PRIVATE VERSUS SOCIALLY OPTIMAL
PROVISION OF EX ANTE LEGAL ADVICE

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of Ex Ante Legal Advice

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Abstract

This article considers whether the demand for legal advice about potential liability for future acts is socially excessive. Using the standard model of accidents, we find that the answer depends on the type of advice and the form of liability. When advice provides information about properly determined liability, the demand for advice is socially optimal under strict liability but is socially excessive under the negligence rule. When advice identifies errors the legal system is expected to make, the demand for advice is socially excessive under both liability rules.

1. Introduction

This article is concerned with the provision of legal advice, given before
individuals act, about their potential liability for causing harm.[1] We ask
whether the demand for such ex ante legal advice is socially appropriate or
tends to diverge from what is optimal.[2] The substantial amounts spent on
legal advice and the frequently expressed opinion that the use of legal
services is excessive suggest the importance of this question.[3]

Ex ante legal advice is of value to individuals who are uncertain about
the applicability of legal rules to their contemplated behavior. Individuals
in this situation may decide upon their course of action using their estimates
of how legal rules apply, or they may first purchase legal advice about legal
rules and then act in light of what they learn. They will purchase advice if
its private value -- the expected reduction in the sum of liability payments
and other expenses -- exceeds its cost. The social value of advice, however,
consists of the expected reduction in the sum of harm caused and other
expenses. When expected harm does not equal expected liability payments, the
possibility of a divergence between the private and the social values of legal
advice arises.

We consider the relationship between the private and social values of
advice employing the standard model of liability for acts that cause harm, in
which we examine individuals' choice of the level of care under the rules of
strict liability and negligence. Two types of advice are studied: advice

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[1] We do not investigate certain forms of ex ante legal advice, notably about
drafting contracts. Also, we do not discuss ex post advice, about the conduct
of litigation. See comment (c) in section 4.

[2] Prior analysis of ex ante legal advice includes Shavell (1988), who studies
the social desirability of the effects of advice on behavior, but not whether
individuals' incentives to purchase advice are socially desirable given its
cost, and Kaplow (1990, 1991), who considers aspects of optimal law
enforcement when individuals may obtain advice. In these articles, attention
is confined to strict liability.

[3] Annual expenditures on legal services were $47.5 billion in 1990.
Department of Commerce (1991).

about properly determined liability, and advice about mistakes that are likely to be made in determining liability (as might occur because of incomplete evidence, jury sympathies, and so forth).

In section 2, we investigate advice about properly determined liability. When liability is strict, liability payments, by definition, equal harm caused. Thus, private costs (liability payments and the cost of care) equal social costs (harm caused and the cost of care), both when individuals are uninformed and when they are informed. This implies that the private incentive to acquire information is socially correct.

Under the negligence rule, by contrast, the private incentive to acquire information is socially excessive. This is for two reasons, each having to do with the fact that individuals who take due care are relieved of liability for any harm that they cause. Consider first individuals who obtain advice and learn that due care is higher than the level of care they would have taken if uninformed. They will be induced to take due care, but, as a consequence, they will escape liability for harm that still occurs. Thus, their private benefit from learning that they should increase their level of care exceeds the social benefit.[4] Second, consider individuals who obtain advice and learn that due care is lower than the level of care they would have taken if uninformed. They will take less care, only due care. Because these individuals will not bear liability for harm, however, they will ignore the fact that their reduction in care increases the harm they cause. Hence, individuals who become informed generate a social cost that they do not incur.[5] In sum, on two accounts the private value of advice exceeds the social value.

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[4] To illustrate, assume that without advice individuals spend 10 on care. With advice, they learn that due care is 15, which reduces expected harm from 50 to 30. The social benefit of this reduction in expected harm is 20, but the private benefit is 50, because uninformed individuals would not have taken due care and thus would have borne expected liability of 50.

