

# THE NATURE AND IMPACT OF THE “TORT REFORM” MOVEMENT

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## I. INTRODUCTION

For over thirty years, repeat players on the defense side of tort litigation have undertaken to “reform” tort doctrine in their favor. Initially, these efforts consisted of ad hoc efforts to address a series of “crises,” primarily in terms of the cost and availability of liability insurance. In the 1980s, the tort reform movement began to develop a more permanent institutionalized approach to the push for “reform.” Not surprisingly, there has been considerable debate about the goals of this movement, the fairness or efficiency of the specific doctrinal reforms it seeks, and the methods it uses.<sup>1</sup> This Article places this debate in

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1. For support of “reform,” see, for example, PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA’S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2001); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1587-90 (1987). For opposition to “reform,” see, for example, CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* (2001); STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (2004); THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001). For more neutral perspectives, see, for example, 1 ALI REPORTERS’ STUDY, *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK* (1991); 2 ALI REPORTERS’ STUDY, *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE* (1991) [hereinafter 2 ALI, *ENTERPRISE RESPONSIBILITY*]; THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996); WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND*

perspective by addressing the nature and impact of the movement in terms of its goals and the doctrinal changes it seeks, the positions for and against these doctrinal changes, the broader context of the role of courts and tort law, and of competing approaches to the reform of accident law. Ultimately, the specific doctrinal changes may be less important than the changes in this broader context, particularly the shift from judicial development of doctrine based on common law reasoning to legislative changes. In particular, this shift indicates that legislation, politics, money, and rhetoric will play an increasing role in the resolution of the struggle over the proper role of tort liability in American society.

## II. AN OVERVIEW OF THE TORT SYSTEM

### A. Definition

Ever since tort law became a distinct doctrinal area in the latter half of the nineteenth century,<sup>2</sup> a tort has been defined as a civil "wrong"—other than a breach of contract—that causes injury, for which a victim can get a judicial remedy, usually in the form of damages.<sup>3</sup> This broad definition requires clarification in many ways, particularly in two respects. First, the operation of tort law involves a complex system of interrelated rules, including not only substantive rules of conduct and liability, but also damages rules, evidentiary rules concerning proof, and procedural rules concerning trial. One practical result of this complexity is that proposals to reform tort law have included changes in all these types of rules. At a conceptual level, any definition of tort law has to recognize this interconnection and the resulting arbitrariness of schemes for drawing lines between the substantive rules of tort liability vis à vis

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THE LITIGATION CRISIS (2004); MARSHALL S. SHAPO, TORT LAW AND CULTURE (2003) (focusing on products liability and viewing the debate over tort reform as a conflict between two cultural views about the allocation of risk); TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE (Peter H. Schuck ed., 1991) [hereinafter TORT LAW AND THE PUBLIC INTEREST]. For recent symposia on tort reform, see, for example, Symposium, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 1009 (2005); Symposium, *Starting Over?: Redesigning the Medical Malpractice System*, 54 DEPAUL L. REV. 203 (2005); Symposium, *Who Feels Their Pain?: The Challenge of Noneconomic Damages in Civil Litigation*, 55 DEPAUL L. REV. 249 (2006); The 2004 Randolph W. Thorer Symposium, *The Future of Tort Reform: Reforming the Remedy, Re-Balancing the Scales*, 53 EMORY L.J. 1219 (2004).

2. See, e.g., G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3-19 (expanded ed. 2003).

3. See, e.g., DAN B. DOBBS, THE LAW OF TORTS § 1, at 1-2 (2000); 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 1-3 (1861); SIR FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 3-4 (New Am. ed. 1894); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1-6 (4th ed. 1971).

rules concerning evidence, damages, and procedure. Second, tort law encompasses such a broad range of “wrongs” that there can be no meaningful test or definition of a wrong. The central concern of the tort system is to address claims for personal injury caused by negligence,<sup>4</sup> and many claim that negligence is a basic foundational principle to identify wrongdoing.<sup>5</sup> However, tortious wrongdoing has an open-ended, contingent quality, which restricts such attempts to develop a universal basis for tort liability for accidental injury.<sup>6</sup>

The tort system usually addresses wrongs by requiring the wrongdoer to pay compensatory money damages to the victim sufficient to restore the victim to status quo ante—i.e., to the position the victim would have occupied had the injury not been caused by the defendant’s wrong.<sup>7</sup> These money damages compensate for two types of losses: (1) economic losses like medical bills and lost income; and (2) noneconomic losses like mental distress and pain.<sup>8</sup> In a case involving exceptionally wrongful conduct like intentional or reckless actions, the tort system may also grant punitive damages to the victim.<sup>9</sup>

### B. Tort Law and Compensation for Accidental Injuries

Though there are only limited statistics on how the tort system provides compensation for “wrongs” in practice,<sup>10</sup> it is possible to make

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4. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 28-29 tbl. C-2 (June 30, 2002) (indicating that 30,194 of 34,071 tort cases commenced in a one-year period were for personal injury); NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 23-29 (Brian J. Ostrom et al. eds., 2003) [hereinafter WORK OF STATE COURTS] (indicating that areas like automobile litigation and medical malpractice comprise most of tort filings).

5. See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 76-78 (Mark DeWolfe Howe ed., 1963); David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201, 224-26 (David G. Owen ed., 1995) [hereinafter PHILOSOPHICAL FOUNDATIONS].

6. See, e.g., DOBBS, *supra* note 3, § 7, at 10-11 (arguing that any coherence in tort law is “derived from . . . its focus on wrongdoing, its increased emphasis on certain analytical tools, and its virtually unique process of lawyering and deciding cases”).

7. See, e.g., RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979); DOBBS, *supra* note 3, § 1, at 2; Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1577-94 (1997).

8. DOBBS, *supra* note 3, § 377, at 1048-53.

9. *Id.* § 1, at 2.

10. See, e.g., CONG. BUDGET OFFICE, THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER 3-4 (2003) [hereinafter C.B.O. PRIMER]; Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 338-41 (1991); Eric Helland et al., *Data Watch: Tort-uring the Data*, 19 J. ECON. PERSP. 207, 207-15 (2005) (listing and reviewing sources of data); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1154-56, 1245-46 (1992).

some generalizations about three important issues concerning the role of tort law in providing compensation for injuries. First, what role does tort law play in compensating for accidents in the United States? Second, to what extent do potential tort claims actually become the subject of formal litigation? Third, of the cases that are litigated, what is known about the administration of these cases?

### 1. Compensation Schemes for Accidental Injury

The tort system plays a relatively limited role in compensating for accidental injury in the United States. Because tort law focuses on wrongdoing, the system does not generally provide compensation where the injurer was not a wrongdoer.<sup>11</sup> In addition, the system does not provide compensation where a wrongdoer has no insurance or no personal assets to pay compensation, or where the amount of loss is too small to be worth the cost of litigation.<sup>12</sup> Even where a wrongdoer has assets or insurance, the tort system will not provide recovery for injury unless the victim brings a claim.<sup>13</sup> As to compensation systems other than tort law, the United States has a diverse set of partially overlapping schemes. For example, nearly all workplace injuries are covered exclusively by workers' compensation, not tort.<sup>14</sup> The costs of accidental injuries are also covered by no-fault auto insurance schemes in some states, by private first party insurance schemes like life insurance and health insurance, and by public schemes like Medicare and Medicaid.<sup>15</sup> As indicated below, coordinating these schemes with tort law is both complicated and controversial.<sup>16</sup>

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11. DOBBS, *supra* note 3, §§ 9-10, at 14-15, 17.

12. Stephen G. Gilles, *As the System Currently Operates, Liability Is, for Wrongdoers . . . Voluntary*, 63 WASH. & LEE L. REV. 603, 606 (2006).

13. See DOBBS, *supra* note 3, § 2, at 5 ("[T]ort suits may be brought by an aggrieved individual. . . [and] can succeed if the proof shows an actionable tort by a more-likely-than-not standard.").

14. *Id.* § 395, at 1104. A worker injured on the job cannot usually sue the employer, but can sue a third party—for example, a negligent driver who collides with an employee making a delivery for the employer. See *infra* note 261 and accompanying text.

15. See, e.g., Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 625-29 (2000) [hereinafter Schwartz, *Auto No-Fault*] (discussing role of non-tort compensation schemes in terms of auto injuries). One study indicates that liability payments (not including attorney fees) by the tort system provide only 7% of total compensation for economic loss caused by nonfatal accidents. If noneconomic losses are included, the tort system provides 11% of the payments. Percentages vary by type of accident. For example, for motor vehicle accidents, the percentages for economic and noneconomic loss were 22% and 33%. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 107-08 & n.53 (1991).

16. See *infra* notes 220-36 and accompanying text.

## 2. Injuries, Grievances, Legal Wrongs, and Claims in Tort

People who have been injured can relate to the legal system in terms of three overlapping categories: (1) those who feel that they have a legal grievance in the sense that they feel they have been wrongfully injured, (2) those who have been wrongfully injured, and (3) those who make a claim in tort, either informally or formally through litigation. The categories are not the same because: (1) some persons who feel they have been wrongfully injured and some persons who have been wrongfully injured may not file a claim, and (2) some people who feel wronged or file a claim may not actually have a valid tort claim. Our understanding of tort claims is improved if we can compare the three categories in terms of the ratio of grievances to filed claims and of valid claims to filed claims. Unfortunately, it is hard to determine these ratios because there is so little data on *nonclaiming* by people who feel they have a grievance or people who have been wronged. To the extent data on the ratio of grievances to filed claims are available, it appears that many accidentally injured people do not make a claim of tortious injury even though they feel they have a grievance for having been wrongfully injured.<sup>17</sup> In addition, it appears that the ratio of valid claims to filed claims is very high. For example, such a pattern of underclaiming is supported by studies of medical negligence, which indicate the ratios of valid claims to filed claims to be ten to one and eight to one.<sup>18</sup>

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17. See, e.g., DANIELS & MARTIN, *supra* note 1, at 63-65 (providing results from various studies, which demonstrate the low occurrence of personal injury claims relative to the number of individuals sustaining actionable injuries); HENSLER ET AL., *supra* note 15, at 110 (concluding that, typically, an “injured person does not even consider the notion of seeking compensation from some other person or entity who might have been associated with the accident . . . or if he does think about this possibility, he is unlikely to pursue it” and that except for “motor vehicle accident victims, only a minority, even among those who are quite seriously injured, ever consider claiming; of those, just a small fraction use legal mechanisms”); David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC’Y REV. 551, 551-62 (1984) (noting the low use of litigation and that this low use is based upon a culture of “individualism emphasizing self-sufficiency”); Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 155, 157-60 (Austin Sarat et al. eds., 1998) (describing two studies which indicated that few individuals commenced liability claims after sustaining an injury); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 536-46 (1980-81) (noting that “significant grievances [are] by no means a rare or unusual event,” but with tortious conduct, litigation is “relatively rare”).

18. PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 24 (1985) (ratio of ten-to-one); PATIENTS, DOCTORS, AND LAWYERS: *MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK: THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK* 6 (1990) (ratio of eight-to-one). Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1599 (2002) (citations omitted) summarizes an earlier study as follows:

### 3. Administration and Distributive Impact of the Tort System

Though data about litigation are easier to find than data about the ratios of claims to grievances and of claims to negligence, there are substantial shortcomings in the available litigation data.<sup>19</sup> As a result, it is only possible to sketch rough approximations about tort settlements and litigation. One recent study provides the following crude overview of the tort system in terms of data for the year 2000: The number of civil suits in state courts—excluding domestic relations litigation—has been roughly the same in proportion to the population from 1987 to 2001, tort filings in state courts declined from 1992 to 2001, and the states vary considerably in terms of whether these rates have increased or decreased and in terms of the rates of increase and decrease in any given year.<sup>20</sup> Another study indicated that approximately 750,000 tort suits were filed in state and federal courts in 2000; about half of these involved automobile cases.<sup>21</sup> In general, about 3% of tort cases filed are actually tried.<sup>22</sup> A verdict study of the nation's seventy-five largest counties in 1996 indicated that plaintiffs prevailed 48% of the time and that the median plaintiff's verdict was \$30,500.<sup>23</sup> Some specific median plaintiffs' verdicts were \$285,576 for medical malpractice, \$176,787 for nonasbestos product liability, and \$17,931 for automobile accidents.<sup>24</sup> This study indicated that about 3% of winning plaintiffs received

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In the mid-1970s, at the height of the tort crisis in California, the California Medical Association sponsored a study of the costs of medical injuries. The investigators asked nurses and then physicians to review nearly 21,000 medical records in twenty-three California hospitals and to identify patients who had suffered an iatrogenic injury. Raters also evaluated the likelihood of a jury finding of liability. They determined that 4.65% of people hospitalized suffered an adverse event and that 0.79% suffered an adverse event for which the provider would likely be found liable—levels of injury that stunned the sponsors.

Because of its interest "in reducing the amount of tort litigation, the California Medical Association quietly killed the study." *Id.* The results of all three studies have been replicated in other studies. *Id.* at 1600; *see infra* note 440.

19. *See supra* note 10 and accompanying text.

20. WORK OF STATE COURTS, *supra* note 4, at 16-29. In all but four years in this period, contract filings were either greater than or equal to tort filings. *Id.* at 30.

21. C.B.O. PRIMER, *supra* note 10, at 6-7; *See, e.g.*, WORK OF STATE COURTS, *supra* note 4, at 26 (discussing a 1992 study of the seventy-five largest counties, which indicated that automobile cases constituted 60% of state tort cases).

22. C.B.O. PRIMER, *supra* note 10, at 5-6.

23. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., NCJ 179769, BULLETIN: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (2000) [hereinafter TRIALS AND VERDICTS].

24. *Id.* These results vary enormously among the states. For example, a study of tort verdicts in several Georgia counties, including counties in the Atlanta metropolitan area, for the period 1994 through 1997 indicated "an overall pattern where modest compensatory damages are the norm and large awards are the rare exception." Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1089 (2000). For jury trials in Georgia, the median verdict was \$5650 in state court and \$7859 in superior court. *Id.*

punitive damages with the median punitive award being \$38,000.<sup>25</sup> In terms of overall costs of the tort system, one recent estimate, based on payments by liability insurance companies and by self-insured defendants as a result of both verdicts and other payments, is that \$260 billion was paid out for processing and paying tort claims in 2004.<sup>26</sup> A study of the distribution of these costs indicates that plaintiffs received 46% of the total costs and that 54% went to pay for plaintiffs' attorneys (19%), defense costs (14%), and for the insurance companies' administrative costs (21%).<sup>27</sup> Because the 46% that goes to plaintiffs is simply a redistribution of loss, it is arguably not a cost of the tort system. By themselves, these data about the tort system do not tell us the whole story because important concerns, like the following, are not addressed: Are there indirect benefits from the redistribution to victims? Are the overall benefits of tort liability worth the costs? As to the 54% administrative costs, how does this figure compare to the administrative costs of other compensation schemes?<sup>28</sup>

As these figures indicate, the tort system is one of the basic schemes used to allocate the costs of injuries in the United States. As a result, it has a fundamental impact on the distribution of wealth because, for any injury, there are four potential bearers of the costs involved: the victim, the injurer, a third party like a private insurer, or the public through a social welfare scheme. If the costs are left on victims, they are poorer; if costs are shifted, victims are richer while injurers, third parties, or the public are poorer. In the tort system, the decision tends to be limited to whether the loss will be borne by the victim or the injurer. Third parties like liability insurers may ultimately bear the cost, but the initial judicial allocation will not usually involve the third party.

### C. *The Goals of Tort Law*

The distributional impact of the tort system's imposition of accident costs raises fundamental moral and political issues concerning the

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25. TRIALS AND VERDICTS, *supra* note 23. For a discussion of other punitive award studies, see *infra* notes 324-28, 341-43 and accompanying text.

26. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS AND CROSS-BORDER PERSPECTIVES: 2005 UPDATE 3, 6 (2006), available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005\\_Tort.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf) [hereinafter 2005 TORT COSTS]. In 2001, the Tillinghast-Towers Perrin figure was approximately \$205 billion. *Id.* app. 2, at 17.

27. C.B.O. PRIMER, *supra* note 10, at 20. The amount spent on court administrative costs is omitted from in-total costs, partly because court administrative costs are viewed as only 1% of total direct costs. *Id.* at 20 n.4.

28. See *infra* note 48 and accompanying text for discussion of such a comparison. The Tillinghast-Towers Perrin report explicitly notes that it has not addressed such issues. See 2005 TORT COSTS, *supra* note 26, at 2.



reasons for and methods of allocating the loss.<sup>29</sup> The tort system's redistribution of the loss from the plaintiff to the defendant has been justified in terms of three policy goals. First, the liability for payment of compensatory damages prevents wrongdoing and thus protects rights in several ways, particularly: (1) the payment for injuries caused by wrongful conduct provides an incentive to avoid wrongful conduct,<sup>30</sup> and (2) even where no wrongdoing is involved, imposing liability for accident costs provides an incentive to reduce injuries not currently preventable by due care by lowering the level of activity, or by seeking innovations that result in new, more cost-effective safety measures.<sup>31</sup> Second, our sense of fairness requires that, as a matter of "corrective justice," victims who suffer injury because their rights have been wrongly denied should have recourse to a system that requires injurers to pay compensation. These injurers "deserve" to bear the costs of their wrongs, not innocent victims.<sup>32</sup> This concept of "just desert" also serves

29. See, e.g., Jules Coleman & Arthur Ripstein, *Mischief and Misfortune (Annual McGill Lecture in Jurisprudence and Public Policy)*, 41 MCGILL L.J. 91, 93-94 (1995) (arguing that corrective justice in tort is connected with distributional issues concerning the allocation of costs of "misfortune").

30. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68-94 (1970); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 5, at 99. Prevention is not only achieved by the "negative" impact of liability on a wrongdoer, but also by several related effects of liability. These other effects are: (1) assuring careful members of society that it is not foolish to conform their behavior to legal norms of safety; (2) conveying a strong message about social disapproval of certain types of conduct and thus strengthening moral frameworks; and (3) inculcating the habit of obeying the law. See, e.g., F. Patrick Hubbard et al., *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C. L. REV. 391, 546-49 (1982); Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262, 263-67 (2005).

31. See, e.g., *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990); CALABRESI, *supra* note 30, at 73, 155; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1082 (1972); Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 652-63 (1998).

32. See, e.g., ALAN CALNAN, JUSTICE AND TORT LAW 99-109 (1997); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY xiii-xx, 3-63 (2001) [hereinafter COLEMAN, PRACTICE OF PRINCIPLE]; JULES L. COLEMAN, RISKS AND WRONGS 303-28 (1992); IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 11-20 (1993); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56-83 (1995); James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 5, at 131; Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72 (Gerald J. Postema ed., 2001); Richard W. Wright, *Right, Justice and Tort Law*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 5, at 159; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409 (1992). Some versions of corrective justice do not require wrongdoing on the part of the injurer. See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544-45, 548-59 (1972) (arguing that persons who impose nonreciprocal risks on others must compensate victims of such risk).

to limit liability from becoming disproportionately large in comparison to a defendant's wrongdoing.<sup>33</sup> Third, compensation of victims is frequently said to be, by itself, a goal of tort law.<sup>34</sup> Punitive damages are justified in terms of the first two goals. More specifically, these damages provide additional prevention by increasing the deterrent impact. This is particularly true in situations where compensatory damages alone may be insufficient. In terms of corrective justice, punitive awards provide vindication for the victim's rights where they have been violated by an exceptionally egregious wrong and satisfy a need for retribution for such conduct.<sup>35</sup>

All three goals have been the subject of extensive debate and disagreement. For example, prevention/deterrence theories are criticized on the ground that they rely on unrealistic assumptions about human behavior—particularly given the widespread use of insurance schemes and the practical problems of suing for small losses and collecting judgments from most uninsured defendants—and about our ability to calculate costs and benefits.<sup>36</sup> Corrective justice is problematic in situations where the loss is not worth the cost of litigation or where the

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33. See, e.g., *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996) (holding that the amount of punitive damages must be proportional to the degree of reprehensibility); *Portee v. Jaffee*, 417 A.2d 521, 525 (N.J. 1980) (limiting liability for recovery of mental trauma caused by injury to another person to avoid imposing “liability that is not commensurate with the culpability of defendant’s conduct”); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1-13 (1968) (discussing role of retribution as a limit on deterrence in criminal law).

34. See, e.g., 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 25.1, at 1299 (1956); ABA COMM. ON THE TORT LIAB. SYS., *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* 4-29 to 4-33 (1984). The view that compensation is a goal of tort law originally developed in the 1930s. See WHITE, *supra* note 2, at 147-52.

35. See, e.g., *Pac. Mut. Life Insur. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[U]nder the law of most States, punitive damages are imposed for purposes of retribution and deterrence.”); RESTATEMENT (SECOND) OF TORTS § 908 (1979) (punitive damages awarded “to punish” and “to deter”); 1 JAMES D. GHIARDI ET AL., *PUNITIVE DAMAGES: LAW AND PRACTICE* §§ 2.01-.13, 4.12-.14 (1985); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373-82 (1994). The lists in some of these authorities include more goals. For example, Owen includes education, compensation, and law enforcement as goals. *Id.* at 373-74. However, education and law enforcement overlap with prevention/deterrence and vindication, while compensation is a very questionable basis for a punitive award. See *supra* note 34 and *infra* notes 40-53 and accompanying text (discussing compensation as a goal).

36. See Gilles, *supra* note 12, at 609-10 (discussing lack of deterrent impact on actors who are judgment proof); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 115-17 (1993); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (reviewing arguments and studies and concluding that tort law deters enough injuries to be worth its administrative costs but that deterrence is not sufficiently precise to support theoretical schemes to fine-tune liability rules to achieve perfect deterrence); see also *infra* text accompanying notes 67-71.

wrongdoer lacks insurance or assets to pay a judgment.<sup>37</sup> Both deterrence and corrective justice theories rely on a concept of a "wrong" to be deterred or corrected, yet both lack a generally accepted theory of rights and of correlative wrongdoing or a theory of allocation of loss where multiple wrongdoers are involved.<sup>38</sup> Moreover, specific tests of wrongdoing are often extremely vague.<sup>39</sup> The view that compensation is a goal of tort law is particularly questionable because the position arguably confuses goals and means. For example, compensatory damages are also used in contract law, but virtually no one asserts that compensation is a goal of contracts. As with torts, contract damages are a means of achieving goals.<sup>40</sup> The role of compensation as a means can be seen more clearly if damages are contrasted with injunctions, which

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37. Gilles, *supra* note 12, at 610.

38. Some deterrence theorists emphasize economic efficiency and define "wrong" as an "inefficient accident" in the sense that it would have been cheaper to expend the costs of a safety measure that would have prevented the accident. *See infra* note 67 (discussion of cost-benefit tests of liability). Other theorists would impose liability on the actor who can best make and implement decisions as to efficiency—i.e., to decide whether it is cheaper to pay safety costs to avoid the accidents or to have the accidents—regardless of whether this decision-maker has made a "wrong" decision in the case involving plaintiff's injury. *See, e.g.,* CALABRESI, *supra* note 30, at 133-73; Calabresi & Hirschoff, *supra* note 31, at 1057, 1059-60. Efficiency-based theories are sometimes criticized on the basis that they ignore concerns for fairness. *See, e.g.,* Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 242 (1980) (arguing that the wealth maximizing theory is incoherent and "biased in favor of those who are already well-off"); *cf.* JOHN RAWLS, *A THEORY OF JUSTICE* 10 (rev. ed. 1999) (arguing in favor of a conception of justice as fairness and against utilitarian conceptions of justice).

For critiques of corrective justice, see, for example, Calabresi & Hirschoff, *supra* note 31, at 1077-82; Coleman & Ripstein, *supra* note 29; Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)). Coleman, who argues in favor of a corrective justice approach and of a concept of wrong based on fairness, contends that the content of "wrong" comes not only from tort law but also "from the criminal law, from our political ideals, and from the content of our everyday moral judgments." COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 32, at 57. Consistent with this argument, he notes that "the actual content of corrective justice—and of fairness itself—may vary" from culture to culture. *Id.* at 58-59. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802-11 (1997), contains a useful review of criticisms of both deterrence and corrective justice theories. Some corrective justice theorists would require compensation in order to rectify injustice even if there is no wrongdoing. *See, e.g.,* Fletcher, *supra* note 32, at 544-45, 548-49.

For discussion of problems with multiple wrongdoers, see *infra* Part IV.A.2 (discussing joint and several liability).

39. *See infra* text accompanying notes 67-70.

40. The underlying goals of contract law are also the subject of dispute, primarily in terms of whether the goal is the promotion of efficiency or the protection of promise-based or expectation-based rights. *Compare* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.9 (6th ed. 2003) (arguing for efficiency), *with* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 8 (1981) (discussing promise-based rights), HENRY MATHER, *CONTRACT LAW AND MORALITY* 1, 3-6 (1999) (asserting that facilitation of reliance and beneficial coordination is the goal), *and* STEPHEN A. SMITH, *CONTRACT THEORY* 3 (2004).

are sometimes granted as the remedy for a tort<sup>41</sup> and thus are a means of achieving goals. Yet no one argues that injunctions are a goal of tort law.

Statements about compensation as a goal often indicate a concern for victims having to bear all the costs of an injury as a “lump-sum” loss.<sup>42</sup> From this perspective, it is better to “spread” the loss among a large group of people, each of whom only pays a small part of the total cost. In order to achieve this better result, a defendant has a duty to compensate if the defendant is the best party to spread the loss.<sup>43</sup> However, this approach rests on a desire to achieve loss-spreading as a goal, not compensation in itself. Consequently, a concern for loss-spreading would require a denial of compensation where the plaintiff is in the best position to spread the loss.<sup>44</sup> Moreover, even though

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41. See, e.g., *Allred v. Harris*, 18 Cal. Rptr. 2d 530 (Ct. App. 1993) (enjoining trespass); *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647 (Wis. 1969) (enjoining nuisance and granting damages for time period prior to injunction); *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.) (enjoining performances by singer for anyone other than the operator of the theatre where she had contracted to sing). See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing injunctions as mechanism for enforcing “property rules”).

42. See WHITE, *supra* note 2, at 148.

43. See *id.* at 147. The judicial approach to using compensation and spreading as goals is illustrated by *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). In justifying the imposition of “strict liability” on the manufacturers of products, Justice Traynor argued in part as follows:

It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

*Id.* at 440-41. Traynor also relied on deterrence and corrective justice to support his position. *Id.* at 440-43. Traynor’s argument for “strict liability” has received only limited acceptance in terms of tort doctrine, and product manufacturers are not generally subject to “strict liability.” See *infra* notes 51-53, 403-05 and accompanying text. For a more extensive analysis of spreading as an approach to accidental injuries, see CALABRESI, *supra* note 30, at 39-67.

44. For example, the New Jersey Supreme Court held that a private water company was liable for negligence in failing to provide sufficient water pressure to fire hydrants, but only to the extent that claims were not covered or were not adequately covered by first party insurance. *Weinberg v. Dinger*, 524 A.2d 366 (N.J. 1987). Similarly, one reason for refusing to grant compensation to the plaintiff in *Ryan v. New York Central R.R.*, 35 N.Y. 210 (1866), was that persons like the plaintiff were in the best position to spread the costs of the loss of plaintiff’s house from a fire negligently started by the defendant. In an area where liability was suspect, the court justified the lack of liability as follows:

[E]ach man, to some extent, runs the hazard of his neighbor’s conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offence committed.

*Id.* at 217.

spreading may be a legitimate goal as part of a *legislative* approach to *accident* law in general,<sup>45</sup> using spreading as a goal for the common law scheme of judicially developed tort law is subject to two basic objections.

First, tort-based compensation awards rely on litigation, which involves high administrative costs. The tort system is, therefore, a relatively expensive way of achieving compensation based on spreading in comparison to private first-party insurance or publicly funded compensation schemes.<sup>46</sup> Because of these high costs, tort law is almost always a less efficient way to spread losses. In addition, the costs of liability insurance in an area like products liability are unfairly imposed on low income purchasers who pay the same in purchasing the liability coverage as higher income purchasers, but who receive less compensation for such injuries as lost income.<sup>47</sup> Unless compensation in torts also achieves a deterrent or corrective goal, it is wasteful and unfair to use torts, rather than a cheaper administrative scheme, for spreading. However, if deterrence or corrective justice is included as a requirement for compensation in a particular doctrinal context, loss-spreading becomes irrelevant—or at least less relevant—because these other goals provide a justification.<sup>48</sup> In addition, the spreading goal cannot be achieved in cases where there is no wrong to deter or correct by requiring compensation.

Second, serious questions of competency and legitimacy are raised if courts, rather than legislatures, compel a defendant to compensate a victim's lump-sum loss simply because the defendant is in a better

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45. See, e.g., CALABRESI, *supra* note 30, at 39-67 (discussing the strategy of placing accident costs on the party "most likely to spread the loss broadly"); *infra* notes 130, 182-84 and accompanying text (discussing legislative adoption of workers' compensation schemes).

46. See, e.g., Priest, *supra* note 1, at 1559-60. Plaintiffs receive about half of each dollar in compensation in the tort system; the other part of each dollar is spent on administration. See *supra* note 27 and accompanying text. In contrast, a first party insurance scheme like Blue Cross/Blue Shield has administrative costs that are 10% of benefits. Priest, *supra*, at 1560. Workers' compensation schemes typically spend 15-20% on administration, including attorney costs. See, e.g., C.B.O. PRIMER, *supra* note 10, at 21 (20%); DEWEES ET AL., *supra* note 1, at 393-94 (15-20%). One study indicates that a pure no-fault scheme for automobile injuries would involve administrative costs of only 7%. STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS xvi (1991) ("No-fault plans that entirely ban access to the liability system reduce transaction costs by about 80 percent."). The federal no-fault scheme for vaccine injuries has administrative costs of 15%. C.B.O. PRIMER *supra* note 10, at 21; cf. *infra* note 140 and accompanying text (discussing childhood vaccine compensation scheme).

47. See, e.g., Priest, *supra* note 1, at 1585-86.

48. In addition to problems of administrative costs, liability based solely on spreading will generally conflict with deterrence because the defendant's incentive to change wrongful behavior is reduced by his ability to use spreading to externalize the costs of the injury from that behavior. See CALABRESI, *supra* note 30, at 64-67, 278-85.

position to spread the loss. The basic reason for questioning the competence of courts to use spreading as a justification in this way is that courts either have no way or only a limited capacity to address such problems as: (1) defining and identifying the best spreader, (2) identifying which victims of accidents are entitled to such compensation, (3) determining whether compensation should be based on a welfare-type basis of equal need or a tort-type basis of compensation in terms of status quo ante, no matter how unfair or unequal that prior status may have been, and (4) providing collective regulatory approaches to achieve the deterrent role of compensation.<sup>49</sup> Legislation is superior to adjudication in addressing not only these tasks, but also the underlying separation of powers issue of the legitimacy of a court's use of spreading as a reason for a redistribution of loss. Because such a distributive choice is usually viewed as a legislative matter in a democracy, there is considerable dispute about whether, when, and to what extent a court may engage in redistribution for the sake of redistribution.<sup>50</sup> Thus, it is not surprising that courts have been generally unreceptive to schemes of "enterprise liability" which justify imposing liability for characteristic risks<sup>51</sup> on a business regardless of fault, partly because it is better able to spread the loss than the victim.<sup>52</sup> For example,

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49. See, e.g., CALABRESI, *supra* note 30, at 278-85; Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 798-802 (1990) (criticizing status quo ante approach on the ground that it simply reinforces questionable inequalities in income distribution); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 97, 101-02 (1994); Priest, *supra* note 1, at 1546, 1585-86 (arguing that spreading by imposing liability on product sellers is unfairly regressive because all consumers pay the same for the spreading "insurance," while high income plaintiffs are compensated in terms of status quo ante and therefore receive more in damages awards than low income plaintiffs); see also Peter H. Schuck, *Introduction: The Context of the Controversy*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 1, at 17, 36-37.

50. See, e.g., Calabresi & Hirschoff, *supra* note 31, at 1077-78, 1081-84; Alan Schwartz, *Products Liability and Judicial Wealth Redistributions*, 51 IND. L.J. 558, 564-68 (1976).

51. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1334 (2001) (characterizing enterprise liability as a scheme based on the assertion "that actors should bear the costs of those accidents that are 'characteristic' of their activities and then distribute those costs among all those who benefit from the imposition of the risks at issue") (citation omitted).

52. See, e.g., Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 663-68 (1990) (book review). For discussions of enterprise liability, see CALABRESI, *supra* note 30, at 50-51 (distinguishing two uses of the term: (1) referring to self insurer; and (2) referring to entity best able to pass costs onto a large pool of customers); Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 599-608 (2005) (tracing history of the concept of enterprise liability); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1192-93 (1996) (referring to a "pattern of retreat" from support of the doctrine). Enterprise liability also rests on a concern for deterring accidents by imposing liability on the enterprise best able to make decisions about reducing accidents not preventable by due care, by reducing the level of the activity or by innovation that results in cost-

imposing liability without fault for product-caused harms based on this concept of enterprise liability has been generally rejected by the courts.<sup>53</sup> In contrast, some legislative schemes for spreading, notably workers' compensation, have been accepted as a basic approach to redistributing the costs of accidents.

