

# China’s New Tort Law: The Promise of Reasonable Care

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## I. INTRODUCTION

In July 2010, the Tort Liability Law of the People’s Republic of China went into effect. Trying to envision the consequence of this new law at the time of its inauguration, I remembered a story I heard in my youth. A version ascribed to the Lakota, a Native American tribe in the United States, is essentially as follows: A few young men questioned the wisdom of a tribal elder and decided that, to test him, they would catch a small bird in one of the men’s hands. “Grandfather,’ one of the men would ask, ‘I have a bird in my hand. You are wise. Is the bird dead or alive?’”<sup>1</sup> If the old man answered “alive,” the young man would crush the bird in his palms and show that it was dead. If, on the other hand, the old man said the bird was dead, the young man would open his hands and let the bird fly free. The young men proceeded with their plan and, in a large

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<sup>1</sup> JOSEPH M. MARSHALL III, *THE LAKOTA WAY: STORIES AND LESSONS FOR LIVING, NATIVE AMERICAN ETHICS ON WISDOM AND CHARACTER* 197 (2002). This is but one version of the tale. This story has been attributed to different sources and told in multiple variations.

gathering of people, asked their question. “Grandfather, I have a bird in my hands . . . . Since you are wise, is the bird dead or alive?”<sup>2</sup> The old man was silent for a time and then offered his response, “Grandson . . . the answer is in *your* hands.”<sup>3</sup>

So too at this auspicious moment, the growth and flourishing of China’s young tort law lies in the hands of its judges and scholars, its government, and its people. Some American scholars question whether there can be meaningful civil law in China as long as the judicial system is not independent from the political system.<sup>4</sup> Others counsel that experience from earlier Chinese legal reforms offers promise.<sup>5</sup> Moreover, the tireless and continued work of so many eminent Chinese scholars to bring the new Tort Liability Law to fruition provides reason for optimism.<sup>6</sup>

This paper enters the unfolding dialogue about Chinese and American tort law. The paper addresses some similarities and differences between the written provisions of China’s Tort Liability Law and U.S. tort law provisions. It then commends a principle that has become central to American tort law—building a tort system that functions to encourage reasonable care for the physical safety of others. Finally, the paper suggests a way in which American tort law could be improved by considering China’s adoption of uniform guidelines for certain issues that do not require individuation—an approach which could reduce litigation costs and increase consistency.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 2* (1999) (expecting law and the courts to be secondary to party policy); Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO’S INVISIBLE HAND 165 (Elizabeth Perry & Sebastian Heilmann eds., 2011) [hereinafter *A Return to Populist Legality*] (noting scholarship that portrays legal development as “constrained by China’s authoritarian system,” but also noting that innovations at times come from the ground up and constrain state behavior); Edward C.Y. Lau, *Litigating Products Cases from China*, 2 ANN. 2008 AAJ-CLE 1793 (2008) (counseling U.S. attorneys seeking to enforce American tort judgments against defective Chinese products: “The Chinese courts are not independent. They are very susceptible to political influence. If a gun factory is owned by the retired military pension groups, they can exert influence with the government to influence the judiciary if there was a judgment that threatened the existence of the factory”).

<sup>5</sup> Benjamin L. Liebman, *Innovation through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L.J. 33 (2006) (noting the willingness of Chinese judges to rule against powerful entities in some defamation cases).

<sup>6</sup> George Conk, *A New Tort Code Emerges in China*, 30 FORDHAM INT’L L.J. 935 (2007) (discussing the lengthy Restatement-like process that preceded China’s Tort Liability Law).

## II. CHINESE AND AMERICAN TORT DOCTRINES

It is difficult to compare the plain language of China's Tort Liability Law with that of American tort law. Some basic Chinese legal terms such as "bear tort liability," for instance, are not terms routinely used in American law. Moreover, even when Chinese and U.S. terms are similar, as with the term "fault," the Chinese terms are not fully defined in the text of the law,<sup>7</sup> and may carry different legal and cultural understandings.<sup>8</sup> In addition, only a limited number of background legal materials are available in English. Consequently, the potential for misunderstanding is ample.

Yet acknowledging these complications, many aspects of China's Tort Liability Law would seem familiar to an American lawyer. While the structure of China's law looks more like a European code than the judicial opinions that gave rise to the American common law of torts,<sup>9</sup> the openness of China's rules may permit additional common law development by Chinese courts.<sup>10</sup> Moreover, many substantive provisions in China's Tort Liability Law contain principles that resemble those found in American law, such as the idea that tort law's goals are mixed,<sup>11</sup> that fault produces potential liability,<sup>12</sup> and that at times liability may be assigned even without proof of fault.<sup>13</sup> American lawyers would recognize the role of contributory and comparative fault<sup>14</sup> and

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<sup>7</sup> Ken Oliphant, *The European Canvas of the Tort Liability Law of P.R. China*, Paper presented at the International Symposium on the Implementation of Tort Liability Law of China at Sichuan University (June 26, 2010) (unpublished paper on file with author).

<sup>8</sup> Cf. BORIS KOZOLCHYCK, *THE LAW OF COMMERCIAL CONTRACTS IN A COMPARATIVE AND ECONOMIC DEVELOPMENT PERSPECTIVE* (forthcoming 2012) (noting that despite being "clothed in western analytical terminology," some Chinese legal interpretations involving commercial third parties "are shaped by legal reasoning unfamiliar to the West").

