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## ARTICLES

### TAMING THE TORT MONSTER: THE AMERICAN CIVIL JUSTICE SYSTEM AS A BATTLEGROUND OF SOCIAL THEORY\*

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When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.<sup>1</sup>

Oliver Wendell Holmes Jr., *The Path of the Law*

The 1960s television classic, *Dark Shadows*, was set in the fictional seaside village of Collinsport, Maine.<sup>2</sup> The plot centered on mysterious events involving ghosts, witches, vampires and other supernatural beings that took place in the Collinswood family mansion.<sup>3</sup> Like the Collinswood mansion, the American civil litigation system is also frequently depicted as existing in “the shadows of an unpredictable American tort monster.”<sup>4</sup> Fear of frivolous but financially devastating lawsuits has replaced the dread of supernatural creatures of the night.<sup>5</sup> The tort monster allegedly stirs up interminable litigation, bankrupts U.S. companies and threatens our collective well-being.<sup>6</sup>

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suggesting the *Dark Shadows* introduction and for other editorial suggestions. Danielle LaVita provided invaluable secretarial assistance.

<sup>1</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>2</sup> Craig Hamrick, *TV Classic Keeps From Fading Into the Shadow*, at <http://www.geocities.com/TelevisionCity/9516/dark.html> (last visited Oct. 28, 2001).

<sup>3</sup> Craig Hamrick, *The History of Dark Shadows*, at <http://www.darkshadow-sonline.com/dso-dark.html> (last visited Oct. 28, 2001).

<sup>4</sup> Roger Clarke, *Nasty, UnBritish and Short, Cloned Pets, Tort Monsters*, INDEP. (London), Aug. 18, 2001, at 11 (commenting on “the shadow of this unpredictable American tort monster”).

<sup>5</sup> Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1386-87 (1987) (“Increasing popular disenchantment with our current tort system has paralleled academic criticism. Virtually no aspect of current tort doctrine has been immune to criticism and legislative reform. However, attention has been focused on spectacular punitive damages cases.”); see also Stephen Daniels & Joanne Martin, *Jury Verdicts and the “Crisis” in Civil Justice*, 11 JUST. SYS. J. 321, 324-26 (1987) (describing tort reformers’ use of apocryphal punitive damages stories to arouse public support and confirm notion of biased juries); Amanda E. Haiduc, Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, 40 CASE W. RES. L. REV. 825, 830 (1990) (asserting that non-economic damages are susceptible to manipulation by juries sympathetic to plaintiffs).

<sup>6</sup> *Michelin Has the Costly Experience of Costs and Damages, American Style*, L.A. TRIB., Nov. 18, 1997, at 12. Insurance firms argue that the explosive growth of tort damages awards causes spiraling insurance rates. See, e.g., Edith Greene et al., *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 806 (1991) (discussing insurance industry’s publicity campaign directed toward insurance crisis). The long-standing belief is that “poor jurors will gouge relatively wealthy defendants.” Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 164 n.118 (1991).

Dow Corning's CEO contends that his company was "devoured by the tort monster" as a result of uncontrolled lawsuits filed by silicone breast implant claimants.<sup>7</sup> He despairs that "once you get caught in the system, you can't escape no matter how responsibly you try to resolve the issues."<sup>8</sup> The dark "shadow of this unpredictable 'American Tort Monster'"<sup>9</sup> has even been cited as a significant cause of the "downfall of America."<sup>10</sup> Neo-conservative tort reformers widely invoke the politically successful image of a monstrously destructive civil justice system.<sup>11</sup>

The image of the corporation as victim of the tort monster is a clear example of what Martha Minow calls "victim's talk."<sup>12</sup> Professor Minow argues that neo-conservatives employ the claim of victimization as an ideological tool in widely disparate fields such as criminal law, civil rights acts, anti-discrimination litigation, hate speech and tort law.<sup>13</sup> "Victim's talk" in the tort arena is used not only to disavow responsibility for defective products, bad medicine and unsafe practices, but to sway the public against trial lawyers in general. Neo-conservatives often employ the theme of a "culture of victimization gone wild" to ridicule plaintiffs seeking compensation for mass torts. The tort reformers, for example, attacked the plaintiff in a landmark tobacco product liability

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<sup>7</sup> Richard Hazleton, *The Tort Monster that Ate Dow Corning*, WALL ST. J., May 17, 1995, at A21; see also *Dow Corning's Bankruptcy Implants a Doubt*, ST. LOUIS POST-DISPATCH, May 24, 1995, at 6B (quoting Richard Hazleton).

<sup>8</sup> Hazleton, *supra* note 7, at A21.

<sup>9</sup> Books, INDEP. (LONDON), Aug. 18, 2001, at 11.

<sup>10</sup> Clarke, *supra* note 5; Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 939 (noting that the insurance industry's "grim prognosis" that lawsuits are driving our country out of business rests on the assumption that product liability actions involve thousands of products and thus jeopardize American industry).

<sup>11</sup> The term 'reform' suggests affirmative change that benefits society, such as strengthened consumer protection laws and heightened civil liability to improve the quality of goods and services. Consumer advocates, however, have long contended that tort reformers have little intention of pursuing these goals. They argue that the tort reform agenda instead promotes the aims of insurers and manufacturers. Indeed, tort reformers have tried to limit civil litigation options, reduce exposure to civil liability and enact legislation that allows industry to calculate its exposure in advance and pass the cost on to the consumer in the prices of goods and services.

Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 125 (1998).

<sup>12</sup> Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993).

<sup>13</sup> *Id.* at 1415.

action by arguing that she should have taken personal responsibility for the cancer caused by her smoking rather than blame the tobacco industry.<sup>14</sup>

Neo-conservative tort reformers use the claim that runaway juries victimize corporations as a public relations device. The imagery of corporate victimhood advances their goal of limiting corporate liabilities and cultivating popular opinion against injured claimants and their attorneys.<sup>15</sup> As the late poet Allen Ginsberg, noted, “[w]hoever controls the media—the images—controls the culture.”<sup>16</sup> This apt observation clearly applies to the tort reformers’ campaign to redefine victimhood. The proponents of neo-conservative tort reform are winning the political struggle by portraying the corporation as victim of a litigation crisis. Corporate victimhood deflects attention away from the true victims: those who suffered from defective products, negligent medicine, investor fraud or unreasonably risky financial activities. Similarly, neo-conservatives redefined the term “reform” to mean caps and other limitations on recovery for injured plaintiffs to improve the functioning of the American civil justice system.

Neo-conservative tort law has its origins in a skillfully organized and well-financed movement to sharply limit key tort rights and remedies such as punitive damages, modified duty, non-economic damages, multiple causation, joint and several liability, products liability and strict liability. Neo-conservative legal consciousness is bringing us “back to the future” by resurrecting the defenses, privileges, immunities and liability-limiting doctrines of an earlier era.<sup>17</sup>

The object of this Article is to survey the political nature and development of neo-conservative tort law in American society. We explain the general character of tort law as a battleground of social theory. Part I of this Article describes

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<sup>14</sup> *Id.* at 1427.

<sup>15</sup> *Id.* at 1415 (describing how neo-conservatives use victim talk to cultivate emotions and secure attention in criminal law, anti-discrimination law, hate speech regulation and family violence).

<sup>16</sup> Mark D. Harman, *Quotes about Ethics, Media*, at <http://excellent.com.utk.edu/~hdharmon/quotes7.htm> (last visited Sept. 1, 2002) (attributing quote to Ginsburg).

<sup>17</sup> Jerry Phillips argues that tort reform proposals are “more of an evisceration than a reform of the system.” Jerry J. Phillips, *Comments on the Report of the Governor’s Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986).

and examines four ages of American tort law: (1) The Absolute Liability Era: 1200-1825; (2) The Laissez Faire Negligence Era: 1825-1944; (3) The Democratic Expansionary Era: 1945-1980; and (4) Neo-conservative Legal Consciousness: 1981 to the present.<sup>18</sup> Judges constructed the negligence paradigm in the mid-1800s to compensate accident victims and replaced absolute liability with the concept that a defendant was liable only for the foreseeable consequences of the wrongdoing. During the negligence era, a host of new defenses, immunities and privileges limited the liability of corporations. After the Second World War, as the American economy became more complex and bureaucratic, torts expanded to counter new dangers from environmental pollution, defective products, dangerous premises, substandard medicine, employment discrimination and other largely corporate misbehavior. Since 1980, neo-conservative tort retrenchment has successfully rolled back the rights and remedies of consumers injured by powerful entities.

Part II argues that the neo-conservative retrenchment campaign is a "conscious goal-oriented practical activity"<sup>19</sup> designed to produce a dominant discourse that will predispose legislators, judges, legal academics and the general public to support liability-limiting tort doctrines. The concerted activities of organizations such as the Olin Foundation and the Federalist Society increasingly influence legal education and scholarship. The result is to halt the development of liberal expansionary tort law in its tracks.

Part III advocates returning tort law to its post-World War II moorings to meet the new social threats posed by the misuse of information age technology. The law of torts was originally a mechanism for redressing physical injuries to the person and, to a lesser extent, for protecting property rights. To continue being effective as an institution of social control, tort law must adapt to new exigencies just as it has throughout the earlier ages of legal history.

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<sup>18</sup> The laissez faire negligence era was a period in which the law of torts was first conceptualized as a subject worthy of systematic study and analysis. During this period, other substantive fields such as corporation law, the law of agency, trusts and contract law were also the subject of abstracted theoretical "doctrinal writings." PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 156 (1965) (attributing to Roscoe Pound use of the term "doctrinal writings" in reference to classical law-as-science).

<sup>19</sup> DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 6 (1997).

As America enters the new millennium, the future of tort law remains in doubt. Torts in cyberspace have been slow to develop, partially as the result of tort reform and new judicial subsidies benefiting Internet service providers, telecommunications giants and media moguls. Tort rights and remedies must be strengthened so that they can play their traditional social control role in the information age; an era in which the nature of injuries has been transformed from tangible, physical harms to intangible injuries to privacy, reputation and individual dignity.

The Enron debacle illustrates the need for powerful tort remedies to counter information torts such as online deception, predatory trading practices, commercial fraud, Internet stock manipulation, duplicitous accounting practices and corporate espionage in a networked world.<sup>20</sup> Electronic fund transfers in the online banking world made it possible for Enron's officers, agents and accountants to conceal massive wrongdoing with the click of a mouse. The unethical company fired its whistle blowing employees for posting truthful information about its illegal accounting practices on the Internet.<sup>21</sup> One of the smoking guns that Enron employees posted was the disclosure that the company's executives were being compensated with \$55 million in retention bonuses shortly before the company filed for Chapter 11 bankruptcy.<sup>22</sup> One employee was terminated for posing a simple question to Kenneth L. Lay, Enron's chairman, about "whether Enron had used aggressive accounting to overstate its profits."<sup>23</sup>

Workers at Enron and other corporations have no countervailing protection against corporate spying in a private sector workplace. Claims against companies for surreptitiously monitoring their employees' Internet and e-mail usage have all been dismissed or resulted in defense verdicts.<sup>24</sup> Indeed, even

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<sup>20</sup> "Enron was a derivatives mill, not an energy company. . . . Enron was able to hide debts and trading losses and to inflate the value of troubled operating businesses (e.g. a venture in fiber-optic-bandwidth trading)." James Grant, *Pecora's Ghost*, FORBES, Mar. 18, 2002, at 200.

<sup>21</sup> *Id.*

<sup>22</sup> Alex Berenson, *Enron Fired Workers for Complaining Online*, N.Y. TIMES, Jan. 21, 2002, at C1.

<sup>23</sup> *Id.*

<sup>24</sup> "[I]n a number of reported cases [involving employee lawsuits over electronic monitoring] the employees' legal claims have failed." Douglas M. Towns, *Legal Issues Involved in Monitoring Employees' Internet and E-Mail Usage*, Gigalaw.com, Jan. 14, 2002, at <http://www.gigalaw.com/articles/2002/towns-2002-01.htm> (last visited Feb. 19, 2002).

the CEO of Sun Microsystems acknowledged that no meaningful privacy protection exists in cyberspace: "You have zero privacy anyway. . . . Get over it."<sup>25</sup> New and more insidious forms of electronic surveillance, resulting from technological advances such as e-mail and the Internet, require expanded, not retracted, tort remedies.

This Article argues that the image of the tort monster is a phantom created for strategic purposes by well-funded corporate and insurance company elites. We apply the methodology of Karl Mannheim's "sociology of knowledge" to demystify the true nature of the tort reform movement. In his 1936 work, *Ideology and Utopia*, Mannheim argued that all ideas, including legal doctrine, are socially constructed ideologies.<sup>26</sup> The sociology of knowledge approach to tort law is to show how rights and remedies "are created in and contingent on specific socio-historical, political and economic contexts."<sup>27</sup> What is at stake in modern tort law is whether our legal system will provide adequate redress to the victims of Enron, HMO malpractice, online torts and highly caloric fast food. The sociology of knowledge approach demystifies the assertions of stakeholders who claim that they represent the common good.<sup>28</sup> Tort reformers "obscure the real condition of society"<sup>29</sup> by portraying the majority of lawsuits against corporations as frivolous or even as a form of legalized extortion.

This Article demystifies the tort reform movement by showing that many of its backers systematically distort the aims of the American civil justice system to advance their liability-limiting agenda. Entities like Enron that "have a financial and ideological interest in advancing this cause"<sup>30</sup>

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<sup>25</sup> Polly Sprenger, *Sun on Privacy: Get Over it*, WIRED NEWS, Jan. 26, 1999 (quoting Scott Mealey), available at [www.wired.com/news/topstories/0,1287,17538,0-0.html](http://www.wired.com/news/topstories/0,1287,17538,0-0.html) (last visited July 12, 2002).

<sup>26</sup> KARL MANNEHEIM, *IDEOLOGY AND UTOPIA* 36 (Harcourt, Brace & World 1946) (1929) (developing the sociology of knowledge as a critical analysis of the diametrically opposed concepts of ideology and utopia).

<sup>27</sup> Lyla Mehta, *From Darkness to Light? Critical Reflections on the World Development Report 1998/99*, 36 J. DEV. STUD. 151 (1999) (discussing purposes of sociology of knowledge).

<sup>28</sup> Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 6 (1995) [hereinafter Koenig & Rustad, *Tort Reform*] (applying the sociology of knowledge perspective to the gendered nature of tort remedies in products liability and medical malpractice).

<sup>29</sup> Mehta, *supra* note 27, at 36.

<sup>30</sup> Grant, *supra* note 20 (describing how the safe harbor provision of the Private Securities Litigation Reform Act of 1995 shields executives, accountants and



provide substantial amounts of funding for tort reform campaigns. One example of special interest litigation enacted under the guise of tort reform is the Securities Litigation Reform Act of 1995.<sup>31</sup> This 1995 law may serve as a safe harbor limiting the accountability of Enron and its auditors. One critic complains that this tort reform “shields from liability any executive who offers wildly inflated—even untruthful—guidance on future prospects as long as that guidance includes certain boiler plate language on the risks of investing in any company.”<sup>32</sup> Another commentator contends that the statute “emboldened dishonest management to lie with impunity” and may even immunize “underwriters and accountants from the consequences of lax performance.”<sup>33</sup> This neo-conservative agenda advances a toothless regime that immunizes corporate misconduct and provides little, if any, protection to American consumers, workers, investors and honest companies.<sup>34</sup> Like Justice Holmes’s dragon, tort law can, and must, be tamed and turned into a useful institution of social control for the digital age dangers.

As William L. Prosser, in his classic tort treatise, observed, “[p]erhaps more than any other branch of the law, the law of torts is a battleground of social theory.”<sup>35</sup> Although torts are sometimes perceived as a system of immutable rules, tort remedies are inevitably contested and contestable socio-legal terrain. Our review of the historical waxing and waning of rights and remedies demonstrates that torts have never been and can never be value-neutral. As Mannheim reminded us, all law reflects social and economic interests.<sup>36</sup>

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may even immunize Enron for some of its wrongdoing).

<sup>31</sup> 15 U.S.C. § 77(a) (2001).

<sup>32</sup> Dan Carney, *Enron Shareholder Suits? Not So Fast: Champions of securities-litigation reform should have been more careful about the law they managed to get passed in 1995*, BUS. WK., Feb. 11, 2002, available at <http://www.businessweek.com/bwdaily/dnflash/feb2002/nf200202118888.htm> (last visited Aug. 29, 2002).

<sup>33</sup> Grant, *supra* note 20 (citing testimony of James S. Chanos).

<sup>34</sup> Professor Gary Schwartz finds no evidence that tort law goes through “cycles of liability expansions and liability stabilization, and that we are merely now at one stage in that cycle.” Gary T. Schwartz, *The Beginning and The Possible End of The Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 683 n.436 (1992). One possibility is that tort law is entering into a period of perpetual decline, leaving its future role as a deterrent very much in doubt.

<sup>35</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 3 (3d ed. 1964) [hereinafter PROSSER, HANDBOOK].

<sup>36</sup> See generally MANNHEIM, *supra* note 26.