The goals of tort law are central to understanding tort reform because many proposed reforms are supported—or attacked—in terms of the validity of a particular goal or of how the proposals would achieve a particular goal. This Article will not attempt to resolve this debate in general or in terms of a particular proposal. Instead, it will simply note the ways in which the goals of tort law are involved in the debate about torts as a system and about specific tort reforms.

The debate about goals is further complicated by the complexity of the tort system, by goals outside tort law, and by broad conceptions of a just society. The broader systemic dimension is illustrated by egalitarian criticisms of limitations on recovery in tort for noneconomic injuries.<sup>54</sup> For example, such limitations have been criticized on the ground that they have a disproportionate impact on women and minorities because these groups tend to have lower amounts of economic loss, particularly in terms of lost earnings, than men.<sup>55</sup> Another egalitarian criticism of the tort system is that it unfairly favors the rich by reinforcing unfair

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effective safety measures. *See supra* note 31 and accompanying text. The concept of enterprise liability also overlaps with concepts of corrective justice like that expressed, for example, in Fletcher, *supra* note 32.

Perhaps the primary area where enterprise liability is embraced is in the area of vicarious liability, particularly under the doctrine of respondeat superior, which makes employers liable for the torts of their employees committed within the scope of employment. Though fault on the part of the employee is generally required, the doctrine imposes "strict liability" on the employer, who is liable even though the employer did nothing wrong. *See, e.g.*, DOBBS, *supra* note 3, §§ 333-36, at 905-20; Keating, *supra* note 51, at 1292-93.

53. *See, e.g.*, RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. a, at 16-17 (1998) (rejecting enterprise liability in the form of strict liability for design or warning). For further discussion of the role of nonfault liability in products liability, see *infra* notes 403-04 and accompanying text.

54. For discussion of these limitations, see *infra* Part IV.A.3.

55. *See, e.g.*, *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 465-68, 491 (Wis. 2005) (holding that limitation on noneconomic damages in medical malpractice actions was unconstitutional in part because of the disproportionate impact on children); KOENIG & RUSTAD, *supra* note 1, § 3.5, at 113-15; Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 466 (1998) (criticizing approach on the basis of gender discrimination); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1280-1314 (2004); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 850-67 (1997); Lisa M. Ruda, Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 207-26 (1993); cf. Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995) (criticizing punitive damages award restrictions on gender grounds).

inequalities in distribution by restoring plaintiffs to the positions they would have been in but for the tortious injury even though these pre-injury positions are unfair.<sup>56</sup> A different, more “conservative” criticism is that “excessive” tort liability has hindered the broader national goals of fostering innovation and protecting the competitive capabilities of the United States in the global economy.<sup>57</sup>

#### D. *The Mechanics of the System*

Though many claims involving compensation for tort liability are resolved without an attorney, attorneys are central in the operation of the tort system. Plaintiffs in tort litigation are generally represented by attorneys paid on the basis of a contingency fee in the range of 30-40% of recovery,<sup>58</sup> which provides an incentive for the plaintiff’s attorney to maximize the amount of compensation per unit of his input. This incentive scheme operates differently with different segments of the plaintiffs’ bar. For example, some attorneys specializing in plaintiffs’ work handle a large number of cases involving smaller amounts of compensation that can generally be resolved without trial; other plaintiffs’ attorneys specialize in trying a small number of cases involving the potential for substantial verdicts or settlements.<sup>59</sup> The contingency fee system forces plaintiffs’ attorneys to act as gatekeepers who only take cases likely to generate a return greater than their

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56. See *supra* note 49 and accompanying text.

57. See Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 1, at 127, 128; ATRA: American Tort Reform Association, <http://www.atra.org/about/> (last visited Apr. 7, 2006) [hereinafter About ATRA].

58. See, e.g., Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas*, 80 TEX. L. REV. 1781, 1781 n.2 (2002) [hereinafter Daniels & Martin, *Precarious Nature*]; Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs’ Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 274 n.4 (noting that “the contingency fee had become an accepted practice in America by the mid-19th century”); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 212-14 (2001); *infra* notes 392-400 and accompanying text (discussing contingency fee system).

59. See, e.g., JEROME E. CARLIN, LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING 71-91 (1994) (contrasting the typical work of high-level lawyers with that of low-level lawyers); Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1788-95 (dividing plaintiffs’ lawyers into four categories); Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*,” 50 DEPAUL L. REV. 453, 476-82 (2000) [hereinafter Daniels & Martin, *The Impact*] (describing “bread and butter” lawyers); Parikh & Garth, *supra* note 58, at 272, 297 (discussing the market referral system as a means of maximizing profit and investing in high-stakes litigation); Yeazell, *supra* note 58, at 208, 213-14; cf. Catherine T. Harris et al., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs’ Attorneys*, 58 SMU L. REV. 225, 245-47 (2005) (noting the highly successful role of “seasoned attorneys”).



investment. In ordinary cases, lawyers may reject as many as nine out of ten potential cases. In complex expensive matters, like medical malpractice, the rates of rejection are likely to be much higher.<sup>60</sup> The defense bar generally operates on the basis of a fee paid regardless of outcome.<sup>61</sup> Because defendants in tort disputes tend to have more wealth than plaintiffs,<sup>62</sup> they have an advantage in the litigation. Defendants' resources will be superior to those of the plaintiffs' side, particularly where the plaintiffs' lawyers handle a large number of cases involving relatively low damages.<sup>63</sup> However, in litigation involving plaintiffs' lawyers with a small-volume, high-damages practice, the plaintiff's side may have superior resources because cost-containment measures by insurance companies often limit expenditures by the defense side.<sup>64</sup>

Though the overwhelming majority of tort suits are resolved without a trial,<sup>65</sup> the jury is usually involved where a tort suit is tried.<sup>66</sup> The jury's role in trials is crucial in three respects. First, juries provide community input on norms of behavior by giving contextual specificity to wrongdoing, which is generally defined in vague terms like "reasonable" and "negligent,"<sup>67</sup> and they determine the amount of

60. See, e.g., Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy*, 38 LOY. L.A. L. REV. 1217, 1233 (2005). It is hard to evaluate the rejection rate of lawyers who focus on a small number of high value cases because much of their practice comes from referrals from other attorneys. See, e.g., Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1793-95.

61. See, e.g., Vidmar, *supra* note 60, at 1234; Yeazell, *supra* note 58, at 197-98, 214.

62. Most defendants are business entities or automobile drivers with insurance, in which case the insurance company usually provides defense counsel. See 2005 TORT COSTS, *supra* note 26, at 7-8 (discussing characteristics of defendants in tort disputes).

63. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 13, 22 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (observing that defense lawyers' successes are attributable in part to their status as "repeat players," armed with "better information . . . greater continuity, better record-keeping, more anticipatory or preventative work, more experience and specialized skill in pertinent areas, and more control over counsel"); Symposium, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 795, 809 (1999).

64. See, e.g., Yeazell, *supra* note 58, at 197-98.

65. See *supra* note 22 and accompanying text; see also H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 4 (1980).

66. A study of the seventy-five largest counties indicates that 85% of the estimated 10,278 tort trials in 1996 were jury trials. TRIALS AND VERDICTS, *supra* note 23, at 1.

67. See, e.g., Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424-39 (1999); Leon Green, *The Torts Restatement*, 29 U. ILL. L. REV. 582, 595 (1935); Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 639-42 (2003). The normative role of the jury is not substantially reduced by the use of "mathematical" risk/benefit approaches like that in the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (referring to "balancing of risks and benefits") and in Learned Hand's opinions in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) and *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) ("The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood

damages necessary to compensate the plaintiffs.<sup>68</sup> This role has increased in an era of comparative fault, which requires not only a qualitative evaluation of conduct in terms of vague tests but also a quantitative determination of the relative amounts of fault of a plaintiff vis à vis the defendant(s)<sup>69</sup> and among different defendants.<sup>70</sup> Second, the jury resolves fact disputes, particularly in situations where the facts are capable of being resolved with some “reasonable” evidentiary basis, even though the factual disagreement cannot be resolved with certainty.<sup>71</sup> Finally, jury verdicts provide a benchmark for settling claims that are not tried.<sup>72</sup>

Both trial judges and appellate judges are central to the system of tort law. Trial judges supervise the conduct of the parties, their attorneys, the witnesses, and the jury. They regulate the jury by serving as gatekeepers as to the cases that can be tried by a jury through motions to dismiss, motions for summary judgment, and motions for directed verdict. Trial judges also decide what evidence reaches the jury and guide the jury through instructions. In addition, judges exercise considerable control over the jury through post-verdict review, including review of the amount of damages.<sup>73</sup> Appellate judges not only review decisions by the trial court judges but also make a considerable amount of the rules governing tort law.<sup>74</sup>

Two characteristics of the judicial system are important in terms of political power. First, because it is composed of lay persons and because

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that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”) As Judge Hand noted in another portion of *Conway*, the three factors of probability, seriousness of injury, and cost of accident avoidance “are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables . . . .” 111 F.2d at 612. Moreover, there is a possibility that the jury may be reluctant to accept the results of a starkly utilitarian application of a cost/benefit test. See Hetcher, *supra*, at 647-52; Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1737-38 (2003).

68. See *supra* note 7 and accompanying text; *infra* Part IV.A.3 (discussing noneconomic damages).

69. See *infra* notes 119 and accompanying text.

70. See *infra* Part IV.A.2.

71. FED. R. CIV. P. 50(a) (providing that disputed fact issues are to be resolved by the jury unless “there is no legally sufficient evidentiary basis for a reasonable jury to” resolve the factual issue).

72. See, e.g., DANIELS & MARTIN, *supra* note 1, at 62-66; Gross & Syverud, *supra* note 10. The role of the concern for the results of formal litigation appears to diminish where a large number of routine small-stakes claims are being settled because it is administratively cheaper to address most of these claims in terms of negotiation using categories rather than case-by-case analysis. See ROSS, *supra* note 65, at 136-39.

73. See *infra* notes 267-70, 317, 323 and accompanying text.

74. See *infra* Part III.B.1.

of its ad hoc, for-this-case-only character, a jury's decision process is hard to manipulate with economic resources. Second, though all government entities are subject to influence through wealth and economic power, judges are far less subject to influence than legislators through political contributions and lobbying by those with substantial economic resources.<sup>75</sup> This difference may be less where judges are elected, but judicial norms and behavior arguably constrain even elected judges.<sup>76</sup> The judicial system is also not subject to "capture" in the same way as regulatory agencies, which can have their role affected by staffing decisions by the executive, funding and other decisions of the legislature, and connections of the agency personnel with the regulated industry.<sup>77</sup> The effectiveness of regulatory control by agencies is also reduced by judicial review of their decisions, particularly in terms of delaying implementation.<sup>78</sup>

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75. See, e.g., SIMON LAZARUS, *THE GENTEEL POPULISTS* 27-28, 245-48 (1974); G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445 (2003) (arguing that various methods of selecting judges are less different than supposed, that substantial politicization of judicial elections is unusual, and that when politics does become involved, judicial elections are virtually indistinguishable from other election contests). Lazarus summarizes this difference as follows:

[T]hree items—wealth, organization, and persuasion—comprise the elements of influence in democratic politics. If everyone can participate by right in the political process, then, inevitably, those who are best able to amass and deploy the ingredients of influence will participate most effectively.

This is not an inflexible rule. Though the means of influence are the same in all arenas of democratic politics, their relative value does vary somewhat from one forum to another. Persuasion counts for more and money for less before the courts and even before administrative agencies, than before congressional committees.

LAZARUS, *supra*, at 28.

76. See, e.g., Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1489-94 (2005); Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1372-80 (2003) (noting a strong relationship between electoral success and relative advantages of political party affiliation and money); James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon's Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1327-34 (2003); *infra* Part IV.C. The textual reference to states where "judges are elected" is a very broad generalization. Judicial selection methods, whether formally termed elections or not, vary immensely not only from state to state, but also within a state in terms of particular elections. See, e.g., Cheek & Champagne, *supra*; Tarr, *supra* note 75. Moreover, as the experience with appointments to the United States Supreme Court indicates, a lifetime appointment scheme is also subject to being politicized.

77. See, e.g., BURKE, *supra* note 1, at 14-15; Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1130-33 (1954); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-52 (1997); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1296 (1986) (noting a pattern where agencies "exhibited a consistent bias in favor of the interests of politically influential constituents").

78. See, e.g., BURKE, *supra* note 1, at 11, 14-15; Merrill, *supra* note 77, at 1050-52; Rabin, *supra* note 77, at 1295-1315. One commentator argues that this pattern of assertive judicial review

### III. TORT REFORM

#### A. Issues

##### 1. Whether a Specific Doctrinal Proposal Is a Reform

By definition, reform is a good thing because the term identifies changes that will remove or reduce faults or abuses and thus provide improvement. Given this definition, it is generally good policy to reform the tort system where possible. However, people frequently disagree about whether a particular proposal for change in tort is, in fact, a “reform.” One side argues the tort system suffers from some defect that must be addressed by adopting the proposed reform.<sup>79</sup> The other side argues the defect does not exist or that, even if there is a problem, the proposed reform will be ineffective or will make the system worse.<sup>80</sup> This dialogue necessarily focuses on *specific* proposals for reforms because, given the complexity of the tort system, tort law can be changed in numerous ways. There is no one single reform for tort law in general; nor is there a single way to change any specific tort doctrine. Consequently, it might be more accurate to speak in terms of a tort *reforms* movement. Because of the extensive dispute about whether the changes sought by the “tort reform” movement are truly reforms, this Article frequently uses quotations around “tort reform” to clarify that it is referring to changes sought by the movement rather than changes that are reforms in the sense of being an improvement in tort law by some more objective standard.

##### 2. How to Decide: “Rationality” Versus Politics

There are many ways to address debate about a specific doctrinal change. A common approach, which can be termed the “rational” or deliberative model,<sup>81</sup> structures the debate by requiring the proponent of a change to specify the reasons why a particular rule is flawed in terms

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of administrative decisions is caused by a concern that agencies are not “neutral” experts because they are too prone to control by the political branches and by the industry being regulated. *See id.* at 1299.

79. For an example of this type of argument, see *infra* notes 220-24 and accompanying text (criticizing collateral source rule).

80. For an example of this type of argument, see *infra* notes 225-27 and accompanying text (defending collateral source rule).

81. “Rational” is put in quotations to recognize that there is considerable debate about the nature and normative significance of the concept. *See generally* ROBERT NOZICK, THE NATURE OF RATIONALITY (1993) (exploring rationality of decision and rationality of belief).

of justice or policy.<sup>82</sup> A decision-maker will then rationally evaluate the proposal in terms of three issues: First, is the rule flawed as the proponents claim? Second, if there is a flaw, will the proposed change ameliorate the problem, at least to some extent? Third, if the change does ameliorate the problem, is it also just or good policy in terms of such questions as: What are the benefits and costs of change? Do the benefits outweigh the costs? If so, who bears these costs and who receives the benefits of change? Is there a better way to address the problem?

The rational model has been subjected to considerable criticism in recent decades on two grounds. One criticism stresses the model's need for some normative measure of justice or good policy to evaluate any proposed change to an area of law, and argues that disagreements about basic conceptions of fairness, justice, and good instrumental policy, particularly in terms of specifics, are, at best, difficult to resolve in any "objective" way in a modern pluralistic society.<sup>83</sup> Second, the rational

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82. In terms of democratic theory, this model is sometimes referred to as the "deliberative model" or the "public interest model." See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 130-31 (2003) (discussing deliberative democracy and public interest); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 149 (1977) (detailing the "public-interest model"); Abner J. Mikva, *Foreword*, 74 *VA. L. REV.* 167, 169 (1988) (discussing the "public interest model"). Michelman describes this model as follows:

The . . . public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group—or as a device for filtering the reasonable from the unreasonable, the persuasive from the unpersuasive, the right from the wrong and the good from the bad.

Michelman, *supra*, at 149 (citations omitted). In this context, the attainment of individual freedom "depends on the possibility of values that are communal and objective." *Id.* at 150.

83. Any claim of "objective normative truth" can be challenged as being actually a matter of: (1) claiming to choose the basic assumptions necessary for the theory on the basis of objective normative truth even though the choice can only be based on personal opinion or preference; (2) avoiding the need to choose between competing values by using a theory that is vague or internally inconsistent; or (3) using basic assumptions but mistakenly claiming that there are no such assumptions and that, therefore, the theory is neutral. Reasoned argument can have no special status because any logical argument based on personally preferred normative postulates or assumptions cannot provide "objective normative truth." Instead, these arguments are simply attempts to present one's favorite views in the guise of objective normative truth. This mode of criticism includes many modern versions of pragmatism and the "critical legal studies" approach. The literature on both topics is vast. Discussions of pragmatic approaches include, for example, POSNER, *supra* note 82, at 84-85 (summarizing "legal pragmatism"); *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds., 1991); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* (Morris Dickstein ed., 1998); *Symposium on the Renaissance of Pragmatism in*

model is based on the premise that there is a meaningful way to resolve factual disputes. However, factual disputes about the impact of a proposed doctrinal change in law are often not determinable in an objective undisputed fashion. For example, proposals to reform tort law often involve complex, difficult to resolve empirical issues about the operation of the system in terms of a specific aspect of the tort system and about the effects of a proposed change.

There are responses to these criticisms. For example, the disagreement about objective values does not mean that a particular culture, even a pluralistic culture, will not have shared values that can provide the basis for agreement.<sup>84</sup> In the United States, efficiency and wealth maximization are widely viewed as important values.<sup>85</sup> Similarly,

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*American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990). Anthologies, reviews of the field, and symposia on "critical legal studies" include: ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); RAYMOND A. BELLIOU, *JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS* 162-89 (1992); *CRITICAL LEGAL STUDIES* (James Boyle ed., 1994); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); *A Symposium of Critical Legal Studies*, 34 AM. U. L. REV. 929 (1985); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Mark V. Tushnet, *Introduction to Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984); and Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 565-67 (1983).

84. See *supra* note 82. In addressing the problem of a lack of demonstrative objective normative "truths," many philosophers have adopted a concept of shared cultural consensus on political values as a foundation for justice. For example, John Rawls has argued that his "political conception of justice" is better than other conceptions because citizens will "view the political conception as derived from, or congruent with, or at least not in conflict with, their other values." JOHN RAWLS, *POLITICAL LIBERALISM* 10-11 (1993). Ronald Dworkin has argued that moral "truth" can be based on the human capacity to make moral judgments that bring conviction, are durable, are shared by many others, and are amenable to logic and the capacity to combine these judgments in a harmonious intellectual structure. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 118-19, 128, 135 (1996). For an example of connecting a political conception like that of Rawls to popular culture, see F. Patrick Hubbard, *Justice, Creativity, and Popular Culture: The "Jurisprudence" of Mary Chapin Carpenter*, 27 PAC. L.J. 1139, 1156-68 (1996).

85. In the context of tort law, Richard Posner has supported his deterrence/efficiency framework as follows:

[T]he most constructive philosophical approach to the question whether wealth maximization should guide tort law may be . . . to *relate* it to the various moral traditions that might have or imply a position on tort liability. If, as I believe, wealth maximization resonates well with several moral theories and offends none, a tort system founded on wealth maximization may deserve to command the widespread support that it does in fact seem to command in our society. To put this another way, the unreflective public opinion underlying a system of tort law that can be best understood and explained in terms of wealth maximization intersects the principal moral traditions found in our society.

Posner, *supra* note 30, at 103 (citations omitted).

fairness is a basic value.<sup>86</sup> Insofar as empirical issues are involved, the lack of precision and certainty in terms of tort litigation data is, to some extent, a matter of degree. These data are not simply meaningless. For example, if nearly all studies show a lack of rapid increase in the number and size of successful tort claims, this lack is a good reason for legislators to reject claims of a litigation explosion.

Where a large pluralistic society like the United States must address normative and factual issues that are difficult to resolve objectively by using the rational model, it is common to argue in favor of using a democratic scheme based on a majority decision-making process through a democratically elected legislature, so long as basic constitutional liberties are not violated.<sup>87</sup> Where such legislative decisions are constitutionally appropriate, it is common to speak in terms of "legislative supremacy," particularly in relation to the power of courts or administrative agencies as they interpret and apply statutes.<sup>88</sup> Because of the central role of the political process in selecting and influencing legislatures, this approach is referred to herein as the "political" model of decision-making.

On the surface, the political model will resemble the rational model in that proponents will give reasons for the change, and the evaluation of the proposal will involve similar questions about the need for change and the relative costs and benefits of change. However, the answers to these questions will be substantially influenced by "nonrational" factors like popular opinion and political contributions and the process will resemble more of a market-like dickering in terms of legislative deals among competing special interests rather than a concern for a broader public interest.<sup>89</sup> Though these characteristics can be defended on the

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86. Jules Coleman makes this argument in terms of his defense of a corrective justice approach to tort law. See discussion *supra* note 38. From a broader perspective, John Rawls has constructed his theory of justice on the basis of shared values about a fair process of decision-making. JOHN RAWLS, A THEORY OF JUSTICE 10-19 (rev. ed. 1999).

87. See, e.g., WILLIAM N. NELSON, ON JUSTIFYING DEMOCRACY 17-33 (1980); RAWLS, *supra* note 84, at 174-75.

88. See, e.g., Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1132-39 (1992); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 320-27 (1989); Jesse M. Barrett, Note, *Legislative History, the Neutral, Dispassionate Judge, and Legislative Supremacy: Preserving the Latter Ideals Through the Former Tool*, 73 NOTRE DAME L. REV. 819, 819-20 (1998).

89. This view of the democratic process is sometimes referred to as the "public choice" model, in contrast to the public interest model, which is discussed at *supra* note 82 and accompanying text. In this model, "all substantive values or ends are regarded as strictly private and subjective," the legislature is a "market-like arena in which votes instead of money are the medium of exchange," and legislatures "dicker towards terms" and bargain rather than deliberate about goals. Michelman, *supra* note 82, at 148. It adopts an "individualist and subjectivist conception of human experience" in which

grounds of the need for and nature of democratic legislation, they constitute a major difference.

Like the rational model, the political model is subject to criticism, primarily concerning the extent to which the legislature is democratic in the sense that it properly represents the views of the electorate. Given practices like campaign contributions, lobbying, mass advertising campaigns, “safe” districts, and low attention and voting rates on the part of voters, there is good reason to question the democratic nature of a decision about tort reform. The issues raised by these practices will not be addressed in this Article, except to note their impact.<sup>90</sup> Instead, it will simply be assumed that both the rational model and the political model are legitimate and useful and that the doctrine of legislative supremacy is legitimate and binding on the courts.

In practice, the two conceptual models overlap; politics can become involved in a rational scientific debate, and rationality is involved in politics.<sup>91</sup> Moreover, both models can be used to support the same asserted need for reform because criticism of a rule can be both rational and democratic; however, the choice of the model may affect the precise nature of the new rule that will address the problem criticized.<sup>92</sup> In addition, because “rationality” has persuasive power in the political arena, pushing for a position in the political arena often involves the defense of the position through the use of the rational model.<sup>93</sup> However, despite this overlap, one model tends to dominate in a concrete situation. For example, a person emphasizing the political approach is likely to use “rational” arguments and factual studies of verdicts as parts of a broader political push for change. However, this person will be likely to

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values, so-called, are taken to be nothing but individually held, arbitrary and inexplicable preferences (the subjectivist element) having no objective significance apart from what individuals are actually found choosing to do under the conditions that confront them (the behaviorist element); from which it seems to follow that there can be no objective good apart from allowing for the maximum feasible satisfaction of private preference as revealed through actual choice.

*Id.* at 152. Within this conception, politicians are viewed as “wealth maximizing egoists.” Mikva, *supra* note 82, at 167; *see also* POSNER, *supra* note 82, at 196-99.

90. For useful reviews of the issues concerning the democratic nature of American government, see, for example, BENJAMIN GINSBERG, *THE CAPTIVE PUBLIC: HOW MASS OPINION PROMOTES STATE POWER* (1986); POSNER, *supra* note 82, at 130-212.

91. In addition, conceptual models can never capture all the complexity of the real world. “[T]he motivations of politicians are far too mixed to be understood through the generalizations . . . theorists formulate about political behavior.” Mikva, *supra* note 82, at 169.

92. *See infra* notes 177-80, 228, 243, 277-80 and accompanying text.

93. *See, e.g.*, DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* (1993) (discussing the rise of think tanks and their importance in politics); JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA* (1996).



manipulate or "spin" the arguments and studies to support a position and to persuade the political decision-makers to accept this spin by supplementing it with techniques like campaign contributions. Such manipulation can result because, in the context of the political model, "[v]eracity is not the measuring standard—political success is."<sup>94</sup>

The distinctions underlying these conceptual models are important because they identify a central division in the tort reform debate: By and large, supporters of the movement use the political model; opponents, particularly academic opponents, prefer the rational process model.<sup>95</sup> Because of this division, the tort reform debate involves not just dispute about doctrine but also a deeper disagreement about which model to use in deciding important legal controversies.<sup>96</sup>

It would be surprising if self-interest does not play a role in choosing a model. For example, an academic opponent of reform may prefer the rational model, at least in part, because it provides relative advantages in terms of ability to use and manipulate the model. Similarly, supporters of reform could prefer the political model because it gives them a comparative advantage in manipulating political decisions by using their wealth to fund political contributions and one-sided publicity campaigns to gain support for a position.

### B. Conventional Tort Reform

In "conventional" or "traditional" tort reform, the complex interrelated issues involved in evaluating a proposed reform are generally addressed by a scheme in which the reasons for and against the proposal are examined by the rational process model. This "reasoned" approach is favored by common law courts<sup>97</sup> and has been used as they adopted both common law rules—such as the "fellow-servant rule"<sup>98</sup>—

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94. Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 73 [hereinafter Daniels & Martin, *Punitive Damages*].

95. See *infra* notes 155-58 and accompanying text (discussing supporters). For information on opponents of the political model, see *infra* notes 195-98 and accompanying text.

96. See *infra* Part IV.B.3.

97. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176-275 (1986); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 246-50 (1960) (discussing the relationship between rule and reason for rule); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 601-07 (1993); Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 890-96 (1981); *infra* note 135 and accompanying text (discussing the adoption of comparative fault). "Reasoned" is in quotes to indicate (and avoid) dispute as to the nature and normative status of judicial reasoning.

98. See, e.g., 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 2.03 (2006).

which favored defendants, and also as they rendered decisions—like abolishing privity as a requirement for suits for injury caused by negligently manufactured products<sup>99</sup>—which favored plaintiffs. This approach has also played a role in legislative reforms, and, “objective” policy studies of “tort reform” legislation are common.<sup>100</sup> This approach has also been used in considering alternatives to the tort system. For example, statistical expertise in analyzing workplace accidents was instrumental in the push to replace the tort system with workers’ compensation schemes,<sup>101</sup> and “objective” studies of automobile accidents played a role in decisions concerning the adoption of no-fault automobile insurance.<sup>102</sup>

### 1. Judicial Reforms

Initially, tort law was primarily a matter of common law and, like any area of common law, was constantly evolving. This dynamic quality continues today and is captured by the following:

It is the glory of the common law that it is not a rigid, immutable code. On the contrary, it is a vital, living force that endows with the breath of life a body of practical principles governing human rights and duties. These rules are subject to gradual modification and continuous adjustment to changing social and economic conditions and shifting needs of society. This characteristic is the life blood of the common law.<sup>103</sup>

Such open acceptance of change was not always so common. For example, in 1900, the New Jersey Supreme Court gave the following

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99. See, e.g., LLEWELLYN, *supra* note 97, at 430-37 (discussing Justice Cardozo’s opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

100. See, e.g., *Report of the Task Force to Consider Tort Reform Proposals*, N.Y. ST. B.J., Apr. 1999, at 80 (detailing a traditional “objective” analysis of proposed “tort reform” legislation); *infra* notes 472, 484 and accompanying text.

101. See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 139-46 (2004). For further discussion of the adoption of workers’ compensation schemes, see *infra* notes 261, 503-05 and accompanying text.

102. See, e.g., ROBERT E. KEETON & JEFFREY O’CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* 7, 11-13 (1965); N.Y. STATE INS. DEP’T, *AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?: A REPORT TO GOVERNOR NELSON A. ROCKEFELLER* 3-4, 83 (1970); Walter J. Blum & Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341, 353; Schwartz, *Auto No-Fault*, *supra* note 15. See *infra* note 139 and accompanying text for discussion of adoption of no-fault automobile scheme.

103. *Caporaletti v. A-F Corp.*, 137 F. Supp. 14, 16 (D.D.C. 1956), *rev’d on other grounds*, 240 F.2d 53 (D.C. Cir. 1957).

argument as a reason for requiring that a plaintiff suffer a physical impact in order to recover for mental distress from fear of being physically injured by a collision with a train:

I think it safe to say that the consensus of opinion of the bar of this state has been that no liability exists for such injuries as are the foundations for the present suit. The fact that, in the mass of suits with which our courts have been crowded for the past decade, this is the first time that any such cause of action has been set up, goes far to demonstrate the accuracy of this statement.<sup>104</sup>

In 1965, this case was overruled by the New Jersey Supreme Court in favor of a rule allowing recovery for mental distress if the plaintiff suffered fear from being in the "zone of danger" of a physical impact that would cause a physical injury.<sup>105</sup> In addressing the need to adopt new rules, the court rejected the reasoning of the 1900 opinion by the following argument: "[T]he common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression."<sup>106</sup>

The conventional method for courts to address tort reform issues emphasizes "rationality" in the sense of giving reasons for a particular position.<sup>107</sup> For example, a court adopting comparative fault will typically identify the flaws in the all-or-nothing character of contributory negligence and then indicate reasons for changing to comparative fault.<sup>108</sup> If the details of the new scheme are addressed—for example, how to address assumption of risk—reasons for this change will also be given.<sup>109</sup> The following examples convey a sense of the range of judicial changes adopted to reform tort law:

- (1) adoption of negligence as the basic standard for imposing tort liability on persons whose actions injure others;<sup>110</sup>
- (2) expansion of the role of negligence by abolishing privity limitations on products liability claims;<sup>111</sup>

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104. *Ward v. W. Jersey & Seashore R.R.*, 47 A. 561, 562 (N.J. 1900), *overruled by Falzone v. Busch*, 214 A.2d 12 (N.J. 1965).

105. *See Falzone*, 214 A.2d at 17.

106. *Id.* at 15.

107. *See supra* notes 97-99 and accompanying text.

108. *See, e.g., Nga Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1230-32 (Cal. 1975).

109. *See, e.g., id.* at 1240-41.

110. *See, e.g., Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850); *WHITE, supra* note 2, at 3-19.

111. *See, e.g., MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); *RESTATEMENT OF TORTS* § 395 (1934); *DAVID G. OWEN, PRODUCTS LIABILITY LAW* § 1.2, at 22-23 (2005).

- (3) abolition of sovereign,<sup>112</sup> charitable,<sup>113</sup> and parental immunities;<sup>114</sup>
- (4) extension of right to recover for mental distress to persons in the “zone of danger,”<sup>115</sup> to certain bystanders,<sup>116</sup> and to victims of “outrage;”<sup>117</sup>
- (5) abolition of category system of entrants for determining liability for injuries on premises;<sup>118</sup> and
- (6) replacement of the doctrine of “contributory negligence,” which totally barred an at-fault plaintiff from recovery, with comparative fault, which allows an at-fault plaintiff to recover some of his loss from the at-fault defendant.<sup>119</sup>

Though states have varied on whether or when to adopt these changes and on the specifics of the new rule to be adopted, the range of changes

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112. See, e.g., *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 889 (Pa. 1973) (abolishing governmental immunity and listing status of immunity in other states), *superseded by* 42 PA. CONS. STAT. ANN. § 8553 (West 1980). See *Michel v. City of Bethlehem*, 478 A.2d 164 (Pa. Commw. Ct. 1984). Legislatures have also abolished sovereign immunity. See *infra* note 136 and accompanying text.

113. See, e.g., EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS § 623 (1974); Paul A. Hattis, *Overcoming Barriers to Physician Volunteerism: Summary of State Laws Providing Reduced Malpractice Liability Exposure for Clinician Volunteers*, 2004 U. ILL. L. REV. 1033, 1034-35 (analyzing the various state and federal statutory approaches taken to deal with volunteer liability in the medical field).

114. See DOBBS, *supra* note 3, § 280, at 753-57.

115. See, e.g., *id.* § 309, at 839-40; see also *Falzone v. Busch*, 214 A.2d 12, 17 (1965) (holding that “where negligence causes fright from a reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover”); RESTATEMENT (SECOND) OF TORTS § 313(2) (1965) (stating that a third party who suffers emotional distress from harm to another can only recover if “the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the [third party]”).

116. See, e.g., DOBBS, *supra* note 3, § 309, at 839-41.

117. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 (1965); DOBBS, *supra* note 3, § 304, at 826.

118. See, e.g., DOBBS, *supra* note 3, § 237, at 615-16.

119. See, e.g., VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1-5, at 18 (3d ed. 1994). There are two basic approaches to comparative fault: (1) the pure system, which allows a plaintiff to recover regardless of how great his fault is—for example, a plaintiff who was 90% at fault would recover, but the recovery would be reduced by 90% to reflect plaintiff’s fault; and (2) mixed schemes, which allow partial recovery unless, in one variation, his fault is greater than the defendant’s, or in the other variation, his fault is equal to the defendant’s. Within each approach, there are variations in how to address a wide range of issues concerning the applicability of the doctrine. See generally, e.g., CLARK, BOARDMAN, CALLAGHAN, COMPARATIVE NEGLIGENCE MANUAL (1995); SCHWARTZ, *supra*, § 2-1(b)(3), at 33; F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. REV. 273, 277-78 (1992). For example, a jurisdiction must determine whether the exceptions to the total bar to recovery, like “last clear chance,” will continue to be exceptions or become simply a factor to be considered in determining shares of fault. See Hubbard & Felix, *supra*, at 283-84, 332. Similarly, the jurisdiction must determine whether the comparative system applies in cases of intentional torts, nuisance, strict liability in tort, and breach of warranty. *Id.* at 295-304, 341-43.

indicates a willingness to use the rational model to change the rules.