<sup>9</sup> Conk, *supra* note 6, at 935 (noting that the "People's Republic of China is in the civil law tradition").

<sup>10</sup> See Oliphant, *supra* note 7 (discussing unresolved issues, for example, whether the standard of care is objective or subjective).

<sup>11</sup> Compare George W. Conk & Zhu Wong, *Tort Liability Law of People's Republic of China (2d official discussion draft December 21, 2008)*, art. 1 (prepared for Renmin University Symposium, Working Paper No. 1501302, 2009), available at <http://ssrn.com/abstract=1501302> [hereinafter *Tort Liability Law of P.R.C.*], with DAN B. DOBBS, *THE LAW OF TORTS* §§ 8-13 (2000).

<sup>12</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 6, with DOBBS, *supra* note 11, §§ 112-14 (2000).

<sup>13</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 7, ch. IX (liability for ultrahazardous activities), with DOBBS, *supra* note 11, §§ 342-48 (2000).

<sup>14</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 26, 27, with DOBBS, *supra* note 11, §§ 199-201 (2000).

contribution,<sup>15</sup> as well as the categories of compensatory damages.<sup>16</sup> Many of the subjects addressed in China's law—including wrongful death, products liability, medical malpractice, and third-party liability<sup>17</sup>—reflect similar areas of liability in U.S. tort law. Additionally, certain procedural aspects of Chinese tort law, including the reliance on an injured victim to set the legal process in motion<sup>18</sup> and the potential for out of court settlement by the parties,<sup>19</sup> are shared by American law.

Of course, even in the written law there are also significant differences between Chinese and American tort law. American tort law is more focused on liability for physical injuries, whereas China's tort law broadly embraces protections against many property-related, dignitary, and economic harms.<sup>20</sup> In some areas, the legal rights and interests mentioned in China's Tort Liability Law receive little protection in the United States. For example, in the United States, legal protection of interests in name, reputation, and honor are quite limited.<sup>21</sup> Similarly, the potential liability of internet service providers appears as broad in China as it is narrow in the United States.<sup>22</sup> In other areas, rights and interests protected under China's Tort Liability Law are protected in the United States, but by laws that are considered outside the tort law. For example, American law addresses rights to copyright and patents under separate legal doctrines concerning intellectual property, rather than through tort law.

Another significant difference between the two countries' tort rules is that, in the vast majority of cases, American tort law can only be triggered by an injured victim. Thus, tort plaintiffs in the U.S. have

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<sup>15</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 14, with DOBBS, *supra* note 11, § 386 (2000).

<sup>16</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 16, with DOBBS, *supra* note 11, § 377 (2000).

<sup>17</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 37, with DOBBS, *supra* note 11, §§ 323-24 (2000).

<sup>18</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 3, with DOBBS, *supra* note 11, § 17 (2000).

<sup>19</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 25, with DOBBS, *supra* note 11, § 388 (2000).

<sup>20</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 2, 36, with DOBBS, *supra* note 11, §§ 1-7 (2000).

<sup>21</sup> The main protection of reputational interests in the United States is through the defamation tort. U.S. defamation law protections are far narrower than those in the United Kingdom, and the U.S. tort is subject to a number of constitutional restrictions. See Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment*, 67 WASH. & LEE L. REV. 467 (2010).

<sup>22</sup> Compare *Tort Liability Law of P.R.C.*, *supra* note 11, art. 36, with 47 U.S.C. § 230 (2011).

apparently fewer prospects for relief to eliminate dangers before an injury has occurred, as recovery is generally restricted to liability rules.<sup>23</sup> In the United States, situations in which risky conduct is prohibited before it leads to harm are generally handled by direct government regulation rather than by tort law. For example, a drug that may cause injury can be pulled from the market by regulators.<sup>24</sup> By contrast, China's Tort Liability Law seems to encompass both liability for damages after a risk has produced harm and prevention of risky conduct that might lead to future harm.<sup>25</sup>

In some cases involving damages, a remedy would seem more readily available in China than it would be in the United States, specifically in cases in which the defendant's fault has not been established. For example, in China, if neither plaintiff nor defendant is at fault, they can sometimes share the loss according to the circumstances.<sup>26</sup> While the scope of China's rule is not clear from the language itself, in the United States, situations in which the plaintiff can recover from a defendant who is not at fault are rare.<sup>27</sup> The most vivid illustration of the difference between the two countries on the issue of no fault liability is China's provision that makes building occupants collectively liable for objects that fall from a building when the specific tortfeasor cannot be identified.<sup>28</sup> Under the fault principle in the United States, an occupant of a building would not be liable in tort for a falling object unless the plaintiff could show directly<sup>29</sup> or by inference<sup>30</sup> that the accident was linked to the occupant's own fault.

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<sup>23</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 15, 45; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

<sup>24</sup> The United States Food and Drug Administration can conduct post-market surveillance of approved drugs and pull them off market if unsafe. See Neil F. Hazaray, *Do the benefits Outweigh the Risks? The Legal, Business, and Ethical Ramifications of Pulling a Blockbuster Drug Off the Market*, 4 IND. HEALTH L. REV. 115 (2007).

<sup>25</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 45.

<sup>26</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 24, art. 32 (permitting reduced tort liability for a guardian who fulfills the obligations of guardianship when the ward causes harm).