## PART I: BACK TO THE FUTURE OF TORT LAW

A. *Stage One: The Absolute Liability Era: 1200-1825*

At early common law in pre-Norman England, the civil liability system was predicated upon a bedrock of "absolute liability."<sup>37</sup> The writ system "was prefigured and technical, shaped by the formalistic pleading requirements that had originated centuries earlier in the King's Chancery Court."<sup>38</sup>

The writ system favored the wealthy because justice could be purchased for fixed prices. Historians Frederick Pollock and Frederic Maitland described the writ system of Henry III as fee-based: "Apparently there were some writs which could be had for nothing; for others a mark or a half-mark would be charged, while, at least during Henry's early years, there were others which were only to be had at high prices."<sup>39</sup> Creditors agreed to pay the king a quarter or a third of the debts that they hoped to recover, creating an economic incentive to support the interests of creditors over debtors.<sup>40</sup> Claimants found redress under the torts of assault, battery and false imprisonment and redressed invasions of property interests such as the trespass to land, trespass to chattels,<sup>41</sup> conversion<sup>42</sup> and nuisance.<sup>43</sup> Defendants were absolutely liable for harms

<sup>37</sup> Judge-made law was called "common" because it constituted the universal principles under which all citizens lived. The English common law began with "the law common to the medieval king's courts." John H. Langbein, *Introduction to 3 BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND* iv (photo. reprint 1979) (1768).

<sup>38</sup> Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of 'Tort Reform': Has the Case Been Made?*, 42 AM. U. L. REV. 1465 (1993).

<sup>39</sup> 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 195 (2d ed. 1968).

<sup>40</sup> 1 *id.*

<sup>41</sup> "A trespass to chattel is committed (by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another)." RESTATEMENT (SECOND) OF TORTS § 217 (1965). A trespass to chattel occurs when a defendant takes property belonging to another but does not impair its value or condition in a significant way. Trespass to chattels occurs where there is interference with chattels as opposed to destruction in condition, quality or value. Intentionally using or intermeddling with a chattel in the possession of another may commit a trespass to a chattel. Most cases involve concrete harm to a chattel, actual impairment of its physical condition, quality or value to the possessor, as distinguished from the mere affront to the owner's dignity as possessor.

<sup>42</sup> A conversion is "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Id.* § 222(A)(1).

<sup>43</sup> A defendant's interference with a plaintiff's interest in property gives rise to a nuisance action. "Today liability for nuisance may result upon an intentional

caused to their neighbors so long as the writ of trespass covered their action.

When Sir William Blackstone wrote his *Commentaries on the Laws of England* (1765-68) ("Commentaries"), his formulation of "private wrongs" was designed for a legal system that provided compensation largely for intentional torts.<sup>44</sup> At that time, tort law was largely a legal institution to adjudicate conflict between neighbors and landowners, and to mediate relations between employers and employees. Volume Three of Blackstone's *Commentaries* synthesized private wrongs before legal subjects were classified into "private and public spheres, and private law was further divided into the recognizable divisions of tort, contract, and property."<sup>45</sup> Volume Three of *Commentaries* is a snapshot of eighteenth century English tort law prior to the development of the fault-based negligence paradigm. Tort law of that period preserved the King's peace and the domestic tranquility of the family and community by mediating conflict between neighbors over property and personal rights.

A litigant used the writ of trespass in early England to "show that he had sustained a physical contact on his person or property, due to the activity of another."<sup>46</sup> The tort system of early common law vindicated indirect as well as direct injuries against persons or property. Early common law based its compensation system upon the classification of injury, as either direct or indirect, rather than on the defendant's state of mind, as does modern tort law.<sup>47</sup> If a plaintiff suffered harm "under

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invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability." PROSSER, *supra* note 35, at § 88.

<sup>44</sup> Blackstone's *Commentaries* was written in the final days of a decaying writ system. A writ was a legal process commanding the arrest of a person or seizure of his property. "This element of damages seems to have been the chief invigorating force between the origin and development of trespass, and also the main cause of that remarkable development of writs and the forms of action which took place in the thirteenth century and included much else in addition to trespass." George E. Woobine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 802 (1924).

<sup>45</sup> R. Blake Brown, *Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship*, 64 SASK. L. REV. 169, 174 (2001).

<sup>46</sup> Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361-62 (1951).

<sup>47</sup> The writ system was organized by type of injury, as opposed to modern tort law, which classifies torts by causes of action into intentional torts, negligence and strict liability. In contrast to modern tort law, which places great emphasis on the standard of care or the state of mind of the defendant, the writ system was a crude conceptual apparatus that sorted torts on the sole criterion of whether the injury was direct or indirect.

non-trespassory circumstances [he was] not able to bring suit in the King's court."<sup>48</sup>

As English society grew more complex, new types of injuries occurred that did not meld well with the anachronistic categories of the formalistic writ system. "If a plaintiff failed to find a pigeon hole for his specific injury, there was no recourse under the writ system."<sup>49</sup> People accidentally struck by arrows shot at targets or injured by falling tree limbs could recover under the writ system, "while others who were hurt 'consequentially'—that is, on whose person there had been no direct contact . . . were denied recovery."<sup>50</sup> However, by the thirteenth and fourteenth centuries, the writ system evolved to recognize new actions for unintended contacts.<sup>51</sup> The writ of trespass on the case developed to compensate for indirect injuries.<sup>52</sup>

Some legal historians contend that Blackstone's principal ideological motive was to defend the rights and privileges of the English elite.<sup>53</sup> These theorists characterize Blackstone as "the supreme apologist for the English political hierarchy and for the distribution of wealth and power that existed in England in the mid-eighteenth century."<sup>54</sup> In contrast, the libertarian torts scholar Richard Epstein praises Blackstone's absolutist vision of property rights as establishing important bedrock principles that have a continuing vitality.<sup>55</sup> Epstein's neo-conservative jurisprudence advocates for limited government and a retreat from New Deal principles, in order to reconcile individual liberty with the common good.<sup>56</sup> These clashing views of Blackstone's *Commentaries* prefigure contemporary debates over tort reform.

<sup>48</sup> Gregory, *supra* note 46, at 362.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 363.

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

<sup>52</sup> Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 613-15 n.310 (1997).

<sup>53</sup> Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 561 n.54 (1997) (concluding that the civilian influence of Blackstone's work was strong but expressing skepticism about his ideological project).

<sup>54</sup> Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 661 (1983); see also Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

<sup>55</sup> RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 14 (1998).

<sup>56</sup> *Id.* at 2.

During the eighteenth century, a major ideological conflict between forward-looking Jeremy Bentham and backward-looking Blackstone foreshadowed the coming struggle between legal formalism and realism that took shape in the early decades of the twentieth century.<sup>57</sup> Bentham's utilitarian philosophy maintained that the law must be refashioned to "maximize the greatest happiness of the greatest number."<sup>58</sup> Bentham targeted Blackstone's "incrementalism, traditionalism and transcendentalism" as a "barnacled, superstitious, reactionary [defense of the] status quo."<sup>59</sup>

Richard Posner's *The Problems of Jurisprudence* supports the utilitarian philosophy of Jeremy Bentham against Blackstone's formulation.<sup>60</sup> Judge Posner views Blackstone's jurisprudence as hampering wealth maximization by imbuing the common law with a "transcendental aura" that was "rooted in Saxon customary law."<sup>61</sup> Under Blackstone's formulation, judges did not create a legal regime that would best benefit society, but instead discovered divinely inspired "'oracles' of the law."<sup>62</sup> The role of the lawyer was to "translate the oracular discourse for the laity."<sup>63</sup>

Oliver Wendell Holmes Jr. attacked Blackstone's notion of legal doctrine as divinely inspired, arguing that law was "the creation of distinctly earthbound political authorities—legislators and, at the time, especially judges."<sup>64</sup> Holmes castigated Blackstone's formalistic model of the English common law for its lack of coherence and inability to evolve to meet new social challenges: "When I began in 1864 the law presented itself as a ragbag of details."<sup>65</sup> Holmes and Sir

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<sup>57</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (comparing legal formalism to "legal heaven" where concepts descend from heavens rather than from society). Legal realists argue that the focus of legal analysis must be on empirical behavioral studies, not on abstract doctrine. See Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-38 (1931) (presenting legal realism as "movement in thought and work about the law" within which certain points of departure are common); see also Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931) (discussing approach of legal realists as requiring "faithful adherence to the actualities of the legal order as the basis of a science of law").

<sup>58</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 12 (1990).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 13.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.*

<sup>63</sup> POSNER, *supra* note 58, at 12.

<sup>64</sup> *Id.* at 13.

<sup>65</sup> OLIVER W. HOLMES JR., *COLLECTED LEGAL PAPERS* 301 (1881).

Frederick Pollock were doctrinalists who created alternative grand theories of tort law based upon “policy arguments and ethos-based arguments (i.e., appeals to the moral sensibilities of the community).”<sup>66</sup>

Colonial America imported Blackstone’s vision of the common law. The First Continental Congress of 1774 decided that Americans were “entitled to the common law as well as all English statutes existing at the time of colonization.”<sup>67</sup> Jurists used special editions of Blackstone’s *Commentaries* to apply his principles to the American states. His interpretations were so central to the formative period of American private law that colonial circuit-riding judges were reported to carry copies of his writings in their saddlebags.<sup>68</sup> Eleven of the thirteen colonies enacted statutes adopting the English common law.<sup>69</sup> And Blackstone’s *Commentaries* became America’s chief reference work for interpreting English common law.<sup>70</sup>

## 1. The Ideological Role of Intentional Torts

### a. *Mayhem*

Eighteenth century tort law strengthened the central government by redefining intentional injury as a violation, not only of the rights of the injured party, but of the King’s peace. Early common law blurred the line between public and private law. Assault, battery and mayhem were indictable criminal offenses as well as torts. The Crown brought indictments for a crime against the public, whereas a tort resulted in damages awarded to the injured party.<sup>71</sup> Additionally, from the time of Henry VIII, mayhem, a malicious injury that resulted in the

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<sup>66</sup> Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1178 (1996).

<sup>67</sup> Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 381, 419 n.131 (1997) (quoting Justice Joseph Story’s recounting of the Declaration of the Congress of 1774).

<sup>68</sup> Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 213 (1993).

<sup>69</sup> *Id.*

<sup>70</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 4 (1978).

<sup>71</sup> 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 121 (photo. reprint 1979) (1768). By defining injuries to the individual as attacks on the Crown, the law of private wrongs merged private and public law functions.

loss of arms, legs, fingers and eyes,<sup>72</sup> could be punished by a fine of treble damages.<sup>73</sup>

### b. *False Imprisonment*

Originally, courts limited an action in trespass to challenging confinement behind "stone walls and iron bars."<sup>74</sup> The tort of false imprisonment expanded to recognize a plaintiff's right to be free of confinement against his will. Habeas corpus, "the most celebrated writ in the English law," was used as a process for removing a prisoner from an inferior court.<sup>75</sup> A precursor to the tort of false imprisonment, habeas corpus served a dual function of vindicating the rights of individuals wrongly incarcerated in public prisons, private houses, "in the stocks, or even by forcibly detaining one in the public streets," while also preserving the public order.<sup>76</sup> The plaintiffs in false imprisonment cases were persons held under invalid warrants, for example, by "impressing . . . mariners for the public service, or . . . apprehending . . . wagoners for misbehaviour in the public highways."<sup>77</sup>

A false imprisonment action could be predicated on technicalities such as serving a lawful warrant or process on a Sunday or in an unlawful place, such as the King's court.<sup>78</sup> This victory of form over substance provides a clear example of the writ system's rigid nature.<sup>79</sup> Justice turned on fine points of procedure as opposed to more enduring principles of justice and equity.

### c. *Nuisances*

From the medieval period to Blackstone's day, torts protected the public's health. A neighbor who "infect[ed] the air" or polluted the environment was liable for the offense of

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<sup>72</sup> 3 *id.* at 121-22.

<sup>73</sup> 3 *id.*

<sup>74</sup> WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 42 (4th ed. 1971).

<sup>75</sup> *Id.*

<sup>76</sup> 3 BLACKSTONE, *supra* note 71, at 127.

<sup>77</sup> 3 *id.*

<sup>78</sup> 3 *id.* at 127-28.

<sup>79</sup> The remedy for false imprisonment included two types, "the one removing the injury, the other making satisfaction for it." 3 *id.* at 128. False imprisonment was remedied by a complicated set of writs; some writs were directed to the sheriff and others to release a man from prison. 3 *id.* at 128-29.

nuisance at common law.<sup>80</sup> Nuisances are difficult to conceptualize because the offensive nature of the harm is based on subjective sensory reactions to unpleasant sounds, sights and smells.<sup>81</sup> Courts calculated damages for nuisance torts based on the depreciation in the value of land and the degree of personal discomfort and annoyance.<sup>82</sup>

Only public authorities could sue for a public nuisance because, under the writ system, the victim was considered to be the subject of the King.<sup>83</sup> The ethic of "every man's home is his castle" gave way to the principle that even a lawful use that caused injury to another's property could be enjoined and compensated by money damages.<sup>84</sup> The law of nuisance resolved individual property disputes as opposed to having extensive regulations, as in modern environmental law.

## 2. Warranties & Other Precursors to Products Liability

Blackstone anticipated Grant Gilmore's concept of "contort"<sup>85</sup> in classifying the contract-based warranty action as a "private wrong." The roots of modern products liability can be found in the law of warranties, which lies on the boundary between the law of contract and tort law.<sup>86</sup> William Prosser dubbed warranty law as "a freak hybrid born of the illicit intercourse of tort and contract."<sup>87</sup> Today, the breach of the implied warranty is a sub-field of products liability, the most controversial branch of tort law.

Blackstone's formulation also anticipated medical malpractice, another hotbed of controversy in modern tort law. The law of "private wrongs," embracing today's field of professional negligence, is a hybrid of contract-based wrongs as

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<sup>80</sup> 3 *id.*

<sup>81</sup> John H. Wigmore, *A General Analysis of Tort-Relations*, 8 HARV. L. REV. 377, 379 (1895).

<sup>82</sup> *Id.* at 379.

<sup>83</sup> HORWITZ, *supra* note 70, at 74.

<sup>84</sup> *Id.* Richard Epstein favors the absolute right view of property rights of the pre-industrial age over the relativistic "balancing of the equities" approach to nuisance that emerged in the nineteenth century. RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 98 (1998).

<sup>85</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974) (observing that the law of contracts is being absorbed into tort law, hence the term "contort").

<sup>86</sup> Contrary to popular accounts, sales law was never completely based upon the ethic of caveat emptor.

<sup>87</sup> William L. Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).



well as tortious injuries. At common law, contracts, whether express or implied, made professionals liable for damages by a special action on the case.<sup>88</sup> Anyone who undertook "any office, employment, trust, or duty," pledged to undertake it with "integrity, diligence, and skill."<sup>89</sup> A sheriff who permitted a debtor to escape after judgment was liable for the consequences to the creditor.<sup>90</sup> Any builder who failed to perform a task in a "workmanlike manner" could be assessed damages.<sup>91</sup>

Even in Blackstone's day, common professions and businesses owed a high duty of care to the public. Innkeepers had a legal obligation to guard their guests' property and were held liable if the goods were lost or stolen.<sup>92</sup> "[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way . . . ."<sup>93</sup> A traveler refused admittance to an inn without good reason could sue for damages.

Assumpsit<sup>94</sup> was available for implied or express contracts for the carriage of goods. A common carrier was liable for losing cargo under its custody or control.<sup>95</sup> The concept that innkeepers owed a heightened duty of care to the general public was later extended to common carriers such as railroads, streetcars and steamboats.

### 3. Contract-Based Remedies

In Blackstone's day, common carriers owed the general public a higher duty of care to protect passengers as well as their property. During the negligence era, courts extended this heightened duty to new forms of transportation such as stagecoaches, railroads and steamboats. From Blackstone's day, courts recognized a greater duty for common carriers and held that common carriers could not limit liability for risk of lost property in their custody.<sup>96</sup> The carriers' quasi-public role,

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<sup>88</sup> 3 BLACKSTONE, *supra* note 71, at 163.

<sup>89</sup> 3 *id.*

<sup>90</sup> 3 *id.*

<sup>91</sup> 3 *id.* at 164.

<sup>92</sup> 3 *id.*

<sup>93</sup> 3 BLACKSTONE, *supra* note 71, at 164.

<sup>94</sup> Assumpsit is "[a] common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal." BLACK'S LAW DICTIONARY 122 (6th ed. 1990).

<sup>95</sup> 3 BLACKSTONE, *supra* note 71, at 164.

<sup>96</sup> 3 *id.*

which sometimes took the form of monopoly, placed them in a superior position to assess risks and protect their passengers.

a. *Actions for Breach of Warranty*

The sales law of the eighteenth century incorporated the covenant of good faith and fair dealing that remains the cornerstone of contemporary commercial law. Eighteenth century merchants were expected to deliver goods that conformed to the contract and were not inherently dangerous. Merchants who sold tainted wine or other provisions were liable for consequential damages for all “[i]njuries . . . affecting a man’s *health*.”<sup>97</sup> These commercial norms reflected a concern for the fair treatment of buyers as contrasted to the caveat emptor ethic of possessive individualism.