[5] Assume as in the previous note that uninformed individuals spend 10 on care. Upon becoming informed, they learn that due care is 6, which raises expected harm by 3. The private benefit is the entire savings in expenditures on care of 4, whereas the social benefit is only 1 because the increase in expected harm of 3 must be subtracted from the savings in the cost of care of 4.

In section 3, we consider advice about mistakes in determining liability (assuming now that individuals know what properly determined liability would be).[6] In this case, under strict liability, it is no longer true that the private and social benefits of advice coincide. Although individuals benefit from advance knowledge of mistakes that the tribunal will make, social welfare declines, because such information leads individuals to adjust their behavior to conform to mistakenly applied rules. For example, an individual who learns that the tribunal is likely to underestimate the harmfulness of his act will be led to take too little care. Under the negligence rule, the private incentive to acquire information also is socially excessive, but for reasons like those identified in section 2.

In section 4, we comment on the interpretation of our analysis.

2. Legal Advice About Properly Determined Liability

Risk-neutral individuals engage in an activity that causes harm h with probability p. Initially, an individual does not know the particular level of harm that his activity might cause; he knows only that harm is distributed according to the positive density $f(\cdot)$ on $[0, \infty)$ in the population of individuals who engage in the activity.[7] Before they act, individuals may purchase information and thereby learn the level of harm, which is what a tribunal would observe if an accident occurs.[8] Expenditures on care x reduce the probability of harm at a diminishing rate: $p'(x) < 0$, $p''(x) > 0$.

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[6] In particular, we assume that legal advice allows an individual to predict the type of error -- an over- or underestimate of the level of harm -- that will be made in his type of case. Also, we suppose that the tribunal is correct on average (the mean of the error is zero).

[7] Individuals might not know how the legal system values the injuries (e.g., pain and suffering, disruption of securities markets) that their conduct may cause. (Similarly, they might not know the extent of the injuries they may cause, although information concerning this may not typically be obtained from lawyers.)

[8] The analysis would be similar if information merely improved individuals' estimates rather than made them perfect.

Individuals decide whether to acquire information and choose a level of care to minimize the sum of their cost of care, their expected liability costs, and the cost of information. The social objective is minimization of the sum of the cost of care, expected harm, and the cost of information. Note that the difference between the private and social objectives is that the former involves expected liability costs and the latter expected harm.

2.1. Strict Liability

Under strict liability, an individual must pay damages equal to the harm he causes. To decide whether to acquire information about the level of harm he might cause, an individual will compare his situation if he is uninformed to that if he is informed. If he is uninformed, he will choose the level of care x_u that minimizes the sum of the cost of care and the expected harm, and his expected cost will be[9]

$$(2.1) \quad C_u = x_u + p(x_u) \int_0^\infty hf(h)dh.$$

If an individual acquires information, he will learn h and choose the level of care $x_i(h)$ that minimizes the sum of the cost of care and the expected harm, and his expected cost will be

$$(2.2) \quad C_i = \int_0^\infty [x_i(h) + p(x_i(h))h]f(h)dh.$$

The private value of information is

$$(2.3) \quad I = C_u - C_i.$$

I is positive, as information allows individuals to tailor their level of care to the harmfulness of their acts.[10]

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[9] The first-order condition determining x_u is $p'(x_u) = -1/\bar{h}$, where $\bar{h}$ denotes the expected harm.

[10] When an individual learns that h is lower than $\bar{h}$, he will take less care, and when he learns that h is higher than $\bar{h}$, he will take more care, for the first-order condition determining x_i is $p'(x_i(h)) = -1/h$ and $p''(x) > 0$.

Because liability equals harm under strict liability, expected private costs equal expected social costs whether individuals are uninformed or informed. Thus, the social value of information equals the private value,

(2.4) $I* = I$.

(The use of a "*" denotes social rather than private values or costs.) Hence, we can state

Proposition 1: Under strict liability, the private and social values of legal advice about properly determined liability are positive and equal.