<sup>27</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS §§ 20-23 (2010) (strict liability for abnormally dangerous activities and animals and intrusion by livestock). Respondeat superior of an employer is a mix of negligence and strict liability.

<sup>28</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 87.

<sup>29</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 49(d) (2009) (each tenant in a building has a duty of reasonable care "with respect to the portion of the premises controlled by the actor").

<sup>30</sup> See *Id.* § 17 cmt. f. (outlining the doctrine of *res ipsa loquitur* and suggesting that it would not impose liability where the harm was negligently caused by one of a number of potential actors unless there is some information to establish which party was

When applicable, however, American tort liability law may have more bite. Some types of damages, particularly pain and suffering and punitive damages, may be available in a wider range of cases in the U.S. than in China. For example, in China punitive damage awards are limited to certain products liability cases.<sup>31</sup> In the United States, on the other hand, punitive damages can be awarded whenever a defendant is guilty of willful or malicious conduct, regardless of the subject matter of the lawsuit.<sup>32</sup>

Many smaller differences between the countries' substantive legal rules can be recounted. In the case of a single indivisible injury by two or more wrongdoers, wrongdoers in China will bear liability equally while in the United States the parties' responsibility is typically apportioned by percentages.<sup>33</sup> Although joint and several liability,<sup>34</sup> along with other newer apportionment approaches,<sup>35</sup> is still favored by most American scholars, legislatures or courts in a majority of U.S. states have modified the rule of joint and several liability. In contrast, joint and several liability apparently governs in China. Employer liability, which applies in both jurisdictions, also appears to have a slightly different cast in the two countries. In the United States an employer is only liable for an employee's negligence if it occurs within the scope of employment.<sup>36</sup> In China, it would seem that the employer is liable whenever the employee causes harm, even if the employee was not negligent.<sup>37</sup> This is just the tip of the iceberg of small but important distinctions.

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probably negligent).

<sup>31</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 47. China seemingly permits punitive damages only in a subset of products liability cases.

<sup>32</sup> RESTATEMENT (SECOND) OF TORTS § 908 (1979) (permitting punitive damages for "outrageous" conduct).

<sup>33</sup> *Compare Tort Liability Law of P.R.C.*, *supra* note 11, art. 12, with THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23(b) (2000).

<sup>34</sup> *Compare Tort Liability Law of P.R.C.*, *supra* note 11, art. 8, with THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, pp.151-59; *see, e.g.*, Lewis Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989).

<sup>35</sup> In the United States, the National Commissioners on Uniform State Laws support a new approach—several liability with reapportionment of uncollectible shares. *See* UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT (2002). This approach has also been recommended for China. *See* ZHU WANG, RESEARCH ON APPORTIONMENT OF TORT LIABILITY—A GENERAL THEORY OF APPORTIONMENT OF TORT LIABILITY AMONG MULTIPLE PARTIES (2009).

<sup>36</sup> DOBBS, *supra* note 11, §§ 333-35.

<sup>37</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 34.

### III. TORT LAW IN ACTION AND THE CENTRALITY OF REASONABLE CARE FOR THE PHYSICAL SAFETY OF OTHERS

The similarities and differences that appear on the face of tort law in the United States and China are much less important than the similarities and differences that will emerge over time as China's Tort Liability Law is fully implemented. Just as a single day of sub-zero temperatures cannot produce three feet of ice, neither is a document of tort rules sufficient for understanding the full body of tort law that will unfold in China in the thousands (perhaps millions) of disputes to be resolved in the years ahead.<sup>38</sup>

Whether China's tort law actually embodies the broad protections that appear on the face of the Tort Liability Law depends in large part on its implementation through legal institutions and procedures. In the United States, tort law litigation depends on an accessible market for independent lawyers and open access to public and private information about the decisions and practices that lead to particular injuries. From an American perspective, increasing the availability of legal representation to individuals and providing litigants with full access to the information necessary to determine legal issues like fault is central to putting a tort-liability system into effect. Thus, proposals for ensuring that tort victims have adequate representation and access to evidence seem vital to China's tort law system.<sup>39</sup> Another important procedural issue is who decides the central issues, like fault, in individual cases. One of the greatest differences between American tort law and tort law in many other countries is the American jury system. In the United States, many key issues of tort liability—including all factual issues related to fault, causation, and harm—are resolved by a jury of local citizens. In addition, if reasonable people could differ about whether conduct lacked reasonable care, the normative question of fault itself is left to jury decision.<sup>40</sup> Who

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<sup>38</sup> See Benjamin J. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 4 (2007) (noting that China's courts reported hearing 8.1 million cases in 2006). To what extent these lawsuits will affect the legal rules themselves is unclear. China's Supreme People's Court can draft judicial interpretations for the Tort Liability Law for specific areas, such as traffic accidents, medical malpractice, and so forth.

<sup>39</sup> For example, to sue in tort, medical malpractice victims must be able to access the evidence they need to build their case, otherwise the burden of proof must be placed on the institution that has that information. See Lixin Yang, *Successes and Shortages in Reform of Liability Caused by Medical Treatment in Tort Liability Law of China* (presentation at the International Symposium of the Implementation of Tort Liability Law in the People's Republic of China, Chengdu, 2010). On the issue of access to representation, see Benjamin J. Liebman, *Legal and Public Interest Law in China*, 34 TEX. INT'L L. J. 211 (1999).