The concept of merchantability evolved out of the medieval fair courts of Western Europe. In the interest of dispensing speedy justice according to the commercial norms of the local community, these informal tribunals had almost no formal rules for the admissibility of evidence and procedure. Their concept of merchantability, which later evolved in the modern law of products liability, was essentially a norm that goods had to conform to minimum standards. To be merchantable, goods had to be at least average and pass without objection in the trade.

b. *Fraud*

The commercial law of the eighteenth century made the seller answerable for defects in goods. In addition to the special action on the case, there was an action for deceit.<sup>98</sup> The action for deceit was available for the “fraudulent recovery of land or chattels.”<sup>99</sup> Social customs, commercial standards and an overarching norm of commercial reasonableness moderated seller sovereignty and caveat emptor. Sellers were held accountable for express warranties they made about the quality of their goods.<sup>100</sup> Even if the merchant made no express

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<sup>97</sup> 3 *id.* at 122.

<sup>98</sup> 3 *id.* at 165.

<sup>99</sup> 3 *id.* at 166.

<sup>100</sup> 3 BLACKSTONE, *supra* note 71, at 122.

warranties about his goods, he was required to deliver goods "fit for the ordinary purpose."<sup>101</sup>

A buyer was expected to take the basic precaution of inspecting goods for patent defects. If a buyer failed to notice that a horse had a missing tail or ear, there was no remedy unless the buyer was blind.<sup>102</sup> A horse "warranted sound," but that actually had no sight in one eye, would constitute a breach of warranty if "the discernment of such defects is frequently a matter of skill."<sup>103</sup> For example, a seller would be liable for representing cloth to be of a certain length only if its measurement could not be determined by sight.<sup>104</sup>

#### 4. Torts to Vindicate Reputation

##### a. *Defamation*

Eighteenth century English law protected a person's reputation and good name through the tort of defamation.<sup>105</sup> Slander was traditionally defined as oral defamation, whereas the written form was classified as libel. Defamation was actionable if the words were "malicious, scandalous, and slanderous words tending to damage or derogation."<sup>106</sup> If a man was falsely accused of a "heinous crime . . . [or] having an infectious disease," the accusation was considered slander *per se*.<sup>107</sup>

A tradesman could recover for lost business if he was falsely accused of being insolvent or of cheating his customers.<sup>108</sup> Traders did not need to prove special damages because of the presumed injury to their business. Physicians and attorneys could obtain redress in the form of exemplary damages for the consequences of words that hurt their professional business. It was slanderous to call a "physician a

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<sup>101</sup> MICHAEL L. RUSTAD, *THE CONCEPTS AND METHODS OF SALES, LEASES AND LICENSES* 180 (1998). The concept of merchantability had its origins in the law merchant tradition. Under this concept, merchants were expected to deliver goods that met the standard of being at least average and fit for their ordinary purposes. Section 2-314 of the Uniform Commercial Code explicitly incorporates the implied warranty of merchantability in modern sales law. *Id.*

<sup>102</sup> 3 BLACKSTONE, *supra* note 71, at 122.

<sup>103</sup> 3 *id.*

<sup>104</sup> 3 *id.*

<sup>105</sup> 3 *id.* at 123.

<sup>106</sup> 3 BLACKSTONE, *supra* note 71, at 123.

<sup>107</sup> 3 *id.*

<sup>108</sup> 3 *id.*

quack or a lawyer a knave.”<sup>109</sup> Words derogating a “peer, a judge or other great officer of the realm” were considered so heinous that they were redressed by imprisonment of the slanderer as well as by an action on the case.<sup>110</sup> Both criminal penalties, to address the public offense, and the civil action on the case, to address the private injury, punished libel.<sup>111</sup>

#### b. *Malicious Prosecution*

The “engines of private spite and enmity” drove malicious prosecution.<sup>112</sup> The plaintiff’s legally protected interest was the “scandal, vexation, and expense” involved in responding to false charges.<sup>113</sup> Two or more defendants could be charged with conspiracy if they took concerted action in bringing false charges against a plaintiff. A plaintiff could only prevail in these cases if the grand jury found no probable cause for the defendant’s accusations. Today, the torts of malicious prosecution and abuse of process are still classified as intentional torts.

### 5. Domestic Torts

The chief ideological function of eighteenth century domestic torts was to protect and bolster the family as a social institution. Eighteenth century tort law reflected the patriarchal family values of an era in which males were absolute rulers of the intimate environment. Men enjoyed extensive rights over their chattels, which included wives, children and servants.<sup>114</sup> Torts protected four types of family relationships: “husband and wife, parent and child, guardian and ward, master and servant.”<sup>115</sup> In the modern era, the changing nature of the family as a social institution is reflected in the abolition of family immunities that makes it possible to sue the head of household for spousal or child abuse. In

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<sup>109</sup> 3 *id.*

<sup>110</sup> 3 *id.* at 122.

<sup>111</sup> 3 BLACKSTONE, *supra* note 71, at 125-26.

<sup>112</sup> 3 *id.* at 126.

<sup>113</sup> 3 *id.* at 157. At common law, the malicious prosecution action was restricted to instituting criminal proceedings without cause. Today the action extends to malicious civil proceedings in some jurisdictions. The tort of abuse of process has also evolved to punish litigants for misusing subpoena powers, discovery and other litigation devices.

<sup>114</sup> 3 *id.* at 138.

<sup>115</sup> 3 *id.*

Blackstone's day, domestic torts were designed solely to vindicate the power of the household head.

a. *Husband and Wife Relationship*

i. Abduction

At common law, women were classified as personal property of the male head of household. Tort law provided remedies for theft of property, including a cause of action for abduction. Abduction was the taking of a man's wife by fraud, persuasion or open violence—a tort that reflected the status of women as chattels.<sup>116</sup> Husbands could recover damages from another man who “persuade[d] or entice[d his] wife to live separate from him without a sufficient cause.”<sup>117</sup> A husband could receive damages for the defendant having taken his wife, but could not repossess his spouse without her consent.

Similarly, if a wife fled an abusive husband and was given refuge by another man, that man “might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband or to the spiritual court to sue for a divorce.”<sup>118</sup> A husband whose wife was abused by another man could file a writ in the names of the husband and wife jointly.<sup>119</sup> If another male beat a man's wife severely, depriving the husband of “the company and assistance of his wife,” the law gave him a separate remedy for monetary damages with a writ of action upon the case.<sup>120</sup> The father, as master of the patriarchal family structure, had standing to sue for bodily and sexual injuries inflicted on his wife, daughters and servants.<sup>121</sup>

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<sup>116</sup> 3 BLACKSTONE, *supra* note 71, at 139.

<sup>117</sup> 3 *id.*

<sup>118</sup> 3 *id.*

<sup>119</sup> 3 *id.* at 140.

<sup>120</sup> 3 *id.* at 138.

<sup>121</sup> “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.” Townsend v. Townsend, 708 S.W.2d 646 (Mo. 1986) (quoting 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 442 (1768)); see also Jane E. Larson, *Women Understand So Little, They Call My Good Nature “Deceit”: A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 383 (1993).

## ii. Adultery & Seduction

Adultery was considered a crime against the public order as well as a civil injury to the husband.<sup>122</sup> The cuckold had an action of *trespass vi et armis* against the adulterer, “wherein the damages recovered were usually very large and exemplary.”<sup>123</sup> Seduction was an action that considered the wife’s social standing and her “previous behavior and character.”<sup>124</sup> Exemplary damages were “properly increased or diminished by circumstances as the rank and fortune of the plaintiff and defendant.”<sup>125</sup> It is quite likely that seducing the wife of a more prominent neighbor would expose the defendant to a larger exemplary damages award. Under modern tort law, punitive damages may be increased because of the defendant’s wealth, but are not calibrated for the poverty or wealth of the plaintiff.

### b. *Parent and Child Relationship*

The writ of ravishment provided remedies for heirs who married without their father’s consent. Family torts addressed family property rights, not the rights of the child. Therefore, it is unclear whether an action could have been pursued for the “taking and carrying away [of] any other child besides the heir.”<sup>126</sup> A father, however, would have an action for the seduction of his daughters. Fathers filed writs for the loss of their female child’s services during pregnancy and childbirth. Further, family torts redressed injuries to the family as a unit rather than the personal suffering or mortification suffered by the individual.

### c. *Guardian and Ward*

At common law, the father of an infant was regarded as the “guardian by nature.” Upon the death of the father, the mother became the guardian. When both parents were deceased, the next of kin were designated as guardian.<sup>127</sup> By

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<sup>122</sup> 3 BLACKSTONE, *supra* note 71, at 138.

<sup>123</sup> 3 *id.*

<sup>124</sup> 3 *id.* at 140.

<sup>125</sup> 3 *id.*

<sup>126</sup> 3 *id.*

<sup>127</sup> BALLENTINE’S LAW DICTIONARY 540 (3d ed. 1969).

Blackstone's day, the guardian in chivalry had been abolished. This status was acquired by a lord of the manor to protect the children of the tenants.<sup>128</sup> If a ward's property was stolen, the guardian could pursue a remedy to recover it.<sup>129</sup> The guardian whose ward was seduced or ravished by an outsider could recover custody of his ward and file a writ for monetary damages.<sup>130</sup> The legal institution of guardianship evolved rapidly to protect incompetents, the elderly, orphans and other helpless individuals.

#### d. *Master/Servant Relationship*

Just as wives and children had no independent action to vindicate their personal rights, servants were dependent upon their master's protection in a court of law. A plaintiff could file an action against another man for hiring his family servant,<sup>131</sup> a writ that prefigured today's business tort action of interference with contract. The master could also file a writ if his servants were beaten, confined or disabled by a third party.<sup>132</sup> The servant as an individual "had no property in his master; and, if he receive[d] his part of the stipulated contract, he suffer[ed] no injury."<sup>133</sup> Under the doctrine of respondeat superior, masters could be liable for their servants' misdeeds within the scope of their duties. This doctrine later evolved into vicarious liability of the corporation for its employees' wrongdoing committed in the scope of duties.

### 6. Injuries to Other Chattels

Eighteenth century tort law validated property-owners' rights to the full enjoyment and use of their chattels and land. Personal property consisted of all moveable chattels. Actions for dispossessed chattels were divided into actions for taking personal property away and for "*detaining* them, though the original taking might be lawful."<sup>134</sup> The rights of personal property owners were vindicated in an action for the

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<sup>128</sup> *Id.* (defining guardian in chivalry).

<sup>129</sup> 3 BLACKSTONE, *supra* note 71, at 140.

<sup>130</sup> 3 *id.* at 141.

<sup>131</sup> 3 *id.*

<sup>132</sup> 3 *id.*

<sup>133</sup> 3 *id.* at 143.

<sup>134</sup> 3 BLACKSTONE, *supra* note 71, at 145.

deprivation of, or damage to, chattels. Originally, trespass covered the wrongful taking of a chattel, in contrast to detinue, which covered the wrongful detention of personal property.<sup>135</sup> Trover was a common law action for the recovery of personal property. Trover was a far more flexible writ than detinue because it permitted an action against a defendant who unlawfully exercised dominion or control over the personal property of another by any means.<sup>136</sup> If, for example, a neighbor borrowed a horse and did not return it, the owner could bring a writ for any damage done to the horse and to compensate for the loss of the horse's services.

With increased urbanization, tort remedies expanded to encompass more complex forms of property deprivation. The more modern tort of conversion has been extended to a wide variety of situations such as the misdelivery of goods, mortgages, gifts, and even to a finder who made an innocent mistake in possessing chattels.<sup>137</sup> The difference between conversion and trespass to chattels is only in remedy. The remedy for conversion is a forced sale versus compensation for mere diminished value due to intermeddling with personal property.<sup>138</sup>

#### a. *Liability for Wild and Domestic Animals*

A defendant who hunted his neighbor's deer, shot his dogs, poisoned his cattle or diminished the value of any of his chattels was liable for an action of *trespass vi et armis*. In the early medieval period, an owner of any animal was "strictly liable for the harm it did."<sup>139</sup> By Blackstone's day, the absolute liability rule applied to the keeping of wild animals such as bears or tigers that involved "obvious danger to the community."<sup>140</sup> The owner was not liable for harm caused by domestic animals unless he "knew, or had reason to know, of a dangerous propensity in the one animal in question."<sup>141</sup> The policy justification for this absolute liability rule was to protect

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<sup>135</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15 (5th ed. 1984).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Russell A. Hakes, *A Quest for Justice in the Conversion of Security Interests*, 82 KY. L.J. 837 (1993) (comparing trespass chattels to conversion).

<sup>139</sup> PROSSER, HANDBOOK, *supra* note 35, at 496.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 77.



the community from dangerous animals that presented a peril that reasonable precautions could not entirely eliminate.

b. *Injuries to Real Property*

A dominant feature of the law of civil wrongs in eighteenth century England was the enjoyment of rights in real property. Real property consisted of "land, tenements and hereditaments"<sup>142</sup> and was considered to be the fountainhead of "substantial and permanent rights," as compared to the "transitory rights" of chattels.<sup>143</sup> Ouster, as its name suggests, occurred when a wrongdoer unlawfully seized possession of land.<sup>144</sup> Trespass to land was by far the most common real property injury.<sup>145</sup> Any "breaking of the close" by entry without the owner's permission was a strict liability offense. The laws of trespass supported a view that "every man's land is . . . enclosed and set apart from his neighbors . . . either by a visible and material fence . . . or by an ideal invisible boundary."<sup>146</sup>

Trespasses were divided into two writs depending upon whether the injury was direct or indirect.<sup>147</sup> Whether the trespass was "willful or inadvertent" affected the "quantum" of damages.<sup>148</sup> An action for trespass could be pursued for nominal damages even when the unwarranted entry caused no actual damages.<sup>149</sup> Yet, there were exceptions to the absolute liability of trespassers. For example, after a harvest, the poor could glean the ground of others.<sup>150</sup> Additionally, hunters of beasts of prey, such as badgers and foxes, could enter the land of another

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<sup>142</sup> *Id.* at 144.

<sup>143</sup> *Id.* at 167.

<sup>144</sup> Ouster is "wrongful dispossession or exclusion of a party from real property." Edwin A. Skoch, *Personal Injury Liability Coverage for Environmental Contamination Under the Comprehensive General Liability Policy: Is Migrating Polluting a "Wrongful Entry or Eviction or Other Invasion of the Right to Private Occupancy"?*, 9 TUL. ENVTL. L.J. 37, 46 (1995) (quoting BLACK'S LAW DICTIONARY 1101 (6th ed. 1990)).

<sup>145</sup> PROSSER, HANDBOOK, *supra* note 35, at 208.

<sup>146</sup> *Id.* at 209.

<sup>147</sup> Trespass on the case was filed when the injuries were indirect and a trespass was committed without force. *Trespass vi et armis* occurred when the trespass was inflicted with force.

<sup>148</sup> PROSSER, HANDBOOK, *supra* note 35, at 209.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 212-13.

without permission because of the public interest in destroying these pests.<sup>151</sup>

## 7. From Absolute Liability to Negligence

The intentional torts from Blackstone's day carried over to modern law. The modern law of torts is largely a product of the negligence paradigm. The role of civil liability as an alternative to dueling, and its role in adjudicating intentional torts among neighbors, gave way to a new regime that compensated for accidental injuries caused by railroads, steamboats, utilities, streetcar companies and other entities that posed danger to the public.

With the development of the law of negligence in the nineteenth century, torts radically changed in form and function. Sir William Blackstone never used the term "torts" in any of his writings.<sup>152</sup> The first American treatise on tort law was not published until 1859, and the first English treatise was produced a year later.<sup>153</sup> The English historian Sir Frederick Pollock wrote in his 1886 first edition of *The Law of Torts*: "The purpose of this book is to show that there really is a law of torts, not merely a number of rules about various kinds of torts."<sup>154</sup>

### B. *Stage Two: The Laissez Faire Negligence Era: 1825-1944*

It was not until the middle of the nineteenth century that torts evolved as a specific doctrinal field. Modern tort law grew up "at the close of the nineteenth century" when "progress toward the recognition of 'fault' or moral responsibility" became the chief basis of liability.<sup>155</sup> Edward G. White argues that the "principal thrust of late nineteenth century doctrines was to restrict, rather than to expand, the compensatory function of the law of torts."<sup>156</sup> The negligence framework provided courts

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<sup>151</sup> *Id.* at 213.

<sup>152</sup> Sir William Blackstone used the term "private wrongs" to describe many of the actions later recognized under the law of intentional torts. *See generally* 3 BLACKSTONE, *supra* note 71.

<sup>153</sup> THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 15 (2001).

<sup>154</sup> LAURENCE H. ELDREDGE, MODERN TORT PROBLEMS 31 (1941) (citing Sir Frederick Pollock's letter to Justice Holmes in THE LAW OF TORTS (1886)).

<sup>155</sup> PROSSER, HANDBOOK, *supra* note 35, at 492.

<sup>156</sup> G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 61 (1980).

with the conceptual tools to expand, as well as contract, liability in dealing with the type of mass disasters that accompanied rapid industrialization. During the heyday of the negligence era, from 1850 to 1910, courts also recognized many new liability-limiting doctrines, such as contributory negligence, the assumption of risk and the fellow servant rule.<sup>157</sup>

Tort law's evolution from absolute liability to the law of negligence traces back to the 1850 case of *Brown v. Kendall*.<sup>158</sup> In that case, the plaintiff suffered a serious eye injury when the defendant, who was attempting to separate two fighting dogs, accidentally struck him with a stick.<sup>159</sup> Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court advanced a fault-based theory that focused on whether the defendant employed reasonable care under the circumstances.<sup>160</sup> After the dogfight case, negligence swept the nation. Courts applied this fault-based theory to a wide variety of other events, including industrial accidents.