A common effect of many of these changes, which were adopted in the period from the 1930s until the 1970s, was to increase the rights of plaintiffs to recover for injuries. This time period also encompassed an increase in the size, role, and influence of the plaintiffs' bar. For these reasons, this period has been referred to as a time of "plaintiff-friendly tort expansion."<sup>120</sup> This pattern of judicial changes favoring plaintiffs is sometimes used by supporters of "tort reform" to justify a shift to changes in favor of defendants on the ground that the plaintiff-favoring shift has gone too far.<sup>121</sup> Not surprisingly, there is dispute about whether the plaintiff-oriented shift simply constitutes a shift necessary to offset a prior scheme that was too defense-oriented, and thus, about whether there is a need to adopt a more defense-oriented approach.<sup>122</sup> In addition, there is considerable evidence that at least some of the trend toward plaintiff-oriented liberalization has ended and, to some extent, has been restricted in recent years.<sup>123</sup>

Two types of approaches have been used to explain the shift in favor of plaintiffs. One approach views the shift as a matter of intellectual history and argues that the changes resulted from the influence of academics and judges who pushed for reforms that increased the rights of victims.<sup>124</sup> The other approach views law as a

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120. John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1027 (2005); *See, e.g.*, KOENIG & RUSTAD, *supra* note 1, § 1.7, at 46 (referring to "Progressive Era" from 1945-1980, during which plaintiffs' rights were expanded); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 601-03 (1992) [hereinafter Schwartz, *Modern American Tort Law*] (referring to "modern tort law," spanning 1960 to the early 1980s, and post-modern tort law, which followed); Yeazell, *supra* note 58 (discussing changes occurring between 1925 and 2000 in substantive and procedural law as well as economic changes that resulted in expanded plaintiffs' bar).

121. *See, e.g.*, HUBER, *supra* note 1, at 7-10, 231.

122. *See, e.g.*, KOENIG & RUSTAD, *supra* note 1, § 1.8, at 59-60 (referring to period of retraction of rights from 1981 to present and resulting reduction in ability of tort law to "constrain new forms of oppression"); Nockleby & Curreri, *supra* note 120, at 1027 (arguing against "retrenchment" of the expansion by asserting that expansion followed "two centuries of law favorable to society's wealthy and educated elite"); Page, *supra* note 52, at 651-54 (noting that "'old tort reform' [in the 1950s and 1960s] was partly an effort to rectify . . . imbalances" in favor of defendants).

123. *See, e.g.*, WHITE, *supra* note 2, at 244-90; Schwartz, *Modern American Tort Law*, *supra* note 120, at 647-48; *infra* note 404 and accompanying text (discussing developments in products liability law).

124. *See, e.g.*, HUBER, *supra* note 1, at 6-7; WHITE, *supra* note 2, at 139-243 (discussing conceptual shifts in tort law initiated by academics); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 (2002); Schwartz, *Modern American Tort Law*, *supra* note 120, at 683-701 (considering several theories that explain the more recent shift in favor of defendants, including removal of judges who pursued "agenda completion").

reflection of popular culture and argues that the tort law developments in favor of plaintiffs reflect a cultural shift in our ideological scheme for defining injuries—whether from accidents, illness, or natural disaster. The intellectual history approach and the cultural approach are not necessarily inconsistent; both could be involved in the shift in tort law.<sup>125</sup>

Whether viewed as a matter of elite intellectual history, of popular culture, or of a combination of both, two underlying competing ideologies are involved.<sup>126</sup> One scheme, which defines injuries as one of the costs of living that all individuals face and must personally find a way to address, is viewed as underlying much of nineteenth-century tort law. The alternative scheme views injuries as a social matter which requires legal schemes that not only help prevent accidents, and thus reduce the harmful effects of injuries, but also ameliorate the economic impact of accidents that do occur. This ideology arguably underlies the twentieth-century shift to workers' compensation and governmental welfare programs, as well as tort doctrines designed to impose the costs of accidents on corporate actors, rather than individual humans. This scheme also supports the adoption of rules granting plaintiffs greater legal rights against injurers, particularly corporate actors, and an increased willingness of jurors to reach decisions in favor of plaintiffs on issues of both liability and damages.

## 2. Legislative Reforms

Even before tort law became a distinct doctrinal subject area in the latter half of the nineteenth century, legislation played a major role in the development of tort law. For example, an affirmative defense like a statute of limitation was adopted as a legislative limitation on tort claims.<sup>127</sup> In terms of substantive rights, the failure of the common law to recognize a claim for wrongful death<sup>128</sup> was reformed in England by

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125. See, e.g., LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 38-43 (1985); SHAPO, *supra* note 1, at 282-300; George L. Priest, *The Culture of Modern Tort Law*, 34 *VAL. U. L. REV.* 573, 574-75 (2000); Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 *VAL. U. L. REV.* 1, 24 (1988) (arguing that expanded liability in the period of 1960-1980 resulted not only from doctrinal developments but also from cultural shifts in favor of greater protection of victims and greater responsibility of injurers); Schwartz, *Modern American Tort Law*, *supra* note 120, at 683-701 (considering several theories, including the theory that the goal of spreading as a basis for legal rules creates unexpected and undesirable results). For further discussion of tort law and culture, see *infra* notes 186-87 and Part IV.B.

126. For discussion of these competing ideologies in terms of tort reform, see *infra* notes 159-61, 169-70, 204-09, Part IV.B.3.

127. PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (W. Page Keeton et al. eds., 5th ed. 1984).

128. See, e.g., 1 STUART M. SPEISER ET AL., *RECOVERY FOR WRONGFUL DEATH AND INJURY*

Lord Campbell's Act in 1846 and by legislation in the United States starting in New York in 1847.<sup>129</sup> Because the common law hurdles imposed on workers by the "infamous trilogy" of contributory negligence, assumption of risk, and the fellow-servant rule limited recovery in tort for workplace injuries, Congress and the states acted to reform or replace tort law.<sup>130</sup> In 1908, Congress reformed tort law by adopting the Federal Employers' Liability Act ("FELA") to govern injuries occurring to employees of railroads engaging in interstate commerce.<sup>131</sup> FELA barred the defense of express assumption of risk, limited the defense of implied assumption of risk, adopted comparative negligence, and reduced the plaintiff's burden of proof.<sup>132</sup> Initially, many states followed a scheme like that of the FELA.<sup>133</sup> However, as a final approach, state legislatures addressed accidents in the workplace by a more draconian method as they replaced the tort system with no-fault workers' compensation schemes.<sup>134</sup> More recently, legislatures have reformed tort law by such changes as adopting comparative fault,<sup>135</sup> by adopting statutory approaches to the liability of governmental units,<sup>136</sup> by limiting the liability of charities,<sup>137</sup> and by establishing a statutory right of contribution among joint tortfeasors.<sup>138</sup> In addition, many states have adopted no-fault automobile schemes to provide a partial replacement to tort law,<sup>139</sup> and Congress has adopted schemes, like the

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§ 1.1, at 3 (3d ed. 1992).

129. See, e.g., *id.* §§ 1.8-9, at 31-32. Some states have a right of action for death in their constitution. *Id.* § 1.10, at 34. Many American nineteenth-century statutes granted wives, but not husbands, a claim for wrongful death. WITT, *supra* note 101, at 53.

130. See, e.g., 1 LARSON, *supra* note 98, §§ 2.03-.04; Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

131. See Friedman & Ladinsky, *supra* note 130, at 64-65.

132. Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (2000); See, e.g., KOENIG & RUSTAD, *supra* note 1, § 1.6[E][1][B], at 44; Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL'Y 591, 594-99 (1999). The "doctrine of assumption of risk was obliterated" by a 1939 amendment. *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 58 (1943).

133. 1 LARSON, *supra* note 98, § 2.05.

134. See, e.g., PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000); 1 LARSON, *supra* note 98, §§ 2.07-.08; Abraham, *supra* note 52, at 585-94; Friedman & Ladinsky, *supra* note 130, at 69-72.

135. See, e.g., SCHWARTZ, *supra* note 119, § 1-4, at 12-13; UNIF. COMP. FAULT ACT § 12 U.L.A. 123-25 (1996).

136. See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2671-80 (2000); South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 to -220 (2005); DOBBS, *supra* note 3, §§ 268-69, at 715-20; KOENIG & RUSTAD, *supra* note 1, § 1.7[B][3][A], at 53.

137. See, e.g., Hattis, *supra* note 113, at 1034 ("As of September 30, 2003: forty-three states and the District of Columbia have some sort of charitable immunity legislation . . .").

138. See, e.g., UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 194 (1996).

139. See, e.g., Schwartz, *Auto No-Fault*, *supra* note 15, at 616-22. For further discussion of no-fault automobile schemes, see *supra* notes 15, 46, 102 and accompanying text.

National Childhood Vaccine Injury Act of 1986,<sup>140</sup> to replace tort law with a system that provides compensation through a scheme that spreads the loss. Finally, legislation can supplement tort law by creating statutory rights and schemes for seeking damages for violations of those rights. These include federal claims for civil rights violations under 42 U.S.C. §§ 1981-1985, for discrimination and sexual harassment under 42 U.S.C. § 2000e for discrimination against Americans with disabilities, and for “wrongful” or “retaliatory” discharge for performing a civic duty or for exercising a protected right.<sup>141</sup> State legislatures have also created such “statutory torts.”<sup>142</sup>

### C. Current “Tort Reform” Movement

#### 1. History, Agenda, and Techniques

The history of the “tort reform” movement can be divided into two overlapping dimensions. The first part, which consists of ad hoc calls for reforms to address a specific liability insurance “crisis,” began in the 1970s when reforms were sought to address a “crisis” caused by large increases in medical malpractice liability premiums and in product liability insurance premiums.<sup>143</sup> In the 1980s, a broader “crisis” was

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140. 42 U.S.C. §§ 300aa-1 to -34 (1988); *See, e.g.*, BURKE, *supra*, note 1, at 142-70; Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL'Y & L. 59 (1999); Elizabeth A. Breen, Note, *A One-Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM. & MARY L. REV. 309, 316 (1999). For a more general review of such alternative schemes, see Apelbaum & Ryder, *supra* note 132, at 601-12.

141. *E.g.*, 28 U.S.C. § 1875 (2000) (permitting claims for employees discharged for service on federal jury); 29 U.S.C. §§ 215(a)(3), 216(b) (2000) (covering violations of the Fair Labor Standards Act); 29 U.S.C. § 1140 (2000) (granting rights under ERISA plan); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (2000); *Haddle v. Garrison*, 525 U.S. 121 (1998) (upholding claim under 42 U.S.C. § 1985(2) for employment discharge for obeying federal grand jury subpoena); BURKE, *supra* note 1, at 60-102 (discussing the Americans with Disabilities Act); *cf.* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 5-8, 11 (1984) (discussing creation of statutory claims and provisions for court-awarded attorneys' fees).

142. *See, e.g.*, S.C. CODE ANN. §§ 41-1-70 to -80, 41-15-510, 53-1-150(c) (1976).

143. *See, e.g.*, ACADEMIC TASK FORCE FOR REVIEW OF THE INS. & TORT SYS., PRELIMINARY FACT-FINDING REPORT ON MEDICAL MALPRACTICE 43 (1987) [hereinafter ACADEMIC TASK FORCE]; AM. MED. ASS'N SPECIAL TASK FORCE ON PROF'L LIAB. & INS., PROFESSIONAL LIABILITY IN THE '80S: REPORT I, at 4-5 (1984) [hereinafter AMA REPORT I]; BURKE, *supra* note 1, at 31-32; 4 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 26.05[5] (2005) (discussing products liability in the context of improvements on real property); U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT, at III-10 to -11 (1977); F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform"*, 23 GA. L. REV. 295, 295-98 (1989); Nockleby & Curreri, *supra* note 120, at 1029-30; Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 419-21 (1986) (describing how the medical malpractice insurance “crisis of availability” in the 1970s resurfaced as a “crisis of affordability” in



caused by a general increase in liability insurance premiums. Once again, reform was sought.<sup>144</sup> In the late 1990s, new "crises" resulted in products liability and medical malpractice and reforms were declared necessary.<sup>145</sup> Each of these "crises" generated its own response in terms of proposed legal changes and in terms of support for and against these changes.

Long-term institutionalized efforts for "reform" characterize the second dimension of the movement, which began in the 1980s. During this time, the level and intensity of the debate increased and a major ongoing long-term struggle developed between two loosely allied groups. On one side were defense-oriented groups like liability insurance companies, physicians, and business groups, which are interested in "tort reform" as the solution to a broad "crisis" in tort liability law and insurance.<sup>146</sup> On the other side are two groups: (1) plaintiffs' attorneys, occasionally joined by a variety of consumer rights organizations, claiming to represent the position of potential victims; and (2) academics using the rational model to criticize the claims of the "tort reform" movement.<sup>147</sup> The institutionalization and success of the first side are illustrated by the founding of the American Tort Reform Association

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the 1980s); Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977) (reviewing major tort reform proposals of the mid-1970s); Allen Redlich, *Ending the Never-Ending Medical Malpractice Crisis*, 38 ME. L. REV. 283, 316-24 (1986) (describing the adoption of state legislation by forty-nine states from 1974 to 1976 designed to curb the increased cost of malpractice insurance); Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 5 (1986) (noting that the declaration of a medical malpractice "crisis" requiring major legal reform in the 1980s caused a sense of *déjà vu*). Some commentators trace the beginnings of tort reform to the 1960s, when "steep increases in the insurance costs incurred by health care providers . . . triggered what came to be known as the 'medical malpractice crisis.'" Page, *supra* note 52, at 649.

144. See, e.g., AMA REPORT I, *supra* note 143, at 8; BURKE, *supra* note 1, at 32; U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 28 (1986) [hereinafter MEDICAL MALPRACTICE COSTS]; Hubbard, *supra* note 143, at 298; Nockleby & Curreri, *supra* note 120, at 1030-32; Qual, *supra* note 143, at 421; Robinson, *supra* note 143, at 32; Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 212-19 (1990).

145. See, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 2-4 (2002) [hereinafter NEW HEALTH CARE CRISIS]; U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO PREMIUM RATE INCREASES 3, 9-14 (2003) [hereinafter GAO, REPORT ON MEDICAL MALPRACTICE]; Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 315-21 (2005); Greg Winter, *Jury Awards Soar as Lawsuits Decline on Defective Goods*, N.Y. TIMES, Jan. 30, 2001, at A1.

146. See *infra* notes 152-54 and accompanying text.

147. See *infra* notes 195-98 and accompanying text.

(“ATRA”) in 1986<sup>148</sup> and the inclusion of “tort reform” in the Republican Party’s “Contract with America” in 1994.<sup>149</sup> Where an increase in liability insurance premiums results in calls for tort reform, this institutional dimension capitalizes on the increase by labeling it a “crisis” and coordinates efforts to resolve it through reform. However, the institutional push for reform is constant regardless of whether an insurance “crisis” exists, and is phrased in broad terms as a “lawsuit crisis” that is structural, widespread, and potentially enduring unless reforms are adopted.<sup>150</sup> The movement also has a continually increasing and evolving list of proposed reforms to address the “lawsuit crisis.”<sup>151</sup>

Although tort law is predominantly a matter of state law and the details of tort reform are often fundamentally different from state to state,<sup>152</sup> it is appropriate to speak in terms of a national movement with respect to five characteristics. First, in every state, a large segment of society—including doctors, retail store owners, and manufacturers—knows it needs to self-insure or purchase liability insurance because of the risk of being sued for tortious injury. Because these “haves” know that they are repeat players on the defense side of the tort system, they have a common motive to reduce costs by reducing the amount of their potential liability in tort by changing tort law in ways that favor defendants. Thus, they define tort reform as changes in tort systems that will have the following two effects: Plaintiffs will win less often, and winning plaintiffs will get less recovery.<sup>153</sup> Subgroups may differ on the relative importance of particular proposals, but all want to reduce defendants’ liability costs. This shared view is reflected in the membership of ATRA, which includes physicians groups like the American Medical Association, manufacturers like DaimlerChrysler Corporation and Caterpillar Corp., and insurance companies like State Farm.<sup>154</sup>

Second, these actors have embraced the political model for addressing reform and have used their considerable resources to lobby

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148. About ATRA, *supra* note 57.

149. See, e.g., Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700-01 (1995); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 673-84 (1996).

150. See *infra* notes 162-63, 171-74 and accompanying text; see also Daniels & Martin, *The Impact*, *supra* note 59, at 467 (describing a \$6.5 million publicity campaign, funded by an insurance trade group, built around the concept of a “lawsuit crisis”).

151. See, e.g., *infra* notes 213-17 and accompanying text.

152. See *infra* Part IV.A.

153. See Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 22-23 (1988) (referring to tort reforms as “victim take-away programs”).

154. ATRA, *Sample List of ATRA Members*, <http://www.atra.org/about/members.php> (last visited Feb. 10, 2007).

and support candidates, to conduct massive publicity campaigns, and to fund conservative think tanks in order to place their common concern for reform on the political agenda in the states and in Congress.<sup>155</sup> In addition, they make campaign contributions to judges seeking election<sup>156</sup> and have attacked judicial decisions that hold reform legislation unconstitutional or that interpret the legislation in a way that favors the plaintiffs' position.<sup>157</sup> The funding of these various activities has created a group of people who provide these activities and who, therefore, have a strong incentive not only to further the agenda but also to reinforce and intensify the belief that a serious crisis exists.<sup>158</sup>

Third, the tort reform movement shares a common ideology favoring "efficiency" and self-reliance as the bases for the allocation of the risk of injuries.<sup>159</sup> From the perspective of this ideology, tort law

155. See, e.g., BURKE, *supra* note 1, at 29-30; KOENIG & RUSTAD, *supra* note 1, § 2.2. at 71-82; Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1796-97; Daniels & Martin, *The Impact*, *supra* note 59, at 459-60; Marc Galanter, *The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture*, 22 MISS. C. L. REV. 47, 52-54 (2002); Rustad & Koenig, *supra* note 124, at 51-52, 74-88; *infra* notes 164-65 and accompanying text.

156. See, e.g., BURKE, *supra* note 1, at 50; STEFANCIC & DELGADO, *supra* note 93, at 96-108; Champagne, *supra* note 76; *infra* notes 507-09 and accompanying text. The ATRA website states: "We identify and champion elected officials and judges who want to fix the system." About ATRA, *supra* note 57.

157. See, e.g., AM. TORT REFORM FOUND., JUDICIAL HELLHOLES: 2005, at 38 (2005), available at <http://www.atra.org/reports/hellholes/report.pdf> [hereinafter JUDICIAL HELLHOLES] (awarding "dishonorable mention" to the Wisconsin Supreme Court because of the court's interpretation of a punitive damages statute and the court's striking down as unconstitutional a limit on noneconomic damages in medical malpractice cases); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 934-35 (2001). The movement also supports more traditional methods of judicial reform. For example, the Product Liability Advisory Council ("PLAC"), "a non-profit association with over 130 corporate members representing . . . product manufacturers . . . has filed over 700 briefs as amicus curiae" on behalf of product manufacturers since 1983. Product Liability Advisory Council, <http://www.plac.com/AM/customsource/security/login.cfm> (last visited Mar. 8, 2007).

158. See, e.g., Galanter, *supra* note 155, at 50. Galanter notes the lack of data about the tort system and the use of "anecdotes and surmises" to construct arguments. He then notes the following:

These create opportunities for professional aggrandizement and careerism. Business people concerned about liability are surrounded by retainers and entrepreneurs with strong incentives to intensify that concern. . . . A host of professionals, consultants, and publicists thrive by magnifying the sense of crisis and touting their ability to exorcize the menace of enhanced liability. These messages are amplified by a small industry of corporately-supported think tanks, lobbyists, consultants and "grass roots" groups that attempt to generate political support for "reforms" of the civil justice system. Politicians and organizational entrepreneurs, in turn, echo the jaundiced view in order to cultivate financial support and garner votes.

*Id.* (citation omitted).

159. See, e.g., SHAPO, *supra* note 1, at 10 (referring to "market culture" that tends "to focus on the 'pitiless indifference' of a universe in which injurers and victims alike must struggle for

should foster efficient behavior by having the following characteristics: (1) injured persons should be required to have primary responsibility for making decisions about risk, for avoiding injury to themselves, and for insuring against that injury; (2) plaintiffs should not recover damages unless they have satisfied their responsibility to protect themselves and unless the plaintiff has clearly shown that the defendant's conduct caused the injury; (3) the conduct by the defendant was at least negligent in the sense that the defendant should have reasonably known the conduct involved a failure to take a safety precaution that was cheaper than the accident cost resulting from the lack of the precautionary measure; and (4) the damages awarded do not exceed the amount necessary to provide "reasonable compensation."<sup>160</sup> If these conditions are not met, payments to a plaintiff are viewed as both unfair and inefficient. Because of this ideology, as well as the nature of the parties in the tort reform movement and the movement's embracing of the political model, it is not surprising that the movement has, to a considerable extent, become allied with the Republican Party.<sup>161</sup>

Fourth, this push for reform has attempted to gain public support of its legislative agenda and its ideology through the use of massive publicity campaigns that share a common rhetorical emphasis on the importance of widely shared values like fairness, efficiency, and

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existence"). "Efficiency" is placed in quotes for the same reason that "rational" and "reason" have been placed in quotes; all of these terms are subject to considerable debate about their nature and normative significance. For arguments in favor of the role of production and efficiency in tort law, see, for example, *supra* notes 30-32, 85; Priest, *supra* note 125. For arguments indicating that economic efficiency and wealth maximization arguments have, at best, a limited role in an area like tort theory because of the contingent nature of the relative rights of the injurer and the victim, see, for example, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 208 (1980) ("We cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified."); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 593 (2003); *supra* note 37 and accompanying text.

160. See, e.g., FEINMAN, *supra* note 1, at 19-32; HALTOM & MCCANN, *supra* note 1, at 56-61; B. Michael Dann, *Jurors and the Future of "Tort Reform"*, 78 CHI.-KENT L. REV. 1127, 1131-35 (2003); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645 (2003); Priest, *supra* note 125, at 579 (criticizing the cultural framework supporting the scheme of corporate enterprise liability as "redistributive, not productive").

161. See *supra* note 149 and accompanying text; see also BURKE, *supra* note 1, at 44; Apelbaum & Ryder, *supra* note 132, at 612-35; Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 475-80 (2002); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1000 (2003); Andrew F. Popper, *A One-term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 125-28 (1998); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 918 (1996).

personal responsibility. However, reform proponents do not address the difficult tasks of defining, applying, and justifying their use of these values in terms of a specific problem raised by a tort doctrine or of the effect of a specific change on the problem.<sup>162</sup> This rhetoric is bolstered by attacks on plaintiffs and on the judicial system by means of the constant repetition of an asserted need to address a crisis and of anecdotal "horror stories" about the "tort tax," a "litigation explosion," "lawsuit abuse," "frivolous lawsuits," "judicial hellholes" and "dishonorable" courts.<sup>163</sup>

Fifth, the political and publicity campaigns are coordinated at a national level by groups like ATRA and the U.S. Chambers of Commerce.<sup>164</sup> For example, ATRA has a "network of tort reform advocates (state coalitions) that advance ATRA's agenda in state capitals . . . [and] an 'army' of more than 135,000 citizen supporters who have joined together in state and local grassroots groups . . . [to provide] an effective one-two punch in the fight for state tort reform."<sup>165</sup>

The movement pursues two strategies to reduce the tort liability of its members. First, it seeks adoption of pro-defense changes in tort law. In terms of specific rules, these changes include: (1) changes made in the general tort doctrines, such as rules concerning joint and several liability, collateral sources, punitive damages, and noneconomic damages; (2) changes focused on product liability law and on medical malpractice; and (3) changes in procedural and evidence law concerning class

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162. See, e.g., HALTOM & MCCANN, *supra* note 1, at 150-54, 169-71, 178-81, 270-71; Daniels & Martin, *Punitive Damages*, *supra* note 94, at 454-72; Daniels & Martin, *The Impact*, *supra* note 59, at 454-72; Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

163. See, e.g., HUBER, *supra* note 1, at 4; JUDICIAL HELLHOLES, *supra* note 157, at 38. These phrases are rhetorical because they are undefined and are based on anecdotes (some of which are not true) rather than systemic data. For more specific analyses of the rhetorical approach of the tort reform movement, see, for example, *infra* text accompanying notes 185-94; see also DANIELS & MARTIN, *supra* note 1; STEFANCIC & DELGADO, *supra* note 93, at 96-108; Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1992); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (reviewing rhetorical public relations campaigns); Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004); Daniels & Martin, *Punitive Damages*, *supra* note 94; Daniels & Martin, *The Impact*, *supra* note 59; Galanter, *supra* note 162; Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, in LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 236 (Stewart Macaulay et al. eds., 1995) [hereinafter LAW & SOCIETY]; Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 420-33, 436-44 (2000) (discussing "tort tax" rhetoric).

164. See, e.g., FEINMAN, *supra* note 1, at 176.

165. About ATRA, *supra* note 57.

actions, jury service, appeal bonds, venue, and expert witnesses.<sup>166</sup> In addition to doctrinal changes, the movement seeks to achieve a defense-oriented shift in the operation of the tort system by identifying and supporting judges who share its views<sup>167</sup> and attacking those who do not.<sup>168</sup> The second goal is described by ATRA as:

[the need] to change the way people think about personal responsibility and civil litigation . . . [by shining] a media spotlight on lawsuit abuse and the pernicious political influence of the personal injury bar[.] . . . [redefining] the victim, [and] showing how lawsuit abuse affects all of us by cutting off access to health care, costing consumers through the “lawsuit tax,” and threatening the availability of products like vaccines.<sup>169</sup>

One aspect of this second goal is to stop “regulation through litigation.”<sup>170</sup> Given the deterrent goal of tort law, the tort system is inherently a scheme designed to regulate by deterring wrongful conduct. Thus, stopping regulation through litigation would be a revolutionary abandonment of the basic deterrent goal of torts.

As the preceding paragraphs indicate, the desire to reduce tort liability is presented in terms of “reforms” necessary to further the public interest. For example, it is argued that reform is needed to reduce unnecessary consumer costs,<sup>171</sup> to enhance the availability of healthcare and medicines,<sup>172</sup> and to make “victims” responsible for their own actions.<sup>173</sup> The push for reform has also been justified on the basis of the

166. *See id.* For discussion of specific doctrinal changes, see *infra* Part IV.A.

167. About ATRA, *supra* note 57; Champagne, *supra* note 76, at 1488.

168. About ATRA, *supra* note 57; JUDICIAL HELLHOLES, *supra* note 157, at 38-39.

169. About ATRA, *supra* note 57. For discussion of the position that an expansion of liability has occurred because of a pro-victim cultural shift that has had an important impact on the application of the sometimes vague, open-textured concepts of tort law, see *supra* notes 120-26 and accompanying text.

170. *See, e.g.*, VICTOR E. SCHWARTZ & LEAH LORBER, REGULATION THROUGH LITIGATION HAS JUST BEGUN: WHAT YOU CAN DO TO STOP IT 9-12 (1999). A considerable part of the concern with “regulation through litigation” is litigation by state governments, like that in the tobacco litigation, where state attorney generals join with plaintiffs’ lawyers to recover for “injuries” to the state. *See id.* at 16-18; ATRA, *Regulation Through Litigation*, <http://www.atra.org/issues/index.php?issue=7351> (last visited Feb. 10, 2007). However, the reform movement also criticizes “judicial departures from basic tort principles” that “extend tort law far beyond its 200-year-old moorings.” SCHWARTZ & LORBER, *supra*, at 14-15.

171. *See, e.g.*, La Fetra, *supra* note 160, at 650-51.

172. *See, e.g.*, NEW HEALTH CARE CRISIS, *supra* note 145; U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 12-25 (2003) [hereinafter GAO, REPORT ON ACCESS TO HEALTH CARE] (examining claims and concluding that there was no showing of widespread healthcare access problems); Monique A. Anawis, *Presentation: Tort Reform 2003*, 6 DEPAUL J. HEALTH CARE L. 309, 311-15 (2003); *infra* note 176 and accompanying text.

173. *See, e.g.*, La Fetra, *supra* note 160, at 657-67.

need to make the United States more competitive in the world market and to enhance innovation in product development.<sup>174</sup>

Whether "tort reform" is necessary or will achieve any of these goals is largely a matter of faith for two reasons. First, rhetorical phrases like "crisis," "litigation explosion," "lawsuit abuse," and "frivolous lawsuits" are so vague that, absent a more precise definition, it is impossible to determine whether we have a crisis or explosion, what constitutes a frivolous claim or an abuse, or how to balance concerns for access to courts against the need to prevent abuse. Nor is there any way to know whether the current level of tort litigation is too high or too low.<sup>175</sup> Second, because of the limitations on the available data concerning the operation of the tort system and the effect of reforms, there is no way to be *sure* whether the tort system hinders innovation, competitiveness, or access to healthcare, whether it provides an improper level of incentives for safety, or whether tort reform will reduce any undesirable effects.<sup>176</sup> Though these two problems substantially weaken the position of the proponents of "tort reform" in terms of the rational model, they provide an ideal situation for the movement to use its economic resources to push its agenda in the political arena by exploiting its considerable ability to fund vague, rhetorical publicity campaigns and to push for legislative change through lobbying and political contributions.

Thus, it is not surprising that, as the tort reform movement pushes its defense-oriented agenda, it has chosen to use legislative change and the political model for decision-making. This preference for the political model does not mean that a particular proposal for doctrinal change cannot also be viewed as a reform by the rational model's techniques of "neutral expertise" and "policy analysis." For example, changing joint

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174. See SHAPO, *supra* note 1, at 5, 10; see also Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 1, at 127-29 (critiquing innovation and competition assertions); W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 1, at 105, 122-23 (analyzing critically innovation assertion); La Fetra, *supra* note 160, at 646-57; Priest, *supra* note 125, at 578-79. The concern for innovation is not new in tort law. For example, the "strict liability" approach of *Rylands v. Fletcher*, L.R. 3 H.L. 330, 338-39 (1868), for causing accidents was rejected by some nineteenth-century courts on the ground of a need to avoid restricting "progress and improvement." See, e.g., *Brown v. Collins*, 53 N.H. 442, 448 (1873) (rejecting the strict liability approach because "it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. . . [and] throw . . . an obstacle in the way of progress and improvement"); *Losee v. Buchanan*, 51 N.Y. 476, 485-87 (1873).

175. See Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 41-46 (2004).

176. See TORT LAW AND THE PUBLIC INTEREST, *supra* note 1, at 39; Galanter, *supra* note 162, at 737-40 (discussing the lack of evidence of impact from the tort system on competitiveness); *infra* notes 516-18 and accompanying text.

and several liability to accommodate comparative fault has been supported both by traditional methods<sup>177</sup> and by the more political methods of the current tort reform movement.<sup>178</sup> However, the specific change adopted may be different depending on the method used. For example, the ATRA proposal simply abolishes joint and several liability and places all the share of an insolvent defendant on the plaintiff,<sup>179</sup> but traditional reform proposals tend to involve methods that result in a sharing of the problems, such as an insolvent defendant.<sup>180</sup>

Traditional reform sometimes has some of these political aspects, particularly when reform is sought within a legislative context. For example, rhetoric can play a role because it can usefully communicate in concrete ways that accurately capture a policy position or motivate people through a common basis of shared values.<sup>181</sup> In terms of accident law, an example of this use of rhetoric is reflected in the phrase, “[t]he price of the product should bear the blood of the workingman,” which was used to support the legislative adoption of workers’ compensation.<sup>182</sup> This rhetorical phrase accurately captures both the risk-spreading enterprise liability theory underlying this compensation scheme and the shared concern for injured workers and their families,<sup>183</sup> even though it begs the question of why workers’ injuries should be viewed as a cost of the employer’s enterprise of production rather than a cost of the employee’s enterprise of working.<sup>184</sup>

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177. See, e.g., UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135-36 (2006); 2 ALI, ENTERPRISE RESPONSIBILITY, *supra* note 1, at 127-57; *infra* notes 243-44 and accompanying text.

178. See, e.g., ATRA: Joint and Several Liability Reform, <http://www.atra.org/issues/index.php?issue=7345> (last visited Jan. 7, 2007) [hereinafter ATRA, Joint and Several].

179. *Id.*

180. See, e.g., UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135-36 (2006) (reallocating the share of an insolvent defendant to all at-fault parties proportionally). The American Law Institute concluded that “[n]o single approach . . . is clearly superior” but notes that reforms that shift all the costs of insolvency on plaintiffs “may have been overreactions.” 2 ALI, ENTERPRISE RESPONSIBILITY, *supra* note 1, at 156. THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, cmt. a (1999) notes that an approach that allocates the share of an insolvent tortfeasor to plaintiff and other tortfeasors in proportion to fault is “theoretically the most appealing” approach. For discussion of approaches to changing the doctrine of joint and several liability, see *infra* notes 251-64 and accompanying text.