<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 8 (2010).

decides these legal issues in Chinese tort law will influence the law's development.<sup>41</sup>

Even given an adequate understanding of the way the law should operate in conjunction with legal rules and procedures, in practice the tort law may develop in unexpected ways. The unforeseen path of expansion has been true in the United States as tort law has developed over hundreds of years,<sup>42</sup> and as an independent body of law over the last one hundred and fifty years.<sup>43</sup> Most notably, one might suppose that a system of negligence liability would produce less overall liability than would a system of strict liability; however, the vast expansion of American tort liability in recent decades has come about within the ambit of negligence, not strict liability.<sup>44</sup> In hindsight, there are many reasons for these developments, particularly the widespread availability of liability insurance.<sup>45</sup> However, a myriad of economic, political and cultural factors have influenced the law's development. As Oliver Wendell Holmes, Jr. famously stated, "[t]he life of the law has not been logic, but experience."<sup>46</sup> Thus, more meaningful comparisons of the similarities and differences of the tort law of China and the United States will only be possible after litigants, lawyers, and judges across China put the Tort Liability Law into practice and through the litigation process transform the flat page of "law on the books" into a living structure of Chinese tort law.<sup>47</sup>

Ultimately, the success of China's tort law will not be measured by how closely it resembles the law of the United States or of any other country, but by how well it serves various goals. China's Tort Liability Law defines those goals as follows: "to protect the legal rights and

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<sup>41</sup> See JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 156 (2008) (mentioning that recent reforms include a people's assessor system).

<sup>42</sup> WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 2 (1987).

<sup>43</sup> See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980).

<sup>44</sup> See Gary Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

<sup>45</sup> See KENNETH S. ABRAHAM, THE LIABILITY CENTURY (2008).

<sup>46</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). The passage continues: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

<sup>47</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

interests of civilian subjects, clarify liability, guard against and impose sanctions for tortious acts, and promote social harmony and stability.” Clear and consistent protection of individual civil law rights and interests in a way that deters tortious conduct and promotes general welfare is also important in the United States. However, whether the two countries’ tort law goals are *actually* similar is difficult to assess at this time. In the United States, the concept of guarding against and imposing sanctions for wrongful acts is particularly important. The core promise of American tort law is its ability to foster a culture of reasonable care for the physical safety of others, which in turn can internalize the costs of those harms and help deter them.

It is difficult to tell whether this American notion of fostering reasonable care for others to prevent harm is a core goal of Chinese law. Language in the first article of the Tort Liability Law states an interest in protecting against tortious acts, yet, much discussion during the symposium focused on harmony, stability, and compensation.<sup>48</sup> To an outsider, the American notion of reasonable care for the safety of others seems compatible with the Chinese concept of “harmony,” particularly if the legal focus on reasonable care for the safety of others is seen as creating a norm that generates moral and cultural power in its own right, not just when sanctions are imposed after a breach.<sup>49</sup> This norm of broad-based care for strangers, not merely for family and friends, seems quite consistent with the Chinese norm, “what you do not wish for yourself, do not do to others.”<sup>50</sup> However, establishing this norm might require a break from the traditional Chinese notion of care for others, which has historically meant care for family members rather than for strangers.<sup>51</sup> A norm of reasonable care for a broad group of others can be a particularly important cultural asset as social and commercial transactions increasingly extend across cities, regions, and nations.

A culture of reasonable care for everyone’s safety can aid a country’s external instrumental goals, such as increased reputation and sales. For example, to the extent that products liability law makes producers accountable for defective products that cause injury, not only in extreme cases with extreme punishments, but as a frequent norm of financial accountability, product consumers may reasonably develop more

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<sup>48</sup> This paper was originally presented at the International Symposium of the Implementation of Tort Liability Law of the People’s Republic of China, Chengdu, China 2010. The Symposium, sponsored by Sichuan University and the Research Center for Civil and Commercial Jurisprudence of Renmin University, included civil law scholars from all over China as well as one European and one U.S. perspective.

<sup>49</sup> DANIEL L. BELL, CHINA’S NEW CONFUCIANISM 26-27, 52 (2008).

<sup>50</sup> See Kozolchyck, *supra* note 8, ch. XVII.

<sup>51</sup> *Id.*

confidence in the safety of those goods.<sup>52</sup> A colleague who sits as a judge on a local tribal court counted this sort of concern as an important reason for assigning liability when he presided over a controversy involving a tribal group's misconduct. If he had failed to sanction the tribe's misconduct, outside entities might balk at future beneficial business relationships with the tribe. Indeed, while U.S. automakers were successfully lobbying against more stringent tort liability to avoid liability for injuries caused by their products in the United States, Japanese automakers were equally successful in complying, voluntarily, with far stricter safety requirements and capturing a large portion of the U.S. automakers' domestic sales.<sup>53</sup> Only recently have U.S. automakers begun to recover market share as they are increasingly perceived as manufacturing safer cars under more stringent legal regulations.<sup>54</sup>

Tort law cannot only help consumers secure safer products, but it can also help honest and careful businesses to compete in open markets. For example, one business may gain a competitive advantage over another business by using substandard and risky ingredients in its products. The other business might then feel economic pressure to follow suit in order to compete. If, instead, courts force the first business to pay full damages in tort for the injuries caused, that business would lose the advantage it had unfairly gained with respect to its competitors. Moreover, other businesses would be able to compete without lowering their own standards. Accordingly, tort law rules can foster consumer confidence while aiding careful business practices by holding wrongdoers to account.