2.2. The Negligence Rule

Under the negligence rule, an individual pays no damages for harm he causes if his level of care x is at least equal to due care, but if his level of care is lower than due care, he is liable for harm caused. Due care is assumed to equal $x*(h)$, the optimal level of care given h -- that which minimizes $x + p(x)h$. (Note that $x*(h)$ increases with h.[11])

An uninformed individual will choose the level of care x_u that minimizes the sum of the cost of care and expected liability payments, and his expected cost will be

$$(2.5) \quad C_u = x_u + p(x_u) \int_{\hat{h}}^{\infty} hf(h)dh,$$

where $\hat{h}$ is level of harm for which due care is x_u. When h exceeds $\hat{h}$, due care exceeds x_u, so the individual will be liable for damages equal to h. When h is less than $\hat{h}$, due care is less than x_u, so the individual will not be liable.

An informed individual knows h and will choose the level of care $x_i(h)$ that minimizes the sum of the cost of care and expected liability payments. Thus, as is well known, the individual will take due care given h, so he will not be liable for the harm he causes. Consequently, his expected cost will be

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[11] This follows from the first-order condition determining optimal care, $p'(x) = -1/h$, and the assumption that $p''(x) > 0$.

$$(2.6) \quad C_i = \int_0^\infty x_i(h)f(h)\,dh.$$

The private value of information is

$$(2.7) \quad I = C_u - C_i,$$

which is positive because information allows individuals to choose their level of care as a function of h.

The expected social cost of an individual's activity is the sum of his cost of care and the expected harm he causes. If an individual is uninformed, the expected social cost differs from his private cost (2.5), because the latter includes harm only when h exceeds $\hat{h}$. Thus, the expected social cost can be expressed as

$$(2.8) \quad C_u^* = C_u + p(x_u) \int_0^{\hat{h}} hf(h)\,dh.$$

The second term measures the expected harm for cases in which the due care standard is met. If individuals are informed, the expected social cost is

$$(2.9) \quad C_i^* = C_i + \int_0^\infty p(x_i(h))hf(h)\,dh.$$

The second term here is the expected harm, which is not a private cost because informed individuals always take due care and thus avoid liability. The social value of information is $C_u^* - C_i^*$, or

$$(2.10) \quad I^* = C_u + \int_0^{\hat{h}} p(x_u)hf(h)\,dh - C_i - \int_0^\infty p(x_i(h))hf(h)\,dh.$$

I^* must be positive, because informed individuals take optimal care for all h, while uninformed individuals take optimal care only when $h = \hat{h}$.[12]

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[12] Substituting for C_u and C_i in (2.10), we obtain

$$I^* = \int_0^\infty \{[x_u + p(x_u)h] - [x_i(h) + p(x_i(h))h]\}f(h)\,dh.$$

The integrand is obviously positive whenever $x_i(h)$ differs from x_u (i.e., whenever $h \neq \hat{h}$).

Using expression (2.7), we find that the divergence between the private and social values of information is

$$(2.11) \quad I - I* = \int_0^{\hat{h}} [p(x_i(h)) - p(x_u)]hf(h)dh + \int_{\hat{h}}^{\infty} p(x_i(h))hf(h)dh.$$

From (2.11), it follows that the private value of information exceeds the social value of information on account of two factors.[13] The first term on the right side of (2.11) is the increase in expected harm for cases in which $h < \hat{h}$. In such cases, informed individuals take less care, implying that $p(x_i(h)) > p(x_u)$. Because they take due care, however, they are not liable for the increase in expected harm, which is of course a social cost, so their incentive to acquire information tends to be excessive. The second term on the right side of (2.11) is the expected harm for cases in which $h > \hat{h}$. In these cases, informed individuals take more care to avoid liability, but harm may still occur. Uninformed individuals would have been found negligent and thus paid damages equal to any harm they caused. Therefore, part of an individual's benefit from obtaining information is escaping liability for harm caused when he takes due care, but this is not a social benefit, again leading to an excessive incentive to acquire information.