181. See, e.g., POSNER, *supra* note 82, at 84-85; Austin Sarat & Thomas R. Kearns, *Editorial Introduction to THE RHETORIC OF LAW* 1, 5-27 (Austin Sarat & Thomas R. Kearns eds., 1994); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691, 698 (1985).

182. HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN’S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 282 (1954).

183. See *supra* note 52 and accompanying text.

184. Cf. CALABRESI, *supra* note 30, at 133-34 (addressing causation issue of “what-is-a-cost-of-what”).



In contrast, "tort reform" rhetoric often lacks such a relationship and appears designed to persuade by misleading.<sup>185</sup> It is rhetoric, in the negative sense criticized by Socrates, designed not only to appeal to shared values but also to take advantage of misconceptions so that it can be "more convincing among the ignorant than the expert."<sup>186</sup> For example, ATRA and other supporters of tort reform stress the problem of "frivolous litigation" and repeat a litany of anecdotes about specific "loony lawsuits." This approach has a powerful impact on public opinion because polling data indicate that "Americans believe too many frivolous lawsuits clog our courts."<sup>187</sup> However, the movement provides no definition of "frivolous lawsuits" and no measure of how many frivolous suits constitute "too many." Nor does it give data to support the claim of a problem. Instead of addressing the validity of the public belief that there is a problem of frivolous lawsuits, the movement simply utilizes the belief to support its agenda. For example, ATRA claims that it "successfully translates that frustration [with frivolous lawsuits] into action and reform."<sup>188</sup> But ATRA's "action and reform" concerning frivolous lawsuits consists solely of legislative proposals that will reduce a plaintiff's right to compensation regardless of whether the claim is frivolous under existing substantive rules. ATRA has virtually *no* legislative proposal specifically directed toward frivolous litigation in the sense of claims that are defined as clearly groundless under existing rules of tort.<sup>189</sup> Indeed, it is hard to know what might be proposed because, as indicated below,<sup>190</sup> the federal and state systems already have several specific schemes designed to address groundless lawsuits.

The rhetorical attacks on "frivolous litigation" are part of a broader rhetorical pattern of criticizing courts by using claims that imply courts are neither competent nor trustworthy. This broader attack is reflected in recurring rhetorical phrases such as the need for "real justice in our courts" and the need to stop "lawsuit abuse," "looney lawsuits," and "judicial hellholes."<sup>191</sup> It is also implicit in the "reform" position that jury verdicts for compensatory and punitive damages are "excessive"

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185. See *supra* notes 162-63 and accompanying text.

186. PLATO, *Gorgias*, in THE COLLECTED DIALOGUES OF PLATO 229, 242 (Edith Hamilton & Huntington Cairns eds., 1961); see also Hayden, *supra* note 166, at 252-54 (noting the movement's manipulation of views by rhetoric based on cultural beliefs).

187. About ATRA, *supra* note 57 (stating that "[a]ccording to a 2003 ATRA survey, 85 percent of Americans" had this belief).

188. *Id.*

189. For discussion of the limited nature of the movement's proposals to address frivolous litigation, see *infra* notes 386-91 and accompanying text.

190. See *infra* notes 380-84 and accompanying text.

191. About ATRA, *supra* note 57; see *supra* notes 162-63 and accompanying text.

and “erratic” despite judicial control over jury verdicts. The broadest attack is to question the deterrent role of the tort system by asserting a need to stop “regulation through litigation.”<sup>192</sup>

These rhetorical attacks on the legitimacy of courts and on the fairness and efficiency of tort law are consistent with the interest of the “haves” supporting the tort reform movement to seek limits on legal curbs on their economic power. As indicated above,<sup>193</sup> decisions of judges and juries are less subject to manipulation through the use of economic resources than are legislatures and regulatory agencies. In addition, courts prefer to use the rational model in decision-making rather than the political model.<sup>194</sup> Consequently, reducing the role of courts, vis à vis that of legislatures and agencies, in allocating injury costs increases the ability of the “haves” to use their economic advantage in determining the rules and outcomes in particular cases.

## 2. Opposition to “Tort Reform”

As indicated above, the long-term opposition to the tort reform movement has two forms. First, most “experts,” including academics and authors of neutral governmental studies, have criticized the use of the political model or have used the rational model to criticize specific claims and proposals.<sup>195</sup> These experts tend to make the following arguments: (1) given the vagueness of the rhetorical claims of proponents and the complexity of determining the impacts of the tort systems, it is not possible to know whether a change in rules is needed or whether a change will have the claimed effect; and (2) to the extent data are available, these data show that there is no problem or that the

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192. See *supra* note 170 and accompanying text.

193. See *supra* notes 73-74 and accompanying text.

194. See *supra* notes 97-99, 107-09 and accompanying text.

195. See, e.g., HALTOM & MCCANN, *supra* note 1, at 73-77. Thomas Burke notes that academics have “effectively counterpunched against the claims” of those supporting tort reform and summarizes the role of the academics as follows:

Marc Galanter, a law professor at the University of Wisconsin, has become a kind of one-man litigation “truth squad,” demonstrating that many of the figures widely quoted by tort reformers—that the United States has 70 percent of the world’s lawyers or that tort litigation costs \$300 billion annually—are vast exaggerations that were more or less made up. These figures still find their way into the media, but Galanter and several other sociolegal researchers have managed to draw attention to some of the defects in the tort reformers’ case. Within academia, and particularly among those who most closely study tort law in action, Galanter’s critical view of the tort reform movement prevails. . . . [T]hey find little evidence for claims of a “litigation explosion,” and they dismiss the lawsuit horror stories regularly generated by tort reformers as unrepresentative anecdotes.

BURKE, *supra* note 1, at 45 (footnotes omitted).

proposed change will be ineffective or unfair.<sup>196</sup>

The opponents of the "tort reform" movement who have used the political model are not "repeat players" in the same way as the repeat players on the defense side. Because the likelihood of being seriously injured by a tort is so low, most people do not view themselves as sufficiently likely to be plaintiffs that they are concerned about the rules of the tort system. Even if one were concerned, a potential victim usually lacks a sufficient interest to spend time and money opposing tort reform in the political arena. Thus, potential plaintiffs have had very little role in the opposition. Instead, political opponents of tort reform have generally consisted of lawyers who specialize in representing tort plaintiffs. These lawyers are, in effect, repeat players for the plaintiffs' side because the contingent fee system provides an economic interest in protecting the plaintiffs' position. Plaintiffs' lawyers either act individually or act collectively through a state group like a state "Trial Lawyers Association" or a national group like the American Association for Justice ("AAJ") (formerly known as the Association of Trial Lawyers of America), which began as the National Association of Claimants' Compensation Attorneys ("NACCA") in 1946.<sup>197</sup> To a lesser extent, some "public interest" advocates have also used the political model to oppose tort reform on behalf of potential victims. For example, Ralph Nader has been termed a "giant" and a "one-man cheering squad" in the support of the tort litigation system and in opposition to the efforts of the tort reform movement.<sup>198</sup>

The political opponents of tort reform have adopted methods similar to those of proponents. For example, plaintiffs' attorneys use lobbying techniques and make political contributions to supporters of their views, including judges in states where judges are elected.<sup>199</sup> To a

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196. See, e.g., BURKE, *supra* note 1, at 45, 194; DANIELS & MARTIN, *supra* note 1, at ix-x, 15-28; HALTOM & MCCANN, *supra* note 1, at 73-110; Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1097 (1996); Galanter, *supra* note 155, at 47-48; Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1522-23 (2003) (reviewing data showing no basis for criticism of juries in terms of bias in favor of plaintiffs, lack of comprehension, and arbitrary, unpredictable decisions); Deborah Jones Merritt & Kathryn Ann Berry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 315 (1999); Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 835-36 (2002); Vidmar, *supra* note 60, at 1219-20 (analyzing tort reform with respect to medical malpractice claims). For a summary of data on the tort system, see *supra* Part II.B. For a discussion of contrast between accounts based on academic studies and media accounts, see *infra* Part IV.B.

197. See, e.g., BURKE, *supra* note 1, at 45-51; American Association for Justice, About AAJ: AAJ and Trial Lawyers, <http://www.atla.org/about/index.aspx> (last visited Jan. 7, 2007).

198. BURKE, *supra* note 1, at 52.

199. See, e.g., BURKE, *supra* note 1, at 50; HALTOM & MCCANN, *supra* note 1, at 111-43; Champagne, *supra* note 76, at 1483.

limited extent, they have also engaged in publicity campaigns like those funded by the tort reform movement.<sup>200</sup> These attorneys also use rhetorical techniques like those of the tort reform movement, for example, arguing in terms of “rights of victims” without acknowledging the need for defining and defending the specific rights involved and the need for examining the impact of specific proposals for reform.<sup>201</sup> Opponents may defend these techniques by arguing that they are just “responding in kind” to groups like ATRA. However, whatever the reason may be, the tactics of these political opponents of “tort reform” are often similar to those of proponents.

The opponents of the tort reform movement are motivated by two somewhat overlapping ideologies. First, academic opponents, by and large, are committed to the rational model and frequently criticize the movement’s proposals and techniques in terms of their failure to satisfy rational modes of analysis.<sup>202</sup> Because of their professional training and practice, plaintiffs’ attorneys also tend to be committed to the rational model as it is exhibited in litigation and judicial decision-making.<sup>203</sup>

Second, the ideology of the political opponents has aspects that are like the market ideology of the tort reform movement<sup>204</sup> because both emphasize individualism and responsibility. From the opponents’ point of view, however, the evaluation of an individual’s choice must be placed within the context of the circumstances that did not result from that individual’s choice.<sup>205</sup> Thus, the movement’s opponents place

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200. See BURKE, *supra* note 1, at 49; HALTOM & MCCANN, *supra* note 1, at 111-43 (noting limited use of publicity campaigns); Deborah L. Rhode, Essay, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 452-53 (2004).

201. See, e.g., BURKE, *supra* note 1, at 49-50.

202. See, e.g., Page, *supra* note 52, at 651-55 (contrasting “old tort reform” based in the courts and on the ideas of scholars, and the “new tort reform” “fueled by . . . economic self-interest” and consisting of “a political attack on tort law in the legislative arena”). A group of over twenty scholars have formed an organization, the Civil Justice Resource Group, to “respond to the widespread disinformation campaign by critics of the civil justice system.” Civil Justice Resource Group, <http://www.cjrg.com/aboutus.html> (last visited Jan. 7, 2007). Some have argued that academics occasionally act from a more political point of view. See, e.g., Gary T. Schwartz, *Empiricism and Tort Law*, 2002 U. ILL. L. REV. 1067, 1076-78 (noting that some academics using empirical data to defend the tort systems may, at times, be affected by political views in favor of compensating victims); see also *supra* note 55 and accompanying text (distributional criticisms of “tort reform”).

203. See *supra* notes 97-99, 107-09 and accompanying text.

204. See *supra* notes 159-61 and accompanying text.

205. See COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 32, at 60-61; SHAPO, *supra* note 1, at 10 (referring to adherents of a “justice culture” who emphasize the vulnerability and lack of choice of victims and the responsibility of those who generate risk). See generally William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (critiquing “legal liberalism,” which stresses populism, rights, and a victim perspective). In part, the philosophical dispute involves a conflict between utilitarian or

significantly greater emphasis on individual rights in terms of concerns like the vulnerability and lack of choice of injured victims, on the responsibilities of injurers, and on the need to use tort liability as a method to control the risks generated by the powerful "haves" in society.<sup>206</sup> Partly because of this ideology and of Republican Party support for tort reform, political opponents of tort reform tend to support the Democratic Party and have received Democratic support in fighting "reform."<sup>207</sup> Despite their concern for social context, political opponents of reform—as well as supporters of reform—have not tended to support replacing the tort system with social compensation programs or regulatory schemes.<sup>208</sup> For example, plaintiffs' attorneys have fought compensation schemes like no-fault automobile insurance in favor of using the judicial forum with its emphasis on individualistic, rights-based approaches to injury.<sup>209</sup>

In this context, "plaintiff lawyers . . . see themselves as 'equalizers' who roam through American society looking for injustice, taking the side of victimized individuals against large, uncaring institutions and in the process making a lot of money."<sup>210</sup> A public interest advocate like Ralph Nader is motivated by "a deep distrust of both corporate and government bureaucracies . . . [and] has developed a strong defense of the adversarial legal model of decision making as against the bureaucratic model."<sup>211</sup> These opponents have a distrust of corporations, of agencies, and of politics, and they prefer a strong judicial role in developing safety standards in areas like product development. They are willing to accept some delays of "good" innovation in order to prevent "bad" innovation.<sup>212</sup>

#### IV. IMPACT OF THE "TORT REFORM" MOVEMENT

##### A. Legislation

Thus far, the tort reform movement has had far more success at the state level than at the federal level. This difference does not result from

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wealth maximizing schemes vis à vis schemes based on a concern like fairness. *See also supra* note 37.

206. *See, e.g.,* FEINMAN, *supra* note 1, at 1-6, 76-77.

207. *See* BURKE, *supra* note 1, at 56; *supra* notes 149, 161 and accompanying text.

208. *See, e.g.,* HALTOM & MCCANN, *supra* note 1, at 266-67, 281-93.

209. *See, e.g.,* BURKE, *supra* note 1, at 103-41, 171-89.

210. *Id.*

211. *Id.* at 53.

212. *See generally, e.g.,* BOGUS, *supra* note 1 (arguing that heavy regulation in the automobile industry leads to safer products).

lack of effort; the movement has tried since the 1970s to get national reform at the federal level.<sup>213</sup> The failure to get proposals adopted at the federal level may result in part from the fact that tort law has traditionally been a matter of state law, and an attempt to federalize products liability law, for example, would face objections on this basis. Another reason may be that Congress provides a forum where AAJ (and other plaintiffs' attorneys), academics, and consumer groups can be more successful in opposing "tort reform."

At the state level, the tort reform movement has focused on a relatively explicit list of legislative reforms to tort law. For example, the ATRA website lists a legislative agenda and areas of focus (with links)<sup>214</sup> and publishes a "Tort Reform Record" in July and December of each year.<sup>215</sup> The Tort Reform Record tabulates the adoption of these reforms by state since 1986, the year ATRA was founded. The reforms that are listed and tabulated are: punitive damages, joint and several liability, prejudgment interest, collateral source rule, noneconomic damages, product liability, class action reform, attorney retention sunshine, appeal bond reform, and jury service reform.<sup>216</sup> The data in ATRA's Tort Reform Record are presented in a table indicating whether a state has adopted a reform in a particular area, as well as in a state-by-state listing of more specific information about the reforms adopted in

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213. See, e.g., Anawis, *supra* note 172, at 314 (discussing healthcare malpractice bills pending in Congress in 2003); Rustad, *supra* note 149, at 674-75, 679-80; Schwartz, *supra* note 161 (considering strengths and weaknesses of federalizing medical malpractice law and products liability law); Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1023-28 (2000) (reviewing products liability proposals in Congress); *infra* note 408 (discussing arguments for federal products liability reform). There have been a few successes at the federal level. See Apelbaum & Ryder, *supra* note 132, at 612-27; see also Popper, *supra* note 161 (discussing federal act imposing limitations on liability of volunteers); sources cited *infra* note 413 (including statute of repose for general aviation aircraft); *infra* note 525 and accompanying text.

214. ATRA Issue Pages, <http://www.atra.org/issues/> (last visited Jan. 8, 2007). ATRA's legislative agenda includes items in its "Areas of Focus." For example, venue reform is included as an area of focus and ATRA has supported federal legislation to limit the venues available to tort plaintiffs. See Gretchen Schaefer, ATRA, *U.S. House Supports End to Lawsuit Abuse*, Oct. 27, 2005, <http://www.atra.org/newsroom/releases.php?id=7974> (supporting H.R. 420, 109th Cong. § 4 (2005)). It also supports state venue "reform." ATRA, Forum and Venue Reform, <http://www.atra.org/issues/index.php?issue=7356> (last visited Jan. 8, 2007).

215. See, e.g., AM. TORT REFORM ASS'N, ATRA TORT REFORM RECORD (2005) [hereinafter TORT REFORM RECORD], available at [http://www.atra.org/files.cgi/799\\_Record\\_12-31-05.pdf](http://www.atra.org/files.cgi/799_Record_12-31-05.pdf). A similar review is compiled by the National Association of Mutual Insurance Companies ("NAMIC"). NAMIC Online, July 2004 Update to "An Overview of State Legislative Efforts to Improve the Legal System," <http://www.namic.org/reports/tortReform/default.asp> (last visited Jan. 8, 2007). For a review of arguments for and against reform and a summary by state of selected "reforms," see CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES, at ix, 2-3 (2004), available at <http://www.cbo.gov/showdoc.cfm?index=5549>.

216. TORT REFORM RECORD, *supra* note 215, at 2.

each state and of judicial consideration of the constitutionality of a reform.

The following discussion is organized around a series of doctrinal proposals for reform and provides a review of reasons for and against specific proposals and a summary of adopted "reforms."<sup>217</sup> One of the most important points concerning the legislative changes is their diversity. This diversity provides a clear indication that neither traditional reform nor "tort reform" has followed a simple, cookie-cutter pattern. Instead, each state has devised its own approach to replacing the common law doctrines targeted for "reform" by the reform movement, and this independent approach has resulted in fifty different sets of rules to address "tort reform."

### 1. Collateral Source Rule

Under the common law "collateral source rule" or "collateral benefits rule," a plaintiff's damages in a torts suit may not be reduced by benefits received from sources like unemployment compensation, first party insurance, or public schemes like Medicare and Medicaid. These benefits are regarded as *collateral* to the tort litigation; evidence of these benefits is, therefore, inadmissible and cannot operate to lessen the damages recoverable from the wrongdoer.<sup>218</sup> The reasons traditionally given in support of this rule are: (1) it is unfair for the defendant to get the benefit of such things as payments from plaintiffs' health insurance or voluntary donations of services by family members; and (2) reducing a damage award by collateral benefits would reduce the deterrent effect of the award because the defendant would no longer be paying the full amount of the accident costs caused by the wrongdoing.<sup>219</sup>

The main argument given for abolishing the rule is that it "allows plaintiffs to be compensated twice for the same injury."<sup>220</sup> Defenders of the rule respond that this double compensation argument is somewhat misleading because it ignores two points. First, they argue that any extra

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217. These summaries should be viewed as rough snapshots. Each state is different in many important respects, and a single statute may not capture the complete picture. Moreover, any review of all states raises difficult research challenges in terms of being sure one has not missed a case or a statutory provision.

218. DOBBS, *supra* note 3, § 380, at 1058.

219. *See, e.g.*, Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66-69 (1970) (noting also the need to pay attorney's fee); Arambula v. Wells, 85 Cal. Rptr. 2d 584, 586 (Ct. App. 1999); DOBBS, *supra* note 3, § 380, at 1058-59; 2 ALI ENTERPRISE RESPONSIBILITY, *supra* note 1, at 162-63.

220. ATRA: Collateral Source Rule Reform, <http://www.atra.org/issues/index.php?issue=7344> (last visited Jan. 8, 2007). Traditional reformers have also made this criticism. *See* 2 ALI ENTERPRISE RESPONSIBILITY, *supra* note 1, at 162.

compensation is fair because the defendant should not get the benefit of something paid for by or donated to the plaintiff.<sup>221</sup> Without the rule, the defendant would receive a windfall at the plaintiff's expense. Second, because providers of the benefit generally have a contractual or statutory right to subrogation or to a lien, which allows the provider to recover the value of the benefit from successful tort claimants,<sup>222</sup> there is rarely any "double recovery."<sup>223</sup> Critics of the rule respond that subrogation involves additional administrative costs because shifting the tort payment from the plaintiff to the provider entails time and expense as the plaintiff and provider determine the rights of the provider.<sup>224</sup> Defenders meet this response by arguments that the administrative costs of subrogation are offset by increased success in achieving the goals of fairness and deterrence.<sup>225</sup> They also argue that eliminating the right of subrogation would increase the costs paid by—and the premiums and other payments necessary to pay for—private first party insurers, workers' compensation carriers, and public health payment schemes.<sup>226</sup> In addition, eliminating the right of subrogation by state legislation would be unfair to plaintiffs where federal law has preempted the area.<sup>227</sup>

The tort reform movement has had considerable success in using the political model to get legislatures to abolish or limit the collateral source rule, and only about a third of the states still adhere to this

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221. See *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995); RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1977); Michael Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. TOL. L. REV. 39, 43 (1990).

222. See, e.g., *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (recognizing health plan's right to equitable lien based on right of subrogation in plan covered by Employee Retirement Income Security Act ("ERISA")); LARSON, *supra* note 98, § 116.01 (explaining workers' compensation statutes); Vidmar, *supra* note 60, at 1256-60; *infra* note 227 and accompanying text. In practice, the insurer may not receive full payment because the amount can be reduced to reflect the plaintiff's costs in securing payment and, where a settlement is involved, the reduction in amount of payment resulting from the acceptance of a lesser, but certain amount. Vidmar, *supra* note 60, at 1259.

223. DOBBS, *supra* note 3, § 380, at 1058-59. Subrogation also helps reduce first party insurance premiums. See *id.* at 1059.

224. See *Helfend*, 465 P.2d at 65 n.8, 67-68. As indicated *supra* note 222, the amount of payment is subject to negotiation.

225. See *supra* notes 28-35, 221 and accompanying text; RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1977) (discussing punishment and, by reference to section 901, deterrence).

226. See DOBBS, *supra* note 3, § 380, at 1059; Vidmar, *supra* note 60, at 1260.

227. See, e.g., *Levine v. United Healthcare Corp.*, 402 F.3d 156, 166-67 (3d Cir. 2005) (holding that New Jersey's anti-subrogation statute was preempted by ERISA). Some state statutes eliminating the collateral source rule provide that the elimination does not apply to federal programs with a federal statutory right or duty to seek subrogation. See, e.g., 40 PA. CONS. STAT. ANN. § 1303.508(d)(4) (West Supp. 2005).



common law rule.<sup>228</sup> The states that have modified the rule<sup>229</sup> differ widely in terms of details concerning the extent of the change and how the change is implemented. More specifically, there is wide variation in whether only some benefits will be affected by the modification of the rule and if so, which benefits,<sup>230</sup> in whether evidence of collateral benefits is admissible where a right of subrogation exists,<sup>231</sup> and in

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228. The following states still have the rule: ARK. CODE ANN. § 16-90-712 (West 2006); HAW. REV. STAT. § 351-63 (2004); MO. ANN. STAT. § 490.715 (West 1996 & Supp. 2006); VA. CODE ANN. § 8.01-35 (2000 & Supp. 2006); *Thompson v. KFB Ins. Co.*, 850 P.2d 773, 776-77 (Kan. 1993); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995); *Weir v. Gasper*, 459 So. 2d 655, 658 (La. Ct. App. 1984); *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980); *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 799 P.2d 133, 136 (N.M. 1990); *Cates v. Wilson*, 361 S.E.2d 734, 738 (N.C. 1987); *Maguire v. Licht*, No. C.A. PC1000-3391, 2001 WL 1006060, at \*7-8 (R.I. Super. 2001); *Covington v. George*, 597 S.E.2d 142, 144-45 (S.C. 2004); *Jurgensen v. Smith*, 611 N.W.2d 439, 442 (S.D. 2000); *Scottsdale Ins. Co v. Nat'l Emergency Servs.*, 175 S.W.3d 284, 300 (Tex. App. 2004); *Hall v. Miller* 465 A.2d 222, 227 (Vt. 1983); *Garnick v. Teton County Sch. Dist. No. 1*, 39 P.3d 1034, 1042 (Wyo. 2002). A Nevada statute modifying the rule was repealed by initiative and referendum in 2004. NEV. REV. STAT. ANN. § 42.020-021 (LexisNexis 2002 & Supp. 2005).

229. The following indicates the states that have modified the rule: ALA. CODE § 6-5-545 (2005); ALASKA STAT. § 09.17.070 (2005); ARIZ. REV. STAT. ANN. § 12-565 (2003); CAL. GOV'T CODE § 985 (West 1995); COLO. REV. STAT. § 13-21-111.6 (2004); CONN. GEN. STAT. ANN. § 52-225a (West 2005); DEL. CODE ANN. tit. 18, § 6862 (West 2006); FLA. STAT. ANN. § 768.76 (West 2005); IDAHO CODE ANN. § 6-1606 (2004); 735 ILL. COMP. STAT. ANN. 5/2-1205.1 (West 2003); IND. CODE ANN. § 34-44-1-1 (West 1999); IOWA CODE ANN. § 668.14 (West 1998); ME. REV. STAT. ANN. tit. 24, § 2906 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06(f) (LexisNexis 2002 & Supp. 2005); MASS. GEN. LAWS ANN. ch. 231, § 60G (West 2000); MICH. COMP. LAWS ANN. § 600.6303 (West 2000); MINN. STAT. ANN. § 548.36 (West 2000); MISS. CODE ANN. § 99-41-17(2)(a) (West 2006); MONT. CODE ANN. § 27-1-308 (2005); NEB. REV. STAT. § 44-2819 (LexisNexis 2005); N.J. STAT. ANN. § 2A:15-97 (West 2000); N.Y. C.P.L.R. § 4545 (McKinney 1992 & Supp. 2006); N.D. CENT. CODE § 32-03.2-06 (1996); OHIO REV. CODE ANN. §§ 2315.20, 2323.41 (LexisNexis 2005); OKLA. STAT. ANN. tit. 63, § 1-1708.1D (West 2004); OR. REV. STAT. § 31.580 (2005); 40 PA. CONS. STAT. ANN. § 1303.508 (West Supp. 2006); TENN. CODE ANN. § 29-26-119 (2000); UTAH CODE ANN. § 78-14-4.5 (2002); WASH. REV. CODE ANN. § 7.70.080 (West 1992); W. VA. CODE ANN. § 55-7B-9a (LexisNexis Supp. 2006); *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.* 700 N.W.2d 201, 208-09 (Wis. 2005). Though the adoption of legislation in response to the tort reform movement is a relatively recent development, legislatures have occasionally modified the rule in the past. *See, e.g.*, MARC H. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 783 (8th ed. 2006) (discussing 1895 Massachusetts statute abolishing rule in suits against railroads for property damage). Courts have also modified the rule in some situations. *See, e.g.*, *Weinberg v. Dinger*, 524 A.2d 366, 378 (N.J. 1987) (abrogating "water company's immunity for losses caused by the negligent failure to maintain adequate water pressure for fire fighting only to the extent of claims that are uninsured for underinsured").

230. *See, e.g.*, 40 PA. CONS. STAT. ANN. § 1303.508(d) (West Supp. 2006) (excluding life insurance and certain government programs from collateral source provisions).

231. *See, e.g.*, UTAH CODE ANN. § 78-14-4.5(1) (2002). The reason for this concern is that otherwise a plaintiff could be forced to pay the insurance company even though the plaintiff did not receive any money for the loss covered by the benefit. Some states allow the plaintiff to introduce evidence of obligation to repay. *See, e.g.*, WASH. REV. CODE ANN. § 7.70.080 (West 1992).

whether subrogation will be barred.<sup>232</sup> The impact of the change has also been limited by the choice of some states to eliminate the collateral benefits rule only for some claims—e.g., only for products liability or for medical malpractice.<sup>233</sup> There is also disagreement about the process of trial in terms of whether the evidence of collateral benefits is admitted for jury consideration<sup>234</sup> or is used solely by the judge to calculate a final damages amount after the jury renders a verdict amount for the plaintiff.<sup>235</sup> Finally, there is considerable variation in whether and how a plaintiff's payment of premiums for a benefit should be considered.<sup>236</sup>

## 2. Joint and Several Liability

Where two or more wrongdoers (“tortfeasors”) caused a plaintiff's injury, the common law imposed joint and several liability on them as joint tortfeasors. This traditional scheme of liability has several important features. First, as a matter of procedure, a plaintiff may elect to sue one, some, or all joint tortfeasors in one suit or in separate suits against individual tortfeasors.<sup>237</sup> Second, though a plaintiff can only get one full recovery for his injury, each tortfeasor is liable for the full amount of plaintiff's loss.<sup>238</sup> Because each tortfeasor is liable for all the damages under the traditional scheme, the verdict for damages in a suit with multiple defendants does not allocate shares of fault among the defendants. Third, a joint tortfeasor who paid the judgment could not compel any of the other joint tortfeasors to pay him a share of the judgment.<sup>239</sup> This third feature of the rule has been changed by statute or by case law in most jurisdictions, and the wrongdoer who has paid the judgment to the plaintiff can now seek “contribution” from other joint tortfeasors.<sup>240</sup> Though the right of contribution was an improvement for the defendant who paid the judgment, it has two shortcomings from the

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232. 40 PA. CONS. STAT. ANN. § 1303.508(c) (West Supp. 2006) (barring rights of subrogation).

233. *See, e.g.*, ALA. CODE § 6-5-520 (2005) (abrogating rule for medical expenses related to products liability cases); CONN. GEN. STAT. ANN. § 52-225a(a) (West 2005) (modifying rule for medical malpractice cases).

234. *See, e.g.*, GA. CODE ANN. § 51-12-1(b) (2000).

235. *See, e.g.*, FLA. STAT. ANN. § 768.76(1) (West 2005).

236. *See, e.g.*, MONT. CODE ANN. § 27-1-308(2)(a) (2005) (cost of securing collateral source benefit for five years prior to the incident); MINN. CODE ANN. § 548.36 (West 2000) (requiring the court to determine the cost of collateral source for two years prior to incident); OHIO REV. CODE ANN. § 2315.20(B) (LexisNexis 2005) (allowing a plaintiff to introduce evidence of any amount paid or contributed).

237. *See, e.g.*, DOBBS, *supra* note 3, § 170, at 413.

238. *See id.*

239. *Id.* § 386, at 1078.

240. *Id.* § 386, at 1078-79; *id.* § 387, at 1080.

perspective of this defendant because the paying defendant bears: (1) the burden of seeking contribution; and (2) the risk that the required contribution from another tortfeasor might be uncollectible.

The doctrine of joint and several liability has been defended on the ground that the disadvantages placed on joint tortfeasors were fair because they were wrongdoers and the injured plaintiff was innocent.<sup>241</sup> This description was accurate when any negligence, no matter how slight, totally barred the plaintiff from recovery. However, this description no longer applies because nearly all jurisdictions now have comparative fault,<sup>242</sup> which may allow an at-fault plaintiff to get partial recovery in tort. Thus, it is not surprising, first, that changing the doctrine of joint and several liability can be viewed as a reform both in terms of traditional tort reform and the tort reform movement, and second, that some states changed the rule before the tort reform movement gained momentum.<sup>243</sup> Nor is it surprising that traditional joint and several liability, even with a right of contribution, is no longer the majority rule in the United States; only ten states now follow the doctrine.<sup>244</sup>

Reforming the rule of joint and several liability initially appears easy because of the intuitive appeal of simply substituting a rule that each defendant should be liable only for his percentage of fault. However, reform is actually far more challenging because defining and measuring "fault" are complicated tasks.<sup>245</sup> Moreover, many jurisdictions use thresholds in comparative fault, and bar recovery in some states if a plaintiff's fault exceeds 50% or, in other states, if the plaintiff's fault is 50% or more.<sup>246</sup> In a state with this arrangement, a threshold approach has appeal in addressing a replacement approach for joint and several liability—for example, by retaining joint and several liability unless the defendant's share of fault is less than 50%.<sup>247</sup> Finally, drafting a new rule presents intertwined substantive and procedural problems. Substantive issues include whether and how plaintiffs and

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241. See, e.g., *Laubach v. Morgan*, 588 P.2d 1071, 1074 (Okla. 1978).

242. See *supra* notes 119, 135 and accompanying text.

243. However, there is no universal agreement on whether the adoption of comparative fault necessitates abolition of joint and several liability. Compare, e.g., *Laubach*, 588 P.2d at 1075 (holding that the adoption of comparative fault abolishes joint and several liability), with *Am. Motorcycle Ass'n v. Superior Court*, 146 Cal. Rptr. 182, 189 (1978) (finding no abolition). Moreover, traditional reform and "tort reform" may not necessarily make the same change. See *supra* notes 179-80 and accompanying text.

244. See *infra* note 252 and accompanying text.

245. See *supra* note 67 and accompanying text.

246. See *supra* note 119.

247. See, e.g., S.C. CODE ANN. § 15-38-15(A) (Supp. 2005). For similar schemes, see *infra* note 256 and accompanying text.

defendants will share the problem of an uncollectible judgment, how to determine if a joint tortfeasor's share is uncollectible, and whether there will be exceptions to the abolition of joint and several liability. Both procedure and substance become involved in determining whether and how a defendant can join another defendant—who will then bear a percentage of fault—as a party to the suit,<sup>248</sup> whether nonparty wrongdoers can be allocated a share of the fault,<sup>249</sup> and how to implement the approach where a joint tortfeasor is immune, is subject to a dollar limit on liability, has settled prior to trial, or is not subject to the jurisdiction of the court.<sup>250</sup>

Because of this complexity, the states have varied widely in terms of the scheme used to replace joint and several liability. The Restatement (Third) of Torts: Apportionment of Liability, which was adopted in 1999, identifies six approaches used in the states:<sup>251</sup> (1) retain common law doctrine of joint and several liability (ten states),<sup>252</sup> (2) retain joint and several liability unless the plaintiff was also at fault (two states),<sup>253</sup> (3) adopt pure several liability based on percentages of fault (eighteen states),<sup>254</sup> (4) adopt comparative fault and reallocate uncollectible share from any defendant by percentage of fault of all parties (five states),<sup>255</sup> (5) retain joint and several liability but apply it only to a defendant

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248. See *infra* notes 259-60 and accompanying text.