### 1. The Rise of Negligence

Negligence is often defined as creating an unreasonable risk or as conduct that departs from the reasonable standard of care.<sup>161</sup> Unlike the intentional torts of Blackstone's day and today, negligence defendants do not deliberately set out to injure plaintiffs. A fireman who maliciously throws live ashes

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<sup>157</sup> As the negligence paradigm developed, judges created and imported tort defenses and immunities from England that served as a brake to expanded liability. The "assumption of risk" doctrine, for example, stated that a plaintiff "voluntarily" assumed a known risk, and the "fellow servant" rule kept employees from recovering for workplace injuries caused by a fellow worker. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 301-02 (1973) (discussing development of doctrines). See generally Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 U. ILL. L. REV. 151 (1946) (discussing importing contributory negligence doctrine from English common law).

<sup>158</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>159</sup> *Id.*

<sup>160</sup> Peter Karsten, Book Review, 18 LAW & HIST. REV. 683, 683 (2000) (reviewing NAN GOODMAN, *SHIFTING THE BLAME: LITERATURE, LAW, AND THE THEORY OF ACCIDENTS IN NINETEENTH-CENTURY AMERICA* (1998)); see also Michael L. Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1159 (1999).

<sup>161</sup> Restatement (Second) of Torts § 302A states: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person." RESTATEMENT (SECOND) OF TORTS § 302A (1965). See generally David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 365, 393 (1994).

from a moving train on a woman standing near the crossing is liable for an intentional tort.<sup>162</sup> In contrast, the “legal delinquency” in a negligence case is carelessness or the failure to exercise reasonable care.<sup>163</sup>

Negligence or accident law expanded rapidly in the 1850s to protect the public against behavior like recklessly constructing an unsafe bridge or failing to maintain a railway trestle, and mass disasters such as the Triangle Shirt Waist Factory fire.<sup>164</sup> The development of negligence freed courts from the shackles of the writ system and permitted courts to begin balancing utilities against risks. Negligence, by its very nature, involves judgments that weigh the social benefit of activities against the risks of harm to the public. In *Thane v. Scranton Traction Co.*,<sup>165</sup> the Pennsylvania Supreme Court noted an important social benefit of industrial development: “Rapidity of transit is no longer a mere convenience to the traveler. It has become a matter of vital interest to the general business of the community.”<sup>166</sup> The same technology that benefited the public, however, endangered the entire community when not carefully managed. Fires, explosions, shipwrecks and other mass disasters on a scale that was unknown in Blackstone’s day resulted from the negligent use of the dangerous instrumentalities necessary for an industrial economy.

In 1890 alone, one railroad worker in every three hundred was killed on the job; among freight railroad brakemen, one in every hundred died in work accidents each year. The most extraordinary rates of death and injury appear to have been reached in the anthracite coalmines of Pennsylvania, where each year during the 1860s and 1870s six percent of the workforce was killed, six percent permanently crippled, and six percent seriously but temporarily disabled.<sup>167</sup>

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<sup>162</sup> *Louisville & Nashville R.R. Co. v. Eader*, 93 S.W. 7, 7 (Ky. 1906) (describing how railroad fireman “recklessly, negligently, and wantonly” threw a shovelful of burning cinders, embers, and ashes into [the plaintiff’s] face, inflicting upon her serious burns and permanent injury to her eyesight, from which she has suffered great injury and damage, and for which she prayed a judgment in the sum of \$5,000”).

<sup>163</sup> BLACK’S LAW DICTIONARY 1184 (4th ed. 1951).

<sup>164</sup> The deaths were caused by the owner locking the factory doors to prevent the seamstresses from leaving the workplace without permission. Bruce Hight, *Life’s Labor: Unions while weak in Texas, still made a difference*, AUSTIN AMERICAN-STATESMAN, Dec. 19, 1999, at E1.

<sup>165</sup> 43 A. 136 (Pa. 1899).

<sup>166</sup> *Id.*

<sup>167</sup> FRIEDMAN, *supra* note 158, at 65. By the turn of the century, one worker in

Thousands of people died in industrial accidents each year before tort law reduced the carnage by creating incentives for safety. Thus, courts began to recognize that “[t]he modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body.”<sup>168</sup> New tort rights and remedies were necessary to counter unreasonable risks of harm caused by the agents of railroads, utilities and streetcar companies.

## 2. Tort Immunities Breed Corporate Irresponsibility

During the negligence era, judges often concluded that the social benefits produced by a given industrial activity outweighed harms to the environment or risks to the public. To protect the benefits, courts crafted escape hatches for industry. These included the doctrines of contributory negligence and the fellow servant rule.

Contributory negligence barred recovery where there was “concurring negligence of both plaintiff and defendant.”<sup>169</sup> A plaintiff could be barred from any recovery if a jury found that she was in any part responsible for her injury. Contributory negligence in the workplace meant that a momentary lapse of caution “would cast the entire burden of his injury upon [the employee].”<sup>170</sup>

Judges extended the assumption of risk doctrine to the workplace, ruling that an employee voluntarily and knowingly assumed the risks when taking a dangerous job. The assumption of risk doctrine cast the entire burden of his injury upon the worker, even if the employer was grossly negligent.<sup>171</sup> The application of this pro-employer defense was particularly harsh for U.S. workers who, unlike their contemporaries in continental Europe, had no social welfare system or social safety net on which to fall back.

American courts further limited the liability of employers by importing the English fellow servant rule, whereby employers escaped liability for injuries to an employee

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fifty was killed or disabled for at least four weeks each year because of a work-related accident. In the population as a whole, roughly one in every thousand Americans died by accident each year. In dangerous industries, accident rates were considerably higher. *Id.*

<sup>168</sup> *Id.* at 467.

<sup>169</sup> *Payne v. Chicago & Alton R.R. Co.*, 31 S.W. 885, 888 (Mo. 1895).

<sup>170</sup> *Richmond Traction Co. v. Martin's Adm'r*, 102 Va. 209, 213 (1903).

<sup>171</sup> PROSSER, HANDBOOK, *supra* note 35, at 550.

caused solely by the negligence of a fellow employee.<sup>172</sup> This doctrine gradually supplanted the common law duty of employers to provide a safe workplace. In *Farwell v. Boston & Worcester Railroad*, a Massachusetts court employed the fellow servant rule to preclude recovery for a railroad engineer who lost his hand in an accident caused by a switchman's carelessness.<sup>173</sup> In ruling that the railroad had no liability, the court observed that the workers' wages compensated them for being exposed to natural and ordinary risks and perils.<sup>174</sup> To make matters even worse, there was a "no-duty" rule that imposed no duty to aid third parties injured in railway accidents.<sup>175</sup>

### 3. Judicial Exceptions to Harsh Defenses

Most states generally adhered to the fellow servant rule.<sup>176</sup> However, a number of states either rejected the fellow servant rule or bypassed its harsh effects. Massachusetts was one of the few states to consistently apply the fellow servant rule strictly. The fellow servant doctrine was based in part on a view that the best service was obtained by placing the cost of certain negligence on the servant.<sup>177</sup> Southern states rejected the fellow servant rule because of the overarching institution of slavery. Southern courts applied the doctrine of respondeat superior, giving masters of injured slaves a right to sue the employer of a slave who injured his co-worker.<sup>178</sup>

In many jurisdictions, judges riddled the fellow servant rule with exceptions. Most courts eviscerated the fellow servant

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<sup>172</sup> *Priestly v. Fowler*, 150 Eng. Rep. 1030 (Ex. 1837).

<sup>173</sup> 45 Mass. 49 (1842).

<sup>174</sup> *Id.* at 50-51.

<sup>175</sup> *Union Pac. Ry. Co. v. Coppier*, 72 P. 281 (Kan. 1903) (reporting case in which employee did nothing to aid severely injured victim).

<sup>176</sup> See, e.g., *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432 (1878) (ruling that that workmen were fellow-servants and therefore, the master was not responsible to a servant for a coal mine injury caused by his fellow-servant); *Whaalan v. Mad River & L.E. R.R. Co.*, 8 Ohio St. 249 (1858); *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Devinney*, 17 Ohio St. 197, 213 (1867) (holding fellow servant rule "defeats recovery against the principal for the negligence of each other"); *Slattery's Adm'r v. Toledo & Wabash Ry. Co.*, 23 Ind. 81 (1864) (holding that a brakeman on a train and one whose duty and business it is to attend a switch are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other).

<sup>177</sup> *Howard v. Illinois Cent. Ry. Co.*, 207 U.S. 463 (1907).

<sup>178</sup> Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEGAL HIST. 269 (1987).

rule by constructing exceptions such as one court's ruling that a conductor was not a "fellow-servant with the firemen, the brakemen, the porters and the engineer of the train. . . . [A]s to them and the train, [he] stands in the place of and represents the corporation."<sup>179</sup> The Supreme Court affirmed the trial court's refusal to apply the fellow servant rule in this negligence case.<sup>180</sup>

The trial record showed clear evidence "that the conductor on each train was guilty of gross negligence."<sup>181</sup> The conductor of the freight train not only violated a general duty of care, but a statutory duty of care in failing to communicate to avoid such collisions.<sup>182</sup> The Court challenged the public policy rationale for the fellow servant exception:

It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.<sup>183</sup>

American courts frequently found ways to bypass the fellow servant rule in railway accident cases. In *Northern Pacific Railroad v. Herbert*,<sup>184</sup> the Supreme Court considered

<sup>179</sup> *Chicago M. & St. P. R.R. Co. v. Ross*, 112 U.S. 377, 390 (1884).

<sup>180</sup> In *Ross*, a conductor failed to deliver a message warning that a gravel train would be on the track. The unwarned freight train

did not stop at the station designated, but continuing at a speed of fifteen miles an hour, entered a deep and narrow cut 300 feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about 100 feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

*Id.* at 381.

<sup>181</sup> *Id.* at 382.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 383.

<sup>184</sup> 116 U.S. 642 (1886).

the application of the fellow servant rule in a case arising out of the construction of a railway from Duluth, Minnesota to Bismark, in Dakota Territory. The brakeman's leg was crushed between two railway cars that were in the process of switching tracks due to a faulty brake that the railway negligently kept in disrepair.<sup>185</sup> The Court held that the fellow servant rule did not apply since the plaintiff and the negligent maintainer of the brake worked in different departments and, therefore, were not fellow servants.<sup>186</sup>

In *Hough v. Railway Co.*,<sup>187</sup> a railway employee was scalded to death by steam when the train was derailed due to a defective cowcatcher. The Supreme Court carved out another exception to the fellow servant rule based upon the common law duty of the employer to maintain a safe workplace.<sup>188</sup> It justified this exception based on reasoning that:

One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.<sup>189</sup>

The Supreme Court also rejected the fellow servant rule in *Union Pacific Railway, Co. v. Daniels*.<sup>190</sup> In *Daniels*, a brakeman on a freight train was severely injured in an accident caused by a crack in a negligently maintained wheel.<sup>191</sup> The Court refused to apply the fellow servant rule, stating that the railway easily could have discovered the defect with proper inspection of the wheels.<sup>192</sup>

Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow-service it has been held that agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow-servants with those who are engaged in operating it.<sup>193</sup>

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<sup>185</sup> *Id.* at 643.

<sup>186</sup> *Id.* at 657.

<sup>187</sup> 100 U.S. 213 (1879).

<sup>188</sup> *Id.* at 217.

<sup>189</sup> *Id.*

<sup>190</sup> 152 U.S. 684 (1894).

<sup>191</sup> *Id.* at 685.

<sup>192</sup> *Id.*

<sup>193</sup> *Northern Pac. R.R. Co. v. Hambly*, 154 U.S. 349, 357-58 (1894).



Courts hesitated to extend the fellow servant rule to an accident caused by employees working in different departments.<sup>194</sup> When the servants' departments were "so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured," the accidents were outside the scope of the fellow servant rule.<sup>195</sup>

The Wisconsin Supreme Court also refused to recognize the fellow servant rule in a case in which a messenger temporarily employed as a brakeman for a single train trip was injured in an accident caused by the negligent conduct of the engineer. The court rejected the rationale of the fellow servant rule, ruling that the railroad was not entitled to immunity from negligence liability:

We are satisfied, therefore, that the general principles of the common law sustain this liability, and that those cases which have attempted to establish an exception, do not rest upon solid ground. If the plaintiff was injured by the negligence of the engineer, even though he was at the time a servant of the company, he himself being guilty of no negligence that contributed to the injury, he is entitled to recover.<sup>196</sup>

Tort scholars have radically different perspectives on the degree to which courts actually followed harsh doctrines such as the fellow servant rule. Charles Gregory argues that nineteenth century judges crafted these anti-employee doctrines "to make risk-creating enterprise less hazardous to investors and entrepreneurs."<sup>197</sup> The policy justification for judicial subsidies was to give "incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees."<sup>198</sup> Gregory maintains that the liability-limiting rules of negligence were functionally necessary "to establish industry, which in turn was essential to the good society" as envisaged by nineteenth century judges.<sup>199</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 357.

<sup>196</sup> *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238 (1860).

<sup>197</sup> Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

In contrast, Morton Horwitz questions the social justice of nineteenth century tort doctrines favorable to rapid industrialization.<sup>200</sup> Horwitz argues that pro-defendant defenses such as the fellow servant rule, contributory negligence and the assumption of risk "broke with the traditional principle of just compensation for injury, in effect subsidizing industrial development at the expense of workers and consumers," which encouraged employers to employ new, but dangerous, technologies and forms of industrial organization.<sup>201</sup> The fellow servant rule, for example, abridged the absolute common law duty to protect servants in the workplace.<sup>202</sup>

Gary Schwartz argues that Horwitz's "subsidy" theory ignores the fact that courts in that era routinely bypassed harsh defenses because they had "a keen concern for victim's welfare."<sup>203</sup> Negligence era courts, for example, created the legal fiction of the attractive nuisance doctrine to permit children to recover for injuries created by railroad turntables. Hundreds of children were injured each year in the late nineteenth century by railroad turntables "unlocked and unguarded near a street so [children] could play and ride on them."<sup>204</sup> The railroad turntable doctrine permitted a child trespasser to recover for injuries despite having no permission to be on the premises.<sup>205</sup> In one turn of the century case, a Texas appeals court described circumstances that called for the railroad turntable doctrine:

On account of the nature and location of the turntable and the fact that it could be easily revolved and ridden upon as a merry go round, it was especially and unusually calculated to attract children and tempt them to get upon and use the same. . . . [I]t had been a very frequent occurrence, and especially on Saturdays and Sundays, for little boys and girls from four to fifteen years of age to gather at this turntable and push it around and ride on it. This use made of the turntable by the children was known to [railroad] agents and

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<sup>200</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 294 (1978).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 210.

<sup>203</sup> Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981); see also Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989).

<sup>204</sup> *Denison & Pac. Suburban Ry. Co. v. Harlan*, 87 S.W. 732, 733 (Tex. 1905).

<sup>205</sup> *Sioux City & P. R.R. v. Stout*, 84 U.S. 657 (1873); *Keffe v. Milwaukee St. P. Ry. Co.*, 21 Minn. 207 (1875) (permitting young children to recover for injuries sustained on railroad turntables despite the general rule that no duty of care was owed to a trespasser).

employers . . . and so used without any objection, and was, or by the exercise of ordinary care could have been, known to appellant. The turntable was a very dangerous machine for children to ride upon or use as a plaything.<sup>206</sup>

Texas tort law did not recognize recovery for trespassing children injured by playing on wagons, haystacks, woodpiles and things of that character, but the courts managed to carve out an exception when they saw a clear injustice.<sup>207</sup>

#### 4. Gender Injustice and Tort Law

During the negligence era, women's tort claims were frequently marginalized or excluded completely by a legal system that did not take into account their household and child-rearing contributions.<sup>208</sup> A married woman could maintain no cause of action because she had no separate legal existence apart from the family as a social institution at common law.<sup>209</sup> In many jurisdictions, there were no tort obligations between husband and wife. "The husband was entitled to his wife's choses in action and thus, if he had injured her, he would likewise owe the duty of compensation only to himself."<sup>210</sup>

Margo Schlanger's historical study of female tort plaintiffs in transportation cases found that "ideas about women's autonomy and authority suffused judicial analyses of women's right to recover."<sup>211</sup> Tort law reflected the sexism of this era by socially constructing a false dichotomy in which males were classified as competent to drive while women "committed contributory negligence as a matter of law simply

<sup>206</sup> *Denison*, 87 S.W. at 733; see also *San Antonio & A. P. Ry. Co. v. Skidmore*, 65 S.W. 215 (Tex. 1901) (upholding a \$1,000 verdict in favor of an eleven-year-old girl "crippled for life" in an accident caused by playing on an "unlocked and unguarded [railroad] turntable . . . that the turntable was of unusual attractiveness to children").

<sup>207</sup> *Denison*, 87 S.W. 732.

<sup>208</sup> Koenig & Rustad, *Tort Reform*, *supra* note 28.

<sup>209</sup> Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 456 (2000).

<sup>210</sup> *Id.* at 531.