Aside from potentially improving business reputation and sales, perhaps the most important reason to embrace tort liability mechanisms that promote reasonable care is to promote the welfare of individuals.<sup>55</sup>

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<sup>52</sup> GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); LANDES & POSNER, *supra* note 42 (arguing that tort law is best understood as a means of inducing cost-effective precaution taking).

<sup>53</sup> See Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 PENN. L. REV. 1823, 1835 (1996) ("the intriguing question may not be why Japanese manufacturers offered the SG system, as much as why American manufacturers do not"); Andreas W. Falkenberg, *Modeling Market Share: A Study of the Japanese and U.S. Performance in the U.S. Auto Market*, 12 J. ACAD. MARKETING SCI. 145, 151-57 (1984) (concluding that increased product quality was a key ingredient in Japanese automakers' increased market share); Eric Noe, *Toyota, Honda Gaining on US Automakers*, ABC NEWS, Nov. 22, 2005, <http://abcnews.go.com/Business/Autos/story?id=1334996> ("Japanese-made cars captured a 36 percent market share in October [2005], an all-time record for the month. The market share for U.S. car sales fell to 52.3 percent, an all-time low.").

<sup>54</sup> See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Market for Products Liability*, 123 HARV. L. REV. 1437 (2010) (suggesting that market forces and extensive regulation have reduced the need for product liability law to encourage safety in widely-sold products such as automobiles).

<sup>55</sup> Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does the Tort*

Human injury is a universal problem in all cultures and throughout time. We need look no further than the tragic collapse of school buildings during earthquakes in Sichuan to hear the cry of victims for accountability even when, as with the wrongful death of children, no adequate remedy is possible. Demands for a system to hold people accountable make sense not simply to extract monetary payments for tragic harms, but because we care so intensely about the precious and irreplaceable gifts of life and health—particularly the lives and health of our children—that we want systems to help safeguard those lives. We want reasonable care for safety to make these tragedies less frequent and to make the reasonable precaution it takes to prevent them more consistent and reliable.<sup>56</sup> Indeed, as China experiences remarkable economic growth and increasing wealth,<sup>57</sup> it seems natural to expect both demands for higher wages,<sup>58</sup> and increased concern for the physical safety of its people.

If there is one distinct characteristic of United States tort law, it is the treatment of tort law not only as a vehicle for redress, but also as a vehicle for internalization of the costs of injuries and ultimately deterrence.<sup>59</sup> Thus, ideally, U.S. tort law not only redresses injuries, but at least in part, prevents them. European tort principles also recognize the importance of harm prevention, not just victim compensation, though perhaps less strongly than the United States.<sup>60</sup> In the context of tort law as

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*Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (discussing empirical evidence concerning tort law's effect on injury reduction in a variety of contexts).

<sup>56</sup> In the case of the Sichuan earthquakes, for example, if school buildings had been built to basic construction standards this could have prevented their easy collapse. See Yang Binbin et al., *Why Did So Many Sichuan Schools Collapse?*, CAIJING MAGAZINE, June 17, 2008. Tort liability would make builders responsible for the low quality work pay damages and make other builders aware that cutting corners is not a profitable future building strategy.

<sup>57</sup> Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L. L. 1, 4 (2006) (addressing China's remarkable economic growth over the last quarter century. "Since 1978, China's gross domestic product has grown 9.4 percent per year; in a good year, the US economy might grow 4 percent").

<sup>58</sup> David Barboza, *As China's Wages Rise, Export Prices Could Follow*, N.Y. TIMES, June 8, 2010, at B1.

<sup>59</sup> P.S. Atiyah, *American Tort Law in Crisis*, 7 OXFORD J. LEGAL STUD. 279, 284 (1987) ("Deterrence is concerned with trying to prevent individuals from committing torts; cost internalization is concerned with trying to make individuals, through the marketplace, pay for the costs they impose on others. These are not the same thing—for instance, the latter goal would require costs to be imposed on individuals for many activities which nobody would wish to prohibit (such as using a marginally more dangerous car than others), and conversely, cost internalization may actually permit defendants, able to bear the costs, to do things which a deterrence policy would forbid outright. The cost internalization argument is sometimes called general (or market) deterrence, but it needs to be distinguished from deterrence").

<sup>60</sup> EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW 10:101

a system that fosters accountability and deterrence, or as a pure compensation system, the potential for divergence between U.S. tort law and the Chinese Tort Liability Law becomes clear. Is China's new tort system designed to provide general compensation for injuries from defendants who have greater wealth, or does it seek to encourage care for others' safety by sanctioning wrongfully-caused harms?

The case of liability for an object that falls from a building and injures another person highlights the potential difference between these two approaches. If a court in China imposes liability on all of the building occupants simply to provide compensation to an innocent injured party, and not because those building occupants should have acted differently, liability might be borne just as well by taxpayers or paid by personal insurance.<sup>61</sup> In this instance, tort liability would simply be one possible form of social insurance, and it would not be designed to redress or sanction wrongfully caused harm. Indeed, in the United States, a taxpayer-funded social compensation system—called social security disability insurance—would provide monthly benefit payments to the victim of the falling object if the victim were completely disabled as a result of the injury and unable to work.<sup>62</sup> If China's Tort Liability Law becomes a means of providing compensation from defendants with resources and not also a way to sanction and deter wrongfully caused harms (not just in this unique, limited and historically-defined category of cases, but as an aspect of Chinese tort theory more generally) then China's law will be quite different from U.S. tort law indeed.