In summary, we have

Proposition 2: Under the negligence rule, the private and social values of legal advice about properly determined liability are positive, but the private incentive to obtain advice is socially excessive.

Remark: In our formulation of the negligence rule, we make the conventional assumption that individuals who take less than due care are responsible for all the harm that their acts cause. Kahan (1989), however, emphasizes that the doctrine of legal causation is such that, in principle, negligent actors are only liable for the additional accidents caused by their failure to take due care. (For example, if the probability of accidents increased from 10% to 15% because of inadequate care, the negligent actor

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[13] Note that the private incentive to acquire information under the negligence rule is socially excessive despite the desirability of individuals' changes in their level of care when they become informed.

would only be liable for the additional 5% of accidents thereby caused.[14])
Under this alternative formulation, the expected cost for uninformed
individuals in (2.5) becomes

$$(2.5') \quad C_u' = x_u + \int_{\hat{h}}^{\infty} [p(x_u) - p(x^*(h))]hf(h)dh = C_u - \int_{\hat{h}}^{\infty} p(x^*(h))hf(h)dh.$$

C_u' is less than C_u by an amount that equals the second term of the expression
for $I - I^*$ in (2.11). (In (2.11), the level of care in this term is $x_i(h)$,
but because informed individuals take due care, $x_i(h) = x^*(h)$.) Thus, the
private value of information still exceeds the social value, but now only due
to the first term in (2.11).

3. Legal Advice About Mistakes in Determining Liability

In this section, we examine the case in which individuals' uncertainty
concerns errors in the amount a court would award if they cause harm. To
focus on advice about legal error, we assume that individuals know the actual
harm h and that a tribunal's award equals h plus an error e, which is
distributed according to the positive density g(e) on the interval $[-h, \infty)$ and
has a mean of zero. (That is, the tribunal makes errors in measuring h, but
over the universe of cases its measurements are unbiased.) If an individual
obtains information, he acquires knowledge of the error that will be made if
he comes before a tribunal.[15]

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[14] We do not know to what degree the doctrine of causation affects actual
case outcomes. If a tribunal could readily identify which 10% of the
accidents would have occurred even if due care had been taken, it is plausible
that there would be no liability in these cases. But if a tribunal could not
determine which of the accidents would have been avoided if due care had been
taken (or if all 15% would have been avoided and a different 10% would have
been caused), it might find negligence in all 15% of the cases.

[15] The assumption that the error can be predicted with certainty, rather than
merely predicted better, simplifies the exposition without greatly affecting
our arguments. We presume that experienced legal experts often would have
some idea in advance whether, for a particular type of case, a tribunal's
award is likely to be higher or lower than in the average case.

3.1. Strict Liability

When subject to strict liability, individuals who are uninformed have an expected cost of

$$(3.1) \quad C_u = x_u + p(x_u) \int_{-h}^{\infty} (h + e)g(e)de,$$

because liability is $h + e$. Observe that the integral equals h because the mean of e is zero, so uninformed individuals choose $x_u = x*(h)$. Individuals who acquire information choose their level of care after learning e. (They will choose $x_i(e) = x*(h+e)$.) Their expected cost will be

$$(3.2) \quad C_i = \int_{-h}^{\infty} [x_i(e) + p(x_i(e))(h + e)]g(e)de.$$

Individuals who learn that $e > 0$ will increase their level of care (because their damage payment will be $h + e$ rather than an expected payment of h); similarly, those who learn that $e < 0$ will decrease their level of care. Because, with knowledge of e, an individual's costs will be lower (except when $e = 0$, in which case costs are unaffected), the private value of information is positive.

Social costs differ from private costs in that the terms multiplying $p(x)$ by e in expressions (3.1) and (3.2) are not social costs. The reason is that social welfare depends on the actual harm, h, rather than the amount of the liability award, $h + e$. Thus, the difference between the private and social values of information is

$$(3.3) \quad I - I* = \int_{-h}^{\infty} [p(x_u) - p(x_i(e))]eg(e)de.$$

The value of (3.3) is positive, because informed individuals take more care (reducing the probability of causing harm) when $e > 0$ and less care when $e < 0$, so the private incentive to obtain information is socially excessive. This conclusion can be readily understood. When individuals learn of any $e \neq 0$, they alter their level of care. Yet this must always be socially undesirable, because the optimal level of care $x*(h)$ is taken when individuals

are uninformed. Since informed individuals do better for themselves but worse for society, the incentive to acquire information must be too great.

