NEOACTUARIALISM: COMMENT ON KAPLOW (1)

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Accuracy is a central, if not the central, value of adjudication. It is a happy day, therefore, when an analyst as sharp as Louis Kaplow trains his eye on it. His results, as usual, are powerful, insightful, and nonobvious. In addition, his paper is detailed, thorough, and as comprehensive as any article on such a broad topic can be. Few will come away from reading his piece without a much deeper and different understanding of how adjudication operates in our legal culture. That, at least, is the effect his arguments have had on me.

This is not to say that there cannot be disagreement. I question both some of Kaplow’s assumptions and the ways he works them out. But, even then, I think, my disagreement serves not so much to undermine his model as to show some other directions in which his insights can lead. In this comment,¹ I will criticize Kaplow’s model of damages assessment, which introduces much of his paper’s analytic framework. In particular, I will show that the model’s central assumptions are somewhat peculiar, suggest that Kaplow himself realizes their oddity, and point out how much of the model’s power and reach comes from these assumptions. In their place, I will make assumptions less discomforting to a proceduralist, assumptions to which Kaplow himself advert, and then redeploy some of Kaplow’s own analyses in light of them. Using some of Kaplow’s own tools, I aim to persuade that accuracy plays a role in adjudication somewhat different from the one he himself describes.

One single feature drives Kaplow’s model of accuracy in the assess-

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ment of damages. Kaplow assumes that initially both actors and adjudicators have a particular kind of information and lack other particular kinds of information relevant in assessing damages. All of his discussion in Section IIA builds from the assumption that actors and adjudicators have perfect information about the identity of a class into which an event falls and about the mean harm of events in that class but no information about the actual, particular harm an event causes. As Kaplow puts it, "Assume that individuals, at the time they decide how to act, know only the average level of harm for the type of act they will commit, but not the actual harm their act will cause."  

Without investing in any information, in other words, the actor and adjudicator alike know the class of a harm and the mean harm for that class. Neither actor nor adjudicator, however, knows anything helpful about the particular event. Any estimate of actual harm requires an investment in information. Kaplow's is an actuarial model in the sense that all events come packaged in black boxes hiding all the events' particularity but with large tags clearly announcing a class into which each hidden event falls along with the exact mean harm for that class. Ignorance as to particularity accompanied fairly complete actuarial information. In this world, pursuing accuracy means acquiring information about the specific harm either ex ante or ex post.

Two powerful implications follow. First, if the actor refuses to invest in such information, the adjudicator will refuse as well. If, for example, the actor simply relies on the actuarial average in estimating damages, the adjudicator will do so too since any other course would incur costs without affecting the actor's behavior. The adjudicator realizes that no matter what it does the actor will behave as if the mean level of harm will result. Thus, the adjudicator will pursue accuracy ex post only if the actor pursues it ex ante.

Second, if the adjudicator invests in no information concerning the event's actual harm, the actor will make no such investments either. So long as the actor knows that the adjudicator will impose actuarial rather than actual damages, the actor will proceed as if his particular action will create only average harm. Average damages is, after all, what he will have to pay. Any investment in information would be a pure waste.

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1 *Id.* at 313 (discussing knowledge of actor); *id.* at 312 (same); *id.* at 312–13 (discussing knowledge and lack of knowledge of adjudicator).

2 *Id.* at 313–15.

3 *Id.* at 316–17.

4 Even if information about the actual level of harm were free, in fact, the actor would ignore it. Such information could only muddy his prediction of what he would have to pay.
Accuracy ex ante matters, then, only when the adjudicator pursues accuracy ex post.

Although Kaplow pursues these implications much further by considering how much public and private investment in information will occur under various assumptions, I will not review his subsequent steps. By not doing so, I hope better to focus attention on his initial, critical assumptions. These assumptions are odd in two ways—in what Kaplow assumes we do and do not know about events and in how he defines accuracy. First, Kaplow assumes we have perfect and costless information about the identity of a class into which a harm falls and about the mean value of harm in that class while we have no information about the actual harm. This is unrealistic, especially for actors.