If instead, China's system is about holding defendants accountable for wrongfully caused harms, the system will be more akin to that in the United States. For example, if a court in China imposes liability on all of the building occupants for the falling object because all of the occupants' conduct is viewed as socially deficient and their own better conduct would have avoided the falling object and subsequent injury, liability in that case would focus on the defendants' own fault and would be more similar to third-party liability in the United States, which focuses on the idea that the defendant's own better care can prevent harm.<sup>63</sup>

Of course, the set of conduct considered wrongful such that it should warrant a legally-actionable tort claim is culturally contingent and subject to continual evolution. In the United States, for example, the extent to which businesses and landlords have an obligation to take

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(2005).

<sup>61</sup> Other forms of insurance might be just as effective, however, that depends upon the functioning of first-party and other insurance markets in China.

<sup>62</sup> 42 U.S.C. § 423 (2011).

<sup>63</sup> See Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

reasonable precautions to protect against crime has increased in recent decades, with potentially salutary effects on U.S. crime rates.<sup>64</sup> Similarly, although twenty years ago failure to wear a seatbelt would not have been considered negligent in most states, today eighty-five percent of the U.S. population wears seatbelts, and a failure to do so would be seen as unreasonable.<sup>65</sup> This change in behavior has effectively decreased the number of lives lost in traffic accidents.<sup>66</sup> Thus, whether conduct creates a risk of harm is an important issue in tort liability as well as regulation in the United States.<sup>67</sup>

In a many tort liability contexts, the risk of harm is easy to identify and the conduct is easily to define as normatively wrongful, such as a punch in the nose. Yet in other areas, like third-party liability, our moral intuitions are less certain and the need for liability to extend to this sphere more contested. One useful example is the case of drunk driving in the United States. In the United States, car accidents are the leading cause of accidental death for children above age one and for adults under age fifty.<sup>68</sup> Of these fatalities, approximately one-third are caused by drunk driving.<sup>69</sup> Drunk driving is considered an unreasonable risk, and in the U.S., as in China, if a drunk driver causes injury, the driver can face criminal or tort liability.<sup>70</sup> But most U.S. jurisdictions have gone further in terms of defining wrongful conduct for tort liability in the drunk driving context. Most U.S. jurisdictions, through their legislatures or courts, have adopted a form of third-party liability referred to as dram shop liability.<sup>71</sup>

Under dram shop liability, if a commercial seller of alcohol serves alcohol to a patron past the point at which the patron appears to be intoxicated, both the patron and the alcohol seller are liable for any injuries the patron may cause to others as a result of the intoxication

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<sup>64</sup> See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999); Philip J. Cook, *Crime Control in the City: A Research-Based Briefing on Public and Private Measures*, 11 CITYSCAPE J. POL'Y DEV. & RES. 53, 80 (2009).

<sup>65</sup> However, some state statutes bar plaintiff's nonuse of a seatbelt as a defense. *LaHue v. GM Corp.*, 716 F. Supp. 407 (W.D. Mo. 1989).

<sup>66</sup> See *Highway Deaths Drop to Lowest Levels Since 1950s*, ARIZONA DAILY STAR, Sept 10, 2010, at A14.

<sup>67</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 7(a) (2010).

<sup>68</sup> CENTER FOR DISEASE CONTROL, INJURY—A RISK AT ANY STAGE OF LIFE (2006), available at [http://www.cdc.gov/Injury/publications/FactBook/Injury—A\\_Risk\\_at\\_Any\\_Stage\\_of\\_Life2006-a.pdf](http://www.cdc.gov/Injury/publications/FactBook/Injury—A_Risk_at_Any_Stage_of_Life2006-a.pdf).

<sup>69</sup> NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TRAFFIC SAFETY FACTS, 2006 DATA: ALCOHOL IMPAIRED DRIVING 1 (2008).

<sup>70</sup> *Tort Liability Law of P.R.C.*, *supra* note 11, art. 33; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 2 (2010) (recklessness).

<sup>71</sup> DOBBS, *supra* note 11, § 332.

(typically as a result of a drunk driving accident). Under dram shop liability, bar owners no longer have an interest in selling patrons as much alcohol as they can, because they may be liable for harm caused by an intoxicated patron. Thus, sellers exercise more precaution in serving their patrons and more care in protecting others from harm.<sup>72</sup> Dram shop liability also reduces specific practices that lead to intoxication and drunk driving, such as serving multiple drinks at a time.<sup>73</sup> Ultimately, dram shop liability reduces motor vehicle fatalities.<sup>74</sup> In this context, the tort law norm of reasonable care for the safety of others promotes behavior that saves lives.