Proposition 3: Under strict liability, the private value of legal advice about mistakes in determining liability is positive and the social value of advice is negative; the private incentive to obtain advice is socially excessive.

Remark: The result in proposition 3 differs from that in proposition 1 (the private value of advice about properly determined liability equals its social value) because advice concerns error, not simply because error is introduced into the model. If one introduces error into the model of section 2 but advice concerns only harm, it is easy to verify that proposition 1 still holds.

3.2. The Negligence Rule

In this version of the model, due care is taken to be $x^*(h+e)$, the level of care that would be optimal if harm were $h + e$. When subject to the negligence rule, individuals who are uninformed have an expected cost of

$$(3.4) \quad C_u = x_u + p(x_u) \int_{\hat{e}}^{\infty} (h + e)g(e)de,$$

where $\hat{e}$ is level of error for which due care is x_u. When e exceeds $\hat{e}$, due care exceeds x_u, so individuals will be liable for damages of $h + e$.[16] Informed individuals learn e and choose $x_i(e) = x^*(h+e)$, and their expected cost will be

$$(3.5) \quad C_i = \int_{-h}^{\infty} x_i(e)g(e)de.$$

The private value of information $C_u - C_i$ is positive, again because information allows individuals to choose their level of care as a function of e.

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[16] Behavior under the negligence rule in the presence of error has been studied, notably, by Diamond (1974) and Craswell and Calfee (1986), but they do not study acquisition of information about error.

Social costs under the negligence rule differ from private costs. If individuals are uninformed, the expected social cost can be expressed as

$$(3.6) \quad C_u^* = C_u + p(x_u) \int_{-h}^{\hat{e}} hg(e)de - p(x_u) \int_{\hat{e}}^{\infty} eg(e)de.$$

The second term measures the expected harm for cases in which the due care standard is met. The third term is subtracted because payments by negligent actors include the error (the component of the integrand in (3.4) that involves e), which is not a social cost but is included in C_u. If individuals are informed, the expected social cost is

$$(3.7) \quad C_i^* = C_i + \int_{-h}^{\infty} p(x_i(e))hg(e)de.$$

The second term is the expected harm, which (as in section 2, (2.9)) is not a private cost because informed individuals always take due care. (Since the actual harm they cause is h, rather than the amount the court awards, h + e, only h appears in (3.7).) The social value of information is $C_u^* - C_i^*$, or

$$(3.8) \quad I^* = C_u - C_i + \int_{-h}^{\hat{e}} p(x_u)hg(e)de - \int_{-h}^{\infty} p(x_i(e))hg(e)de - p(x_u) \int_{\hat{e}}^{\infty} eg(e)de.$$

The sign of I^* is ambiguous.[17]

The divergence between the private and social values of information is

$$(3.9) \quad I - I^* = \int_{-h}^{\hat{e}} [p(x_i(e)) - p(x_u)]hg(e)de + \int_{\hat{e}}^{\infty} p(x_i(e))hg(e)de + p(x_u) \int_{\hat{e}}^{\infty} eg(e)de.$$

Each term on the right side of (3.9) is positive, so the private value of information exceeds its social value. The first two terms are analogous to the two terms of equation (2.11), which measure the excessive incentive to acquire information under the negligence rule in the model of section 2. The third term involves the same group of individuals as the second -- those who would have been negligent in the absence of information. In addition to being relieved of liability for the actual harm they cause when they take due care,

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[17] If $\hat{e}$ is near zero, $I^* < 0$. (If $\hat{e} = 0$, I^* is the same as under strict liability, and thus is negative.) If $\hat{e}$ is sufficiently different from zero, I^* may be positive. (For most e, behavior would improve when individuals become informed.)

they also are relieved of liability for the error component that they would have paid when taking care of x_u if uninformed.[18] This private benefit is not a social benefit.