<sup>211</sup> Margo Schlanger, *Injured Women Before Common Law Courts: 1860-1930*, 21 HARV. WOMEN'S L.J. 79, 105-06 (1998); see also Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Lucinda M. Findley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

by driving.”<sup>212</sup> In other areas of tort law, patriarchal assumptions immunized battering husbands from liability for spousal abuse.<sup>213</sup> Similarly, a child had no cause of action against her parents, no matter how egregious the mistreatment or neglect.<sup>214</sup> The judiciary upheld these intra-family immunities on the dubious policy justification that tort lawsuits would damage the integrity of the family as a social institution. This formalistic argument ignored the reality that harmony seldom existed in an intimate environment dominated by an abusive husband.

### 5. Tort Limitations on Patient Rights

Medical malpractice cases were rarely successful prior to the 1940s because plaintiffs had to run a gauntlet of common law barriers to establish professional negligence. Charitable immunity precluded actions against hospitals on the ground that “the charitable donations that supported a hospital constituted a public trust that could not be diverted.”<sup>215</sup> Courts’ unwillingness to extend vicarious liability principles to a hospital “because doctors and nurses were considered to be independent contractors rather than hospital employees” imposed another barrier to medical malpractice actions.<sup>216</sup> Most states did not modify or limit the doctrine of charitable immunity until the 1960s.<sup>217</sup>

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<sup>212</sup> Schlanger, *supra* note 211, at 106.

<sup>213</sup> See generally Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989) (arguing that continuing applicability of spousal immunity serves little purpose). At common law, interfamily immunities were formidable obstacles for recovery. Carl Tobias argues that spousal immunity is a significantly regressive doctrine that harms women, though the immunity is neutral on its face. See generally *id.* The traditional policy reason for the immunity was to preserve familial peace, discipline and control. See generally *Kirchner v. Crystal*, 474 N.E.2d 275 (Ohio 1984) (describing immunity). These policy reasons were mere legal fictions protecting abusive males. Beginning in the 1960s, the clear trend was reversal or restriction of the family immunities. By “1970, about a dozen courts had rejected any universal principle of immunity between spouses.” *KEETON ET AL.*, *supra* note 136, § 122. By 1980, another dozen states had eliminated spousal immunity. *Id.* Similar but less dramatic reversals can be seen in the erosion of parent-child immunity. *Id.* at 904-907; see generally *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971) (abrogating parental immunity).

<sup>214</sup> Caroline E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617, 622-23 (1993).

<sup>215</sup> Mark J. Garwin, *Immunity in The Absence of Charity: EMTALA and the Eleventh Amendment*, 23 S. ILL. U. L.J. 1, 2 (1998).

<sup>216</sup> *Id.*

<sup>217</sup> By 1969, “[a] substantial majority of jurisdictions have abolished charitable immunity.” JERRY PHILLIPS ET AL., *TORT LAW: CASES, MATERIALS, AND PROBLEMS* 797

Physicians engaged in a widespread "conspiracy of silence" by refusing to testify against other doctors, even in cases of obvious medical negligence.<sup>218</sup> The locality rule required plaintiffs to obtain expert testimony from a local doctor as to the standard of care practiced in his immediate community.<sup>219</sup> By the 1960s, local community rules for expert testimony were liberalized and, in some cases, expert testimony was not required under the so-called "common knowledge" exception.<sup>220</sup>

Further, it was only in the 1940s that courts began to apply the evidentiary doctrine of *res ipsa loquitur*, which permits patients who lack direct evidence of medical negligence to smoke out wrongdoers.<sup>221</sup> A patient who was seriously injured during what should have been a routine operation could not recover because he could not prove direct negligence. Prior to World War II, most courts required plaintiffs to present expert testimony, even when the injury was as clear cut as a physician carelessly leaving medical instruments, surgical towels or other foreign objects inside a patient after surgery.<sup>222</sup>

Compounding limitations on patient rights, other important avenues to recovery remained closed until the mid-1960s. Only then did the doctrine of informed consent,

(2d ed. 1997).

<sup>218</sup> Nicolas P. Terry, *An eHealth Diptych: The Impact of Privacy Regulation on Medical Error and Malpractice Litigation*, 27 AM. J. L. & MED. 361 (2001).

<sup>219</sup> Dr. Bernard Friedland & Dr. Richard W. Valachovic, *The Regulation of Dental Licensing: The Dark Ages?*, 17 AM. J. L. & MED. 249, 253 (1991).

<sup>220</sup> Denver Peacock, *Haase v. Starnes: The Arkansas Supreme Court's Refusal to Require Expert Testimony in Express Warranty Medical Malpractice Litigation*, 50 ARK. L. REV. 731, 735 (1998).

<sup>221</sup> In a medical malpractice case a plaintiff relying on *res ipsa loquitur* must show:

- (1) [T]hat the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) that the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and (3) that the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.

*Roylance v. Rowe*, 737 P.2d 232, 235 (Utah 1987). The doctrine of *res ipsa loquitur* was extended to medical malpractice first in a 1944 California case, *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944) (applying *res ipsa loquitur* to health care providers attending plaintiff during an appendectomy). Later cases extended *res ipsa loquitur* to manufacturers of medical instruments, as well as to doctors and hospitals. See *Anderson v. Somberg*, 338 A.2d 1 (N.J. 1975) (applying *res ipsa loquitur* to medical malpractice case in which fragments of a surgical instrument broke off into the plaintiff's spinal column during a back operation).

<sup>222</sup> Peacock, *supra* note 220, at 736.

requiring physicians to inform their patients of material risks from given procedures, begin to develop. Additionally, before 1965, when corporate medical negligence was recognized in *Darling v. Charlestown Community Memorial Hospital*, hospitals were not liable for the medical malpractice of affiliated physicians.<sup>223</sup> Corporate liability for medical malpractice and defective products evolved rapidly in the 1960s and 1970s.

## 6. Judicial Restrictions on Tort Law Development

During the negligence era, tort law was a stagnant pool that prevented judicial recognition of new categories of plaintiffs. A complex web of tort defenses, immunities, privileges and limited duties arbitrarily excluded whole categories of claimants. The doctrine of sovereign immunity prevented lawsuits against governmental units<sup>224</sup> and corporations used the doctrine of ultra vires<sup>225</sup> to shield themselves from torts outside the scope of their articles of incorporation.

In the negligence era, courts steadfastly refused to expand tort rights and remedies to new categories of claimants, in part because of a fear of opening up the floodgates of liability. For example, in 1884, Massachusetts Supreme Court Justice Oliver Wendell Holmes Jr. rejected prenatal injuries as a cause of action because the fetus "was a part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was recoverable by her."<sup>226</sup> Not until the democratic expansionary era after World War II did courts begin to recognize torts for prenatal injury, wrongful birth and wrongful death. In the post-war period, a more progressive tort law regime displaced many of the liability-

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<sup>223</sup> 211 N.E.2d 253, 260 (Ill. 1965) (holding hospital liable for the tortious acts of its servants).

<sup>224</sup> Beginning in the 1950s, however, courts and legislatures began to erode or eliminate immunity after immunity. The Federal Torts Claim Act of 1946 waived the government's immunity from many, but not all, tort actions. 28 U.S.C. §§ 1346, 2674 (1946). Many state legislatures enacted parallel provisions making their states liable for many forms of injury law.

<sup>225</sup> The doctrine of ultra vires maintained that a corporation was not responsible for acts beyond those listed in its corporate charter. Creative counsel argued that since torts were not within the corporate charter, they were not cognizable.

<sup>226</sup> *Dietrich v. Northampton*, 138 Mass. 14, 17 (1884).

limiting defenses, privileges and immunities of the negligence era.<sup>227</sup>

### C. *The Democratic Expansionary Era: 1945-1980*

The American law of torts was a relatively sleepy outpost prior to the 1940s, but plaintiff-oriented tort expansion began shortly after the Second World War. By the mid-1960s, this expansion had shifted into high gear. Every branch of tort law expanded to recognize new classes of plaintiffs and new categories of injury.<sup>228</sup> In the eighteenth and nineteenth centuries, "tort law was in the hands of, and therefore served the interests of, society's wealthy, educated elite—who tended to focus on their own reputation and wealth not factory worker's safety."<sup>229</sup> Intentional infliction of emotional distress did not emerge as a separate tort until the middle of the twentieth century.<sup>230</sup> In contrast, by the 1970s, victims of mass-marketed products, hospital negligence, gender discrimination, racial discrimination and toxic exposures were able to use tort litigation individually and in class actions.

#### 1. The Erosion of Barriers to Recovery

Liability-limiting no-duty rules, defenses and immunities "retreated, like a melting glacier in a hostile environment . . . ."<sup>231</sup> In the field of business torts, trial lawyers expanded the torts of disparagement, false advertising and

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<sup>227</sup> Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Accidents*, 67 COLUM. L. REV. 170, 181 (1967).

<sup>228</sup> DAN B. DOBBS, *THE LAW OF TORTS* § 3 (2000).

<sup>229</sup> Anthony J. Sebok, *Can Tort Litigation Against Enron Work? The Problems and Possibilities in Suing a Bankrupt Company*, at <http://writ.news.findlaw.com/-sebok/20020225.html> (last visited Feb. 28, 2002).

<sup>230</sup> Emotional injuries could be recovered if attached to another independent tort such as assault, battery or false imprisonment. Justice Roger Traynor's landmark opinion in *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952), recognized the right to be free from "serious, intentional, and unprivileged invasions of emotional and mental tranquility." *Id.* at 286. The *Siliznoff* case was the first U.S. appellate case to permit recovery for severe emotional distress even if there were no physical manifestations. Section 46 of the Restatement (Second) of Torts cited *Siliznoff* in recognizing a cause of action for the tort of outrage. Section 46 cmt. d of the Restatement (Second) requires that the defendant's actions be extreme and outrageous. Today, there are jurisdictional differences in whether a plaintiff may recover absent a showing of physical manifestation of severe emotional distress caused by the defendant's outrageous misconduct.

<sup>231</sup> ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* 68 (2d ed. 1983).

intellectual property infringement.<sup>232</sup> The pro-defendant doctrines of the negligence era were supplanted by plaintiff-oriented reforms such as comparative negligence in most states.<sup>233</sup> The fields of medical malpractice and strict products liability expanded from sleepy outposts to bustling realms that incorporated hotly contested new causes of action.

During the democratic expansionist era from 1945 to 1980, barrier after barrier to women's tort recovery melted away.<sup>234</sup> Interfamilial and charitable immunities were largely eliminated.<sup>235</sup> New categories of claimants were recognized for injuries sustained in utero and even for preconception injuries.<sup>236</sup> Tort law expansion after World War II resulted in the extension of new tort rights and remedies to women, compensating them for reproductive, familial and gender-related injuries.<sup>237</sup>

In 1946, courts first recognized a separate claim for prenatal injuries in *Bonbrest v. Kotz*.<sup>238</sup> Courts gradually expanded these actions, permitting a child to bring an action for prenatal injuries inflicted by third persons.<sup>239</sup> The Illinois

<sup>232</sup> Business torts were critical in protecting intellectual property rights in the fields of trademark infringement, trade secrets theft, unfair competition and false advertising.

<sup>233</sup> Comparative negligence jurisdictions vary depending on whether they are "modified" or "pure" regimes. In a modified system, negligent plaintiffs may recover provided their negligence is neither equal to nor greater than that of the defendant. In a pure comparative negligence regime, the plaintiff's recovery is diminished by the degree of negligence, even if it is greater than or equal to that of the defendant. In a modified comparative negligence jurisdiction following the fifty-fifty rule, a plaintiff may not recover if his fault was fifty percent or more in contributing to his injury. In a pure comparative negligence jurisdiction, the plaintiff's recovery is reduced by the degree of his or her own negligence.

<sup>234</sup> Feminist scholars argue that tort law must evolve further to protect women's rights. See, e.g., Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 404 (1994).

<sup>235</sup> Courts are divided as to whether a pregnant woman has a duty to her unborn child. Even in jurisdictions that have abolished parent/child immunity, courts have been reluctant to expand liability to include actions by a child against her mother for fetal injuries.

<sup>236</sup> Koenig & Rustad, *Tort Reform*, *supra* note 28, at 19-20.

<sup>237</sup> *Id.*

<sup>238</sup> 65 F. Supp. 138 (D. D.C. 1946).

<sup>239</sup> Over time, tort law has allowed greater recovery for psychic injuries that disproportionately benefited women. See generally Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990). In the nineteenth century, courts would deny recovery for harm from fright unless there was some physical impact. Gradually, the strictures on emotional injuries were expanded. The first exception provided that a plaintiff could recover if she fell



Supreme Court in 1953 recognized a duty for injuries occurring a few days after birth,<sup>240</sup> overruling a contrary 1900 decision.<sup>241</sup> And in *Renslow v. Mennonite Hospital*,<sup>242</sup> the Illinois Supreme Court rejected viability as a precondition for recovery of prenatal injuries suffered by a fetus. Following this trend, a Michigan court allowed recovery for a child born with profound retardation resulting from exposure to rubella syndrome.<sup>243</sup> In *Bergstreser v. Mitchell*,<sup>244</sup> the Eighth Circuit permitted a child to pursue a prenatal injury lawsuit against a medical care provider for injuries caused by a negligently performed caesarean section that had occurred years earlier.

In contrast, courts were slow to recognize a parent's right to recovery for wrongful birth or a child's action for wrongful life.<sup>245</sup> Wrongful birth claims generally stem from a medical provider's negligent treatment or a failure to diagnose a fetal injury that essentially deprives the parents of the opportunity to make a well-informed decision to either avoid conception or to terminate a pregnancy. Tort liability for wrongfully causing or failing to diagnose a fetal injury resulting in the birth of a child with a defective injury was first cognizable in a case where there was a failure to correctly diagnose or predict the effects of rubella on fetal development.<sup>246</sup> Courts have been particularly reluctant to recognize "wrongful birth" actions involving the tort liability of

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within the zone of danger, even if there was no physical impact. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), recognized recovery even when the plaintiff fell outside the zone of danger. This permitted a mother to collect for emotional damages suffered when she saw her child killed by an automobile. *Id.*

<sup>240</sup> *Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953) (recognizing a wrongful death action for the death of an infant who sustained a fetal injury while in a viable condition).

<sup>241</sup> *Allaire v. St. Luke's Hosp.*, 56 N.E. 638 (Ill. 1900), *overruled in part by Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953) (holding no action for injuries to a fetus, only days away from birth).

<sup>242</sup> 367 N.E.2d 1250 (Ill. 1977).

<sup>243</sup> *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989).

<sup>244</sup> 577 F.2d 22 (8th Cir. 1978) (holding that a child stated a cause of action against medical care provider for injuries proximately caused by a caesarean section negligently performed upon the child's mother several years prior to the child's birth).

<sup>245</sup> "Wrongful pregnancy (or wrongful conception) is distinguished from wrongful birth (or wrongful life), where the latter refers to consequences that ensue from a doctor's or hospital's failure to inform a pregnant woman of medical conditions that might affect her decision to terminate her pregnancy . . . ." Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1070 (1999).

<sup>246</sup> *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

a medical provider when the result is the birth of a normal child.<sup>247</sup>

Wrongful life claims are brought on behalf of a disabled child, as opposed to the parent's claim for wrongful birth or pregnancy. New Jersey recognized a wrongful conception claim in *Schroeder v. Perkel*,<sup>248</sup> a case in which a physician's failure to diagnose an obvious condition of cystic fibrosis in the parent's first infant led them to have a second child with the same genetic defect. Wrongful birth and life expansions remain controversial and only a few jurisdictions have adopted them. Courts have been slow to recognize these claims because determining whether parents would have pursued an abortion knowing of a fetal injury is often speculative. Moreover, it is always difficult for juries to calibrate damages for having been born with a defect.

## 2. Expansion of Special Relations Giving Rise to Duties

Few concepts in the law of torts are more laden with political implications than the concept of legal duty in the law of negligence. The no duty rule is an elastic concept that can be used to expand or to contract liability.<sup>249</sup> An individual owes no duty of care to a stranger absent a special relationship.<sup>250</sup> The common law "no duty to rescue" rule "applies irrespective of the gravity of the danger to which the other is subjected . . . ."<sup>251</sup> Yet, "if there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which makes his situation worse."<sup>252</sup>

The no duty rule, for example, does not mandate assisting a drowning stranger even though the burden of rescue would be slight. The Restatement (Second) of Torts notes that the no duty rule applies even if an "actor realizes or should realize that action on his part is necessary for another's

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<sup>247</sup> See, e.g., *Hitzemann v. Adam*, 518 N.W.2d 102, 107 (Neb. 1994) (ruling that parents may not obtain the costs of rearing a normal child born in the wake of an unsuccessful sterilization operation).

<sup>248</sup> 432 A.2d 834 (N.J. 1981) (basing liability for wrongful conception on the failure of informed consent).

<sup>249</sup> Section 314A of the Restatement (Second) lists a number of special relationships that create a duty to render aid, such as that of a common carrier to its passengers, an innkeeper to his guest or possessors of land. RESTATEMENT (SECOND) OF TORTS § 321 (1965).

<sup>250</sup> *Id.* § 315.

<sup>251</sup> *Id.* § 314, cmt. c.

<sup>252</sup> KEETON ET AL., *supra* note 135 § 56.

aid or protection.”<sup>253</sup> The common law distinction between nonfeasance and misfeasance provides a good illustration of the no duty rule. Francis Bohlen wrote:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.<sup>254</sup>

Eighteenth century courts carved out exceptions to the no duty rule based upon the higher duties “owed by surgeons, apothecaries, solicitors, and innkeepers.”<sup>255</sup> Another early exception to the no duty rule recognized in Blackstone’s day was the common carrier’s duty of care to aid a sick or injured passenger.<sup>256</sup> After World War II, courts used the malleable language of foreseeability and proximate cause to increasingly expand presumptive duties of care.