Usually when an actor faces a particular choice about how to act, he will already have information available that would make simply relying on the actuarial average inappropriate—even if he knew it. Imagine a typical driver. He is likely, first of all, to be actuarially clueless. How many well-defined classes of harm does he know the mean of? Do any of these fit the particular situation in which he finds himself? Then there are other difficulties. Even if, as he flashes through the countryside, the driver somehow does have a meaningful idea of the relevant actuarial class and of that class's mean damages, does he have no further information about the actual harm that might result from his actions? Unless actuarial harm categories are incredibly narrowly defined—driving his particular car on days with this particular weather at this particular speed at this particular time of day on this particular type of road into another particular kind of car traveling at its particular speed and so on—in which case the categories are both implausible and unnecessary, he will have other information already available that will aid in predicting actual damages. In short, the driver is likely to have neither the knowledge nor the ignorance that Kaplow imputes to him.

Nor would the adjudicator. When it begins to assess damages, the adjudicator always has at least the complaint and the answer before it. Again, unless the harm categories are extremely narrowly defined, the pleadings, let alone any affidavits and evidence, will likely present more information about the particular event than Kaplow allows. Likewise, it is doubtful that the adjudicator will have costlessly available the detailed actuarial information Kaplow assumes.

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6 They would be implausible because it would be so difficult to construct them, to determine their means, and for the driver to remember them. They would be unnecessary because the narrower they are, the more they look like predictions of the event's actual damages. At some point, the class becomes so narrow that it is practically equivalent to the event itself.
Placing Kaplow’s model in another context reveals its oddity. Assume that you are shopping for groceries. You go into a store, pick up a particular item, find that you can easily identify it as produce, meat, or dairy and know exactly the average price of items in each of those categories. Without investing in further information, however, you can find out nothing about the particular item or its price. Sound familiar? Except in insurance rating perhaps, just placing an item in a category usually requires more information about its particularity than Kaplow allows us. Furthermore, neither stores nor customers would be happy with Kaplow’s system. Actuarial pricing would operate as a kind of uncertainty tax on all purchases. It would also pose obvious moral hazard and adverse selection problems.

Kaplow’s conception of accuracy is also peculiar. He defines the term to mean knowledge of the actual harm an event causes. So far, no problem. The difficulty comes from his definition of “inaccuracy.” In his model, inaccuracy means not just getting the actual harm wrong, but getting it wrong in a particular way. By construction, the inaccurate result, the assessment of damages an actor or adjudicator arrives at without investing in any information, mistakes the actual harm but gets the average class harm exactly right. In this view, when someone is accurate, they are right; but when they are inaccurate, they are also right—just on average!

Kaplow recognizes that some are apt to think his central assumptions peculiar. To them he offers a different understanding of his model:

The simple story examined here can be understood in a manner that captures a range of more realistic situations. One might imagine that after some inquiry, a tribunal has information on the actual harm in a particular case, but that uncertainty nonetheless remains. At that point, it has an estimate of the actual harm, which can be taken to be the “average” for purposes of the analysis. (Thus, the “average” need not be across some broad class of acts about which the adjudicator may know little but rather can be understood as simply the best estimate before undertaking additional investigation.) It could, however, engage in further inquiry—at some cost—to refine its estimate for the particular case. This refined estimate, even though itself imperfect, can be taken to be the “actual” harm for present purposes.  

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7 Even in the context of insurance, moreover, neither an insured actor nor a court would be likely to rely on the insurer’s risk categories in trying to assess damages in a particular case. The insurer’s categories, at least the ones used to generate premiums, are likely to be too broad to be truly useful. Both actor and adjudicator would have more specific information that would make using the insurer’s categories largely inappropriate.

8 Kaplow, supra note 1, at 313 n.10.
This revised formulation reflects a traditional picture of harm assessment where both actors and adjudicators make initial estimates of particular harm, which they refine as they acquire further information. This model represents an improvement, for it contains none of the oddity of the earlier formulation. It neither assumes that actors and adjudicators have the actuarial knowledge and specific ignorances Kaplow earlier imputes to them nor defines inaccuracy peculiarly. In the revised model, inaccuracy straightforwardly represents an initial rough guess of the actual harm caused, not an actuarially exact average of a wider class's harm.

Despite these advantages, Kaplow's reformulation has a problem. It reflects very different assumptions than his earlier model does. Initial rough guesses and actuarial averages are simply not the same. They assume different kinds of information on the part of the evaluators, and, more important to Kaplow's argument, they entail quite different implications for the initial estimate of damages. In particular, Kaplow's reformulation makes no assumption that the actor and adjudicator's inaccurate assessments will be related. His actuarial model does, however. It assumes that they will be exactly equal.