Proposition 4: Under the negligence rule, the private value of legal advice about mistakes in determining liability is positive, and the private incentive to obtain advice is socially excessive.

Remarks: (a) Note that there is little resemblance between the reasons that the incentive for acquiring information is excessive under strict liability and under negligence. The results under the negligence rule are similar for the two types of uncertainty studied in this article, while those under strict liability are different.

(b) Consider again the alternative formulation of the negligence rule in which negligent actors are responsible only for the additional accidents caused by their failure to take due care. For the same reason that applied to (2.11), the first term in the expression for I - I* in (3.9) would be unaffected under the alternative formulation of negligence. Again, the second term would be zero because of the reduction in C_u. The third term would differ, but would still be positive: the excessive incentive on account of avoiding liability for the erroneous component would only reflect the portion of that component attributable to the failure to take due care.[19]

4. Extensions and Discussion

In this section, we discuss the applicability of our analysis to different types of legal advice and note some additional factors that bear on our conclusions.

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[18] This component is positive, as the mean of e is zero and the integral excludes the lowest values of e.

[19] In (3.9), e would be weighted by $p(x_u) - p(x_i(e))$ rather than by $p(x_u)$. It is straightforward to verify that this term would be positive (because greater weight is placed on higher values of e). The modified term could be greater or less than the third term in (3.9) (the weight on all values of e is less for the modified term, but the weight falls more for lower values of e, which may be negative).

(a) *Other sources of uncertainty about the extent of liability.* For concreteness, we examined uncertainty about true harm and about mistakes in assessing harm. If we had assumed instead that uncertainty concerned the cost of care or the effect of care on the likelihood of accidents, the analysis would be largely the same. When information concerns any characteristics and liability is properly determined, the private incentive to acquire information under strict liability will be optimal because individuals bear all the costs and benefits of their decisions. Under negligence, individuals who take due care escape liability for harm they cause, so that the private value of information that allows them to choose care optimally will exceed the social value. And when information concerns the prediction of errors that will be made in ascertaining any characteristics relevant to liability, the private incentive to obtain advice will be socially excessive even under strict liability, because such advice induces individuals to modify their behavior in accordance with mistakenly applied rules.

(b) *Uncertainty about whether strict liability or the negligence rule applies.* Consider the case in which individuals' only uncertainty concerns the form of liability (and the legal system assesses conduct without error). Then, there is no private or social value from obtaining information. Whichever rule prevails, individuals will be induced to take optimal care. Because individuals' actions will therefore be the same regardless of the rule, there is no value to knowing it in advance. The situation would, of course, differ if one took into account the decision whether to engage in the activity at all, since expected total costs are greater under strict liability.[20]

(c) *Areas of law in which our analysis is relevant.* Although strict liability and negligence apply mainly in the domain of accident law, analogous rules are employed more broadly. For example, liability for breach of contract may be viewed as strict liability, because usually no inquiry is made into whether breach was reasonable. And in many areas of regulation, the form

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[20] The results also would differ in the presence of legal error.

of liability is similar to negligence: if a standard is met, there is no liability or fine, despite the fact that harm might be caused.

We should note, however, that our analysis is limited to ex ante legal advice about potential liability. The analysis of other types of ex ante advice may differ. For instance, advice concerning how to make obligations legally binding would tend to be mutually advantageous to affected parties and thus have private and social values that were similar, whereas advice designed to seek bargaining advantages in relation to other parties in a transaction would not have this tendency and thus might be expected to have a positive private value that exceeds its social value (the latter possibly being zero or negative). Also, advice rendered ex post (concerning the conduct of litigation), which has been studied elsewhere,[21] involves different elements. Because such advice is rendered after individuals act, it does not have an obviously beneficial effect in guiding behavior; the social value of advice is therefore unclear, but the private value is positive.