249. See *infra* notes 260-61 and accompanying text.

250. See *infra* note 261 and accompanying text.

251. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17, cmt. a (1999). The counts for each category in the text above are based on 2005, not 1999, the date of the adoption of the Restatement.

252. ME. REV. STAT. ANN. tit. 14, § 156 (2003); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1403, 3-1404 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 231B, § 1 (West 2000); N.C. GEN. STAT. § 1B-3 (2005); 15 PA. CONS. STAT. ANN. § 9317 (West 1995); R.I. GEN. LAWS § 10-6-6 (1997); VA. CODE ANN. § 8.01-443 (2000); Yancey v. Farmer, 472 So. 2d 990, 992 (Ala. 1985); Great Am. Assurance Co. v. Fisher Controls Int'l, No. Civ.A. 02C-05-168 JR, 2003 WL 21901094 (Del. Super. Ct. Aug. 4, 2003); Bd. of Educ. v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796, 802 (W. Va. 1990).

253. OKLA. STAT. ANN. tit. 23, § 15(D) (West Supp. 2006); WASH. REV. CODE ANN. § 4.22.070(1)(b) (West 2005).

254. ALASKA STAT. § 09.17.080(d) (2004); ARIZ. REV. STAT. ANN. § 12-2506 (2003); ARK. CODE ANN. § 16-55-201 (2005); COLO. REV. STAT. ANN. § 13-21-111.5(1) (West 2005); GA. CODE ANN. § 51-12-33(b) (2000 & Supp. 2006); IDAHO CODE ANN. § 6-803(3) (2004); IND. CODE ANN. § 34-51-2-5 (West 1999); KAN. STAT. ANN. § 60-258a (1994 & Supp. 2006); KY. REV. STAT. ANN. § 411.182 (LexisNexis 2005); LA. CIV. CODE ANN. art. 2324(B) (1997); MISS. CODE ANN. § 85-5-7 (West Supp. 2005); NEV. REV. STAT. ANN. § 41.141(4) (LexisNexis 2002); N.M. STAT. ANN. § 41-3A-1 (West 2003); N.D. CENT. CODE § 32-03.2-02 (1996); UTAH CODE ANN. § 78-27-38 (2000 & Supp. 2006); VT. STAT. ANN. tit. 12, § 1036 (2002); WYO. STAT. ANN. § 1-1-109(e) (2005); McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992).

255. See CONN. GEN. STAT. ANN. § 52-572o (West 2005); MICH. COMP. LAWS ANN. § 600.6304 (West 2000); MINN. STAT. ANN. § 604.02 (West 2000 & Supp. 2006); N.H. REV. STAT. ANN. § 507:7-e (1997); OR. REV. STAT. § 31.610 (2005).

whose share of fault exceeds some threshold percentage (twelve states),<sup>256</sup> and (6) retain joint and several liability but only for economic harm, as opposed to noneconomic harm (three states).<sup>257</sup> There is also considerable overlap among and variation within the alternatives to joint and several liability.<sup>258</sup> For example, schemes that initially allocate among defendants on the basis of percentage of fault must address the issue of which tortfeasors are included in the allocation. Two possible answers are: allocating among parties only, and allocating among all wrongdoers, including nonparties.<sup>259</sup> Where only parties are included in the allocation, a state must determine whether party defendants have a right to join nonparty wrongdoers.<sup>260</sup> Where nonparties are included in the allocation, will there be an exception for some wrongdoers, such as the plaintiff's employer who would be immune on the basis of the doctrine of workers' compensation exclusivity, which generally bars an injured employee from suing his employer?<sup>261</sup> Another reason for

256. HAW. REV. STAT. § 663-10.9 (Supp. 2005); 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 2003 & Supp. 2006); IOWA CODE ANN. § 668.4 (West 1998 & Supp. 2006); MO. ANN. STAT. § 537.067 (West Supp. 2006); MONT. CODE ANN. § 27-1-703(2) (2006); N.J. STAT. ANN. § 2A:15-5.3 (West 2000); N.Y. C.P.L.R. 1601 (McKinney 1997); OHIO REV. CODE ANN. § 2307.22 (LexisNexis 2005); S.C. CODE ANN. § 15-38-15(A) (Supp. 2005); S.D. CODIFIED LAWS § 15-8-15.1 (Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon 1997 & Supp. 2006); WIS. STAT. ANN. § 895.045 (West 1997).

257. CAL. CIV. CODE § 1431.2 (Deering Supp. 2007); FLA. STAT. ANN. § 768.81 (West 2005); NEB. REV. STAT. ANN. § 25-21,185.10 (LexisNexis 2004).

258. For example, the Oklahoma scheme provides that joint and several liability applies if: (1) plaintiff is not at fault; or (2) the defendant's share of fault exceeds 50%. OKLA. STAT. tit 23, § 15 (West Supp. 2006). The Florida statute combines: (1) retention of joint and several liability where the plaintiff is not at fault; (2) no joint and several liability unless the defendant is more than 10% at fault; and (3) joint and several liability for economic damage, based on a sliding scale in terms of defendant's percentage of fault and the amount of economic damage. FLA. STAT. ANN. § 768.81 (West 2005).

259. Compare IND. CODE ANN. § 34-51-2-7 (West 1999) (allocating among parties and nonparties), with MONT. CODE ANN. § 27-1-703(6)(c)(3) (2006) (allocating among parties only). Courts have disagreed about the constitutionality of allocating a share of fault to a nonparty. See, e.g., *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011, 1016-18 (Mont. 1996) (striking down earlier Montana scheme that allowed nonparty allocation); *Haff v. Hettich*, 593 N.W.2d 383, 389-90 (N.D. 1999) (upholding nonparty allocation).

260. See, e.g., *Brown v. Keill*, 580 P.2d 867, 875 (Kan. 1978) (holding that defendants may join joint tortfeasors).

261. See, e.g., UTAH CODE ANN. §§ 78-27-38, -39 (2002 & Supp. 2006) (including immune parties unless fault of all immune persons is less than 40%, in which case share of immune persons is shared by all at fault nonimmune persons); WASH. REV. CODE ANN. § 4.22.070(1) (West 2005) (excluding entities immune from liability, such as employer within workers' compensation scheme). For further discussion of workers compensation, see, for example, LARSON, *supra* note 98, § 100.01; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C20 (1999). The reason for this bar is that workers' compensation is viewed as based on the following *quid pro quo* exchange: The worker receives guaranteed payments for injuries (though at a lower rate than in tort) and the employer receives the benefit of an immunity from tort liability. LARSON, *supra* note 98, § 100.01[1]. However, the employee can sue a third party like a product manufacturer that sold a

variation is that schemes that reallocate an uncollectible share must define “uncollectible” for purposes of reallocation and provide a system for reallocation.<sup>262</sup> There is substantial agreement in the schemes modifying joint and several liability on some points, particularly the following: (1) certain actions still involve joint and several liability—e.g., intentional tortfeasors and persons acting in concert;<sup>263</sup> and (2) vicarious liability doctrines like *respondeat superior* are not affected—i.e., the employer and employee are treated as a single party.<sup>264</sup>

### 3. Noneconomic Damages

Under the traditional common law scheme, the amount of damages for noneconomic injuries, which include such things as pain and suffering, mental distress, and loss of enjoyment of life, is typically determined by the jury based on the evidence at trial. Though trial judges have the discretionary power to use a special verdict form that contains separate amounts for economic damages and for noneconomic damages,<sup>265</sup> a common practice is to have a general verdict that combines both types of compensatory damages in a single figure unless a party requests a special verdict.<sup>266</sup> Where a general verdict is used, there is no way to know the amount of noneconomic damages. In order to assure that the amount of compensatory damages is supported by the evidence, the amount is subject to review by the trial judge and the appellate court. When a party files a motion challenging the amount of a verdict, the trial judge must review the damages awarded by the jury and decide if the damages are: (1) reasonable, in which case the motion is denied; (2) merely inadequate or excessive, in which case a new trial *nisi remittitur* (decreasing the amount of damages) or new trial *nisi additur* (increasing the amount of damages) is granted;<sup>267</sup> or (3) so grossly

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workplace machine with a design defect that caused the employee’s injury. *See, e.g.*, S.C. CODE ANN. §§ 42-1-550, -560 (1985). For discussion of suits for subrogation by third parties against the employer, see LARSON, *supra* note 98, §§ 121.01-.09.

262. *See, e.g.*, OR. REV. STAT. § 31.610(3) (2005).

263. *See, e.g.*, IDAHO CODE ANN. § 6-803(5) (2004) (applying joint and several liability to parties acting in concert); S.C. CODE ANN. § 15-38-15(C)(3)(a), -(F) (Supp. 2005) (applying joint and several liability to parties acting in concert and intentional acts); RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. §§ 12, 15 (1999) (same).

264. *See, e.g.*, WASH. REV. CODE ANN. § 4.22.070 (West 2005) (applying joint and several liability where person is acting as agent or servant); RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 13 (1999). *Respondeat superior* is discussed *supra* note 52.

265. *See supra* note 8 and accompanying text for discussion of types of damages.

266. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 251-52 (2003).

267. As indicated in the text, there are two types of new trial *nisi*. First, if the verdict is “merely inadequate” or “merely insufficient” based on the evidence, a new trial *nisi additur* is granted. Second, if the trial court determines that the jury’s verdict is “merely excessive” based on the evidence, a new trial *nisi remittitur* is granted. In either case, the trial judge gives a dollar figure

inadequate or excessive that they are the result of passion, caprice or prejudice, in which case a new trial is granted. If there is an appeal of any of these rulings, the appellate court reviews the record to determine if the trial court has abused its discretion—i.e., to determine whether the decision is supported by the evidence in the record and whether it accords with applicable legal doctrine.

Critics of granting recovery for noneconomic damages in this way have used the rational model of tort reform to make the following four-part argument: (1) even though pain and mental trauma are "real" injury costs, these noneconomic injuries have no equivalent dollar value that will "fix" or "replace" these psychic injuries; (2) money (regardless of amount) cannot really "compensate;" (3) because there is no measure for noneconomic harm, the amount of awards is erratic and unpredictable; and (4) recovery for noneconomic damages should, therefore, be limited or abolished.<sup>268</sup> The tort reform movement has bolstered this reasoning for limiting noneconomic damages by arguing that damages for noneconomic injuries are said to be "erratic" and "excessive" because juries are too generous in awarding noneconomic damages based on

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believed to be a fair verdict and designed to be a fair settlement of the dispute. The refusal of the party prevailed against on the motion to accept the proposed dollar amount results in a new trial. The litigation is ended if the parties accept this proposed dollar amount. For discussion of this scheme in terms of a particular state, see F. PATRICK HUBBARD & ROBERT L. FELIX, *THE SOUTH CAROLINA LAW OF TORTS* 550-55 (3d ed. 2004).

268. See Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*, 55 DEPAUL L. REV. 489, 493-512 (2006) (reviewing empirical studies, arguments, and proposals for reform). One of the best known early proponents of this view is Louis Jaffe, who argued that, in a world of widespread insurance and "enterprise liability" (which he mistakenly assumed was likely to characterize tort law), damages for noneconomic injuries, particularly past injuries, should not be recoverable, except perhaps for "a consolation, a solatium," because "neither past pain nor its compensation has any consistent economic significance." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953). For discussion of enterprise liability, see *supra* notes 50-51 and accompanying text. For more recent arguments concerning the lack of an economic equivalent for noneconomic loss, see, for example, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 133-35 (1987); Richard Abel, *General Damages Are Incoherent, Incalculable, Incomensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004); see also Priest, *supra* note 1, at 1546-47 (arguing that lack of first party insurance for noneconomic harm indicates the view that money does not "compensate" for noneconomic harm). Some of the recent arguments refine Jaffe's arguments against noneconomic damages in the context of a scheme imposing "enterprise liability" on an actor that is able to spread losses. See, e.g., George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237, 262 (1992); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 408 (1988). However, as indicated *supra* notes 50-51 and accompanying text, enterprise liability is a questionable doctrine when adopted by a court and does not characterize a substantial area of tort law.

sympathy for a plaintiff elicited by skillful plaintiffs' attorneys.<sup>269</sup> In addition, limits on noneconomic damages in medical malpractice cases are claimed to be necessary as a way to reduce malpractice insurance premiums and maintain access to healthcare.<sup>270</sup>

Opponents of limitations on noneconomic damages have a response to each of the arguments. First, because the pain and mental trauma from things like serious incapacitation, dismemberment, disfigurement or loss of a child in a horrible accident are real injuries, the payment of substantial sums is necessary for three reasons: (1) to provide adequate deterrence of wrongful conduct;<sup>271</sup> (2) to provide at least some meaningful measure of compensation for horrible, tragic losses;<sup>272</sup> and (3) to provide more equitable treatment to some classes of people—e.g., women, children, and the elderly—who tend to have a lesser amount of certain types of economic damages than, for example, middle-aged men, who generally have a higher amount of lost income.<sup>273</sup> Second, jury verdicts are neither erratic nor excessive because they are subject to control by such things as rules of evidence, judicial guidance through instructions from the trial judge, and judicial review—at the trial level and at the appellate level—as to whether the amount of damages is supported by the evidence.<sup>274</sup> Third, there is little reason to think that

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269. See, e.g., ATRA: Noneconomic Damages Reform, <http://www.atra.org/issues/index.php?issue=7340> (last visited Nov. 13, 2006); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 48-49 (2002).

270. See, e.g., ATRA: Medical Liability Reform, <http://www.atra.org/issues/index.php?issue=7338> (last visited Nov. 13, 2006) (arguing that in order "[t]o help bring a degree of predictability and fairness to the civil justice system that is critical to solving the growing medical access and affordability crisis," it is necessary to adopt several reforms, including "a \$250,000 limit on noneconomic damages"); The White House, Medical Liability, <http://www.whitehouse.gov/infocus/medicalliability/> (last visited Nov. 8, 2006) (supporting limit of \$250,000).

271. See, e.g., Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 SAN DIEGO L. REV. 1097, 1097-99, 1112-13 (2003); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 804-10 (1995) (stressing deterrent role and urging the use of the ex ante approach to determining amount of noneconomic damages).

272. For arguments that money damages do compensate in some way, see, for example, Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1818-22 (1995); Feldman, *supra* note 7, 1585-89 (arguing that compensation for noneconomic harm is necessary to restore victim's ability to "flourish"); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 502 (1982) ("Ten units of pain is still ten units of pain, but it will be easier to bear in Bermuda."). For an argument that noneconomic damages have an important symbolic value as society's recognition of the importance of plaintiff's loss even if they do not restore the status quo ante, see Margaret Jane Radin, Essay, *Compensation and Commensurability*, 43 DUKE L.J. 56, 69-86 (1993).

273. See *supra* note 55 and accompanying text.

274. See, e.g., Jacqueline Ross, *Will States Protect Us, Equally, from Damage Caps in Medical*



limitations will increase access to healthcare.<sup>275</sup> Even if there were such an increase, it is unjust to subsidize medical malpractice premium costs in order to increase access by forcing the most severely injured victims of medical malpractice to forego part of the compensation necessary to "make them whole."<sup>276</sup>

Assessing these competing positions by the standards of the rational model is difficult for three reasons. First, the data on verdicts are limited, particularly given the widespread use of the general verdict, which combines economic and noneconomic damages and thus restricts the data on the amounts of noneconomic damages involved in tort cases.<sup>277</sup> Second, even if better data were available, it would be difficult, if not impossible, to determine whether there is a pattern of awarding "erratic" or "excessive" amounts of noneconomic damages. Given the procedures in place to prevent jury excess and given that studies of jury behavior do not indicate any pattern of erratic behavior,<sup>278</sup> it seems plausible to think that erratic jury behavior is rare. On the other hand, given the lack of an objective measure of the money value of pain, it is also plausible to think conscientious fair-minded juries would vary enormously in setting a dollar value on a plaintiff's psychic harm.<sup>279</sup> Third, the imposition of

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*Malpractice Legislation?*, 30 IND. L. REV. 575, 594 (1997). For discussion of review of verdicts by trial judges, see *supra* notes 267-70 and accompanying text. There is some empirical support for the argument that jury verdicts are not erratic. See, e.g., Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 260-61 (1993); Vidmar, *supra* note 60, at 1235-45; Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 278-99 (1998) (discussing data showing strong downward impact as a result of postverdict review of jury awards of noneconomic damages). There is also evidence to show verdicts are erratic. See, e.g., Abel, *supra* note 268, at 291-303 (presenting evidence and arguments to show that awards are erratic and unpredictable); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 919-27 (1989).

275. See *infra* notes 519-21 and accompanying text.

276. See, e.g., Benjamin C. Zipursky, *Coming Down to Earth: Why Rights-based Theories of Tort Can and Must Address Cost-based Proposals for Damages Reform*, 55 DEPAUL L. REV. 469, 485 (2006).

277. Some jurisdictions require separate verdicts. Data from three of these jurisdictions (California, Florida, and New York) provide reason to believe that noneconomic damages constitute about 50-60% of total awards in many instances of personal injury. See Vidmar et al., *supra* note 274, at 296. However, there is considerable variation in terms of specifics. For example, a study of the impact of California's \$250,000 cap on noneconomic damages indicated wide variation in noneconomic damages as a percentage of total awards. For example, "[w]hile the overall percentage of non-economic awards is [forty-two] percent of the aggregate awards originally granted by juries in all cases, as total award size increases, the proportion of non-economic damages decreases, except in death cases." NICHOLAS M. PACE ET AL., CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 19-20 (2004) [hereinafter CAPPING NON-ECONOMIC AWARDS].

278. See *supra* notes 265-67, 274 and accompanying text.

279. See Abel, *supra* note 268, at 291-97.

limitations on noneconomic damages raises the question of *how much* compensation is needed for noneconomic damages rather than the issue of whether *any* noneconomic damages should be compensated. Because money for pain and mental trauma cannot literally restore the plaintiff to status quo ante, the issue of how much to compensate in order to address the goals of tort law is more complex than determining whether to award some compensation. Ultimately, the issue of how much is adequate, rather than inadequate or excessive, may not be answerable in any precise manner.

Given the lack of data concerning the amount of compensation for noneconomic damages and the challenges of determining how much to compensate for psychic harm, it is not surprising that the states have adopted widely varying approaches to limiting noneconomic damages. The only area of agreement seems to be that limitations on the maximum amount recoverable are *the* way to reform awards of noneconomic damages.<sup>280</sup> This agreement may reflect the political reality that the tort reform movement has included these limitations in its legislative agenda. Except for this agreement that, if reform is needed, limitations are the way to reform this area of damages, the states have varied widely in their approaches.

About half the states have no limitations on noneconomic damages except for miscellaneous restrictions. Many of these states have never enacted legislation.<sup>281</sup> Four of these have explicit constitutional

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280. For example, as an alternative to using limits, a schedule based on nature of injury could be used. *See, e.g.,* Bovbjerg et al., *supra* note 274, at 938-76; *see generally* Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"*, 22 U. MICH. J.L. REFORM 303 (1989) (describing how to develop guidelines for determining pain and suffering damages and explaining how these guidelines will be effective); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995) (proposing guiding juries by reference to types of injury and ranges of awards for each type). Though there are problems with a scheduling approach, it would avoid a basic problem with limitations—i.e., only reducing the recovery of the most severely injured. Limitations also permit the challenged characteristics of jury determination of noneconomic damages, like variability and uncertainty, to continue to exist for verdicts within the limit. Adopting schedules would involve difficulties. However, a full consideration of the strengths and weaknesses of schedules is beyond the scope of this Article. The point in terms of the text above is that alternatives like schedules are not considered by legislatures while limitations are not only considered but also adopted. The only schedule-type approach used in legislation is to vary the limit upward in cases of severe physical injury. *See infra* notes 287, 290, 301 and accompanying text.

281. These states include the following: Arkansas, Connecticut, Delaware, Iowa, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Tennessee, Vermont, and Wyoming. *Cf.* Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417, 431-58 (2004) (showing, in a survey of how the states treat caps on damages in medical malpractice cases, these states as having no cap damages in medical malpractice cases, and discussing those states that have caps on noneconomic damages specifically).

prohibitions of limitations.<sup>282</sup> Some legislative limits have been declared unconstitutional, and some caps on noneconomic damages have been upheld.<sup>283</sup>

About ten states have enacted general legislation limiting noneconomic damages in personal injury actions,<sup>284</sup> but these limitations vary enormously. For example, they vary in absolute amount, ranging from \$250,000 to \$1,000,000,<sup>285</sup> and in terms of the method of computation of the amount—e.g., determining the amount of the limit by: (1) an absolute figure, or (2) the greater of an absolute figure or a figure based on some variable measure—such as the greater of \$400,000 or life expectancy years multiplied by \$8,000.<sup>286</sup> There is also a wide variation in the treatment of such things as severe disfigurement or physical impairment,<sup>287</sup> particular torts (like intentional torts),<sup>288</sup> wrongful death,<sup>289</sup> or some other “justification” for exceeding the

282. ARIZ. CONST. art. II, § 31; KY. CONST. § 54; PA. CONST. art. III, § 18; WYO. CONST. art. X, § 4.

283. For cases striking limitations, see, for example, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 171 (Ala. 1991); *Brannigan v. Usitalo*, 587 A.2d 1232, 1232-33, 1237 (N.H. 1991); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989); *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 447, 491 (Wis. 2005) (holding limits on all medical malpractice claims unconstitutional, though limits on wrongful death medical malpractice claims constitutional). For cases upholding limitations, see, for example, *Fein v. Permanente Med. Group*, 695 P.2d 665, 668-69 (Cal. 1985); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 905, 907 (Colo. 1993); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 598 (Ind. 1980); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 521 (La. 1992); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 899-900, 908 (Mo. 1992). For discussion of constitutional challenges to limits on noneconomic damages, see generally Ross, *supra* note 274; Kristine Cordier Karnezis, Annotation, *Validity and Construction of State Statutory Provisions Relating to Limitations on Amount of Recovery in Medical Malpractice Claim and Submission of Such Claim to Pretrial Panel*, 80 A.L.R.3d 583 (1977).

284. See ALASKA STAT. § 09.17.010 (2004); COLO. REV. STAT. ANN. § 13-21-102.5 (West 2005 & Supp. 2006); HAW. REV. STAT. ANN. § 663-8.7 (LexisNexis 2002); IDAHO CODE ANN. § 6-1603 (2004); KAN. STAT. ANN. § 60-19a02 (1994 & Supp. 2005); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (LexisNexis 2002); OHIO REV. CODE ANN. § 2315.18(B)(2) (LexisNexis 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997 & Supp. 2006). Many states have more narrowly focused limitations. See, e.g., COLO. REV. STAT. § 13-21-203(1)(a) (2004) (wrongful death claims).

285. Compare, e.g., IDAHO CODE ANN. § 6-1603 (2004) (imposing a cap of \$250,000 for noneconomic damages), with FLA. STAT. § 766.118(2) (2003) (imposing a cap of \$500,000 for noneconomic damages as against medical practitioners, and \$1,000,000 if the injury resulted in persistent vegetative state or death).

286. ALASKA STAT. § 09.17.010(b) (2004) (providing, except for cases involving severe permanent physical impairment or severe disfigurement, cap of the greater of \$400,000 and the life expectancy of the beneficiary times \$8,000).

287. See, e.g., *id.* § 09.17.010(c) (imposing cap of the greater of life expectancy times \$25,000 or \$1,000,000 for permanent physical impairment or severe disfigurement).

288. See, e.g., IDAHO CODE ANN. § 6-1603(4)(a) (2004) (exempting a cap for willful, reckless, or felonious conduct).

289. See, e.g., MICH. COMP. LAWS ANN. § 600.1483(1) (West 1996) (raising cap from

amount.<sup>290</sup> The approaches also vary in terms of whether the limit is applicable to each occurrence, to each claimant, to each claim, or to each defendant<sup>291</sup> and of whether the limit is automatically adjusted for inflation and if so, how it is adjusted.<sup>292</sup>

Twenty-two states have legislation with limitations on noneconomic damages applicable to medical malpractice actions.<sup>293</sup> As the following six examples illustrate, these focused limitations vary considerably: (1) some states limit the amount of noneconomic damages because they have adopted a cap for both economic and noneconomic damages in medical malpractice actions;<sup>294</sup> (2) the states vary in their approach to multiple claims or multiple defendants;<sup>295</sup> (3) the amount of the limit on noneconomic damages varies from \$250,000 to \$500,000;<sup>296</sup> (4) the states vary in their approach to inflation;<sup>297</sup> (5) some states allow

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\$280,000 to \$500,000 if death or permanent loss of vital bodily function); *id.* § 600.6304(1).

290. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102.5(3)(a) (West 2005) (imposing cap of \$250,000 unless court finds justification by clear and convincing evidence for cap of \$500,000).

291. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. §§ 11-108(a)(2)(i), (b)(3)(ii) (LexisNexis 2002) (imposing cap of \$500,000 per beneficiary, \$700,000 per occurrence).

292. *See, e.g., id.* (increasing cap by \$15,000 per annum beginning the year after passage of the statute).

293. ALASKA STAT. § 09.55.549 (2004 & Supp. 2005); CAL. CIV. CODE § 3333.2 (West 1997); COLO. REV. STAT. § 13-64-302 (2004); FLA. STAT. ANN. §§ 766.118(2), (4) (West 2005); GA. CODE ANN. § 51-13-1(b) (Supp. 2006); IND. CODE ANN. § 34-18-14-3 (West 1998) (imposing cap on both economic and noneconomic damages); LA. REV. STAT. ANN. §§ 40:1299.42-43 (2001 & Supp. 2006) (imposing cap on both economic and noneconomic damages); MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2000); MICH. COMP. LAWS ANN. § 600.1483 (West 1996); MISS. CODE ANN. § 11-1-60 (West Supp. 2005); MO. ANN. STAT. § 538.210 (West Supp. 2000 & Supp. 2006); MONT. CODE ANN. § 25-9-411 (2005); NEB. REV. STAT. ANN. § 44-2825 (LexisNexis 2005); N.M. STAT. ANN. §§ 41-5-6 to -7 (West 2003) (imposing cap on both economic and noneconomic damages); N.D. CENT. CODE § 32-42-02 (1996); OHIO REV. CODE ANN. § 2323.43 (LexisNexis 2005); OKLA. STAT. ANN. tit. 63, § 1-1708.1F (West Supp. 2006); S.C. CODE ANN. § 15-32-220 (Supp. 2005); S.D. CODIFIED LAWS § 21-3-11 (2004 & Supp. 2006); UTAH CODE ANN. § 78-14-7.1 (2002); VA. CODE ANN. § 8.01-581.15 (2000 & Supp. 2005) (imposing cap on both economic and noneconomic damages); W. VA. CODE ANN. § 55-7B-8 (LexisNexis 2000 & Supp. 2006). Alaska, Colorado, and Ohio also have a general limit on noneconomic damages. *See supra* note 284.

294. *See, e.g.*, COLO. REV. STAT. § 13-64-302 (2004) (imposing cap on total damages of \$1,000,000).

295. *See, e.g.*, N.D. CENT. CODE § 32-42-02 (1996) (imposing cap, per occurrence of \$500,000); OHIO REV. CODE ANN. § 2323.43 (LexisNexis 2005) (imposing cap of \$500,000 per beneficiary, which can rise to \$1,000,000 for multiple beneficiaries); S.C. CODE ANN. § 15-32-220 (Supp. 2005) (imposing cap of \$350,000 per claimant for single healthcare institution; cap of \$350,000 per claimant per healthcare provider; and cap of \$1,050,000 per claimant for any combination of healthcare institutions and healthcare providers).

296. *Compare* MONT. CODE ANN. § 25-9-411 (2005) (cap of \$250,000), *with* N.D. CENT. CODE § 32-42-02 (1996) (cap of \$500,000).

297. *See, e.g.*, COLO. REV. STAT. § 13-64-302(1)(c) (2004) (raising, by legislation, limit from \$250,000 to \$300,000 to “reflect an adjustment for inflation”); S.C. CODE ANN. § 15-32-220(F) (Supp. 2005) (adjusting cap yearly based on consumer price index).

increased recovery for "special" cases, such as wrongful death,<sup>298</sup> especially egregious conduct like recklessness,<sup>299</sup>—perhaps by a showing of clear and convincing evidence—<sup>300</sup> or substantial injuries like brain damage, spinal cord injury, severe injury to reproductive system, or loss of cognitive ability that eliminates ability to live alone;<sup>301</sup> and (6) some states apply the limit only to certain types of medical care, such as obstetrics.<sup>302</sup>

#### 4. Punitive Damages

##### a. Current Common Law and Constitutional Law Framework

Under the generally followed common law approach, a plaintiff can receive punitive damages if the defendant's conduct was especially wrongful—for example, reckless, intentional, or malicious.<sup>303</sup> These damages are in excess of the amount needed to compensate the plaintiff and are imposed as punishment for the defendant's egregious conduct. As with any punishment, punitive damages serve two purposes—deterrence and corrective justice, which is sometimes referred to as retribution.<sup>304</sup> From a deterrence perspective, punitive damages are necessary where compensatory damages are not sufficient to provide adequate deterrence. In any deterrence scheme, the amount of the cost

298. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(2) (LexisNexis 2002) (raising cap of \$350,000 to \$500,000 in wrongful death and personal injury actions).

299. See, e.g., S.C. CODE ANN. § 5-32-220(E) (Supp. 2005) (imposing no limit where "grossly negligent, willful, wanton, or reckless" conduct was the proximate cause, defendant engaged in fraud or misrepresentation related to the claim, or defendant destroyed medical records to avoid the claim).

300. See, e.g., COLO. REV. STAT. ANN. § 13-21-102.5 (2005) (increasing the cap from \$250,000 to \$500,000 if there is a showing by clear and convincing evidence); OKLA. STAT. ANN. tit. 63, § 1-1708.1F(B) (West 2004 & Supp. 2006) (lifting cap in cases where judge finds by clear and convincing evidence that defendant was negligent).

301. See, e.g., MICH. COMP. LAWS ANN. § 600.1483 (West 1996) (raising cap of \$280,000 to \$500,000 if claimant has suffered brain damage, spinal cord damage, damage to reproductive system which prevents procreation or damage to cognitive ability which prevents living alone).

302. See, e.g., OKLA. STAT. ANN. tit. 63, § 1-1708.1F(A)(2) (West 2004 & Supp. 2006) (limiting noneconomic damages in cases involving pregnancy to \$300,000).

303. See 1 GHIARDI ET AL., *supra* note 35, §§ 5.01-.03. RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.2, at 90-97 (2005 ed.); DOBBS, *supra* note 3, § 381, at 1062; Owen, *supra* note 35, at 364; *cf.* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 465-66 (1993) (holding that "egregiously tortious conduct" standard "in West Virginia and elsewhere" satisfies due process). There are exceptions to this pattern. For example, the South Carolina Unfair Trade Practice Act allows treble damages, which means actual damages are trebled so that the total award is one-third actual damages and two-thirds punitive damages for negligent violations. See S.C. CODE §§ 39-5-140(a), (d) (1985).

304. See, e.g., *supra* note 35 and accompanying text.

imposed on a wrongdoer may vary in terms of factors other than the amount of injury to a particular victim. For example, deterrence schemes generally increase the punishment imposed on a wrongdoer in terms of the seriousness of wrongdoing, of whether the wrongdoer is a recidivist, of the likelihood of detection, and of the amount of profit from the wrongdoing.<sup>305</sup> Punishment's retributive or corrective function requires that wrongdoers receive their "just deserts."<sup>306</sup> Therefore, inefficient overdeterrence may be tolerated because the negative impact of deterrent sanctions on wrongdoers, particularly very culpable wrongdoers, is treated as less important than the concern for retribution for egregious harm to innocent victims.<sup>307</sup>

Even before the tort reform movement, three states did not allow punitive damages except where authorized by law.<sup>308</sup> In addition, states that permit a punitive award disagree on whether an entity like a

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305. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438-39 (2001) (discussing "optimal deterrence" in terms of harm inflicted and likelihood of detection); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577, 582 (1996) (holding that "a recidivist may be punished more severely than a first offender" and that higher ratios of punitive damages to compensatory damages may "be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (approving Alabama scheme for imposing punitive damages, which included consideration of concerns like "duration of [the] conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct," as well as "profitability" of the conduct); cf., e.g., *Rummel v. Estelle*, 445 U.S. 263, 284 (1980) (recognizing that punishment schemes of increased penalties for recidivists are based on the "propensities [the wrongdoer] has demonstrated over a period of time" and such increased punishment is permissible because, in part, of a desire "to deter repeat offenders"); see also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 791, 844-45 (Edwin A. Burt ed., 1939). Three of the variables relevant to punishment in Bentham's deterrence scheme are: (1) "The greater the mischief of the offense, the greater is the expense, which it may be worthwhile to be at, in the way of punishment"; (2) "Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less"; and (3) The "punishment must not be less than . . . the profit of the offense." *Id.* (emphasis omitted).

306. See, e.g., *Gore*, 517 U.S. at 575 n.24 ("The principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983))); *id.* at 582 (holding that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages").

307. *Cooper Industries, Inc.* notes:

[I]t is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically "optimal deterrence." "[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many."