Contemporary judges determine whether to impose a duty by balancing the factors of risk, foreseeability and the likelihood of injury against the social utility of the actor’s conduct.<sup>257</sup> If negligence could be imposed for simple nonfeasance, there would be massive expansion of categories of plaintiffs and negligence-based causes of action.<sup>258</sup> Today, the law of torts imposes duties to aid or protect based upon special relationships.<sup>259</sup> Courts significantly expanded special duties to aid or protect others in the post-Second World War period.

### 3. Modified Duties

Duty is “an expression of the sum total of those considerations of policy which lead the law to say that the

<sup>253</sup> RESTATEMENT (SECOND) OF TORTS § 314.

<sup>254</sup> Frances H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219-20 (1908).

<sup>255</sup> KOENIG & RUSTAD, *supra* note 28, at 17.

<sup>256</sup> 3 BLACKSTONE, *supra* note 71, at 164.

<sup>257</sup> *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968).

<sup>258</sup> The well-established no duty rule has its origins “in the early common law distinction between misfeasance and nonfeasance.” RESTATEMENT (SECOND) OF TORTS § 314.

<sup>259</sup> *Id.* § 314A (describing special duties of common carriers to passengers, innkeepers to guests, possessors of lands to invitees and others who are required to aid or protect those in peril).

particular plaintiff is entitled to protection.”<sup>260</sup> Judge Benjamin Cardozo used the concept of duty, rather than proximate cause, to determine liability for negligence in *Palsgraf v. Long Island Railroad Co.*<sup>261</sup> In *Palsgraf*, Long Island Railroad employees set off a bizarre chain of events by assisting a passenger who was trying to board a moving train. While being pushed onto the train by railroad employees, the passenger dropped a package containing fireworks that detonated when they fell. The explosions caused heavy scales to fall on the plaintiff who was standing on the other side of the platform.

The New York Appeals Court affirmed the dismissal of the plaintiff's negligence complaint against the railway. Judge Cardozo stated that there is no such thing as “negligence in the air” and held that the railroad owed no duty of care to an unforeseeable plaintiff.<sup>262</sup> “The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relative to her it was not negligence at all.”<sup>263</sup>

*Palsgraf* created a new role for judges as gatekeepers who could exclude entire categories of plaintiffs based on whether a duty was owed. As Judge Cardozo explained: “The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.”<sup>264</sup> Prosser described *Palsgraf* as a “bombshell burst” that reframed the issue of foreseeability in terms of duty rather than proximate cause.<sup>265</sup> The principle that no duty was owed the unforeseeable plaintiff was incorporated into the Restatement (Second) of Torts and became black letter law for all negligence problems.<sup>266</sup>

In contrast, during the absolute liability era, many courts followed the direct consequence rule. Under this rule, a negligent actor was liable for all of the direct consequences of

<sup>260</sup> *Id.*

<sup>261</sup> 162 N.E. 99 (N.Y. 1928).

<sup>262</sup> *Id.* at 99 (“Proof of negligence in the air, so to speak, will not do.”) (citing SIR FREDERICK POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920)).

<sup>263</sup> *Palsgraf*, 162 N.E. at 99. Prosser states that the *Palsgraf* case’s major contribution to tort law was that it conceptualized negligence “as relational but also founded upon the foreseeability of harm to the person in fact injured.” PROSSER, *supra* note 252, at 285.

<sup>264</sup> *Palsgraf*, 162 N.E. at 101.

<sup>265</sup> KEETON ET AL., *supra* note 135, at 284.

<sup>266</sup> *Id.* at 285 (noting that Cardozo was an advisor to the drafting of the first Restatement of Torts).

his actions without regard to the foreseeability of the time and place of the injury or location of the plaintiff. The famous case of *In re Polemis*<sup>267</sup> established the direct consequence rule in a case where a workman dropped a plank into the hold of a ship, causing a spark to ignite the fuel in the hold. The resulting fire destroyed the ship and its cargo. The arbitrators who heard the case "specifically found that this was not a foreseeable result of the negligence, [and that] recovery was allowed because it was all 'direct.'"<sup>268</sup>

The traditional formula for negligence asks whether: the defendant owed a duty to the foreseeable plaintiff; the defendant breached that duty to the plaintiff; the plaintiff suffered an injury; and the breach of the duty was the proximate cause of the injury.<sup>269</sup> In practice, however, the concepts of duty and proximate cause are blended by asking whether a duty is owed to the plaintiff.<sup>270</sup> The central question in duty or proximate cause cases has to do with the expansion or retraction of liability. "Under these rubrics, a standard problem is whether the negligent defendant can be held liable for unforeseeable consequences or to unforeseeable plaintiffs."<sup>271</sup> The *Dillon* court acknowledged that duty was "a shorthand statement of a conclusion, rather than an aid to analysis in itself."<sup>272</sup> The court in *Rowland v. Christian*<sup>273</sup> acknowledged that policy factors such as the policy of preventing future harm or availability of insurance entered into the determination of whether a duty was owed.

Judges used the allied concepts of duty and proximate cause as devices to exclude categories of plaintiffs where the risk was so unforeseeable that the line was drawn on liability. More importantly, these concepts permitted judges to make evaluations of risk-creation reflecting the needs of each age. The downside of adopting the *Palsgraf* rule was the potential

<sup>267</sup> 3 K.B. 560 (1921).

<sup>268</sup> PROSSER, HANDBOOK, *supra* note 35, at 265.

<sup>269</sup> See M. Lee Huffaker, *Recovery for Infliction of Emotional Distress: A Comment on the Mental Anguish Accompanying Such a Claim in Alabama*, 52 ALA. L. REV. 1003, 1008 (2001).

<sup>270</sup> See E. Wayne Theode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 33 (1977).

<sup>271</sup> Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 439 (1987).

<sup>272</sup> *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (quoting PROSSER, HANDBOOK, *supra* note 35, § 53).

<sup>273</sup> 443 P.2d 561 (Cal. 1968).

for the politicization of negligence claims. Prosser's view of the *Palsgraf* case was that it became "hopelessly entangled with other rules, and others bases of policy."<sup>274</sup> The law of torts imposes no general duty to control the conduct of third persons or to prevent dangerous individuals from doing harm to others.<sup>275</sup> However, courts will use the language of foreseeability to craft a "special duty" where the plaintiff is particularly sympathetic, or where strict interpretation of the no duty rule is particularly harsh. For example, many courts do not impose a duty on the police to respond to the commission of a crime or to provide adequate protection.<sup>276</sup> One court circumvented this limitation by finding a county liable for negligently failing to respond to a 911 call in a timely manner.<sup>277</sup> In an Alaskan case, a court recognized a special relationship between a parolee and the state, requiring close supervision for the protection of third parties.<sup>278</sup> Courts will modify duties of care to achieve social justice.

#### 4. California's Creative Continuity in Tort Law

The concept of duty or proximate cause is a clear example of tort law as a battleground of social theory. The California Supreme Court illustrates how courts manipulate the concept of duty or proximate cause to expand or contract plaintiffs' rights to recover in negligence cases. The expansionary era California Supreme Court "was perceived as a tribunal stacked with liberal justices."<sup>279</sup> In a number of historic firsts, the California Supreme Court led the way in carving out new categories of plaintiff recovery in nearly every corner of tort law. California recognized new remedies for non-pecuniary injuries, loss of consortium, prenatal injuries, punitive damages, medical monitoring, wrongful life and wrongful birth. Plaintiffs were also permitted to recover

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<sup>274</sup> PROSSER, HANDBOOK, *supra* note 35, at 285.

<sup>275</sup> RESTATEMENT (SECOND) OF TORTS § 315 (1965).

<sup>276</sup> PHILLIPS ET AL., *supra* note 217, at 708.

<sup>277</sup> DeLong v. County of Erie, 89 A.D.2d 376 (N.Y. App. Div. 1982).

<sup>278</sup> Div. of Corr. v. Neakok, 721 P.2d 1121 (Alaska 1986) (holding law enforcement entity liable for failing to impose special conditions of release to supervise dangerous parolee who killed stepdaughter and boyfriend).

<sup>279</sup> John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 ALB. L. REV. 1461, 1466 (1998).

against co-defendants under the novel theory of concerted action.<sup>280</sup>

An example of California's tort expansion is the seminal market share case of *Sindell v. Abbott Laboratories*.<sup>281</sup> In *Sindell*, the plaintiff was one of thousands of daughters who developed cancer and diseases such as adenocarcinoma and vaginal adenosis because their mothers used diethylstilbesterol ("DES") when pregnant. The plaintiff could not identify the specific manufacturer who marketed the DES taken by her mother decades earlier. The Supreme Court of California developed a market share theory as a means of assigning at least part of a loss to various defendants whose conduct justified liability but who could not be identified.<sup>282</sup> A number of other courts rejected market share liability because of the practical difficulties in defining and proving a market share.<sup>283</sup>

Additionally, the California Supreme Court employed the concept of duty to expand, rather than to retract, liability. This was the first court to recognize new special relationships that imposed positive duties upon defendants.<sup>284</sup> Judge Roger Traynor of the California Supreme Court developed the doctrine of strict products liability in *Greenman v. Yuba Power Products, Inc.*<sup>285</sup> The American Law Institute soon embraced Judge Traynor's opinion and adopted section 402A of the Restatement (Second) of Torts in 1965. By the early 1980s, all but a few jurisdictions adopted section 402A, which was entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer."<sup>286</sup>

<sup>280</sup> The court in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), applied a concerted action theory to find two hunters liable in negligence because it was impossible to prove which misfiring hunter actually shot the plaintiff. The court shifted the burden of proof to each defendant, requiring him to prove that each had not wounded the plaintiff. The rule developed in *Summers* was incorporated into the Restatement (Second) of Torts § 433B(d) (1965).

<sup>281</sup> 607 P.2d 924, 933, 937 (Cal. 1980).

<sup>282</sup> *Zuchowicz v. United States*, 140 F.3d 381 (2d Cir. 1998) (discussing market share theory).

<sup>283</sup> See, e.g., *Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 751 P.2d 215 (Or. 1988) (rejecting market share theory in DPT vaccination case); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (rejecting alternative liability and market share liability theories in DES case).

<sup>284</sup> The concept of expansive and restrictive jurisdictions first appeared in MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES—CASES AND MATERIALS* (4th ed. 1987).

<sup>285</sup> 377 P.2d 897 (Cal. 1962).

<sup>286</sup> "Section 402A did not represent either a majority or minority position; it was based upon one case. Nevertheless, it was not long before this principle became the almost unanimous position in the United States." Charles E. Cantú, *Distinguishing the*

California also expanded liability to bystanders in negligent infliction of emotional distress cases. In *Dillon v. Legg*,<sup>287</sup> Justice Tobriner enlarged the parameters of this tort to permit recovery by a parent who witnessed an accident that caused the death of her young daughter. Prior to this ruling, recovery was not permitted if the plaintiff was outside the zone of danger. Justice Tobriner's opinion overturning the regressive "impact rule" reflected the California Supreme Court's willingness to recognize new categories of plaintiffs' recovery: "No good reason compels our captivity to an indefensible orthodoxy."<sup>288</sup>

In another first, California imposed negligence liability for the content of a radio broadcast. In *Weirum v. RKO General, Inc.*,<sup>289</sup> a rock station with a large teenage audience offered a large cash prize for locating a disc jockey. A high-speed chase on Los Angeles freeways ensued as listeners competed to be the first to spot the elusive announcer.<sup>290</sup> The court found the radio station liable for the wrongful death of a motorist forced off the road by a speeding teenage driver who was attempting to catch up to the disc jockey's automobile.<sup>291</sup> The court rejected the defendant's argument that the contestants' reckless driving was a supervening event that should preclude a finding of negligence.<sup>292</sup> The *Weirum* court found that the radio station's contest created an unreasonable risk of harm.<sup>293</sup> The court applied a balancing test, and determined that the gravity and likelihood of the danger of the station's conduct outweighed the utility of having such a contest.<sup>294</sup>

In *Tarasoff v. Regents of University of California*,<sup>295</sup> a psychotic patient told a University of California therapist that he intended to kill a young student. The therapist and his supervisors believed that the patient presented a serious

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*Concept of Strict Liability for Ultra-hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 42 (2001).

<sup>287</sup> 441 P.2d 912 (Cal. 1968).

<sup>288</sup> *Id.* at 925.

<sup>289</sup> 539 P.2d 36 (Cal. 1975).

<sup>290</sup> *Id.* at 38.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 40.

<sup>293</sup> *Id.*

<sup>294</sup> *Weirum*, 539 P.2d at 40.

<sup>295</sup> 551 P.2d 334 (Cal. 1976).



danger of violence.<sup>296</sup> The University of California psychiatrist informed the police but did not warn the victim or her parents. The patient carried out his threat, killing the student.<sup>297</sup> The court held the patient-therapist relationship created a duty to exercise reasonable care to protect others from the foreseeable result of the patient's illness.<sup>298</sup>

The high-water mark of California's judicial tort expansionism was *Bigbee v. Pacific Telephone & Telegraph Co.*<sup>299</sup> Charles Bigbee was severely injured when an automobile driven by a drunk driver struck the telephone booth in which he was standing.<sup>300</sup> Bigbee filed an action against the Pacific Telephone & Telegraph Company, alleging that the telephone booth was negligently designed, installed and maintained.<sup>301</sup> The plaintiff argued that the telephone booth was placed too close to Century Boulevard, a busy street in Inglewood, California.<sup>302</sup> The complaint also alleged that the booth was negligently designed and maintained because the door jammed and trapped him inside so that he could not escape before the car crashed into the booth.<sup>303</sup>

The telephone company responded that it had no duty to protect telephone booth users from drunk drivers and that the risk was unforeseeable as a matter of law.<sup>304</sup> The company argued that the drunk driver's action was a "superseding cause" of Bigbee's injury.<sup>305</sup> The trial court granted summary judgment, but the appellate court reversed on the ground that the issue of foreseeability remained a triable issue of fact for the jury.<sup>306</sup> The California Supreme Court agreed. It ruled that a jury should decide whether a car crashing into the booth and injuring an individual inside was reasonably foreseeable.<sup>307</sup>

The California Supreme Court not only created new duties but found creative ways to side-step old, previously

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<sup>296</sup> *Id.* at 345.

<sup>297</sup> *Id.* at 351.

<sup>298</sup> *Id.*

<sup>299</sup> 665 P.2d 947 (Cal. 1983).

<sup>300</sup> *Id.* at 948.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Bigbee*, 665 P.2d at 949.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 948-49.

<sup>307</sup> *Id.* at 953.

impenetrable, defenses such as the fireman's rule.<sup>308</sup> Until *Lipson v. Berger*, it was well established that firemen would not have a cause of action against a property owner when injured while fighting a fire on private property.<sup>309</sup> In *Lipson*, the California Supreme Court carved out an exception to the common law no duty rule towards firemen when the landowner misled the rescuers. The *Lipson* court found the fireman's rule inapplicable because the chemical manufacturer and plant owner concealed the presence of dangerous explosives from emergency workers, thereby misrepresenting the radius of the risk.<sup>310</sup> Justice Bird, writing for the majority, noted that "it has long been established in California that all persons owe a duty of care to avoid injury to others unless public policy clearly requires that an exception be made."<sup>311</sup>

California became the first jurisdiction to judicially recognize the tort of intentional infliction of emotional distress ("I.I.E.D.") in the 1952 case, *State Rubbish Collectors Ass'n v. Siliznoff*.<sup>312</sup> In *Siliznoff*, the defendants threatened to beat up the plaintiff, destroy his property and ruin his business during a dispute over whether fees should be paid to a labor union.<sup>313</sup> Since *Siliznoff*, courts have extended I.I.E.D. to punish racial attacks, sexual harassment, hate crimes and extreme bullying in the workplace.

During the tort expansion period, California was a bellwether jurisdiction that paved the way for tort expansion in other states. Just as California led jurisdictions in tort expansion post-WWII, it took a reverse course in the 1980s that reflected a nationwide retrenchment of tort law.

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<sup>308</sup> "Simply put, the fireman's rule provides that fire fighters and police officers may not recover damages for injuries arising out of the risks inherent in their respective professions." *Mariin v. Fleur, Inc.*, 528 N.W.2d 218, 219 (Mich App. 1995).

<sup>309</sup> 644 P.2d 822 (Cal. 1982) (refusing to extend fireman's rule in case where chemical manufacturer misrepresented that no toxic materials were involved in a fire; the court found this misrepresentation an act of misconduct, independent from a tortious act that may have caused the fire, and therefore, there was no bar to recovery).

<sup>310</sup> *Id.* at 827 ("[T]he rationale underlying the fireman's rule does not support shielding from liability a defendant who negligently or intentionally misrepresents the nature of a hazard to an arriving firefighter.").

<sup>311</sup> *Id.* at 829.

<sup>312</sup> 240 P.2d 282 (Cal. 1952).

