. To be clear, this argument is precisely the sort that an economist of tort law would make. It is well known that I do not adopt an economic approach to law. In fact, I am strongly critical of it. Nevertheless, I want to show that even the line of argument most sympathetic to those who would advance the contemplated legislation, fails to support intervening in the existing liability regime. And to do that I have to employ the economic analysis line of argument. My view is that there is no argument to support the contemplated legislation! [↑](#footnote-ref-15)
16. For the purposes of the discussion, I am assuming an idealized version of the existing liability regime, not because I think the ideal is realized, but because it makes it easier to explain how the system is designed to work. Of course, it will fall short, and in many different ways; and because of that it will not perfectly secure the outcomes it is designed to secure. But any version of it will put in place incentives that impact all relevant parties in significant ways and that is not true of any legislative proposal that would provide a blanket immunity or any other proposal that is likely to create a de facto immunity. [↑](#footnote-ref-16)
17. This is painfully clear as a non-trivial number of our fellow citizens view not wearing a mask during the pandemic to be an expression of their autonomy. Not every action that expresses a desire or a preference is an expression of autonomy. If it were, one might want to rethink the claim that autonomy is as valuable as we think it is. [↑](#footnote-ref-17)
18. Matters are made worse by the fact that other victims who come down with other illnesses not covered by legislative intervention are entitled to repair – perhaps even against the very same shop owners. [↑](#footnote-ref-18)
19. It is not just that tying insurance to employment increases vulnerability to larger numbers of individuals losing insurance protection, insurance as a benefit associated with some employment opportunities has the obvious impact of depressing wages as contract negotiations between employers and employees typically place employees in the position of having to choose between ‘wage’ or ‘health benefit’ increments. Separating insurance from employment would change the dynamic of labor negotiations in a way that it is plausible to believe will increase wages. Finally, with the changing nature of the economy, and the increase in the ‘gig’ economy as a proportion of the overall economy, health care is separated from employment but not with an alternative general approach to providing health care made widely available. All additional increases in the extent to which we transform to a gig economy will only exacerbate both problems: depressed wages and a reduction in individuals covered by health insurance. I have a good deal more to say about these related issues but must save those discussions for other short papers like this one, but not this one! [↑](#footnote-ref-19)