(d) *Advice that subverts law enforcement.* We have not discussed legal advice that allows individuals to reduce expected liability for acts they commit (such as by facilitating concealment of behavior). Clearly, such advice is generally undesirable because it reduces the effectiveness of law enforcement.

(e) *The case where expected sanctions do not equal expected harm.* We assumed in our analysis that expected sanctions equaled expected harm. Expected sanctions are, however, often less than expected harm, especially where the likelihood of imposing sanctions is significantly less than one.[22] This possibility affects the analysis of legal advice, although the influence on our results is ambiguous. Consider the situation in section 2 (where uncertainty concerns the actual level of harm an act may cause) under strict liability and assume that expected liability is only half of expected harm.

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[21] See Kaplow and Shavell (1990).

[22] Another reason expected sanctions may not equal expected harm is that individuals' estimates of the expected harm may be systematically biased, which can create a divergence between the private and social values of advice. See Kaplow (1990).

If an individual is advised that harm is high and thus increases his level of care, his savings in liability payments will be only half the reduction in harm, so his benefit from advice will be less than the social benefit. If he learns that harm is low and thus decreases his level of care, his increase in liability payments will be only half the increase in harm, so his gain (his savings in expenditures on care minus the increase in liability payments) will exceed the effect on social welfare. Hence, no clear conclusion can be drawn about how a deviation between expected sanctions and expected harm influences the relationship between the private and social values of advice.[23]

(f) *Litigation costs.* Accounting for litigation costs may affect our conclusion that the incentive to obtain legal advice is socially excessive under the negligence rule. The reason is that an individual who obtains legal advice about the due care standard takes due care in all instances (whereas uninformed individuals are sometimes negligent). The exercise of due care provides a social benefit that injurers do not enjoy: when injurers are not negligent, victims will not sue (assuming they are aware that due care has been taken),[24] which saves victims' litigation costs and court costs.[25] Because this savings is not a benefit for injurers, there is a tendency under the negligence rule (running counter to those we discussed) for the private value of advice about potential liability to be less than the social value.[26]

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[23] To illustrate, suppose that an individual who learns that harm is high increases expenditures on care from 10 to 12, which decreases expected harm from 50 to 40. His benefit is half the decrease in harm (10 × 50% = 5) minus the increase in cost of care (2), which is 3. In contrast, the social benefit is the entire decrease in harm (10) minus the increase in the cost of care (2), or 8, which exceeds the private value by 5. Suppose also that if he learns that harm is low, he decreases expenditures on care from 10 to 4 and expected harm rises from 10 to 20. His benefit is the savings in expenditures on care (6) minus the increase in liability (10 × 50% = 5), or 1. The social benefit is 6 - 10 = -4, which is less than the private benefit by 5.

[24] Often, victims may not initially be aware of whether due care has been taken, but may learn about this early in discovery, before a significant portion of litigation costs have been incurred. See, for example, Farber and White's (1991) study of malpractice suits.

[25] Litigation costs would have other effects in our model, as some suits may be discouraged and injurers' incentives would differ because, if sued, they must pay their legal costs in addition to damages.

[26] Under strict liability, it is, of course, also true that savings in victims' litigation costs and court costs are not a benefit to injurers. But acquiring information may either raise or lower the amount of litigation,

(g) *Policy to correct inappropriate acquisition of information about the law.* Our analysis suggests that when strict liability governs and expected sanctions equal expected harm, the private demand for ex ante legal advice will be socially appropriate, other factors aside. When advice concerns how individuals should behave under the negligence rule or whenever it concerns legal error under any rule, however, the demand for ex ante legal advice tends to be excessive. In these cases, the state could tax legal advice. (If the demand would be inadequate, perhaps because of the effect of litigation costs, the state could subsidize advice.)

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because an informed injurer may either reduce or increase his level of care, producing more or fewer accidents.

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