532 U.S. at 439-40 (quoting Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1450 (1993)).

308. See 1 GHIARDI ET AL., *supra* note 35, §§ 4.07-11 (showing that the states are Louisiana, Massachusetts and Nebraska).

corporation should be liable for punitive damages if no management official engaged in or ratified the egregious conduct,<sup>309</sup> whether punitive damages are insurable,<sup>310</sup> and whether an estate can recover for or be liable for the decedent's egregious conduct.<sup>311</sup>

Under the common law, there is no mathematical or strict monetary limit on the amount of punitive damages.<sup>312</sup> Instead, the award in each case is based on the circumstances involved, and the process of trial and appeal is designed to help insure both that a punitive award is appropriate and that the amount is not excessive. At the trial stage, punitive damages are always stated as a separate item in the verdict.<sup>313</sup> In addition, it is not uncommon to bifurcate the trial into a liability phase and a punitive damages phase so that evidence relevant only to punitive damages will not be considered by the jury when determining liability.<sup>314</sup> Under this approach, the jury determines two issues in the first phase: (1) whether the defendant is liable for compensatory damages and, if so, the amount of those damages; and (2) whether the defendant has been shown to be reckless, willful, or intentional, often by a standard of clear and convincing evidence.<sup>315</sup> If the answer to the second question is "yes," a second phase will be undertaken so that the jury can determine the amount of punitive damages to be awarded.<sup>316</sup> The jury's decision to grant or deny a punitive award and the amount of any award are subject to review by the trial judge, who has the power to affirm the award, reverse the award and require a new trial, or to reduce the award.<sup>317</sup> These decisions by the trial judge are reviewed by the appellate court to insure that the trial judge has not abused his discretion.<sup>318</sup>

In the last fifteen years, the Court has imposed due process limits on punitive awards. In terms of the conduct subject to punitive damages, the Court has adopted a bright-line general rule: No state may impose

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309. See *id.*, *supra* note 35, § 24.05.

310. See *id.*, *supra* note 35, § 7.11; JOHN W. MORRISON, *THE INSURABILITY OF PUNITIVE DAMAGES: COMMENT AND JURISDICTIONAL ANALYSIS* 4 (2d ed. 1986).

311. See 1 GHIARDI ET AL., *supra* note 35, § 9.10.

312. See *infra* note 321.

313. James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 450 (1995).

314. See 1 GHIARDI ET AL., *supra* note 35, §§ 12.01, .05, .13.

315. See *id.* §§ 9.12, 21.13.

316. *Id.* § 12.10.

317. See, e.g., *id.* at §§ 18.01-.10. Technically, the trial judge can grant a *remittitur* reducing the award. This grant gives the parties the choice of either accepting the reduction or appealing the judge's decision. See *supra* notes 265-67 and accompanying text for discussion of *remittitur*.

318. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 445-47 (Ginsburg, J., dissenting) (discussing the fact that the common law tradition was to leave the decision of punitive damages within the province of the jury, and to use an abuse of discretion standard).

punitive damages for conduct that only affects another state.<sup>319</sup> The Court has also addressed limits on the amount of punitive damages. Under guidelines issued by the United States Supreme Court, the trial judge must review the amount of an award of punitive damages to determine if it satisfies due process by considering three factors: the reprehensibility of the defendant's conduct, the ratio of compensatory damages to punitive damages, and the criminal and regulatory sanctions for conduct like that engaged in by defendant.<sup>320</sup> The Supreme Court has stressed that the application of these factors to a punitive damages award varies widely in terms of the facts involved and that, therefore, there are no rigid rules—for example, a rigid formula about the ratio of compensatory damages to punitive damages.<sup>321</sup> On the other hand, the Court has also indicated that the ratio of punitive damages to actual damages is an important variable in reviewing punitive awards and that there is a presumption against very high, three digit ratios.<sup>322</sup> A procedural limit imposed by the Supreme Court is that the trial judge's decision concerning the punitive award will be reviewed de novo by the appellate court—i.e., the appellate court will make its own independent review of the evidence without granting any presumption of validity to the decision by the trial judge.<sup>323</sup>

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319. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996).

320. See, e.g., *Campbell*, 538 U.S. at 418; *Cooper Indus., Inc.*, 532 U.S. at 440; *Gore*, 517 U.S. at 575-85.

321. See, e.g., *Campbell*, 538 U.S. at 425. (“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. . . . [T]here are no rigid benchmarks that a punitive damages award may not surpass . . .”).

322. See, e.g., *id.* at 425-26 (“Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . . [T]here is a presumption against an award that has a 145-to-1 ratio.”); *Gore*, 517 U.S. at 583 (“When the ratio is a breathtaking 500 to 1, . . . the award must surely ‘raise a suspicious judicial eyebrow.’”). It is possible to rebut the presumption. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993), approved a punitive award that was 526 times as large as the actual damages award because of the potential for substantial harm to others (and for gain to defendant) if the defendant’s conduct was not deterred. *Gore*, 517 U.S. at 582, noted:

[L]ow awards of compensatory damages may properly support a higher ratio than compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

323. See *Cooper Indus., Inc.*, 532 U.S. at 431.



### b. Reform Proposals

Studies of verdicts show that punitive awards are uncommon.<sup>324</sup> Though many proponents of "reform" agree that *awards* of punitive damages are relatively rare,<sup>325</sup> they criticize punitive damages on the basis of the impact of the number of *claims* for punitive awards. For example, ATRA argues that reform is necessary for the following reasons:

[T]heir frequency and size have grown greatly in recent years. . . . [and] they are routinely asked for today in civil lawsuits. The difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases.<sup>326</sup>

Depending on one's definition of "routine," there is support for ATRA's assertions because there are data indicating that claims for punitive damages are at least not exceptional.<sup>327</sup> Though there is some

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324. See, e.g., TRIALS AND VERDICTS, *supra* note 23, at 7; Denise E. Antolini, *Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001*, 20 J.L. & POL. 143, 207-08, 216 (2004) (presenting data to show Hawaii awarded punitive damages in slightly greater than five percent of all damages judgments); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 387-88 (1999) (discussing data from urban county in Ohio indicating no punitive awards in medical malpractice or products liability and that "[p]unitive damages were much more common in business disputes"); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 19-20, 69; Eaton et al., *supra* note 24, at 1094 (citing studies showing low percentages and moderate amounts of punitive awards).

325. For example, ATRA agrees that "punitive damages awards are infrequent . . ." ATRA: Punitive Damages Reform, <http://www.atra.org> (follow "Issues" hyperlink then follow "Punitive Damages Reform" hyperlink) (last visited Jan. 23, 2007) [hereinafter Punitive Damages Reform].

326. *Id.*, see also TORT REFORM RECORD, *supra* note 215, at 17.

327. See, e.g., Antolini, *supra* note 324, at 222; Eaton et al., *supra* note 24, at 1094. Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 181-82. Antolini, *supra* note 324, at 222, reviewed Hawaiian verdict data and summarized the data on claiming of punitive damages as follows:

Of the three Hawaii systems, the federal court experienced the highest mean annual request rate for punitive damages—43.52%, slightly higher than the annual mean of 37.14% for state courts, and three times higher than the CAAP ["Court Annexed Arbitration Program" for smaller-value cases] annual mean of 15.47%. In short, punitive damages claims are most often requested in the high-value federal court cases in Hawaii, "often requested" (*i.e.* about one-third of the time) in Hawaii state courts, and not very often sought in the lower-value CAAP cases. Thus, characterizing the tendency to request punitives as either "routine" or as "exceptional" would exaggerate the data. The best overall characterization is that punitive damages are "moderately often" requested in Hawaii.

Eaton et al., *supra* note 24, at 1094, note that "[p]laintiffs sought punitive damages in 3763 of the

support for ATRA's assertion that awards of punitive damages are difficult to predict, there are also data indicating considerable predictability.<sup>328</sup>

In order to address these alleged problems with punitive damages, several changes have been proposed.<sup>329</sup> First, ATRA argues that a strict standard of "actual malice" by the defendant should be imposed as a requirement for any punitive award; however, this term is not defined by ATRA.<sup>330</sup> Apparently, the tort reform movement would prefer a standard requiring an intent to cause harm to the specific victim or personal ill will toward the specific victim.<sup>331</sup> Second, the plaintiff should be required to show the egregious conduct by clear and convincing evidence.<sup>332</sup> Third, there should be proportionality so that the punishment fits the offense.<sup>333</sup> Fourth, federal legislation should be adopted to address the problem of multiple punitive awards by different states.<sup>334</sup>

Other aspects of punitive damages have been criticized and, to some extent, addressed by traditional tort reform.<sup>335</sup> For example, because compensatory damages are designed to make the plaintiff whole again by restoring the plaintiff to status quo ante,<sup>336</sup> punitive awards have been criticized by traditional reformers as constituting a financial windfall to plaintiffs.<sup>337</sup> One approach to address this windfall is to impose a scheme whereby part of the award is shared with the state so that it becomes more like a fine.<sup>338</sup> Generally, these schemes seek to

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tort claims filed . . . but obtained punitive damages awards in only fifteen cases."

328. Thomas A. Eaton, David B. Mustard & Susette M. Talarico, *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. LEGAL STUD. 343, 347-48 (2005) (reviewing arguments and studies).

329. *See* Punitive Damages Reform, *supra* note 325.

330. *See id.*

331. *See, e.g.*, N.C. GEN. STAT. § 1D-5(5) (2005) (defining "malice" as "personal ill will toward the claimant"). The statute also allows recovery of punitive damages if the defendant engages in fraud or in willful or wanton conduct. *Id.* § 1D-15(a).

332. Punitive Damages Reform, *supra* note 325.

333. *Id.*

334. *Id.*

335. *See, e.g.*, GHIARDI ET AL., *supra* note 35, §§ 21.01-21.22; OWEN, *supra* note 111, § 18.1, at 1124-27 (discussing history of criticism); Owen, *supra* note 35, at 382-413 (discussing criticisms and proposed reforms).

336. *See supra* note 7 and accompanying text.

337. *See, e.g.*, Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 145 (Ohio 2002); Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1345-51 (2000); Todd M. Johnson, Comment, *A Second Chance: A Proposal to Amend Missouri's Tort Victims' Compensation Fund*, 67 UMKC L. REV. 637, 647-49 (1999); Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 865 (1994).

338. *See, e.g.*, Dardinger, 781 N.E.2d at 145; Janie L. Shores, *A Suggestion for Limited Tort*

provide enough return to the plaintiff so that plaintiffs—and their attorneys, who are paid on a contingency fee basis—will have an adequate incentive to act as “private attorneys general.”<sup>339</sup> Because this approach allows high punitive awards and has a minimal impact on the incentives of plaintiffs, it has not often been urged by the tort reform movement. For example, the ATRA website does not advocate this change.

Critics of “reform” challenge the need for changing the law concerning punitive damages.<sup>340</sup> For example, some argue that the proponents’ claims that punitive awards have “distorted settlement” or have “led to wildly inconsistent outcomes” are speculative and conclusory.<sup>341</sup> Instead, given the variation among cases, awards will vary; and, this variation is not necessarily inconsistent, particularly in light of the procedural scheme for reviewing punitive awards.<sup>342</sup> The impact of potential punitive damages verdicts on settlement negotiations will be the same as the impact of a potential compensatory verdict—i.e., both sides will consider the likelihood and possible amount of the potential verdict of punitive damages in settlement negotiations. However, such consideration is not a “distortion,” regardless of whether punitive damages or compensatory damages are involved, because rational settlements should be based on the likely outcomes of litigation.<sup>343</sup> For example, even if punitive damages are “routinely asked

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*Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 93 (1992); Dodson, *supra* note 337, at 1345.

339. See *infra* notes 374-79 and accompanying text. For a discussion of using punitive damages to assist law enforcement, see Owen, *supra* note 35, at 380-81.

340. See, e.g., Lori Woodward O’Connell, *The Case for Continuing to Award Punitive Damages*, 36 TORT & INS. L.J. 873, 874 (2001); Koenig, *supra* note 327, at 170.

341. Compare Punitive Damages Reform, *supra* note 325, with Eaton, Mustard & Talarico, *supra* note 328, at 343, 347-49, 365 (reviewing studies, noting lack of empirical research, and concluding that “there is little systemic evidence that the threat of punitive damages casts a large shadow” on settlement negotiations). See also Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 5-14; Steven Garber, *Products Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250; Koenig, *supra* note 327, at 170; Rustad, *supra* note 324, at 31, 56, 65.

342. See, e.g., Eaton, Mustard & Talarico, *supra* note 328, at 347-48, 365-66 (reviewing studies showing predictability of punitive awards and noting that their study of Georgia verdicts indicated that “punitive damages were awarded in a higher percentage of Georgia bench trials than jury trials”); Koenig, *supra* note 327, at 207. But see generally Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEG. STUD. 1 (2004) (arguing that juries award punitive damages more often than judges, award higher levels, and award punitive damages with less relationship to punitive awards). Comparisons of judges and juries may be unreliable because of choices made in choosing to forego the right to jury trial. See Joni Hersch, *Demand for a Jury Trial and the Selection of Cases for Trial*, 35 J. LEG. STUD. 119, 140 (2006).

343. See Eaton, Mustard & Talarico, *supra* note 328, at 366 (concluding that “a claim for uncapped punitive damages impedes rather than coerces settlement” because trials where uncapped

for” as ATRA claims, a rational defense attorney would discount this request for punitive damages by reference to the fact that punitive awards are rare.<sup>344</sup> Finally, given the uncertainty as to what constitutes optimal deterrence, the concern for retribution indicates that erring in favor of some overdeterrence is a good approach.<sup>345</sup>

Opponents also argue that the current system satisfies the concerns of the reform movement. Virtually all states now require egregious conduct.<sup>346</sup> Adopting a more specific standard that focuses on the specific victim would allow wrongdoers who intentionally or recklessly endanger “statistical victims” to avoid punitive damages—for example, using fraudulent schemes that will result in substantial harm to only a portion of users. Similarly, though change in some states may be needed, proof by clear and convincing evidence is widely used as the standard.<sup>347</sup> As to the need for federal legislation to address multiple awards by different states, there is no such need because the Supreme Court has clearly barred any state from imposing punitive damages for conduct that only affects another state.<sup>348</sup>

#### c. Impact of “Tort Reform” on Doctrine

Though various statutory provisions concerning punitive damages have been adopted, it is hard to determine the impact of the reform movement for two reasons. First, because some proposals are supported by both the “tort reform” movement and by the traditional rational approach to reform, it is sometimes difficult to determine the basis for adopting a specific doctrine. Second, at other times, it is hard to determine whether a change in the common law, as opposed to a codification of the common law, has been proposed or adopted. In any event, the statutes have addressed punitive damages in several different ways.

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punitive damages were involved were more common than trials where a cap was involved); Koenig, *supra* note 327, at 208, 209. For a discussion on the policy implications of punitive damage caps, see generally Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 323-39 (1991).

344. See *supra* notes 324-26 and accompanying text. It may be that the reform movement has allowed its rhetoric to distort its understanding of the facts and thus gives too high a premium to the risk of punitive damages. See, e.g., Galanter, *supra* note 162, at 751-52 (pointing out the risk that a person who uses a deliberately misleading story may eventually be “persuaded by his own story”); Garber, *supra* note 341, at 283 (“[C]ompany decisionmakers are likely to substantially overestimate the frequency and magnitudes of punitive damages awards in automobile product liability cases.”).

345. See *supra* note 307 and accompanying text.

346. See *supra* note 303 and accompanying text. *But see supra* note 303 (discussing the right to treble damages for negligent violations of a statutory scheme barring unfair trade practices).

347. See *supra* note 315 and accompanying text.

348. See *supra* note 318 and accompanying text.

First, though some statutes adopt a specific standard of liability for imposing punitive damages, the legislation often simply restates the common law standard of reckless, intentional, or malicious injury in different words.<sup>349</sup> Other statutes vary the common law standard by requiring personal ill will or intentional harmful conduct directed toward the plaintiff.<sup>350</sup> Given the questionable effect of such provisions in terms of conduct threatening only statistical victims,<sup>351</sup> as in the case of marketing a drug known to be dangerous, this type of statute would appear to be the result of the movement's efforts.

Second, "reform" statutes frequently contain procedural provisions that either do not change the common law or merely change it slightly. More specifically, a statute may do things like the following: (1) impose a burden of proof requiring a standard of clear and convincing evidence as to the required degree of culpability or the amount of punitive damages<sup>352</sup> or, as in a few states, impose a burden of proof beyond a reasonable doubt to show the requisite culpability<sup>353</sup> or to provide a basis for satisfying a scheme for avoiding a cap on the amount of punitive damages;<sup>354</sup> (2) require bifurcation of the compensatory damages and punitive damages phases of trial in all cases,<sup>355</sup> or at the request of a party;<sup>356</sup> and (3) structure the imposition of punitive damages by addressing the charge to the jury<sup>357</sup> and the review of a punitive award by the trial judge<sup>358</sup> and appellate courts.<sup>359</sup>

Third, various statutory schemes have been adopted to limit the amount of punitive damages, either in terms of a fixed limit,<sup>360</sup> or of a variable limit based on a specific factor or list of factors. Where a variable limit is imposed, it can vary in terms of factors like the

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349. See, e.g., IDAHO CODE ANN. § 6-1604 (2004) (providing that a plaintiff must prove "oppressive, fraudulent, malicious or outrageous conduct").

350. See, e.g., N.C. GEN. STAT. § 1D-5(5) (2005). The statute also permits recovery of punitive damages if the defendant engages in fraud or in willful or wanton conduct. *Id.* at § 1D-15(a).

351. See *supra* notes 346-48 and accompanying text.

352. See, e.g., IDAHO CODE ANN. § 6-1604 (2004) (requiring that culpability be proved by clear and convincing evidence).

353. See, e.g., COLO. REV. STAT. ANN. § 13-25-127 (West 2005).

354. See, e.g., OKLA. STAT. ANN. tit. 23, § 9.1(D)(2) (West 1987 & Supp. 2006).

355. See, e.g., ALASKA STAT. § 09.17.020(a) (2004).

356. See, e.g., ARK. CODE ANN. § 16-55-211(a)(1) (2005); OHIO REV. CODE ANN. § 2315.21(B) (LexisNexis 2005).

357. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a) (Vernon 1997).

358. See, e.g., ALA. CODE § 6-11-23(b) (2005).

359. See, e.g., ARK. CODE ANN. § 16-55-210 (2005).

360. See, e.g., COLO. REV. STAT. ANN. § 13-21-102.5(3)(a) (West 2005) (limiting punitive damages to \$250,000, unless the court finds justification by clear and convincing evidence to support a higher amount; in no case to exceed \$500,000); IND. CODE ANN. § 34-51-3-4 (West 1999) (limited to the greater of three times compensatory damages or \$50,000).

following: (1) a fixed multiple of compensatory damages;<sup>361</sup> (2) the lesser or greater of a fixed amount or a variable amount—for example, the lesser or greater of (A) a multiple of compensatory or (B) a percentage of the wealth or income of the defendant or profitability of the misconduct;<sup>362</sup> (3) different types of defendants—for example, differing treatment for small businesses or for defendants based on their net worths;<sup>363</sup> (4) different types of injuries (e.g., wrongful death) or claims (e.g., products liability);<sup>364</sup> and (5) different types of misconduct—for example, crime or conduct motivated by financial gain where adverse consequences are known.<sup>365</sup> Where limits are imposed, there may be exclusions from the limits—for example, there might be no limit in cases involving intoxication by the defendant,<sup>366</sup> conviction of a felony which caused the injury,<sup>367</sup> wrongful death,<sup>368</sup> or a product liability claim.<sup>369</sup>

Fourth, some statutes bar punitive awards for certain situations. Such statutes, for example, prohibit punitive awards if: (1) the defendant is a governmental entity;<sup>370</sup> (2) the defendant complied with regulatory or government standards;<sup>371</sup> (3) the defendant was of unsound mind;<sup>372</sup> or (4) punitive damages for the same conduct have already been imposed by a court unless the prior award is “insufficient” in amount, in which case the prior award will be subtracted from the total.<sup>373</sup>

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361. *See, e.g.*, 40 PA. CONS. STAT. ANN. § 1303.505(d) (West 1999 & Supp. 2006) (double compensatory damages).

362. *See, e.g.*, KAN. STAT. ANN. § 60-3702(e)-(f) (Supp. 2006) (cap of lesser of defendant’s maximum annual income for any one of the past five years or \$5,000,000; or where the defendant realizes or will realize a profit, up to one and a half times that profit).

363. *See, e.g.*, MONT. CODE ANN. § 27-1-220(3) (2005) (lesser of \$10,000,000 or three percent of defendant’s net worth); OHIO REV. CODE ANN. § 2315.21(D)(2) (LexisNexis 2005) (two times compensatory or if “defendant is a small employer or individual,” the lesser of two times compensatory or ten percent of net worth, up to \$350,000).

364. *See, e.g.*, ALA. CODE § 6-11-29 (2005) (wrongful death actions are exempt from cap); GA. CODE ANN. § 51-12-5.1(e)(1) (2000) (cap not applicable to products liability cases).

365. *See, e.g.*, FLA. STAT. ANN. § 768.73 (West 2005) (noting that “[w]here . . . the wrongful conduct . . . was motivated solely by unreasonable financial gain and . . . the unreasonably dangerous nature of the conduct, . . . [and] the high likelihood of injury . . . was actually known by the [defendant],” punitive damages shall not exceed the greater of four times the damages awarded each claimant or two million dollars).

366. *See, e.g.*, MISS. CODE ANN. § 11-1-65(3)(d)(ii) (West Supp. 2005).

367. *Id.* § 11-1-65(3)(d)(i).

368. *See, e.g.*, ALA. CODE § 6-11-29 (2005).

369. *See, e.g.*, GA. CODE ANN. § 51-12-5.1(e)(1) (2000).

370. *See, e.g.*, S.C. CODE ANN. § 15-78-120(b) (2005) (included as part of state’s Tort Claims Act).

371. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-2107 (West 2003).

372. *See, e.g.*, S.D. CODIFIED LAWS § 20-11A-5 (1994).

373. *See, e.g.*, FLA. STAT. ANN. § 768.73(2)(b) (West 2005).

Fifth, some statutes provide that a punitive damage award will be shared with the government.<sup>374</sup> These statutes vary in terms of such factors as the following: (1) the amount to be shared;<sup>375</sup> (2) the use of the governmental share;<sup>376</sup> (3) exceptions to sharing with the government (e.g., no sharing where the wrongful act was specifically directed at the plaintiff);<sup>377</sup> and (4) the calculation of the plaintiff's attorney's contingency fee in terms of the plaintiff's share or of the total award.<sup>378</sup> This reform approach has even been adopted by the Ohio Supreme Court which, acting on its inherent common law powers: (1) held that a case-by-case consideration of sharing punitive damages with the public was appropriate, and (2) awarded a portion of a \$30 million punitive award to a cancer institute at Ohio State University.<sup>379</sup>

### 5. Frivolous Claims

There is universal agreement that frivolous claims, whether presented by a plaintiff or a defendant, are undesirable. Consequently, all jurisdictions use motions to dismiss and motions for summary judgment to eliminate claims that should not go to the jury. In addition, states have a wide range of schemes for sanctioning frivolous claims. These schemes include the following: (1) common law claims, such as tort claims for malicious civil prosecution<sup>380</sup> or for abuse of process;<sup>381</sup> (2) procedural rules like Rule 11 (sanctions for improper, unwarranted, or unsupported claims) and Rule 37 (sanctions for noncooperation in discovery) under the Federal Rules of Civil Procedure; (3) "frivolous proceeding" statutes;<sup>382</sup> (4) disciplinary rules for lawyers who file frivolous claims,<sup>383</sup> and (5) the explicit and inherent disciplinary powers of courts.<sup>384</sup>

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374. See, e.g., Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity as a Tool of Modern Day "Tort Reform"*, 50 DRAKE L. REV. 593, 595 (2002).

375. See, e.g., GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (seventy-five percent of punitive award less reasonable costs of litigation, including attorney's fees remitted to the state).

376. See, e.g., IND. CODE ANN. § 34-51-3-6(b) (West 1999) (seventy-five percent of punitive award to the state's violent crime victims compensation fund).

377. See, e.g., IOWA CODE ANN. § 668A.1 (West 1998) (awarding plaintiff the full amount of punitive damages where "the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived").

378. See, e.g., 735 ILL. COMP. STAT. ANN. § 5/2-1207 (West 2003) (judicial discretion to apportion punitive award, including determination of attorney's fees).

379. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145-46 (Ohio 2002).

380. See DOBBS, *supra* note 3, §§ 436-37, at 1228-34.

381. *Id.* § 438, at 1234-40.

382. See, e.g., HAW. REV. STAT. ANN. § 607-14.5 (LexisNexis 2002); S.C. CODE ANN. § 15-36-10(A)(1)(d) (Supp. 2005).

383. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006).

384. See, e.g., *Chewing v. Ford Motor Co.*, 579 S.E.2d 605, 611 (S.C. 2003) (fraud upon the

Despite these schemes, the tort reform movement constantly asserts that frivolous claims are an important widespread problem in that there are “too many” frivolous lawsuits. Opponents disagree with this assertion, and this disagreement involves such subissues as: What does “frivolous” mean? How common are frivolous claims? Given the current limits on frivolous claims and that addressing frivolous claims by more draconian measures, like mandatory severe sanctions, can be counterproductive in the sense that the costs—both in terms of the time and resources to apply such measures and of possible reduction in access to the courts—will exceed the benefits? How many are too many?<sup>385</sup>

Opponents also note that data on claims indicate that because many potential tort claims are not filed, there may be more of a problem with underclaiming than overclaiming.<sup>386</sup> Generally, the tort reform movement ignores data and specific issues and simply repeats its litany of anecdotal “horror stories” and its refrain that there is too much frivolous litigation. Moreover, the tort reform movement has virtually no proposal specifically designed to reduce frivolous lawsuits. ATRA’s “Issue Pages” do not have a separate listing of this as an issue<sup>387</sup> and its Tort Reform Record does not address doctrinal changes directed at reducing frivolous litigation.<sup>388</sup> To the extent that changes that might address frivolous litigation are proposed by the tort reform movement, the proposals take three forms. First, limitations on the right to sue in tort and on the amount of damages in tort can arguably be viewed in part as measures to reduce the incentive to bring frivolous litigation. Second, there are proposals to make relatively minor changes in the existing limits on frivolous litigation. These proposals include imposing inflexible mandatory penalties on frivolous actions regardless of possible procedural inefficiency,<sup>389</sup> and imposing an “objective” standard for misconduct in the form of whether a “reasonable attorney” would know of a lack of facts or of a legal basis for a claim, rather than a

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court); *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 793-94 (S.C. Ct. App. 1998) (civil compensatory contempt).

385. See, e.g., ATLA Press Room, ‘Frivolous’ Lawsuit News, <http://www.atla.org/pressroom/facts/frivolous/index.aspx> (last visited Jan. 20, 2007) (summarizing ATLA position and listing studies (with links) supporting position).

386. See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448-50 (1987). For more discussion of underclaiming, see *supra* Part II.B.2.

387. See ATRA: Issue Pages, *supra* note 214.

388. See TORT REFORM RECORD, *supra* note 215, at 1-3.

389. See, e.g., H.R. 420, 109th Cong. §§ 2-3, 6-8 (2005) (amending Rule 11 of the Federal Rules of Civil Procedure to eliminate “safe harbor” provision that allows a litigant to withdraw a frivolous claim without sanctions, requiring state courts to apply this amended version if the “action substantially affects interstate commerce,” imposing a “three strikes” rule for suspending an attorney, and adopting other sanctioning measures).



good faith standard based on a subjective belief in a factual or legal basis for a claim. At least one state has adopted such a reasonable attorney standard.<sup>390</sup> Third, pretrial screening mechanisms have been proposed and some of these have been adopted, particularly for medical malpractice claims.<sup>391</sup>

## 6. Contingency Fees

Contingency fees are generally viewed as ethical<sup>392</sup> and as a workable method of providing victims with access to the courts.<sup>393</sup> However, the dollar amount of a contingency fee based on 30-40% of a multimillion dollar settlement or verdict can be very large, and the system has been the subject of considerable debate.<sup>394</sup> Such high fees are often attacked as unfairly excessive on the basis of one or both of the following arguments: (1) they take too much money from the victim; and (2) such large fees provide too much incentive for plaintiffs' attorneys to bring suit, particularly in situations where the suit becomes financially feasible because the large amount of possible recovery provides a reason to bring a suit with such a low probability of recovery that the suit is, to some, questionable or frivolous.<sup>395</sup> Opponents reply to these attacks by noting the access provided by the contingency fee system and by pointing to evidence showing that plaintiffs' lawyers have an hourly fee that is comparable with that of other professionals.<sup>396</sup> In

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390. S.C. CODE ANN. §§ 15-36-10(A)(3)(b)-(d), -10(A)(4)(a)(ii)-(iv) (Supp. 2005).

391. See *infra* notes 457-66 and accompanying text.

392. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(a)-(c) (2006).

393. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. b (2000); see also 2 ALL, ENTERPRISE RESPONSIBILITY, *supra* note 1, at 273-75; 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 8-27 to -28 (3d ed. Supp. 2003) ("In particular, contingent fees . . . can provide access to the courts by persons with possibly meritorious claims who would not otherwise be able to litigate."); Drew C. Phillips, *Contingency Fees: Rules and Ethical Guidelines*, 11 GEO. J. LEGAL ETHICS 233, 233, 234 (1998); *infra* note 396 and accompanying text.

394. See, e.g., Symposium, *Contingency Fee Financing of Litigation in America*, 47 DEPAUL L. REV. 227 (1998).

395. See, e.g., Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 282 (1996); Michael Horowitz, Essay, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, 182 (1995); Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT'L L.J. 755, 761-63 (1992); ATRA: Contingent Fee Reform, <http://www.atra.org/issues/index.php?issue=7354> (last visited Mar. 14, 2007) (supporting legislation to limit use of contingency fee "where a legitimate risk of non-recovery exists" and to require an hourly fee where there is "no legitimate risk of non-recovery"); ATRA: Medical Liability Reform, *supra* note 270 (arguing for "a sliding scale for attorney's contingent fees").

396. See, e.g., Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 LAW & CONTEMP. PROBS. 175, 186-87 (2001); Vidmar, *supra* note 60, at 1233; cf., e.g.,

addition, the contingency fee system forces plaintiffs' attorneys to act as gatekeepers because they have no incentive to bring a suit with so little chance of success that it is not likely to be worth the attorney's costs.<sup>397</sup>

Currently, attorneys' fees are limited in all states by rules of professional conduct that prohibit lawyers from charging unreasonable fees.<sup>398</sup> Some states have imposed additional statutory limitations on contingency fees. The limit is usually in the form of a sliding scale in which the fee percentage decreases as the amount of the recovery increases. Of the states with limits, at least six states have general limits on contingency fees in personal injury or wrongful death actions,<sup>399</sup> and at least nine states have limits for medical malpractice only.<sup>400</sup>

### 7. Products Liability

Increases in liability insurance costs for sellers of products have played a major role in the push for "tort reform" since the 1970s.<sup>401</sup> However, only a few proposals have been aimed exclusively at product-caused injuries. One reason for this lack is that some general reforms have been a particular concern of product manufacturers, particularly punitive damages "reform" and the elimination of the doctrine of joint and several liability. Eliminating joint and several liability has been important to manufacturers because it could reduce the liability of product manufacturers and other sellers where third party wrongdoers are also involved. For example, in a "crashworthiness" case, the manufacturer might be liable for using inadequate design features to protect the driver in case of a crash. In such a case, eliminating joint and several liability could mean the manufacturer's share would be less in relation to the share of a drunken driver who went through a stop sign and collided with the car driven by the plaintiff.<sup>402</sup> Another reason for

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Daniels & Martin, *supra* note 58, at 1795 (reporting plaintiff's lawyer's perception that contingency fee practice was unstable, difficult and contracting).

397. *See supra* notes 58-60 and accompanying text.

398. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2006) (explicitly approving contingency fees subject to requirements such as "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee").

399. CONN. GEN. STAT. ANN. § 52-251c (West 2005); MASS. GEN. LAWS ANN. ch. 231, § 60I (West 2000); OKLA. STAT. ANN. tit. 5, § 7 (West 2001); MICH. CT. R. 8.121(A)-(D) (2004); N.J. R. CT. 1:21-7(c) (2006 & Supp.); WYO. CT. R. ANN., R. COVERING CONTINGENT FEES 5 (2003).

400. FLA. CONST. art I, § 26; CAL. BUS. & PROF. CODE § 6146 (West 2003); DEL. CODE ANN. tit. 18, § 6865 (West 2006); 735 ILL. COMP. STAT. ANN. 5/2-1114 (West 2003); IND. CODE ANN. § 34-18-18-1 (LexisNexis 2006); ME. REV. STAT. ANN. tit. 24, § 2961 (2000); N.Y. JUD. LAW § 474-a (McKinney 2005); TENN. CODE ANN. § 29-26-120 (2000); WIS. STAT. ANN. § 655.013 (West 2004).

401. *See supra* notes 143-45 and accompanying text.