The fact that American tort law can produce important benefits in terms of human welfare is its most salient feature.<sup>75</sup> Norms change over time and tort law can influence them to change in a direction that increases incentives for safety. “[I]f—in order to deter by charging certain activities ‘their costs’—a society gives people the right to recover, such recoveries will surely affect what people think their rights are. And that in turn will surely affect that society’s notions of corrective justice.”<sup>76</sup> The promise of a system of tort liability is that it will lead people “to behave more carefully” even in situations “that cannot, and should not, be reached by criminal law.”<sup>77</sup>

From an American perspective, one hope for China’s Tort Liability Law is that in the application of its fault principles, even if enshrining different particular doctrines than those in the U.S, China’s Tort Liability Law will develop a broadly understood norm of reasonable care for the safety of others. Through this principle, the Tort Liability Law might not only compensate people who have suffered harms in a way that fosters social stability, but also encourage safer products and conduct and save lives.

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<sup>72</sup> Frank Sloan et al., *Liability, Risk Perceptions, and Precaution at Bars*, 43 J.L. ECON. 473 (2000).

<sup>73</sup> Lan Liang et al., *Precaution, Compensation and Threats of Sanction: The Case of Alcohol Servers*, 24 INT’L REV. L. & ECON. 49 (2004).

<sup>74</sup> Frank Sloan et al., *Tort Liability Versus Other Approaches for Deterring Careless Driving*, 14 Int’l Rev. of L. & E. 53 (1994); Chaloupka et al., *Alcohol-Control Policies and Motor-Vehicle Fatalities*, 22 J. LEG. STUD. 161 (1993).

<sup>75</sup> LANDES & POSNER, *supra* note 42, at 14 (“Assume with Aristotle that the purpose of tort law is to do ‘corrective justice,’ that is to restore to a person what has been wrongfully taken from him rather than to improve the allocation of resources. It would still be necessary to inquire into the source of the norms on the basis of which certain conduct is deemed wrongful. That source might be economic.”)

<sup>76</sup> Guido Calabresi, *Toward a Unified Theory of Torts*, 3 J. TORT L. 1, 7 (noting that social norms can adjust to accept a range of practices if those practices deter injuries).

<sup>77</sup> *Id.*

## IV. GUIDELINES—REDUCING THE COSTS OF LITIGATION

If the norm of reasonable care for others holds the promise of greater safety, a potential peril of such a system is cost. Individualized litigation regarding facts related to fault, damage and causation consume personal and public resources. In the United States, for every dollar paid out in tort liability approximately forty cents is paid for litigation costs.<sup>78</sup> Thus, litigation itself can consume nearly a third of liability-related expenditures. If there were a way to encourage reasonable care at lesser cost, such an approach would be well worth consideration. China's tort rules suggest one possibility. In the area of wrongful death, rather than calculate individualized damages in each case, Chinese tort law generally awards the decedent's beneficiaries twenty times the average earnings in the decedent's locality.<sup>79</sup> This presumptive award can be decreased in certain circumstances, as in the case of old age, or increased in other circumstances, as when the decedent had been living in a city but was registered as living in a rural area. While some commentators have recommended that China consider America's individualized damage awards,<sup>80</sup> it is China's approach that merits attention in the United States.

Despite criticism in China that its approach has led to unequal awards, such an approach might actually equalize awards in the United States. U.S. wrongful death recoveries can provide millions of dollars of damages in some cases and almost nothing in others.<sup>81</sup> Because individualized damage determinations are primarily based on lost income, the family of a successful middle-aged person killed during peak earning years might receive a substantial award, while the family of a deceased child, teenager, homemaker, or retiree might receive a very low award.<sup>82</sup> Under the U.S. system, the decedent's race and gender, which are linked to

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<sup>78</sup> See Polinsky & Shavell, *supra* note 54, at 1469-70 (2010); Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 AM. L. & ECON. REV. 330 (2007) (costs of defending claims were eighteen percent of insurers' total expenditures).

<sup>79</sup> See SPC Interpretation on Compensation for Personal Injury, *cited in* THE CHINA LAW CENTER, YALE LAW SCHOOL, TORT LAW IN CHINA: HISTORICAL DEVELOPMENT AND SELECTED ISSUES (2006); Conk, *supra* note 6, at 946 n.61.

<sup>80</sup> Donald Clarke, *Tort Damages for Wrongful Death in China*, THE CONGLOMERATE BLOG (Feb. 18, 2008), <http://www.theconglomerate.org/2008/02/tort-damages-fo.html>.

<sup>81</sup> See Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537 (2005).

<sup>82</sup> See Andrew J. McClung, *Dead Sorrow: A Story About Loss and a New Tort Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 20-22 (2005) (discussing cases in which wrongful death awards produce zero or extremely low damage awards, as with the wrongful death of the author's fiancée because at the time of her death she was an unmarried adult without children).

average earnings, may also lead to unequal awards,<sup>83</sup> particularly in jurisdictions that cap noneconomic damages awards.<sup>84</sup> These dramatically uneven recoveries undermine the idea that all life has value. Moreover, low U.S. awards for certain groups such as children may lead to suboptimal risk deterrence.<sup>85</sup> A standard measure of damages could reduce the extent to which wrongful death recoveries are suboptimal and highly income-dependent in the U.S.

Applying China's approach could reduce litigation costs. Although each party would still have to prove fault in order to establish liability, time-intensive inquiries that mark individualized damage calculations could be avoided.<sup>86</sup> For instance, under the Chinese approach, it would be unnecessary for a judge or jury to hear testimony about whether the decedent, had he lived, would have worked at a minimum wage job or become a skilled laborer.<sup>87</sup> Similarly, courts would not need to determine the present value of the particular worker's future wages—a task that is not only time consuming but also speculative.