<sup>313</sup> Prior to the early 1950s, the common law permitted recovery for emotional distress in cases involving the mishandling of dead bodies and where the defendant had knowledge of a plaintiff's eccentricities or susceptibility to emotional illnesses. Under modern tort law, no recovery is available unless a plaintiff proves extreme distress and conduct by the defendant that would be viewed as outrageous in the larger community. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

D. *Neo-conservative Tort Law Retrenchment: 1981 to the Present*

1. The Tort Reformer's Blame Game

The discourse of the tort reformers invokes traditional values such as self-reliance, personal responsibility and property rights to castigate the contemporary civil justice system as unfairly redistributive social welfare and destructive of core American values. Skirmishes are being fought on the contemporary "battleground of social theory" between tort reformers and defenders of the tort expansionism that provided consumers, women and workers with new vehicles of legal redress after World War II. Reformers shift compassion from the injured claimant to the corporation as victim.<sup>314</sup> Their goal is to show that an American tort monster victimizes corporations. This imagery creates confusion and ambivalence about the American civil litigation system.

Applying the word "victim" to corporate wrongdoers is as misleading as referring to nuclear weapons as "peacekeepers." Reformers misleadingly label tort limitations as reforms rather than retrenchment. "Tort reform" has become a code phrase they employ as part of a campaign to limit the rights and remedies of less advantaged groups such as women, minorities, workers and consumers.<sup>315</sup> Tort monster stories have become the functional equivalent of the ghosts and phantoms found in *Dark Shadows*, creating the specter of an irrational civil justice system consuming victim corporations.

Reformers use tort monster tales as ammunition in their public relations war. A typical horror story involved a bank robber who filed a lawsuit claiming that his deafness prevented him from hearing the alarm tripped by the teller. The hapless criminal is said to have filed suit against the bank for "exploiting his disability!"<sup>316</sup> The American Tort Reform Association ("ATRA") regaled policymakers with another such tale involving a customer who sued a nightclub, claiming that its topless dancer gave him whiplash by bumping him with her

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<sup>314</sup> See <http://www.overlawyered.com> (last visited July 19, 2002) (recounting examples of "outrageous" tort law suits and linking to the writings of major tort reform authors Michael Fumento, Peter Huber, Walter Olsen and Jonathan Rauch).

<sup>315</sup> See generally KOENIG & RUSTAD, *supra* note 28.

<sup>316</sup> Clyde Haberman, *Didn't Win a Lottery? Time to Sue*, N.Y. TIMES, Nov. 16, 1999, at B1.

huge, silicone implant-augmented breasts.<sup>317</sup> In reality, such claims are quickly dismissed with prejudice or eliminated by summary judgment.<sup>318</sup> As with most horror stories, the tort monster is illusory. However, the public is left with the impression that corporations are being besieged by similar lawsuits.

A corporate-funded "outrage industry" creates and disseminates these myths to redefine the meaning of tort victim. The reformers' long-term goal is to secure media attention in their campaign to reallocate the cost of injuries from corporate wrongdoers to the victims.<sup>319</sup> Professional ideologists use victim's talk to create pejorative headlines such as: "Mister Softee Serves Ice Cream, Subpoenas," "Fire-Walking Nudist, Files Heated Lawsuit," "Personal Injury Lawyer Says Telephone Directory to Blame for His Lack of Clients" and "Land of the Free—Where Even our Pets Can Join the Lawsuit Lottery."<sup>320</sup>

The tort reformers also mock apocryphal warnings. The quintessential such warning being that the contents of a coffee cup are hot.<sup>321</sup> Reform advocates portray victims of defective products as whiners who refuse to take personal responsibility for injuries caused by the their own carelessness. ATRA celebrates National Lawsuit Awareness Week each year and sponsors a five-mile "Tort Trot" to benefit the hydrocephalic infants allegedly harmed by frivolous products liability lawsuits.<sup>322</sup>

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<sup>317</sup> American Tort Reform Association, *Lawsuit claims Stripper was "Reckless"*, at <http://www.atra.org/show/7253> (last visited Aug. 29, 2002).

<sup>318</sup> See generally *CNN Late Edition With Wolf Blitzer: Wolf Blitzer, Hatch, Edwards Discuss War on Terror; Dreier, Rangel Debate Measures to Police Corporate Responsibility; Interview With Louis Farrakhan* (CNN television broadcast, July 14, 2002) (stating that frivolous lawsuits are dismissed all the time).

<sup>319</sup> The tort reformers' *idée fixe* is the war against punitive damages in products liability and medical malpractice. The tort reformers' obsession is to restrict the rights of Americans to obtain redress for injuries caused by dangerously defective products or substandard medical treatment. If this were a true crusade against lawsuit abuse, the focus would be on businesses suing businesses lawsuits, which account for the majority of million dollar punitive damages awards.

<sup>320</sup> American Tort Reform Association, *Looney Lawsuits*, at <http://www.atra.org/display/13> (last visited July 19, 2002).

<sup>321</sup> American Tort Reform Association, *Looney Lawsuits*, at <http://www.atra.org/show/7071> (last visited Aug. 19, 2002).

<sup>322</sup> *Applauding the ATRA for Setting Aside Last Week as National Lawsuit Abuse Awareness Week*, reprinted in 143 CONG. REC. H08059 (daily ed. Sept. 29, 1997) (statement of Rep. Northrup).

These public relations ploys are part of a calculated campaign to limit the liability of corporate defendants.<sup>323</sup> ATRA's "Lawsuit Abuse" campaign uses the rhetorical device of blaming the victim and chooses its illustrative cases carefully, to maximize both their entertainment and outrage value. Such tort tales distort real life cases to create the ideological motif of unworthy claims and claimants.

## 2. Judicial Tort Retrenchment

### a. *The California Supreme Court's Retreat*

Over the past two decades, tort law has been radically retrenched under the rubric of "tort reform." Just as the California Supreme Court led the nation in modifying duties and expanding plaintiffs' rights from 1945 to 1980, it has played a leading role in the most recent retrenchment period. By 1980, the California Supreme Court had taken a more conservative turn, ruling "that principles of comparative negligence can reduce the plaintiff's recovery in a strict products liability action."<sup>324</sup> In 1988, the court refused to extend the doctrine of strict liability to prescription drugs.<sup>325</sup> The principal reason for the court's retrenchment has been its change in composition with the appointment of more conservative justices.<sup>326</sup>

<sup>323</sup> The American Tort Reform Association Steering Committee membership list consists of corporate actors, including the Business Roundtable, General Aviation Manufacturers Association, National Association of Home Builders, Food Marketing Institute, National Association of Manufacturers, National Paint & Coating Association, Pharmaceutical Manufacturers Association, Sporting Goods Manufacturing Association, Aetna, American Home Products Corp., Chrysler Motors Corp., Clorox Co., Dow Chemical, USA, General Electric Co., McDonald's, Pfizer and Travelers Companies. See generally Koenig & Rustad, *supra* note 28, at 26 (describing the 1989 steering committee membership list of January 1989).

<sup>324</sup> Gary T. Schwartz, *The Beginning And The Possible End Of The Rise Of Modern American Tort Law*, 26 GA. L. REV. 601, 699 (1992) (citing *Daily v. Gen. Motors Corp.*, 575 P.2d 1162, 1168-69 (Cal. 1978)).

<sup>325</sup> Schwartz, *supra* note 324, at 698 (citing *Brown v. Superior Court*, 752 P.2d 470, 480 (Cal. 1988)).

<sup>326</sup> California had one jurisprudence when Rose Bird was Chief Justice and another when she and two other justices were replaced in a recall election in which the California Supreme Court's reversal of death sentences was critical. . . . George Deukmejian publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences.

Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 153 n.81 (1996).

Gary Schwartz attributes the California Supreme Court's changed judicial philosophy to the election of more conservative state governors, which, in turn, led to the appointment of more conservative justices. In 1983, before conservative Republican George Deukmejian began his eight years as governor, liberal to moderate judges dominated the California Supreme Court.<sup>327</sup> By the end of Deukmejian's last term in 1991, only Judge Mosk remained from the pre-1983 court.<sup>328</sup>

The California Supreme Court in *Thompson v. County of Alameda*, was unwilling to recognize a duty to warn of the danger that a juvenile would sexually assault young children.<sup>329</sup> The court found that the county had no duty to warn the local police and the parents of neighborhood children that the potentially dangerous young man was being released from prison. The court's finding of no duty was based upon the fact that the court found no direct or continuing relationship between the decedent's parents and the county that would rise to the level of a special duty. Unlike *Tarasoff*, the county did not have special knowledge that a specific sex offender would choose specific children in the community to molest, and the court refused to find a duty where there was no specific targeted threat. The increasing conservatism of the California Supreme Court has resulted in a judicial climate hostile to the expansion of tort rights to new categories of plaintiffs.

#### b. *Judicial Tort Reform in Other States*

Developments in state courts throughout the country parallel the retrenchment of the California Supreme Court.<sup>330</sup>

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<sup>327</sup> Schwartz, *supra* note 324, at 686.

<sup>328</sup> *Id.*

<sup>329</sup> 614 P.2d 728, 735 (Cal. 1980) (refusing to "impose a blanket liability on County for failing to warn plaintiffs that a minor with dangerous propensities was being released on parole for "policy considerations").

<sup>330</sup> The New York Court of Appeals, for example, has steadfastly refused to expand new categories of tort liability in recent years. In a single term, New York's highest court considered fifteen cases in which plaintiffs sought to expand the grounds for tort reform. In eleven of the fifteen cases, New York's highest court "held against plaintiffs and denied attempts to establish new grounds for tort liability." Robert A. Baruch, *Bush, Court Takes Restrictive Approach to Tort Liability*, N.Y. L.J., Nov. 2, 1992, at S12 (summarizing tort decisions of New York's highest court in 1991-1992 term). The resurrection of no-duty rules is preventing the expansion of tort remedies to new categories of plaintiffs in New York. *Id.*

However, the most active battles over tort theory are being fought in state judicial elections. The American Judicature Society has expressed concern that special interest groups are infecting state court elections in their attempts to gain partisan advantage.<sup>331</sup> Many criticize judicial seminars with a pro-market bent as an improper forum for influencing the path of the law. A recent study concludes, "[t]hese seminars amount to a veiled effort to lobby the judiciary under the guise of judicial education."<sup>332</sup>

Judge Mikva worries that judicial objectivity is undermined "when private interests are allowed to wine and dine judges at fancy resorts under the pretext of 'educating' them about complicated issues."<sup>333</sup> Gary Schwartz recounts how Stanley Mosk, a liberal California Supreme Court Justice, changed his views toward expanded products liability after attending a conference sponsored by Yale's Program on Civil Liability.<sup>334</sup> The academic conference exposed Justice Mosk to neo-conservative torts scholarship such as George Priest's work on enterprise liability and Richard Epstein's writings on the moral hazards of over-investing in safety in products liability. The pro-market and anti-regulation perspective presented at these free judicial seminars is antithetical to the role of punitive damages.

c. *The Road to Nowhere: Constitutionalizing Punitive Damages*

i. The History of Punitive Damages

One of the more dramatic and far-reaching judicial tort reforms is the constitutionalization of punitive damages. Historically, punitive damages were grounded in the common law, rather than federal constitutional law. In his poem, *The Traveller*, Oliver Goldsmith wrote that "[l]aws grind the poor, and rich men rule the law."<sup>335</sup> However, at the time of

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<sup>331</sup> Adam W. Lasker, *Panels Debate Public Financing of State Candidates for Judge*, CHI DAILY L. BULL., Aug. 6, 2001, at 3.

<sup>332</sup> DOUG KENDALL, NOTHING FOR FREE: HOW JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST 1 (Community Rights Counsel, July 2000), available at <http://www.tripsforjudges.org/crc.pdf> (last visited July 12, 2002).

<sup>333</sup> Hon. Abner J. Mikva, *Foreword to KENDALL, supra note 332*, at iii.

<sup>334</sup> Schwartz, *supra* note 324, at 688-89.

<sup>335</sup> Oliver Goldsmith, *The Traveller*, reprinted in *Poets' Corner*, at

Blackstone and Goldsmith, the ordinary English citizen had at least one remedy to sting the rich when they abused their power, the doctrine of exemplary damages. Just as Roman Senators were assessed multiple damages when they oppressed the weak, the English courts punished high-handed aristocrats by imposing large fines paid directly to the victim.<sup>336</sup>

## ii. English Doctrine of Exemplary Damages

The doctrine of exemplary damages was first recognized as a common law remedy during the period in which Blackstone wrote his *Commentaries on the Law of England*.<sup>337</sup> Exemplary damages were awarded above and beyond compensatory damages when an intentional tort was committed "by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant."<sup>338</sup> Penal damages "were expressly recognized in the form of damages by a statute of no less importance than the English Habeas Corpus Act."<sup>339</sup>

Blackstone's *Commentaries* do not mention the first reported exemplary damages awarded in the 1763 companion cases of *Wilkes v. Wood*<sup>340</sup> and *Huckle v. Money*.<sup>341</sup> In *Wilkes v. Wood*, John Wilkes, the publisher of *The North Briton*, sued a Member of Parliament for trespass.<sup>342</sup> In May of 1763, Wilkes's editorial had intemperately criticized George III for signing the pro-Prussian Treaty of Paris, charging that the King lent his name "to the most odious measures and the most unjustifiable public declarations from a throne ever renowned for truth, honor and unsullied virtue."<sup>343</sup> The King considered this editorial a "gross personal libel" and ordered Wilkes's

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<http://www.geocities.com/Athens/Acropolis/2012/poems/golds02.html> (last visited Aug. 8, 2002).

<sup>336</sup> See 3 THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW* 13-16 (Fred B. Rothman & Co., 1989) (1906) (discussing the role of ancient Roman *legis actiones* in history of remedial law).

<sup>337</sup> 3 BLACKSTONE, *supra* note 71.

<sup>338</sup> BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

<sup>339</sup> Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287 n.92 (1993) [hereinafter Koenig & Rustad, *Historical Continuity*] (citing 3 BLACKSTONE, *supra* note 71, at 1683 n.16).

<sup>340</sup> 98 Eng. Rep. 489 (K.B. 1763).

<sup>341</sup> 95 Eng. Rep. 768 (K.B. 1763).

<sup>342</sup> *Wilkes*, 98 Eng. Rep. at 489-99.

<sup>343</sup> *Id.*



immediate arrest.<sup>344</sup> The King's Bench, England's highest court,<sup>345</sup> found this action illegal because the trespass had been carried out without proper authority under a general warrant that called for the immediate arrest of the publishers of *The North Briton*. The court upheld "large and exemplary" damages because actual damages would not be sufficient to punish or deter this type of governmental misconduct.<sup>346</sup> Despite the fact that there was no physical damage, the jury awarded Wilkes 1,000 pounds sterling, quite a considerable sum at that time.

In the companion case of *Huckle v. Money*, John Wilkes's employee sued for false imprisonment, trespass and assault arising from the same events.<sup>347</sup> In *Huckle*, Lord Camden, the Chief Justice, coined the term "exemplary damages" to describe that portion of the damage award exceeding actual damages:

The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 pounds damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light. . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.<sup>348</sup>

Lord Camden considered the purpose of exemplary damages to punish official oppression by the King's agents. The exemplary damage award meant that even the King was not above the law:

[The jury] saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas, which struck the jury on the

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<sup>344</sup> *Id.*

<sup>345</sup> The King's Bench's independence in these rulings prefigured our separation of powers. In this case, even King George III was subject to the Magna Carta and the law of the land.

<sup>346</sup> *Wilkes*, 98 Eng. Rep. at 490.

<sup>347</sup> *Huckle*, 95 Eng. Rep. at 768.

<sup>348</sup> *Id.* at 768-69.

trial; and I think they have done right in giving exemplary damages.<sup>349</sup>

Courts imposed these first exemplary damage awards against public officials who abused power in their official capacity, but the remedy soon took on a wider role.<sup>350</sup>

The remedy of exemplary damages expanded to punish private individuals who committed intentional torts with malicious intent.<sup>351</sup> Courts permitted "very large and exemplary" damages in domestic tort cases against adulterers.<sup>352</sup> Wanton acts endangering the peace such as the destruction of real property, willful battery, mayhem, willful taking of personal property and willful trespasses of real property were punished with exemplary damages to make an example of the offender.<sup>353</sup> Courts also assessed exemplary damages to deter oppressive misconduct of indolent aristocrats:

It has been a very frequent complaint in England, that the small fines imposed for drunkenness and disorderly conduct afford no checks to these indulgences by the rich. It is very obvious, therefore, that to allow mere pecuniary satisfaction for wrongs, in the present state of society, would be to put the laws under the control of the wealthier classes.<sup>354</sup>

The remedy of exemplary damages can best be understood as a "manifestation of the law's concern with exercises and defaults in the use of power."<sup>355</sup> Exemplary damages protected the rights and dignity of individuals who

<sup>349</sup> *Id.*

<sup>350</sup> See, e.g., *Leith v. Pope*, 96 Eng. Rep. 777, 777-78 (K.B. 1779) (awarding exemplary damages to victim of malicious prosecution); *Sharpe v. Brice*, 96 Eng. Rep. 557, 557 (K.B. 1774) (awarding exemplary damages to victim of illegal search); *Benson v. Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (assessing exemplary damages against militia colonel for whipping common soldier out of personal animus); *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793-94 (K.B. 1764) (awarding exemplary damages to victim of illegal search, seizure and imprisonment).