402. The text uses the phrase "could mean the manufacturer's share would be less" because some schemes would reallocate the share of the driver among all the wrongdoers if the driver's

the lack of specific proposals is that, as the common law in this area has proceeded on the basis of the traditional model, the general development has been consistent with the concerns of the defense position. More specifically, at one time it appeared that "liability without fault" might become the law concerning liability for product-caused injury.<sup>403</sup> However, doctrinal developments in the last two decades have reaffirmed that, with only a few exceptions, fault is required in most states.<sup>404</sup> Thus, though a need to "reform strict products liability" is sometimes given as a reason for reform,<sup>405</sup> there is little need for reform of a doctrine that is not widely used.

One proposed product-focused "reform" has been the adoption of a statutory scheme providing that compliance with government regulations should raise at least a rebuttable presumption that the product is not defective and should bar the awarding of punitive damages.<sup>406</sup> Several states have adopted such a presumption.<sup>407</sup>

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share is uncollectible and some states use a threshold scheme. *See supra* notes 253, 255-56 and accompanying text. With such schemes, the manufacturer's share might be less.

403. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402(A) (1965) (amended 1998); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 512-13 (1985).

404. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 522-27, 530-32 (1990) (identifying the trend in products liability toward an increasing percentage of opinions in favor of defendants and toward a decreasing success of plaintiffs at trial); Rabin, *supra* note 52, at 1204-08. Under the Restatement's approach, liability without fault is only imposed in two situations: (1) where a "manufacturing defect," caused by a departure of the product as manufactured from "its intended design," is involved; and (2) where a "seller," such as a retailer, is held liable for an injury caused by a product defect even though the seller had no role in manufacturing or designing the product or in deciding about warnings. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a), (c) (1998). A few jurisdictions still impose strict liability on sellers of products in some other situations. *See, e.g.*, James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958, 967-73 (2002) (observing that courts impose strict liability in "abnormally dangerous activities" and legislatures impose strict liability with worker's compensation); Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 891 (2005). Analysis of the law in this area is complicated because, for example, some consumers' expectations tests (which can be "strict liability" standards) have the effect of imposing less liability than negligence. *See, e.g.*, OWEN, *supra* note 111, § 8.3, at 489. In addition, courts often speak in terms of a consumer expectation test of liability, but apply a negligence type cost-benefit analysis. *See, e.g.*, Kysar, *supra* note 67, at 1726-46.

405. *See, e.g.*, Priest, *supra* note 1, at 1535-36.

406. For discussions of such proposals, see, for example, Owen, *supra* note 35, at 412 (arguing that, at most, there should be a presumption against punitive awards); Ashley W. Warren, *Compliance with Governmental Regulatory Standards: Is It Enough to Immunize a Defendant from Tort Liability?*, 49 BAYLOR L. REV. 763, 766, 772 (1997) (arguing that "compliance generally should be merely evidence of, and at the most a rebuttable presumption of, nonnegligence"); *supra* note 371 and accompanying text.

407. *See* MICH. COMP. LAWS ANN. § 600.2946 (West 2000) (drug manufacture and sales); N.J.

The primary area of state legislative “reform” focusing on products themselves has been in the area of statutes of repose, which bar any suit for injury caused by a product defect after a set time period from the sale of the product.<sup>408</sup> For example, this approach to time limits on the right to sue is urged on the website of the National Association of Manufacturers.<sup>409</sup> The reasons given for adopting a statute of repose include the problems of proof after the passage of time, the need for certainty about potential liability after a period of time, and the increasing potential for problems of misuse and alteration as a product ages.<sup>410</sup> To a considerable extent, these concerns are addressed by common law doctrine recognizing the relevance of a product’s age<sup>411</sup> and by statutes of limitation, which bar a suit unless it is brought within a time period (for example, three years) from the time the plaintiff knew or should have known of a tort claim. The arguments against statutes of repose, as opposed to statutes of limitations, include the inflexibility of a set period of time for all products and the unfairness of cutting off liability before a victim knows of the claim, could reasonably know of the claim, or has even been injured.<sup>412</sup>

In response to the arguments in favor of reform and to address concerns of a “crisis” in products liability, Congress enacted legislation limiting the time within which certain aircraft claims may be brought.<sup>413</sup> Similarly, a number of states have adopted one of three types of time

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STAT. ANN. § 2A:58C-4 (West 2000) (drug, food and device warning or instruction); N.D. CENT. CODE § 28-01.4-02 (2006) (aviation products liability); OH. REV. CODE ANN. § 2307.76 (LexisNexis 2005) (“ethical drug”); UTAH CODE ANN. § 78-15-6 (2002) (general compliance with government standards).

408. See, e.g., FRUMER & FRIEDMAN, *supra* note 143, § 26.05[1], [3]. It has also been argued that Congress should act so that uniformity in products liability law can be achieved. See, e.g., Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 12-15 (1997) (reviewing arguments and taking a skeptical position on the need for federal legislation); Schwartz, *supra* note 161 (reviewing proposals for federal legislation, discussing problems from lack of uniformity, and noting problems with federal legislation); Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 267-70 (2000) (arguing for federal legislation).

409. NAM: Legal Reform Agenda, [http://www.nam.org/s\\_nam/doc1.asp?CID=202331&DID=234995](http://www.nam.org/s_nam/doc1.asp?CID=202331&DID=234995) (last visited Jan. 22, 2007). NAM also supports a misuse or alteration “defense” that would reduce a plaintiff’s recovery. *Id.* However, this doctrinal approach is already generally followed. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 (1998).

410. See, e.g., FRUMER & FRIEDMAN, *supra* note 143, § 26.05[1].

411. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. d (1998) (stating that “age of the product” is relevant to defect); Charles E. Cantu, *The Useful Life Defense: Embracing the Idea That All Products Eventually Grow Old and Die*, 80 NEB. L. REV. 1 (2001).

412. See, e.g., FRUMER & FRIEDMAN, *supra* note 143, § 26.05[1].

413. See General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552, 1553 (1994) (codified at 49 U.S.C. § 40101 note (2000)); *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1109 (9th Cir. 2002).

limitations (in addition to a traditional statute of limitations) on products claims: (1) a time-specific statute of repose; (2) a more flexible "useful life" of the product scheme; or (3) a hybrid of (1) and (2). In terms of time-specific statutes, about ten states have such a statute of repose for products liability actions.<sup>414</sup> Some states have adopted a time-specific statute of repose that was subsequently held to be unconstitutional.<sup>415</sup> In states with a valid time-specific statute of repose, the time period for these statutes varies from five to fifteen years.<sup>416</sup> There are also other variations among the states. For example, one part of Colorado's scheme utilizes a rebuttable presumption that, ten years after the first sale for use or consumption of a product, the product was not defective and the manufacturer was not negligent.<sup>417</sup> Nebraska's statute of repose is triggered at the date of first sale or lease for use of products made in Nebraska; if the particular product is not manufactured in Nebraska, the repose period is that of the state of manufacture unless that state has no statute of repose, in which case the Nebraska ten-year repose period is applicable.<sup>418</sup> The states vary in terms of exceptions to the statute of repose. For example, some have exceptions for express warranties for other periods,<sup>419</sup> and for intentional, willful, fraudulent, reckless, or grossly negligent conduct.<sup>420</sup> There are also various other exclusions for certain products—for example, asbestos<sup>421</sup> and breast implants.<sup>422</sup>

Some states have also adopted useful life statutes to address the possibly long period of use of products.<sup>423</sup> Useful safe life statutes differ from statutes of repose in that, instead of providing a specific time

414. See, e.g., COLO. REV. STAT. ANN. § 13-21-403(3) (West 2005) (presumption that product not defective ten years after sale); *id.* § 13-80-107 (seven years for new manufacturing equipment); GA. CODE ANN. § 51-1-11(b)(2) (2000) (ten years); IND. CODE ANN. § 34-20-3-1 (West 1999) (ten years); IOWA CODE ANN. § 614.1(2A) (West Supp. 2006) (fifteen years); KY. REV. STAT. ANN. § 411.310(1) (LexisNexis 2005) (five years); NEB. REV. STAT. ANN. § 25-224 (LexisNexis 2004) (ten years); N.C. GEN. STAT. § 1-50(a)(6) (2005) (six years); OHIO REV. CODE ANN. § 2125.02(D)(2) (LexisNexis Supp. 2006) (ten for wrongful death relating to product defect); OR. REV. STAT. § 30.905(1) (2005) (eight years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (Vernon Supp. 2006) (fifteen years).

415. See, e.g., *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1004 (Ala. 1982); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 296 (N.H. 1983); *Dickie v. Farmers Union Oil Co.*, 611 N.W.2d 168 (N.D. 2000).

416. See *supra* note 414.

417. COLO. REV. STAT. ANN. § 13-21-403(3) (West 2005).

418. NEB. REV. STAT. ANN. § 25-224(2)(a) (LexisNexis 2004).

419. See, e.g., IDAHO CODE ANN. § 6-1403(2)(b)(1) (Supp. 2006).

420. See, e.g., CONN. GEN. STAT. ANN. § 52-577a(d) (West 2005).

421. See, e.g., *id.* § 52-577a(e) (West 2005).

422. See, e.g., OR. REV. STAT. § 30-908(2) (2005).

423. See, e.g., Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689 *passim*. The concept of useful life is arguably a part of the common law as well. See *supra* note 411, 414 and accompanying text.

period in which the plaintiff must bring his suit, these statutes employ a rebuttable presumption that, if a product has been used beyond the term of the statutorily defined useful life, the defendant is not negligent or the product is not defective. Six states have adopted a useful life statute, but these statutes vary enormously.<sup>424</sup> The statutes in Idaho and Kansas do two things: (1) state that a product seller who proves by a preponderance of the evidence that the product's useful safe life had expired is not liable for harm caused by the product; and (2) establish a presumption, rebuttable by clear and convincing evidence, that ten years is the useful safe life of a product.<sup>425</sup> Washington's statute is similar, except the presumption of useful safe life arises at twelve years and can be rebutted by a preponderance of the evidence.<sup>426</sup> In Minnesota, the length of the useful life of a product is not defined; instead, it is determined by the experiences regarding similar products, taking into account the factors listed in the statute.<sup>427</sup> Michigan's statute provides that a plaintiff does not get the benefit of any presumptions if the product has been in use for more than ten years.<sup>428</sup> Florida employs a complex scheme prescribing different useful lives for various products.<sup>429</sup>

Two states have products liability statutes of repose that combine the approaches of both time-certain statutes and useful safe life statutes. In Tennessee, a plaintiff has the shorter of one year after the expiration of a product's anticipated life or ten years from its purchase to bring suit.<sup>430</sup> Connecticut's hybrid statute provides that products liability actions must be brought within ten years from the date the defendant parted with possession or control of the product; however, this time-certain limitation is inapplicable in all actions except workers' compensation actions if the plaintiff can prove that the harm occurred during the product's useful safe life.<sup>431</sup>

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424. FLA. STAT. ANN. § 95.031(2)(b) (West Supp. 2007); IDAHO CODE ANN. § 6-1403(1) (Supp. 2006); KAN. CIV. PROC. CODE ANN. § 60-3303 (West Supp. 2006); MICH. COMP. LAWS ANN. § 600.5805(13) (West Supp. 2006); MINN. STAT. ANN. § 604.03 (West Supp. 2006); WASH. REV. CODE ANN. § 7.72.060(1)-(2) (West 1992).

425. IDAHO CODE ANN. § 6-1403(1)(a)-(2)(a) (Supp. 2006); KAN. CIV. PROC. CODE ANN. § 60-3303(a)(1)-(b)(1) (West Supp. 2006).

426. WASH. REV. CODE ANN. § 7.72.060(1)-(2) (West 1992).

427. MINN. STAT. ANN. § 604.03 (West Supp. 2006) (stating that the factors are: (i) wear and tear, (ii) progress within the industry, (iii) local conditions, (iv) the policy regarding repairs, renewals and replacements, (v) represented useful life, and (vi) modification by user).

428. MICH. COMP. LAWS ANN. § 600.5805(13) (West Supp. 2006).

429. FLA. STAT. ANN. § 95.031 (West Supp. 2007) Certain things, including commercial aircraft, large sea vessels, commercial railroad equipment and improvements to property are not subject to the statute of repose.

430. TENN. CODE ANN. § 29-28-103(a) (2000).

431. CONN. GEN. STAT. ANN. § 52-77a(a), (c) (West 2005).

## 8. Medical Malpractice

As with products liability, concern about the increases in medical malpractice liability insurance premiums has played a major role in the push for "tort reform" over the years. The most recent rate increases, which began in the late 1990s,<sup>432</sup> appear to have abated.<sup>433</sup> The tort reform movement asserts that these increases are caused by a "lack [of] reasonable limits on liability."<sup>434</sup> Because of this lack, insurance companies "either leave the market or substantially raise costs" and physicians "are choosing to stop practicing medicine, abandon high-risk parts of their practices, or move their practices to . . . states" with lower malpractice rates.<sup>435</sup> Physicians are also said to be practicing wasteful "defensive medicine."<sup>436</sup> In order to remedy these problems, ATRA argues for reform "that includes: (1) a \$250,000 limit on noneconomic damages; (2) a sliding scale for attorney's contingent fees; (3) periodic payment of future damages; and (4) abolition of the collateral source [rule]."<sup>437</sup> Assessing these claims and proposals for reform is difficult because, as with any area of tort law, litigation statistics are so incomplete.

It has been particularly hard to assess the reasons for increases in medical malpractice premiums and proposals for reform because of six characteristics of medical malpractice. First, it is difficult to determine the amount of the impact of claims on premium costs, even though it appears that there has been an increase in medical malpractice payouts,<sup>438</sup> because other factors have affected the amount of

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432. See *supra* note 145 and accompanying text.

433. See JOANNE DOROSHOW & J. ROBERT HUNTER, AMS. FOR INS. REFORM, INSURANCE "CRISIS" OFFICIALLY OVER—MEDICAL MALPRACTICE RATES HAVE BEEN STABLE FOR A YEAR 1 (2006), available at <http://www.insurance-reform.org/pr/MMSOFTMARKET.pdf>.

434. ATRA: Medical Liability Reform, *supra* note 270.

435. *Id.*

436. See, e.g., The White House, Medical Liability, *supra* note 270 (arguing that "[f]rivolous lawsuits and excessive jury awards are . . . forcing doctors to practice overly defensive medicine"). The amount of any impact of defensive medicine on costs and access to medicine is not clear. GAO, REPORT ON ACCESS TO HEALTH CARE, *supra* note 172, at 26-29 (reviewing reports but concluding prevalence and costs of defensive medicine are not reliably measured); Randall R. Bovbjerg et al., Commentary, *Defensive Medicine and Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL'Y & L. 267, 267-68 (1996). *But cf.* Mello & Brennan, *supra* note 18, at 1606-07 (arguing that the growth of managed care diminished the practice of defensive medicine, to the extent that it occurred at all). In addition, concern about insurance premiums, not about defensive medicine, has been the primary motivation for physicians' support of "tort reform." See DOROSHOW & HUNTER, *supra* note 433, at 7-8.

437. ATRA: Medical Liability Reform, *supra* note 270.

438. GAO, REPORT ON MEDICAL MALPRACTICE, *supra* note 145, at 1-2. *But see, e.g.*, Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005) (presenting data showing no substantial increase in Texas for period 1988-2002).

premiums.<sup>439</sup> Moreover, it is hard to know whether any increases in claims or payouts have resulted simply because more valid claims have been brought.<sup>440</sup> Second, each state has a unique medical malpractice insurance situation because the tort system in each state is, to some degree, unique and because medical malpractice insurance is sold state-by-state rather than nationally.<sup>441</sup> Third, rates vary among medical specialties, and some specialties—e.g., obstetrics—can have very high injury costs in situations where undesired outcomes occur.<sup>442</sup> This results not only in higher potential verdicts and settlements where the claim has merit, but also in increased incentives for a plaintiff's attorney to take the case. Consequently, these specialties could have higher premiums even if the doctors involved are no more likely to be negligent than other medical specialists.<sup>443</sup> Fourth, premium rates are, to some extent, affected by changes in the amount of income generated on invested premiums, by competition among the small number of carriers in this sector of the insurance industry, and by changes in reinsurance markets.<sup>444</sup> Fifth, medical malpractice litigation, which generally requires extensive use of expensive experts, is costly.<sup>445</sup> Sixth, there is a long time lag between an allegedly negligent act by a healthcare giver and resolution of a potential claim.<sup>446</sup> For example, data from Florida

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439. See *infra* notes 440-47 and accompanying text.

440. Increases in *valid* claims could explain increases in payouts because studies of medical records to determine the amount of malpractice occurring in medicine indicate that the number of harmful outcomes due to medical negligence exceeds the number of claims filed by a substantial amount. See *supra* note 18 and accompanying text; see also U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: NO AGREEMENT ON THE PROBLEMS OR SOLUTIONS 11 (1986) [hereinafter GAO, NO AGREEMENT]; David A. Hyman, Commentary, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639, 1642-47 (2002); cf. TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 26 (Linda T. Kohn et al. eds., 2000) (estimating that preventable medical errors cause 44,000 to 98,000 deaths per year); J. Douglas Peters et al., *An Empirical Analysis of the Medical and Legal Professions' Experiences and Perceptions of Medical and Legal Malpractice*, 19 U. MICH. J.L. REFORM 601, 613 (1986) (noting that approximately three-fourths of physicians surveyed indicated that competent physicians sometimes deviate from accepted standards of care and thereby injure their patients). Danzon notes that in the late 1970s, "at most 1 in 10 negligent injuries resulted in a claim, and . . . at most 1 in 25 negligent injuries resulted in compensation" and that even assuming an extreme increase in claims by the mid-1980s, the "rough current estimate is that only 1 in 5 incidents of malpractice gives rise to a malpractice claim." DANZON, *supra* note 18 at 24-25. These figures are consistent with studies of the ratio between claims and potential claims in terms of tort claims in general.

441. See, e.g., GAO, REPORT ON MEDICAL MALPRACTICE, *supra* note 145, at 3, 9-10.

442. See, e.g., Vidmar, *supra* note 60, at 1223-24.

443. See, e.g., U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: EFFECTS OF VARYING LAWS IN THE DISTRICT OF COLUMBIA, MARYLAND, AND VIRGINIA 26 tbl.III.1 (1999).

444. See GAO, REPORT ON MEDICAL MALPRACTICE, *supra* note 145, at 2, 8, 10.

445. See Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1798.

446. See, e.g., Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 422-23 (2005); Mark Geistfeld, *Malpractice Insurance and the (Il)legitimate*



indicate that settlements occur in most cases between three and six years after the injury.<sup>447</sup> Because premiums at any given time must be based largely on historic claims data from earlier years, actual claims payouts for conduct in the year the premium is paid may be so high that the premium was inadequate. The cumulative impact of these diverse factors makes it very hard to determine the causes of increases in medical malpractice premiums and to analyze the impact of any particular proposed "tort reform."

Regardless of the reasons for the increase, medical malpractice has been a focal point of tort reform for several reasons. First, access to good medical care is essential, and any possible negative impact on access to healthcare is a matter of great concern. Second, because of cost-containment measures imposed by private insurers and by publicly funded programs like Medicare, doctors have only a limited ability to pass on the costs of medical malpractice premiums to patients. Third, doctors are humans rather than corporate actors. This adds a different dimension, both in the form of doctors' reactions to being sued and to the need for tort law—as opposed to licensing, ethics, or pride in craft—to deter wrongdoing.<sup>448</sup>

A number of "reforms" have been adopted to address the "problem" of medical malpractice insurance premiums. First, as indicated above, twenty-two states have adopted various schemes for limiting noneconomic damages.<sup>449</sup> Second, some states have modified the collateral source rule for medical malpractice claims.<sup>450</sup> Third, several states have adopted contingency fee restrictions for medical malpractice actions.<sup>451</sup> A fourth type of reform concerns expert witnesses. Doctors have long complained that the rules about medical experts qualified to testify about the standard of care and the cause of the injury are too

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*Interests of the Medical Profession in Tort Reform*, 54 DEPAUL L. REV. 439, 454 (2005); William M. Sage, *Medical Malpractice Insurance and the Emperor's Clothes*, 54 DEPAUL L. REV. 463, 480-81 (2005).

447. Vidmar et al., *supra* note 145, at 334.

448. See, e.g., Anawis, *supra* note 172, at 310-11; Hubbard, *supra* note 143, at 356. Anawis argues as follows:

As a physician, I would argue that it is not the responsibility of the legal system to determine the quality of medical care, the existence of negligent care, or to deter . . . "bad conduct." We as physicians need to do a better job at identifying and educating physicians who are not providing quality medical care.

Anawis, *supra* note 172, at 311. For a critique of the deterrent effect of tort liability in the medical malpractice context, see Mello & Brennan, *supra* note 18, at 1607-23.

449. See *supra* notes 293-302 and accompanying text.

450. See *supra* note 233 and accompanying text.

451. See *supra* note 400 and accompanying text.

lax.<sup>452</sup> As a result, statutory definitions of “expert” have been adopted, and at least twenty states require the plaintiff to file an affidavit from a statutorily qualified expert that a claim exists.<sup>453</sup> These requirements vary in terms of such things as: (1) whether the affidavit must be filed with the complaint or within some specified time after filing,<sup>454</sup> (2) whether the requirement applies to all professional negligence or only to medical negligence,<sup>455</sup> and (3) the procedures and sanctions for failure to comply.<sup>456</sup>

In order to reduce frivolous claims and reduce litigation costs, “thirty-one states adopted screening panels of some sort.”<sup>457</sup> Because of problems with these panels, some were repealed,<sup>458</sup> while others were held unconstitutional in many states.<sup>459</sup> Today, at least seventeen states

452. See SPECIAL TASK FORCE ON PROF'L LIAB. & INS., AM. MED. ASS'N, PROFESSIONAL LIABILITY IN THE '80S: REPORT 3, at 13 (1985) (criticizing the use of expert witnesses who “routinely serve as expert witnesses for plaintiffs” because such “traveling experts often have little actual experience in the particular speciality of the defendant physician or knowledge of the appropriate standard of care”). Physicians also criticize many expert witnesses, particularly academic experts, on the ground that these experts are unable to understand the proper standard of care because they lack an appreciation of the unique circumstances involved. *Id.*; Feinstein, *Medical Negligence and the Tort System: What are the Options?*, 74 J. FLA. MED. A. 774, 776-77 (1987). Another target of criticism is the retired physician who serves as an expert. *Id.* at 777.

453. ARIZ. REV. STAT. ANN. § 12-2602 (2003); ARK. CODE ANN. § 16-114-209 (2006); COLO. REV. STAT. ANN. § 13-20-602 (West 2005); CONN. GEN. STAT. ANN. § 52-190a (West 2005); FLA. STAT. ANN. § 766.203 (West 2005); GA. CODE ANN. § 9-11-9.1(a) (Supp. 2005); 735 ILL. COMP. STAT. ANN. § 5/2-622 (West Supp. 2006); MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02(a) (LexisNexis 2002); MICH. COMP. LAWS ANN. § 600.2912d (West 2000); MINN. STAT. ANN. § 145.682 (West 2005); MISS. CODE ANN. § 11-1-58 (West Supp. 2005); MO. ANN. STAT. § 538.225 (West 2000); NEV. REV. STAT. ANN. § 41A.071 (LexisNexis Supp. 2005); N.J. STAT. ANN. § 2A:53A-27 (West Supp. 2006); N.D. CENT. CODE § 28-01-46 (2006); S.C. CODE ANN. § 15-36-100 (Supp. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005); W. VA. CODE ANN. § 55-7B-6 (LexisNexis Supp. 2006); N.Y. C.P.L.R. 3012-a (McKinney 1991); PA. R. CIV. P. 1042.3 (West 2006).

454. Compare GA. CODE ANN. § 9-11-9.1a (Supp. 2005) (requiring affidavit to be filed with the complaint), with ARK. CODE ANN. § 16-114-209 (2006) (requiring affidavit to be filed within thirty days of the complaint being filed).

455. Compare S.C. CODE ANN. § 15-36-100(B) (Supp. 2005) (applying to all professional negligence claims), with MISS. CODE ANN. § 11-1-58(1) (West Supp. 2005) (applying only to actions against a “licensed physician, healthcare provider or healthcare practitioner”).

456. See, e.g., ARK. CODE ANN. § 16-114-209 (2006) (providing that if the affidavit is not filed within thirty days of filing, the complaint shall be dismissed).

457. Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 990 (2004).

458. See, e.g., Jona Goldschmidt, *Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel*, 23 ARIZ. ST. L.J. 1013, 1014 (1991) (tracing the history of the Arizona Medical Liability Review Panel, adopted in 1976 and repealed in 1989).

459. See, e.g., *Aldana v. Holub*, 381 So. 2d 231, 235 (Fla. 1980); *Mattos v. Thompson*, 421 A.2d 190, 196 (Pa. 1980); cf., e.g., Heather Brann, Comment, *Utah's Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Procedure*, 2000 UTAH L. REV. 359, 385-416 (suggesting constitutional challenges to the Utah

require, or encourage, that medical malpractice claimants submit their claims to some form of screening panel prior to filing a complaint or shortly thereafter.<sup>460</sup> These requirements vary in terms such as the following: (1) composition of the panel,<sup>461</sup> (2) whether the requirement applies to all professional negligence or only to medical negligence,<sup>462</sup> (3) the effect of the panel's decision (varying from no impact on litigation, to admissible at trial, to admissible with a presumption of correctness),<sup>463</sup> and (4) whether the panel is mandatory.<sup>464</sup>

Because of two problems with prelitigation screening schemes, they have often been a disappointment. One problem arises because, unless the screening is done carefully, it is unfair (and perhaps unconstitutional) to impose severe restrictions on those who "lose" before the panel. However, careful screening will involve costs and delays. If there are still trials even with such screening, the overall combined costs of screening and trials may be higher than the costs of a litigation system alone. In addition to concerns about fairness and constitutionality, reducing the costs of the screening by making it less careful may result

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panels under the theories of denial of access to the courts, non-uniformity of laws and usurpation of judicial power); Karnezis, *supra* note 283, at 589-90. For more detailed discussion of some of these problems, see *infra* notes 467-68 and accompanying text.

460. ALASKA STAT. § 09.55.536 (2004); DEL. CODE ANN. tit. 18, §§ 6803-14 (2006) (requiring a patient to submit a claim to a review panel as an alternative to filing a corroborative affidavit of another professional); FLA. STAT. ANN. § 766.106 (West 2005); HAW. REV. STAT. § 671-12 (1993); IDAHO CODE ANN. § 6-1001 (2004); IND. CODE ANN. §§ 34-18-10-1 to -8 (West 1999); KAN. STAT. ANN. § 65-4901 (Supp. 2001) (requiring panel review upon request of one party); LA. REV. STAT. ANN. § 40:1299.47(A) (2001); ME. REV. STAT. ANN. tit. 24, §§ 2851-53 (2000); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2000); MICH. COMP. LAWS ANN. § 600.4903 (West 2000); MONT. CODE ANN. § 27-6-105 (2005); NEB. REV. STAT. ANN. § 44-2840 (LexisNexis 2005); N.H. REV. STAT. ANN. §§ 519-B:1 to B:3 (Supp. 2005); N.M. STAT. ANN. § 41-5-14 (West 2003); UTAH CODE ANN. § 78-14-12 (2002); VA. CODE ANN. § 8.01-581.2 (2000). In order to reduce litigation costs, at least one state has adopted a requirement of filing a "Notice of Intent to File Suit" as a way of facilitating mediation and settlement prior to filing a complaint. See S.C. CODE ANN. § 15-79-125 (Supp. 2005) (providing for some minimal discovery and requirement of mediation within 120 days).

461. Membership can be based on requirements that members include persons such as the following: attorney, physician/healthcare provider, lay person, and claims expert. See, e.g., HAW. REV. STAT. ANN. § 671-11(b) (1993) (providing that the panel shall consist of three persons: a chairperson who is familiar with the personal injury claims settlement process, an attorney, and a physician or surgeon).

462. See, e.g., N.M. STAT. ANN. § 41-5-14 (West 2003) (providing for panels solely for medical malpractice cases).

463. See, e.g., DEL. CODE ANN. tit. 18, § 6812 (2006) (admissible at trial); IDAHO CODE ANN. §§ 6-1003 to -1004 (2004) (no impact); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06(d) (LexisNexis 2002) (admissible with presumption of correctness with the burden "on the party rejecting it to prove that it is not correct").

464. See, e.g., NEB. REV. STAT. ANN. § 44-2840(2) (LexisNexis 2005) (requiring submission of claim to panel); VA. CODE ANN. § 8.01-581.2 (Supp. 2005) (providing that any party may request review by panel).

in it having no real effect on the number of jury trials because the parties may not accept the results of the process. Once again, overall costs may increase because the process will involve time and expense, and jury trials will still be necessary for many claims.<sup>465</sup> A second type of problem may arise if the screening system is effective in reducing overall costs by providing a cheaper, faster scheme for resolving claims in a meaningful manner. This effect satisfies the goal of reducing litigation costs as the plaintiff's costs for bringing a claim will be reduced. However, because of this lower cost, additional claims may be filed and overall medical malpractice claims payouts may increase.<sup>466</sup>

### 9. Constitutional Review

When tort reforms have been subject to challenge under state constitutional law, many reforms have been declared constitutional while many others have been held unconstitutional.<sup>467</sup> The primary grounds for challenging these reforms are: right to jury trial, right to obtain damages, equal protection, due process, separation of powers, special legislation, unconstitutional taking, and right of access to the courts.<sup>468</sup> The results have varied considerably, and it is hard to

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465. See, e.g., Goldschmidt, *supra* note 458, at 1107 (arguing that panels are unsuccessful because they impose costs and delays without sufficient benefit); Marc R. Lebed & John J. McCauley, *Mediation Within the Health Care Industry: Hurdles and Opportunities*, 21 GA. ST. U. L. REV. 911, 920-24 (2005) (discussing the medical profession's view that benefits are not worth costs); Struve, *supra* note 457, at 992-96 (concluding that panels have had little success because benefits are not worth the costs).

466. See, e.g., Struve, *supra* note 457, at 991-92.

467. See, e.g., TORT REFORM RECORD, *supra* note 215, *passim* (noting constitutional litigation concerning specific legislation); Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 419-34 (1995); Schwartz & Lorber, *supra* note 157, at 939-76 (containing appendices listing reforms held unconstitutional and reforms held constitutional after 1983); Kristine Cordier Karnezis, Annotation, *Validity of State Statutory Cap on Punitive Damages*, 103 A.L.R. 5th 379, 391-415 (2002); ATRA: Judicial Nullification of State Civil Justice Reform, <http://www.atra.org/issues/index.php?issue=7350> (last visited Jan. 30, 2007) (listing state-by-state statutes held constitutional and statutes held unconstitutional); *supra* notes 286, 457-59 and accompanying text (discussing constitutional challenge to limitations on noneconomic harm and to pretrial screening schemes of medical malpractice claims). For criticism of cases holding "reform" legislation unconstitutional, see *supra* notes 157-58 and accompanying text.

468. See, e.g., *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004) (upholding a limitation of punitive damages and denying constitutional challenges under theories of separation of powers, right to trial by jury, taking, equal protection, due process, access to courts, special legislation, and void for vagueness); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 792 (7th ed. 2001); Karnezis, *supra* note 467, at 391-415; cf. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 537-59 (2005) (arguing that, though there is no right to a specific set of tort rules, there is a right to a legal scheme for redress of private wrongs). See generally Symposium, *State Constitutional Law*, 32 RUTGERS L.J. 897 (2001) (discussing various

generalize about these challenges because of variations among the states in terms of the statutory schemes and constitutional frameworks.

#### 10. Conclusion

It is hard to know precisely what the overall doctrinal effect of the tort reform movement has been. Many changes have been adopted, but some of the changes were adopted before the movement gained momentum in the 1980s and some are supported by both rational reform arguments and by the tort reform movement. Moreover, the changes are very diverse in terms of details. Finally, there is no scheme of "jurimetrics" for measuring the impact of any single rule or doctrinal change on a complex system like tort law. Nevertheless, it seems plausible that the various pro-defendant changes have had at least some pro-defendant impact in terms of plaintiffs' recoveries, even if it is not possible to measure the extent of that impact.<sup>469</sup>

#### B. Culture

##### 1. Evidence of Impact

As indicated above, one goal of the tort reform movement has been to shape cultural views of tort law in ways that favor the defense side.<sup>470</sup> To the extent this goal is achieved, it will be easier to convince courts and legislatures to shape doctrine in ways the movement prefers and to persuade juries to render fewer and smaller plaintiff verdicts. There are a number of reasons to conclude that this effort has been successful. For example, the campaign is facilitated by widespread ignorance concerning how the system operates, particularly in terms of the available statistical data about the tort system. The widespread cultural belief that there is "too much" litigation, particularly "frivolous" litigation, appears to be based on misperceptions about the system's methods of screening frivolous claims and about the small number of such claims overall.<sup>471</sup> Changing these misperceptions with reports of reliable statistical data is difficult because

[i]n the broader public debate, . . . tort reform critics are outfinanced

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constitutional challenges to state tort reform legislation).

469. See, e.g., Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1797-1801 (observing the responses of a sample of plaintiffs' attorneys indicating their perceptions that formal legal changes had a negative impact on their practices and that the impact varied depending upon the nature of their practices).