Indeed, an approach that softens the extreme damage award differences assigned in the American system and affords a simpler process for determining awards has been recently embraced in the United States. When the United States government established a fund to compensate the families of the victims of New York's September 11<sup>th</sup> attacks, the Special Master of the September 11<sup>th</sup> Victim Compensation Fund ("9/11 Fund") created uniform guidelines for calculating wrongful death recoveries. Despite the fact that damages were to be modeled on the tort system, the guidelines limited the recovery of lost wages for high income earners and raised recoveries for low income earners.<sup>88</sup> The 9/11 Fund also allowed a lump sum recovery for pain and suffering damages, which had the effect of evening out damage awards across categories of victims. Some American scholars have suggested other fixed awards for certain aspects

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<sup>83</sup> MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* 155 (2010).

<sup>84</sup> Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).

<sup>85</sup> Posner & Sunstein, *supra* note 81.

<sup>86</sup> Cf. Eric Posner & Luigi Zingales, *A Loan Modification Approach to the Housing Crisis*, 11 AM. L. & ECON. REV. 575 (2009) (suggesting a cram down plan in which housing valuations are not individually adjusted but determined on the basis of average home prices in a given zip code).

<sup>87</sup> See, e.g., *Martin v. U.S.*, 471 F. Supp. 6 (D. Ariz. 1979).

<sup>88</sup> Even so, the damage awards for wrongful death under the 9/11 fund ranged from a low of \$250,000 to \$7,000,000. KENNETH R. FEINBERG ET AL., DEPARTMENT OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at [http://www.justice.gov/final\\_report.pdf](http://www.justice.gov/final_report.pdf).

of wrongful death recoveries, such as for lost enjoyment of life.<sup>89</sup> Of course, standardized damages, including compensation tables for particular types of injury, are a critical component of workers compensation systems in the United States.<sup>90</sup>

With a uniform damages structure, some safeguards might be necessary to prevent moral hazard. For example, if a poor person's family could recover more money for the person's death than he or she would have received during his or her life, courts might put in place safeguards to ensure that deaths intended by the decedent or a decedent's beneficiary would not be compensated. Wealthy persons concerned that they or their beneficiaries would receive too little compensation could purchase additional private insurance above the presumptive damages amount. To the extent that lower tort payments for the death of wealthy people might not generate adequate deterrence, mechanisms to deter risks disproportionately affecting high-income earners could be considered. Even with a more uniform approach to damages in wrongful death cases, modifications to recovery criteria could be made. For example, in addition to estimated wage loss, the 9/11 Fund factored in the number of dependents supported by each decedent. Similarly, actual expenses preceding death, such as hospital costs, might be added as another compensation factor. Rather than use China's approach of applying the average earnings in each locality as the baseline for the compensatory award, another option would be to use the average value of a statistical life and adjust it based on the cost of living in the particular locality.

Not only would uniform guidelines for damages make awards more consistent and easily administered, but they might aid in combating special pleading by particular parties or classes of injurers. Wrongful death suits provide a useful window into the shared pressures that tort law faces when it requires powerful interests to compensate for harms. In the United States, those pressures typically come from well-organized private interests groups that plead their case to state legislatures. In light of these pressures, a number of United States jurisdictions have placed various caps on wrongful death recoveries, as in the case of medical malpractice. In both countries, it is important to think about legal mechanisms that can hold parties to liability for damages, even against powerful actors and in controversial cases. General norms about fair compensation amounts may be one aid. With respect to damage awards in individual cases, these norms may increase the crucial ability of judges to decide cases fairly and predictably and not be influenced by the power of individual parties or outside interests.<sup>91</sup>

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<sup>89</sup> Posner & Sunstein, *supra* note 81.

<sup>90</sup> DAN B. DOBBS, PAUL H. HAYDEN, & ELLEN M. BUBLICK, *THE LAW OF TORTS* (2d. ed. 2011).

<sup>91</sup> See THE CHINA LAW CENTER, YALE LAW SCHOOL, *TORT LAW IN CHINA*:

## V. CONCLUSION

None of us can see the future. Yet, together we will create it. Given the shared challenges countries face about ways to prevent injuries and fairly respond to them, it has been my great pleasure to participate in the conversation about China's new Tort Liability Law. Posted outside my office door is a quote attributed to artist Michelangelo, "I am still learning." Nowhere is the opportunity to learn more evident to me than when we share ideas across national borders. While countries' tort law expresses their societies' unique history and normative commitments, looking at ways in which different countries resolve and understand similar questions can expand our own understanding.<sup>92</sup> While we Americans hope that we have valuable lessons to teach, we have just as much to learn.<sup>93</sup> With the passage of the new Tort Liability Law, I am pleased to become a student of the tort law of the People's Republic of China. I look forward to our shared dialogue in the years to come.

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HISTORICAL DEVELOPMENT AND SELECTED ISSUES (2006).

<sup>92</sup> See Eric A. Posner & Cass R. Sunstein, *Response—On Learning from Others*, 59 STAN. L. REV. 1309 (2007) (addressing reasons that courts should be interested in the views taken by courts from other jurisdictions and suggesting that relying on the law of other states to constrain judicial policy preferences reduces courts' discretion to make errors).

<sup>93</sup> Liebman, *A Return to Populist Legality*, *supra* note 4, at 43 (noting China's widespread study of foreign legal systems).