Under the traditional approach, both actor and adjudicator make initial estimates of the actual damages under conditions of relative uncertainty and then proceed to refine them if they acquire more information. Nothing guarantees that they will arrive at the same eventual estimate, and there is even less warrant for thinking that their initial estimates, the ones they make under relative uncertainty, will be equal. In fact, the greater the uncertainty, the less similar one would expect different people's initial estimates to be.

Kaplow's actuarial model entails exactly the opposite result. Under this approach, both actor and adjudicator have exactly the same information and information gaps at the beginning of their assessments. To them, relative uncertainty means that they both know which class the act falls into and the mean harm for that class and nothing helpful about the event's particularity. In other words, in their state of relative ignorance, both actor and adjudicator will have exactly the same estimate of damages: the mean class harm. Furthermore, even if they each invest equally in acquiring information about the particular harm, nothing guarantees that they will arrive at the same final estimate. Acquiring information can only drive their assessments apart. In Kaplow's world, ignorance may not be bliss, but it at least has the advantage of leading the actor and the adjudicator to agree in their estimates of damages.

Ensuring this agreement, in fact, seems to be the whole point of Kaplow's assumptions. His model's power, it turns out, springs directly
from this initial agreement, not from its actuarial validity. To see this, assume that the actor and adjudicator’s estimates under uncertainty exactly agree but differ from the actuarial average. All of Kaplow’s major implications still follow—even if both parties know that their initial estimates have no actuarial foundation. Actors will still not pursue accuracy ex ante unless they believe adjudicators will pursue it ex post and vice versa. The only difference lies in what the actors and adjudicators will pursue instead. Rather than pursuing actuarial damages, Kaplow’s concept of inaccuracy, they will follow their mutual misestimation. They will simply be inaccurate in a more traditional way.

Kaplow’s central results hold, moreover, even when actor and adjudicator disagree in their initial estimates of damages. Consider a twist on Kaplow’s primary example. He describes a toxic leak that both actor and adjudicator believe may cause a harm of 5, 10, or 15 with equal probability. Both, in other words, place the leak in the same actuarial category and agree that the mean for that category is 10. Unless the actor believes that the adjudicator will later invest in information about actual harm, the actor will proceed as if actual damages are 10, for this is what he will expect to pay for his action. Now the twist: suppose that the actor for some reason believes that the adjudicator will misestimate the mean for the category as only 5. In that case, as in Kaplow’s example, the actor will not base his conduct on any estimate of actual damages. But he will not base his conduct on actuarial damages either. In these circumstances, he will act as if the harm is 5, not 10, even though he knows that 5 is actuarially mistaken. He will follow what he expects to pay regardless of how accurately it reflects either actual or actuarial damages. What matters to him is how the adjudicator will assess damages under uncertainty, not how actuarially accurate the adjudicator’s estimate will be.

So too for the adjudicator. If it knows that the actuarial damages are 10 but believes that the actor will misestimate them as 15, it has no reason in the particular case to pursue accuracy ex post. Investing in information to determine actual damages would have no affect in the particular case. That much is clear from Kaplow’s analysis. But the adjudicator has no particular reason to impose actuarial damages either. Doing so would not affect the actor’s behavior. In fact, in this world, the adjudicator has no reason to choose any particular level of damages over another. The primary virtue of actuarial damages is simply that they are easily and cheaply at hand. They are, by Kaplow’s construction, always and costlessly available. In a particular case, they have no other advantage.

9 Id. at 313–14.
What then is the value of accuracy? If actors care only about what the adjudicator's expected award of damages will be, not about its accuracy, why should anyone pursue this value? The answer, I think, is implicit in much of Kaplow's analysis. If the adjudicator knows that the actor cares only about what damages the adjudicator will impose and the adjudicator wants to promote optimum activity levels, it will follow a simple strategy. It will behave in such a way as to make the actor believe that the best estimate of the adjudicator's ultimate award is accurate, actual damages. The adjudicator, in other words, will act as if accuracy matters ex post in order to make the actor believe that it does ex ante. Thus, although accuracy ex post has no instrumental value in the particular case since it cannot affect the actor's behavior, it has great value for future cases since it can convince future actors to pursue accuracy ex ante. In this way, the adjudicator can promote efficient future behavior. Furthermore, as Kaplow's analysis of information costs suggests, to obtain these beneficial results the adjudicator does not have to actually achieve accuracy. The adjudicator has only to aim well enough at it to convince actors that their best cost-effective estimate of future awards should look toward actual damages. In a sense, it is just the appearance of accuracy ex post that matters.