470. See *supra* notes 167-70 and accompanying text.

471. See, e.g., Daniels & Martin, *The Impact*, *supra* note 59, at 476-93; see also Galanter, *supra* note 155, at 53 (discussing the relationship between corporate actors and "lawsuit abuse").

and often outgunned. Their research typically appears in specialized academic publications and is only occasionally discussed in the popular media. Moreover, there is no pro-litigation think tank to rival the likes of the Manhattan Institute's Center for Legal Policy, which supports the research of [tort reform proponents].<sup>472</sup>

The impact of these superior resources is reflected in the fact that the massive marketing campaign of the movement has achieved a high degree of useful brand identification for its proposals; the phrase "tort reform," which literally means an improvement in the tort system, is generally viewed in terms of the movement's agenda.

There is also evidence to support the conclusion that the movement's campaign has strengthened perceptions in ways that favor the defense. For example, the movement has had legislative success at the state level, and this success arguably indicates public support for changing doctrine. At another level, there is support for the view that jurors' attitudes have become less supportive of plaintiffs in tort suits and that this change has affected verdicts.<sup>473</sup> One commentator has argued that the movement's bromides about a "litigation explosion" and a "liability crisis" have played a role in shifting judicial attitudes about granting motions to dismiss and motions for summary judgment in favor of defendants.<sup>474</sup> Thus, it seems plausible that the sustained large-scale public relations campaign of the tort reform movement has caused at least some increase in the view that the tort system needs "reform."

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472. BURKE, *supra* note 1, at 45; *see, e.g.*, HALTOM & MCCANN, *supra* note 1, at 73-110, 270-306; *see also* GINSBERG, *supra* note 90, at 149-80 (noting the advantages of superior economic resources in influencing public opinion in elections and arguing that the political right has more of these economic resources). Ginsberg observes that this increased access to resources "has given the forces of the political right a significant—perhaps a decisive—competitive edge." *Id.* at 176. The lack of effect of academic studies on popular opinion is supported by an empirical study of opinions about litigation and verdicts before and after an academic study was made and released to the press. This study revealed that, although the detailed academic study of tort litigation (which showed no significant increase in the number of suits filed or verdict amounts) had been published in a limited way in the media, the public and most legislators were not aware of the study and continued to believe there had been substantial increases. However, the legislators and lobbyists working on tort reform legislation were aware of the reporter's findings and this awareness apparently played a role in the failure of the legislature to adopt the proposals for tort reform. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 602-03 (1988).

473. *See, e.g.*, BURKE, *supra* note 1, at 32; Daniels & Martin, *The Impact*, *supra* note 59, at 479-82 (using anecdotal evidence from attorneys); Daniels & Martin, *Precarious Nature*, *supra* note 58, at 1802-08; Hans & Albertson, *supra* note 196, at 1506-09. *But see* Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 813-16 (1991) (discussing contrary results in a study of mock jurors and indicating some level of rejection by jurors of claims made by proponents of the tort reform movement).

474. Henderson & Eisenberg, *supra* note 404, at 504-05 (identifying a trend of decreasing success for plaintiffs at trial).

## 2. Scale and Complexity of Culture

Our culture is so large and complex that it is not possible to determine the extent and importance of any change in support of the tort reform movement's agenda. Any sufficiently inclusive definition of "culture" would include not only the vast array of beliefs and values we share, but also all the social and institutional means used to communicate about them and implement them.<sup>475</sup> Thus, any analysis of law and culture must recognize the scale and complexity of culture, particularly the interconnection between law—as a part of culture—and the other parts of culture.<sup>476</sup> Because of these interconnections, it is clear that culture affects law and that law affects culture.<sup>477</sup> Unfortunately, the complexity involved makes it hard to do more than state broad generalizations, such as: Legal rules (and conceptions of justice) are controversial where there is cultural disagreement about the proper rule.<sup>478</sup>

One common way to simplify—at least partially—the analysis of law and culture is to focus on images of law presented in mass media like movies, television, books, and magazines. In using this approach, one can focus either on the content of the presentations<sup>479</sup> or on the nature of the presentations.<sup>480</sup> However, adopting this narrowed perspective to address the issues of the impact of the media-based

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475. Donald Black defines culture in a way that conveys a sense of the scale and complexity of the concept:

Culture is the symbolic aspect of social life, including expressions of what is true, good, and beautiful. It thus includes ideas about the nature of reality, whether theoretical or practical, and whether supernatural, metaphysical, or empirical. Examples are science, technology, religion, magic, and folklore. It also includes conceptions of what ought to be, what is right and wrong, proper and improper—apart from the behavior of social control itself. Values, ideology, morality, and law have a symbolic aspect of this kind. And, finally, culture includes aesthetic life of all sorts, the fine arts and the popular, such as poetry and painting, clothing and other decorative art, architecture, and even the culinary arts. It should be clear that culture has an existence of its own, apart from the way people experience it.

DONALD BLACK, *THE BEHAVIOR OF LAW* 61 (1976) (citation omitted).

476. See, e.g., *Introduction to LAW & SOCIETY*, *supra* note 163, at 6-10.

477. See, e.g., *id.* at 7, 15-16; SHAPO, *supra* note 1, at 6-11, 269-300.

478. See, e.g., SHAPO, *supra* note 1. Shapo argues, for example, that doctrinal controversies concerning tort law are "relatively accurate cultural mirror[s]" and that "when a judicial decision has something to say about culture, it is likely to reflect a fairly deep rooted idea." *Id.* at 269-70. For further discussion about using minimal consensus to develop schemes of law and justice, see *supra* notes 84-86 and accompanying text.

479. See, e.g., *LAW ON THE SCREEN* (Austin Sarat et al. eds., 2005).

480. See, e.g., RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000); Kimberlianne Podlas, *As Seen on TV: The Normative Influence of Syndi-Court on Contemporary Litigiousness*, 11 *VILL. SPORTS & ENT. L.J.* 1 (2004). For a more general account of the impact of changes in the nature of media, see, for example, BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* (1999).

publicity campaign of the tort reform movement does not help that much because even a large, sustained public relations campaign is just a small part of the vast array of media images of law. More specifically, media stories about tort law vastly outnumber the accounts presented by the movement. However, these media stories have a tendency to distort images about tort law in ways that favor the movement; for example, media accounts of jury verdicts generally overreport large verdicts.<sup>481</sup> Because of the neutrality and sheer scale of media accounts and because the media's distorted images are consistent with the movement's claims, it is plausible to think that news accounts have played the predominant role in causing (or reinforcing) widespread popular misperceptions, such as that large verdicts are more common than they are.<sup>482</sup> Similarly, both news and entertainment accounts present images of greedy plaintiffs bringing frivolous claims for large amounts of money.<sup>483</sup> In short, it is hard to know whether and to what extent public views are shaped by publicity campaigns as opposed to the entertainment and news media and if (or how) media accounts respond to, rather than shape, public views.

Thus, even if we focus on the successful adoption of doctrinal changes supported by the movement, it is not possible to determine such things as whether a particular legislator shared the movement's position because of the public relation campaign, because of other media presentations, or because of some other reason. In this regard, it is important to remember that society is not monolithic. People vary in their values, in how they form opinions, and in the issues they consider important. For example, a study of the effect on opinions of a report with thorough statistical data on verdicts indicated that, although neither popular opinions nor legislators' opinions in general were affected by

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481. See, e.g., HALTOM & MCCANN, *supra* note 1, at 61-72, 156-81, 195-226, 303-06 (providing data to support view that institutionalized aspects of media result in a tendency to support the tort reform movement because of the following: (1) a preference for "anecdotal tort tales" because of their simplicity and support by widely accepted "truths" about life and law; (2) a preference for publishing uncommonly large verdicts because of the "holler of the dollar;" and (3) reliance on easily accessible, readable stories); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64, 64 (Sept.-Oct. 1996); see also Galanter, *supra* note 155, at 51-52.

482. See Bailis & MacCoun, *supra* note 481, at 64-65; Galanter *supra* note 155, at 51-52.

483. For example, *Saturday Night Live*, a program not noted for endorsing a pro-business bias, had a recurring character, the "Unfrozen Caveman Lawyer," who in one sketch demands, and is immediately given by the jury, "two million in compensatory damages, and two million in punitive damages." *Saturday Night Live Transcript of "Unfrozen Caveman Lawyer,"* <http://snltranscripts.jt.org/91/91gcaveman.phtml> (last visited Feb. 2, 2007). A *Seinfeld* episode portrayed a similar image as Kramer was advised to seek punitive damages for too-hot coffee. KOENIG & RUSTAD, *supra* note 1, at 6-7. This overly litigious character is, in effect, an American cultural category. See Hayden, *supra* note 163, at 248-50.



publicity about the data, the legislators and lobbyists working on the legislation were aware of the study and this awareness affected their views and the legislation.<sup>484</sup>

### 3. Two Ideological Conflicts

Underlying the debate about tort reform are two types of ideological conflicts. The first conflict reflects the lack of a consistent cultural consensus concerning the relationship between the individual and society, particularly in terms of a wide range of decisions involving product design, air and water pollution control, scenic conservation, and occupational health and safety.<sup>485</sup> On one hand, there is a rights-based individualism that views events like injuries and natural disasters as items to be addressed and remedied by society generally or by "wrongdoers," rather than as inescapable facts of life.<sup>486</sup> In terms of tort law, this view is reflected in the notion that the tort system plays an important role in controlling corporate misconduct and compensating victims. Support for this role is often reflected in movie and television presentations that provide positive images of tort law, showing the legal victories of ordinary people in combating large, greedy, unscrupulous corporations.<sup>487</sup> On the other hand, there is a responsibility-based view of individualism that emphasizes the need for potential victims to protect and take care of themselves.<sup>488</sup> Media accounts also support this view—for example, by presenting tort law as a system where greedy lawyers and plaintiffs "extort" damages in "frivolous" lawsuits.<sup>489</sup> These images of litigiousness are so widespread that "litigiousness" has been referred to as an American cultural category characterized by flawed courts and greedy plaintiffs.<sup>490</sup>

The two competing cultural views reflect a basic ideological divide that parallels the ideological conflict between the supporters and opponents of "tort reform" with regard to their views about injuries. Both sides prefer an individualized approach based on recovery for

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484. Songer, *supra* note 472, at 602-03.

485. This same conflict underlies the national "takings reform movement" which has many similarities in terms of tactics and ideology with the tort reform movement. *See, e.g.*, F. Patrick Hubbard, "Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement", 50 S.C. L. REV. 93, 109-21 (1998).

486. *See, e.g.*, SHAPO, *supra* note 1, at 10; Engel, *supra* note 17, at 558; Galanter, *supra* note 162, at 717-18.

487. *See, e.g.*, A CIVIL ACTION (Touchstone Pictures 1998); ERIN BROCKOVICH (Jersey Films 2000); *see also* La Fetra, *supra* note 160, at 658-59; Diane Waldman, *A Case for Corrective Criticism: A Civil Action*, in LAW ON THE SCREEN, *supra* note 479, at 201, 201.

488. *See, e.g.*, SHAPO, *supra* note 1, at 10; Engel, *supra* note 17, at 558-59.

489. *See supra* note 483 and accompanying text.

490. *See* Hayden, *supra* note 163, at 248.

wrongdoing rather than regulatory programs or no-fault compensation schemes.<sup>491</sup> However, the “tort reform” position is based on an individualistic perspective that emphasizes the victim’s responsibility to engage in self-protection and self-insurance, while the opposing position emphasizes the injurer’s responsibilities in terms of the rights of victims and the need to use the tort system to control injurers’ behavior and protect the rights of vulnerable victims.<sup>492</sup> The broader culture is in tension on “tort reform” because popular culture reflects *both* views: Those plaintiffs—and their lawyers—who are simply “greedy whiners” should not be compensated, but “worthy victims” should be.<sup>493</sup> Applying this two-part cultural view to “tort reform” in the political arena is complicated by the fact that most people know so little about how the tort system distinguishes between greedy whiners and worthy victims. Because this tension goes beyond tort law and involves a broader cultural debate, the tort reform movement’s publicity campaign could have broader effects—it can cause a shift toward decreased support of injurer control and increased support for placing responsibility with the injured individuals, rather than the injuring actors.

The second ideological conflict concerns the nature and role of truth in legal development. As indicated above, the rational model of decision-making places considerable weight on empirical studies of how the tort system operates and takes reasoned moral debate seriously. The political model, however, tends to view truth as more malleable and involves a greater willingness to pick and choose among anecdotes and studies in order to present its picture of the truth. In terms of popular culture, the contrast and struggle between these models has been captured by Stephen Colbert, the host of the *Colbert Report*, a satirical “news” show on the Comedy Central cable television channel, as the contrast between “truth” and “truthiness.” In Colbert’s scheme,

“Truthiness is sort of what you want to be true, as opposed to what the facts support. . . . Truthiness is a truth larger than the facts that would comprise it—if you cared about facts, which you don’t, if you care about truthiness.”<sup>494</sup>

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491. See *supra* note 208 and accompanying text.

492. See *supra* notes 159-60, 202-12 and accompanying text.

493. See, e.g., Engel, *supra* note 17, at 558 (contrasting “rights-oriented individualism” with “individualism emphasizing self-sufficiency”).

494. Jacques Steinberg, *Truthiness*, N.Y. TIMES, Dec. 25, 2005, § 4, at 3, available at 2005 WLNR 20926880 (quoting Colbert’s comments from a “recent interview”). Though Colbert invented its definition for his show, the term existed before his use of it, but with a different meaning. 18 OXFORD ENGLISH DICTIONARY 629 (2d ed. 1989) (defining “truthiness” as “truthfulness, faithfulness”).

The word was voted word of the year by the American Dialect Society,<sup>495</sup> and one commentator has voted that the word "caught on instantaneously last year precisely because we live in the age of truthiness."<sup>496</sup> In the world of truthiness, "[w]hat matters most now is whether a story can be sold as truth, preferably on television."<sup>497</sup>

The distinction between truth and truthiness parallels the line between the rational model of decision-making vis à vis the political model. In this regard, the tort reform movement's success in using the political model and publicity campaigns to persuade legislatures to adopt its reform proposals could be important at two levels. In terms of tort reform, the success indicates a reduced role for the rational model in debate about tort reform. This reduced role is reflected in the minimal impact that empirical studies of the operation of the tort system have had on the general cultural awareness of how the system operates.<sup>498</sup> As a result, more decisions will be based on the political model, where the repeat defense-side actors have advantages compared to potential victims and compared to academic critics. Because most people know little about how the tort system distinguishes between "greedy whiners" and "worthy victims," this comparative advantage is likely to enable the tort reform movement to shift more costs to victims. At a broader level, the tort reform movement's success has caused—or simply revealed—the reduced role of the rational model in cultural and political debate in today's world. In either event, the reduction of the role of rationality will have important impacts not only in the "tort reform" context but also in resolving the inherent cultural conflicts. As the political model becomes more dominant, more power will shift to actors with the ability to influence decisions made on the basis of that model.

### C. *The Role of Courts*

The impact of the tort reform movement on the courts overlaps with its impact on doctrine and its impact on culture. More specifically, to the extent that doctrinal changes in tort law reduce plaintiffs' recoveries, the courts will be less important in the overall scheme of compensating and

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495. Press Release, American Dialect Society, *Truthiness* Voted 2005 Word of the Year (Jan. 6, 2006), [http://www.americandialect.org/Words\\_of\\_the\\_Year\\_2005.pdf](http://www.americandialect.org/Words_of_the_Year_2005.pdf) (announcing the vote of "truthiness" as word of the year (noting that "*truthiness* refers to the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true")).

496. Frank Rich, Op-Ed, *Truthiness 101: From Frey to Alito*, N.Y. TIMES, Jan. 22, 2006, § 4, at 16, available at 2006 WLNR 1184978.

497. *Id.*; See, e.g., HALTOM & MCCANN, *supra* note 1, at 270-71 (noting use of "'symbolic politics,'" "empirically ungrounded political lore," and "iconic images" to "mold public agendas").

498. See *supra* note 472 and accompanying text.

regulating injury costs. In addition, if the tort reform movement's campaign has caused the political culture to change in the sense that legislatures will continue to take a larger role in changing tort doctrine, the relative power of courts to make rules will also be reduced. Finally, from a more general cultural perspective, it is plausible to assume that the sustained attacks on the courts, along with the diminished role of the rational model favored by courts, have had some negative effect on the power of courts, though it is not possible to know how much.

The impact of any shift in the power of courts may not be that great for several reasons. First, thus far, much of the tort system is unchanged. More specifically, a considerable range of common law doctrine has not changed; judges retain considerable power to change tort doctrine and interpret legislation, and judges and juries still play a central role in applying tort rules. In addition, courts still have the right to determine whether a "tort reform" statute is constitutional. Second, lawyers on the defense side have substantial resources and have generally done well in litigation<sup>499</sup> except, perhaps, in areas where plaintiffs' attorneys may now have greater litigation resources.<sup>500</sup> Therefore, any increase in outcomes favorable to the defense from new doctrines might not be substantial. Third, the power of courts vis à vis the legislature has been declining over the last century.<sup>501</sup> This shift has resulted in large part because the "slow, unsystematic, and organic quality of common law change made it clearly unsuitable to many legal demands of the welfare state."<sup>502</sup> This institutional dimension may have had more impact on the role of courts than attacks by the tort reform movement. Finally, with the "accidental" exception of workers' compensation,<sup>503</sup> which is now supplemented by OSHA regulations designed to deter unsafe conduct,<sup>504</sup> extensive legislative or administrative regulation of injurers' conduct to reduce accidents or broad welfare schemes to provide compensation are not favored in the United States.<sup>505</sup> Instead, we have relied upon private market systems like first party insurance and, where "wrongs" are involved, upon the tort system, which is dependent on courts.<sup>506</sup> It is not

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499. See *supra* note 63 and accompanying text.

500. See *supra* note 64 and accompanying text.

501. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-3 (1982).

502. *Id.* at 5.

503. See WITT, *supra* note 101, at 20-21 (arguing that the adoption of workers' compensation was a unique "accident" of American history).

504. See, e.g., CALABRESI, *supra* note 30, at 64-67 (discussing the advantages of a scheme of penalties or fines to achieve deterrence where a loss spreading scheme is used).

505. See, e.g., G. Edward White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 *VAND. L. REV.* 1337, 1361-64 (2001).

506. See, e.g., BURKE, *supra* note 1, at 2-20, 171-204; W.G. Friedmann, *Social Insurance and*

clear how far the tort reform movement, whether through doctrinal change or through efforts to delegitimize courts, can go in reducing the deep cultural preference for these types of schemes rather than social welfare schemes.

Even if the power of the courts is not substantially reduced, the exercise of power by courts may be changed as a result of two factors. First, as indicated above, judges' views may be influenced by the cultural impact of the reform movement's efforts to change public views about tort law. Though judges know more about the mechanics of the tort system than the general public, many will not have the time, resources, or inclination to investigate the academic literature about such topics as studies of jury verdicts and caseloads. Moreover, judges may feel compelled to respect cultural views notwithstanding their own personal skepticism about the validity of those views. Second, though increased politicization of the popular election process for judges has resulted from factors other than tort reform,<sup>507</sup> the selection of judges has become more politicized in recent years, partly because both proponents and opponents of tort reform have focused on elections and have made increasingly large contributions to candidates running for judicial office.<sup>508</sup> For example, in the 1988 election for the Texas Supreme

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*the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949) (arguing that English and American tort law were developing differently because Great Britain was using welfare schemes to address accidental injuries).

507. See, e.g., COMM'N ON THE 21ST CENTURY JUDICIARY, AM. BAR. ASS'N, JUSTICE IN JEOPARDY 13-18 (2003) [hereinafter JUSTICE IN JEOPARDY]; Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1404-13 (2003); *supra* note 76 and accompanying text. The increasing politicization of judicial elections has resulted in a United States Supreme Court decision prohibiting states from barring judicial office candidates from announcing their views on political or legal issues, and in lower court opinions prohibiting states from restricting the rights of judicial candidates to attend or speak to political gatherings, to seek, accept, or utilize a partisan endorsement, and to solicit funds. *Republican Party v. White*, 536 U.S. 765, 788 (2002) (holding as unconstitutional a canon of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues); *Republican Party v. White*, 416 F.3d 738, 744 (8th Cir. 2005) (holding that the partisan activities and solicitation clauses violate the First Amendment).

508. See, e.g., BURKE, *supra* note 1, at 50-51; JUSTICE IN JEOPARDY, *supra* note 507, at 20-22, 37-38; *supra* notes 76, 155-58 and accompanying text. Burke summarizes recent spending as follows:

From 1994 to 2000 the amount of money contributed to state supreme court candidates more than doubled, from about \$21 million to over \$45 million. State supreme court candidates who raised money in 2000 averaged \$430,000 in contributions, at least half of which has been identified as coming from business and legal interests. . . . [A]most all of the contributions were concentrated in just a few states—Alabama, Illinois, Michigan, Mississippi, Nevada, Ohio, Texas, and West Virginia—that feature high-profile judicial struggles over the tort system. Indeed, Alabama alone recorded more than \$13 million in contributions in 2000. Beyond their contributions to candidates, business and plaintiff-lawyer groups in four tort battleground states—Ohio, Alabama, Michigan, and

Court, where two-thirds of the seats were at issue, the defense side and the plaintiffs' side contributed heavily to their preferred candidates. "Factoring primary opponents into the calculation, \$10,374,442 was raised by all candidates for the court that year and another \$1.4 million was contributed to a plaintiffs' lawyer-funded independent [political action committee]." <sup>509</sup>

This "situation was a harbinger of things to come in many states that held judicial elections." <sup>510</sup> The impact of fundraising on judicial independence is evidenced by a recent filing of a petition for certiorari in the United States Supreme Court challenging a ruling of the Illinois Supreme Court and requesting review of the following issue: "May a judge who receives more than \$1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?" <sup>511</sup> The politicization of courts is paralleled by an increasingly political context for traditionally neutral debate about tort law <sup>512</sup>—for example, as the American Law Institute restates the rules adopted by courts <sup>513</sup>—and by criticisms that some academic research

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Mississippi—also bought their own television ads to participate directly in the election. In Ohio, where the supreme court had recently struck down a comprehensive tort reform law, business interests—in particular, the U.S. Chamber of Commerce and Citizens for a Sound Economy—dominated the ad war, spending nearly \$2 million in direct advertising against \$1 million spent by plaintiff lawyers and their labor union allies. Ohio viewers saw a total of more than twelve thousand television ads costing more than \$5 million; many of the ads were devoted to criticizing or defending the judges' votes on civil liability issues.

BURKE, *supra* note 1, at 50-51.

509. Champagne, *supra* note 76, at 1483.

510. *Id.* at 1484.

511. Petition for Writ of Certiorari at i, *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006) (No. 05-842) (denying petition). The petition summarized the facts as follows:

Illinois selects the judges of its highest court through partisan elections. This case reached that court on October 2, 2002 after a \$1.05 billion verdict against Respondent, State Farm Mutual Auto Ins. Co., was unanimously upheld by the Illinois Appellate Court. The case was argued before and submitted to the Supreme Court of Illinois in May of 2003. Illinois then held a regularly scheduled judicial election in November 2004 for a vacant seat on the Supreme Court. The winner of this election, then-trial judge Lloyd Karneier, directly received over \$350,000 of donations from Respondent, Respondent's Lawyers, and Respondent's *Amicus* and their lawyers. Over \$1 million in additional funds came indirectly from groups with which Respondent State Farm was affiliated and a member. After his election, Justice Karneier declined to recuse himself from this matter, and then cast the decisive fourth vote overturning the verdict against State Farm.

*Id.*

512. See, e.g., Antolini, *supra* note 324, at 150-51; Galanter, *supra* note 162, at 750-51.

513. See, e.g., Robert L. Rabin, Introduction, *Restating the Law: The Dilemmas of Products*

and debate appears to be moving from the rational model to the political model of analysis.<sup>514</sup>

#### D. Other Concerns of the Movement

One goal of "tort reform" has been the reduction in the dollar amount of tort liability, referred to rhetorically by the tort reform movement as the "tort tax." This reduction is viewed as important because the movement views the current amount of tort liability as too high in the sense that plaintiffs are either compensated where they should not be or overcompensated where they do have a right to compensation. These excessive amounts are viewed as not only unfair to defendants but also harmful to society because excessive liability inhibits America's competitiveness in the international market, reduces innovation, and results in a loss of access to medical services because doctors are unable to obtain insurance or avoid specialties with high medical malpractice premium costs.<sup>515</sup>

As indicated above, statistics on the tort system are very limited.<sup>516</sup> Moreover, because the effective date of a legislative change is frequently phrased in terms of application to claims arising after the adoption of a statutory change, there can be long delays between the adoption of a change and any effects of that change on the tort system. In any event, for whatever reason, there is cause to believe that "tort reform" has *not* caused a decrease in the total payouts from the tort system. For example, an actuarial and management consulting firm estimated that the total costs of the tort system were \$205 billion in 2001, and \$260 billion in 2004.<sup>517</sup> One can interpret such an increase in figures in several ways, including the following: the data are not reliable, the increase would have been more without "tort reform," the increase indicates the need for

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*Liability*, 30 U. MICH. J.L. REFORM 197, 214 (1997) (noting that waiting on consensus among states on products liability law would postpone the Restatement effort "indefinitely"); Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761, 766 (1998); Frank J. Vandall, *A Critique of The Restatement Third, Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 570, 573 (2000); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 507-36 (1996); *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567 (1998).

514. See, e.g., Antolini, *supra* note 324, at 151, 154 (noting the increased funding of academic research by "corporations hit with large punitive damages awards" and that academic "studies have become ensnared in the polarized politics of tort reform"); Galanter, *supra* note 341, at 13-14; *supra* notes 202-05 and accompanying text.

515. See *supra* notes 172-74 and accompanying text.

516. See *supra* note 10 and accompanying text.

517. See *supra* note 26 and accompanying text.

more “tort reform,” or the data indicate that wrongful injuries or legitimate claims are increasing. There is even greater room for interpretative disagreement in trying to assess the impact of the tort system (and “tort reform”) on things like competitiveness and innovation. To the extent data are available, there is good reason to be skeptical that there has been any substantial impact.<sup>518</sup>

Nevertheless, it seems plausible to assume that at least some of the doctrinal changes will lower overall liability levels. For example, limitations on noneconomic damages probably lower total liability costs because at least some judgments will be lower and plaintiffs’ attorneys will have a substantially reduced incentive to sue in some cases. Some studies have shown that caps do reduce the amount of plaintiffs’ recoveries.<sup>519</sup> Other studies indicate that, while medical malpractice insurance premium rates have risen in most states and while states with caps can have higher rates than states without caps, states with a limit on noneconomic damages had lower percentage increases in rates than states without caps.<sup>520</sup> However, it is not possible to know: (1) whether any reduction in claims or premiums was caused by the caps or other factors; (2) the amount of any reduction; or (3) whether any reduction provides greater access to healthcare.<sup>521</sup> Moreover, it is important to keep in mind that any reduction from a limitation on damages on the amount of medical malpractice liability is *not* a reduction in the social costs of medical malpractice. The victim still incurs the cost. The limitation simply prevents the courts from shifting the amount above the cap to the defendant.

### E. Costs of “Tort Reform”

“Tort reform” has a number of costs. The most obvious costs include the expenditures of time and money spent by the movement and

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518. See, e.g., Litan, *supra* note 57, at 128-31; Viscusi & Moore, *supra* note 174, at 114-15, 122-23.

519. See, e.g., CAPPING NON-ECONOMIC AWARDS, *supra* note 277, at xx-xxi (estimating that California cap of \$250,000 reduced plaintiffs’ recoveries in a five-year period (1995 to 1999) from \$421 million to \$295 million); Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 77-78 (1986) (finding an overall reduction based on the combination of both limits on all compensatory damages and limits on noneconomic damages); Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 407-08, 411, 419-22 (2005); Vidmar, *supra* note 60, at 1252-53.

520. See, e.g., GAO, REPORT ON ACCESS TO HEALTH CARE, *supra* note 172, at 30-31; GAO, REPORT ON MEDICAL MALPRACTICE, *supra* note 145, at 11-14; Anawis, *supra* note 172, at 312; Vidmar, *supra* note 60, at 1252-53.

521. See, e.g., GAO, REPORT ON ACCESS TO HEALTH CARE, *supra* note 172, at 30; Sharkey, *supra* note 519, at 408-10; Vidmar, *supra* note 60, at 1252-53.



its opponents as they fight over "reform"—for example, the money both sides have spent for publicity campaigns and for lobbyists and the value of the time spent by corporate personnel and doctors on tort reform rather than other tasks. Some sense of the scale of these costs is reflected by a study indicating that \$101.3 million was spent to support or oppose tort liability proposals on the ballot in seven states in the 2003-2004 election cycle.<sup>522</sup> Another cost is the extent to which the preventive and corrective justice goals of tort law may have been frustrated. Less obvious costs include the possible erosion of the legitimacy of courts as a result of the attacks by the reform movement.

From a broader perspective, a substantial cost has been the impact of the movement on the legislative agendas of Congress and the states. Because the movement is able to place its proposed reforms on legislative agendas, other possible reforms of accident law have not been considered. The range of possible alternative approaches is very broad, partly because of the possible problems that can be identified and placed on the agenda for reform. For example, if the high administrative costs of tort are viewed as the primary problem, the legislature could adopt schemes that might reduce these while also achieving goals of prevention, corrective justice, and spreading.

One such approach would be first, to adopt a universal healthcare scheme that grouped physicians into hospitals and hospital networks; and second, to abolish the collateral benefits rule for healthcare costs.<sup>523</sup> This scheme could go further. If physicians were grouped into hospitals or hospital networks to provide healthcare, one could eliminate claims for medical malpractice based on negligence and substitute a no-fault scheme in which each hospital or network is liable for any specified "avoidable adverse event." Deterrence would be achieved by implementing an experience rating for each hospital or network. This rating scheme would also serve corrective justice ends because the payments to victims would correlate to premium costs to the hospital or network. Though the rating scheme and the application of the scheme to avoid adverse events would involve administrative costs, these costs would be substantially lower than those of the tort system.

Both proposals would have at least some chance of success within

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522. RACHEL WEISS, THE INST. ON MONEY IN STATE POLITICS, TORT LAWS ON TRIAL: LAWSUIT LIABILITY MEASURES, 2004, at 2 (2006), <http://www.followthemoney.org/press/Reports/200603211.pdf>.

523. For discussion of such a scheme for healthcare, see BURKE, *supra* note 1, at 201 (noting that "national healthcare in itself is a tort reform"). For discussion of an "avoidable adverse event" scheme, see Mello & Brennan, *supra* note 18, at 1623-37. For a critical review of the adverse event approach, see Hyman, *supra* note 440, at 1639.

the political model. AAJ's objection to the loss of the collateral benefits rule or to malpractice claims would be offset to some extent because victim compensation and universal healthcare are consistent with its ideology of rights-based individualism. Doctors traditionally oppose socialized medicine, but they also have a strong dislike of medical malpractice litigation. Depending on the financing mechanism for the healthcare scheme, business interests would be supportive of a scheme that not only eliminates the collateral benefits rule for healthcare costs but also shifts healthcare costs from the employment context to the government.

There are, of course, many details and problems to be addressed in such proposals for healthcare and tort reform. However, the point is not that this scheme is *the* solution. Instead, the point is that the tort reform movement has so dominated the legislative agenda that other approaches are simply not considered. In the long run, this failure to consider more basic changes may be the highest cost of the tort reform movement's success.<sup>524</sup>

## V. CONCLUSION

Perhaps the most interesting issue raised by the tort reform movement is: How will we know if the movement has succeeded in "reforming" tort law? The ills to be addressed—such as, "loony lawsuits," unnecessary consumer costs, and inefficient restrictions on innovation and competitiveness—are so vague that it is hard, if not impossible, to develop a test of when they are cured. Similarly, it will be hard to determine if the cultural campaign to "change the way people think about personal responsibility" has succeeded. Passage of changes to all of the items on ATRA's current legislative agenda would not necessarily count as success because there would still be other ways to change tort law doctrine in order to reduce recoveries. Moreover, achieving ATRA's doctrinal agenda might not be sufficient to address the "improper" cultural framework.

In any event, it seems unlikely that the movement will declare success (or failure) any time soon. Instead, the push is likely to continue for three reasons. First, the ideology of the movement provides a sense of intense moral commitment to get the United States on the right track and keep it there. Second, changing the tort system in favor of the

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524. For similar criticisms of the impact on the movement's political agenda and discussion of other alternatives not considered, see, for example, HALTOM & MCCANN, *supra* note 1, at 289; Rhode, *supra* note 200, at 447. For another specific choice that has not been considered in the political arena, see *supra* note 280.

defense side is in the self-interest of the movement's members because reducing payouts to claimants reduces their costs. Third, the professionals seeking these "reforms" have a personal stake in continuing their employment.

In all likelihood, the movement's push for tort reform not only will continue but also will evolve to include more ways to achieve change favoring defendants. More specifically, the following are likely: (1) pushing for new doctrinal changes in favor of the defense side; (2) asserting new reasons why tort reform is needed; and (3) finding new forums to push for reform.<sup>525</sup> Opposition to reform will also continue. This recurring theme of disagreement is not new; defining legal standards of wrongful conduct and liability always involves dispute. However, the nature of this struggle over tort law has shifted, and is likely to continue to shift, to a more politicized context where money and rhetoric tend to supplant traditional rational analysis.

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525. See, e.g., Stephen Labaton, *'Silent Tort Reform' Is Overriding States' Powers*, N.Y. TIMES, Mar. 10, 2006, at C5 (arguing that administrative officials appointed by President George W. Bush are using their power to adopt schemes to preempt state law, including tort law, that sets safety standards for certain industries).