<sup>351</sup> The word "intent" means that an actor "desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8 (2000).

<sup>352</sup> Rustad & Koenig, *Historical Continuity*, *supra* note 339 (citing 3 BLACKSTONE, *supra* note 71, at 139).

<sup>353</sup> 3 BLACKSTONE, *supra* note 71, at 1607-08, 1647-48, 1655-56, 1699-1700, 1782-83, 1804-05 (referring to the imposition of exemplary damages for intentional torts against the person and property).

<sup>354</sup> Rustad & Koenig, *Historical Continuity*, *supra* note 339, at 1333 n.838 (1993) (citing Note, *Vindictive Damages*, 4 AM. L.J. 61, 75 (1852)).

<sup>355</sup> MARSHAL S. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY* xiii (1977) (stating that the central role of tort law has been with moderating relations of power).

lacked economic power or aristocratic status. In eighteenth century England, juries awarded exemplary damages to punish social affronts such as the seduction or mistreatment of servants, the debauching of daughters of poor men and other acts committed by the upper class that disrupted the social fabric.<sup>356</sup>

In *Tullidge v. Wade*, Chief Justice Wilmot upheld a jury's exemplary damages award against the wealthy seducer of the plaintiff's daughter who lived in his house.<sup>357</sup> "Actions of this sort," he explained, "are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings . . . the jury have done right in giving liberal damages."<sup>358</sup> In an exemplary damages case, the jury could examine all the circumstances and the conduct of both parties right up to the moment of the verdict.<sup>359</sup>

As the eighteenth century came to a close, exemplary damages were firmly entrenched in the Anglo-American tradition as a remedy for intentional torts like assault and battery inflicted with malice.<sup>360</sup> Exemplary damages were awarded to a common soldier victimized by a militia colonel's brutal whipping in a 1766 case.<sup>361</sup> The owner of an English poorhouse was punished by an exemplary damages verdict for maliciously shaving the head of a female pauper.<sup>362</sup> Such awards often constituted the only line of defense against powerful individuals whose actions the criminal authorities failed to prosecute.<sup>363</sup>

Many of the private wrongs first established in early English tort law are still well recognized in modern tort law. The *jura persona* of the writs described by Blackstone reflected a late feudal society that relegated women, children, wards and servants to the role of second-class citizens. Injuries to these

<sup>356</sup> See generally WILLIAM B. WILLCOX & WALTER L. ARNSTEIN, *THE AGE OF ARISTOCRACY: 1688 TO 1830* (5th ed. 1988).

<sup>357</sup> 95 Eng. Rep. 909, 909 (K.B. 1769).

<sup>358</sup> *Id.*

<sup>359</sup> *Praed v. Graham*, 24 Q.B.D. 53, 53-55 (1889).

<sup>360</sup> Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931). Malicious acts warranting the imposition of exemplary damages were wrongful acts done intentionally without just cause or excuse. Exemplary damages were intended to prevent revenge-seeking against such acts.

<sup>361</sup> *Benson v. Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (assessing exemplary damages against militia colonel for whipping a common soldier out of personal animus).

<sup>362</sup> *Forde v. Skinner*, 172 Eng. Rep. 687, 687 (1830).

<sup>363</sup> *Id.*

individuals were viewed as violations to the family as a social institution.

### 3. Exporting Punitive Damages to America

The United States Supreme Court described punitive damages as “a well established” remedy in the 1851 case, *Day v. Woodworth*.<sup>364</sup> Two decades later, the Vermont Supreme Court ruled that punitive damages were “not an innovation of the common law, [they are] the common law.”<sup>365</sup> The size of punitive damages awards varied with the enormity of the offense against society rather than by the amount of compensation owed to the plaintiff.<sup>366</sup> The remedy was explicitly designed to punish and deter particularly serious misbehavior. As a federal court noted:

Sometimes the jury, for the good of society, when some outrageous lawlessness is committed, may award not only compensation to a party, but may go further for the benefit of the public, and say to the law-breakers: “I will sting you, and put a little more on you. I will chastise you and make you smart; and, although the injured party has not been damaged the whole amount, I will give the additional sum for the public good.”<sup>367</sup>

The remedy of punitive damages extended from intentional misconduct cases to accident cases where the circumstances indicated gross negligence or recklessness. By the nineteenth century, common carriers were subject to punitive damages under the doctrine of vicarious liability. In *Frink & Co. v. Coe*,<sup>368</sup> the court awarded punitive damages against a stagecoach company for employing a known drunkard as a driver. The court stated: “In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained.”<sup>369</sup> In *Maysville & Lexington R.R. Co. v. Herrick*,<sup>370</sup> the court instructed the jury on the

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<sup>364</sup> 54 U.S. 363, 371 (1851).

<sup>365</sup> *Edwards v. Leavitt*, 46 Vt. 126, 135 (1873).

<sup>366</sup> *Id.*

<sup>367</sup> *W. Union Tel. Co. v. Thompson*, 144 F. 578, 586-87 (5th Cir. 1906).

<sup>368</sup> 4 Greene 555 (Iowa 1854).

<sup>369</sup> *Id.* at 559.

<sup>370</sup> 76 Ky. 122 (1877).

propriety of awarding punitive damages in a railroad accident case:

The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or "reckless indifference to the safety of . . . passengers", or intentional misconduct" on the part of the agents and officers of the company.<sup>371</sup>

Today, the majority of jurisdictions follow the Restatement (Second)'s view of punitive damages that requires a showing of "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."<sup>372</sup> The reporters of the Restatement (Second) found that states varied widely in their standards for punitive damages.<sup>373</sup>

#### 4. Constitutionalizing Punitive Damages

Until recently, judges widely assumed that each state was its own laboratory in crafting rules for punitive damages.<sup>374</sup> However, the Supreme Court reversed the assumption that state law shapes the contours of punitive damages. Today's Supreme Court has, in effect, nationalized punitive damages by imposing complex procedural and substantive limits on recovery.

##### a. *Browning-Ferris Industries v. Kelco Disposal, Inc.*

Justice Sandra Day O'Connor became the first member of the Rehnquist Court to express concern over excessive damages when she wrote about "skyrocketing" punitive damages in her dissent in the 1989 case, *Browning-Ferris Industries v. Kelco Disposal, Inc.*<sup>375</sup> In *Browning-Ferris*, a large

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<sup>371</sup> *Id.* at 127.

<sup>372</sup> RESTATEMENT (SECOND) OF TORTS § 908(2) (2002).

<sup>373</sup> *Id.* § 908(2) cmt. b.

<sup>374</sup> Some states did not recognize punitive damages at all, whereas others permitted the remedy to be recovered only if malice was proven. A large number of states followed the Restatement test of "reckless indifference." Justice White in *Silkwood v. Kerr McGee*, 464 U.S. 238 (1984) wrote: "Punitive damages have long been a part of traditional state tort law." *Id.* at 255.

<sup>375</sup> 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor's subsequent dissenting opinion in *Pacific Mutual Life Insurance, Co. v. Haslip*, 499 U.S. 1 (1991), shows that she has not changed her mind about the potential constitutional infirmities of punitive damages. She wrote that

commercial waste disposal firm challenged the large ratio of punitive damages exacted in a Vermont state antitrust action.<sup>376</sup> The majority held that the Eighth Amendment's excessive fines clause does not apply to awards of punitive damages in cases between private parties where the government has neither a role in prosecution nor a right to receive a share of the award.<sup>377</sup> The Court declined to rule on whether the large punitive damages award violated the Due Process Clause and ruled that the issue was not properly before them.<sup>378</sup> Justice O'Connor observed, "as recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal."<sup>379</sup> By 1991, other members of the Court were equally concerned about punitive damages awards. This concern led the Court to revisit the constitutionality of punitive damages five times in recent years. The Court has, in effect, federalized what had once been the province of state law.

b. Pacific Mutual Life Insurance Co. v. Haslip

In 1991, the Supreme Court recognized due process rights in the awarding of punitive damages in *Pacific Mutual*

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"recent years . . . have witnessed an explosion in the frequency and size of punitive damage awards."). *Id.* at 61 (O'Connor, J., dissenting). O'Connor noted further that punitive damages have combined with "other significant legal developments [which] include the advent of product liability and mass tort litigation" to create a litigation crisis. *Id.* at 62. As evidence, she cited a law review article that complained, "[t]oday, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." *Id.* (citing Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989)). See also *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (asserting that jury's "wholly standardless discretion . . . appears inconsistent with due process").

<sup>376</sup> The defendant in *Browning-Ferris* argued that punitive damages verdicts were like amercements and were, therefore, covered by the Eighth Amendment's prohibition against excessive fines. *Browning-Ferris*, 492 U.S. at 268. The Supreme Court rejected this argument, holding "on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Id.* at 260. Justice Blackmun, writing for the majority, found the meaning of "fine," as used in the Eighth Amendment, to be "a payment to a sovereign as punishment for some offense" and, therefore, inapplicable to punitive damages awards. *Id.* at 265.

<sup>377</sup> *Browning-Ferris*, 492 U.S. at 274.

<sup>378</sup> *Id.* at 282.

<sup>379</sup> *Id.*

*Life Insurance Co. v. Haslip*.<sup>380</sup> *Haslip* involved an insurance agent who secretly pocketed his clients' premiums rather than sending them to Pacific Mutual Life Insurance Co. The agent concealed from his "customers" the fact that he had caused their policies to lapse.<sup>381</sup> Cleopatra Haslip, the principal plaintiff, learned of the agent's malfeasance only after the insurance company rejected her hospital bill.<sup>382</sup> After unsuccessfully attempting to resolve the matter, she and her co-employees sued both the dishonest agent and Pacific Mutual.<sup>383</sup> The Court found that the large punitive damages awarded by the *Haslip* jury complied with procedural due process, but that the 4 to 1 ratio between punitive and compensatory damages was close to the line of constitutional excessiveness.<sup>384</sup> Never before had the Court considered the possibility that a large punitive damages award could be constitutionally suspect.

c. *TXO Production Corp. v. Alliance Resources Corp.*

Two years later the Court again considered the issue of whether a high ratio punitive damages award violated a defendant's constitutional due process rights. The Court in *TXO Production Corp. v. Alliance Resources Corp.* held that a \$10 million award of punitive damages was not so grossly excessive as to violate due process<sup>385</sup> when measured against a general concern of reasonableness.<sup>386</sup> The Supreme Court rejected TXO's argument "that a \$10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—was so excessive that it must be deemed an arbitrary deprivation of property."<sup>387</sup> The Court, in upholding the large ratio award, refused to incorporate a mathematical test for excessiveness.<sup>388</sup>

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<sup>380</sup> 499 U.S. 1 (1991).

<sup>381</sup> *Id.* at 9.

<sup>382</sup> *Id.* at 4.

<sup>383</sup> The jury returned a general verdict of \$1,040,000 for Haslip, of which only \$200,000 was compensatory damages and less than \$4,000 was for out-of-pocket expenditures. *Id.* at 20.

<sup>384</sup> *Id.* at 21.

<sup>385</sup> 509 U.S. 443, 462 (1993). The verdict was handed down in a common-law slander of title action in a West Virginia state court.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 454.

<sup>388</sup> In *TXO*, the defendant engaged in predatory business practices, and the jury had a basis for concluding that the defendant acted in bad faith in a scheme that

d. *Honda Motor Co. v. Oberg*

The next year witnessed the first successful constitutional challenge to a punitive damages award in Anglo-American history based on procedural due process grounds. In *Honda Motor Co. v. Oberg*, the Supreme Court focused exclusively on the narrow procedural issue of whether states are required to grant a post-judicial review of punitive damages awards.<sup>389</sup> The Court ruled that Oregon's prohibition on post-trial excessiveness reviews violated Honda's due process rights.<sup>390</sup> The *Oberg* decision requires all states to institute post-verdict procedures to test punitive damages verdicts to determine whether they are excessive. Never before had the high court dictated a national procedural standard for the awarding of the civil remedy of punitive damages.

e. *BMW of North America, Inc. v. Gore*

Two years later, the Supreme Court, for the first time in history, struck down a state punitive damages award on grounds of excessiveness. In *BMW of North America, Inc. v. Gore*,<sup>391</sup> a 5-4 majority found a \$2 million punitive damages award to be excessive and violative of the Due Process Clause of the Fourteenth Amendment. The jury had found BMW liable for \$4,000 in compensatory damages and \$4 million in punitive damages because the company touched up the paint on automobiles damaged in transit without informing the purchasers.<sup>392</sup> The trial court reduced the \$4 million punitive damages award to \$2 million.<sup>393</sup> The Alabama Supreme Court upheld the award.<sup>394</sup> The United States Supreme Court found the award to be excessive, and violative of BMW's due process rights. The Court articulated "three guideposts" to test for excessiveness: (1) degree of reprehensibility; (2) ratio between punitive award and plaintiff's actual harm; and (3) legislative sanctions provided for comparable misconduct.<sup>395</sup>

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was part of a larger pattern of fraud, trickery and deceit, especially in light of the large amount of money at stake with respect to the oil and gas rights at issue.

<sup>389</sup> 512 U.S. 415 (1994).

<sup>390</sup> *Id.* at 418.

<sup>391</sup> 517 U.S. 559 (1996).

<sup>392</sup> *Id.* at 565.

<sup>393</sup> *Id.* at 566.

<sup>394</sup> *Id.* at 567.

<sup>395</sup> *Id.* at 575-85.



Justice Scalia, in his dissent, warned against the Court's extensive intrusion into a previously purely state court arena: "The legal significance of these 'guideposts' is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages."<sup>396</sup> He characterized the majority's "guideposts" as marking "a road to nowhere."<sup>397</sup> Justice Ginsburg's dissenting opinion warned against the Court venturing "unnecessarily and unwisely . . . into territory traditionally within the States' domain."<sup>398</sup> However, it was not long before the Supreme Court again reformed the standard of review in state punitive damages litigation.

f. *Cooper Industries, Inc. v. Leatherman Tool Group*

In *Cooper Industries, Inc. v. Leatherman Tool Group*,<sup>399</sup> Leatherman manufactured the Pocket Survival Tool. When Cooper Industries marketed a similar tool, Leatherman sued Cooper for trade dress infringement, unfair competition, false advertising and the business tort of "passing off" goods of a competitor as its own. The jury awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages, finding Cooper's conduct to be malicious.<sup>400</sup> After a trial judge upheld the award, Cooper Industries filed an appeal with the Ninth Circuit Court of Appeals, which affirmed the punitive damages award.<sup>401</sup>

The Supreme Court granted certiorari on the issue of whether the Ninth Circuit applied the correct standard of review.<sup>402</sup> The Ninth Circuit applied the abuse-of-discretion standard declining to reduce the amount of punitive damages.<sup>403</sup> The Court affirmed the Ninth Circuit's finding that the award was not violative of due process since it was "proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to deter an entity of Cooper's size."<sup>404</sup> The Court's

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<sup>396</sup> *BMW*, 517 U.S. at 606 (Scalia, J., dissenting).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 607 (Ginsburg, J., dissenting).

<sup>399</sup> 532 U.S. 424 (2001).

<sup>400</sup> *Id.* at 429.

<sup>401</sup> *Id.* at 430.

<sup>402</sup> *Id.* at 431.

<sup>403</sup> *Leatherman Tool Group v. Cooper Indus.*, 199 F.3d 1009 (9th Cir. 1999).

<sup>404</sup> *Cooper Indus.*, 532 U.S. at 430.

ruling in *Cooper Industries* means that all circuit courts must apply the *BMW* test of due process using a de novo standard.

Constitutionalizing punitive damages has made it more difficult for plaintiffs to obtain and collect these awards. The Court's proportionality requirement is, in effect, a capping of punitive damages. The Court has, in essence, entered the ideological arena of tort reform where it had no previous role.

The Court's intrusion into the constitutionality of the specific procedures and methods for awarding punitive damages likely will result in further Supreme Court review. The long history of states' punitive damage experimentation produced wide variation on fundamental issues. For instance, whether the defendant's wealth is admissible. In response to corporate defendants' arguments that "Robin Hood style" jurors unfairly redistribute wealth, a few jurisdictions restrict the use of evidence of the defendant's wealth. A growing number require bifurcated proceedings in which corporate wealth may not be introduced until a plaintiff establishes liability. The majority of jurisdictions require punitive damages to be proven by an elevated quantum of evidence such as clear and convincing as opposed to the standard of preponderance of the evidence. Colorado requires plaintiffs to prove the wrongdoing leading to punitive damages beyond a reasonable doubt.<sup>405</sup> Such differences in procedural protections among the jurisdictions make corporate defendant challenges likely.

## 5. Legislative Tort Reform

Legislative tort retrenchment has been one of the most successful law reform campaigns in Anglo-American legal history. In the first six months of 2001 alone, Florida, Mississippi, Nevada, Oklahoma and West Virginia enacted at least one limitation on plaintiffs' rights to recovery.<sup>406</sup> Colorado passed the Construction Defect Action Reform Act which prohibits the awarding of any damages against builders of residential property who comply with building code or industry

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<sup>405</sup> Each of these state law differences in the awarding of punitive damages is described in Thomas H. Koenig & Michael L. Rustad, *The Quiet Revolution Revisited: An Empirical Examination of State Tort Reforms of Punitive Damages*, 16 JUST. SYS. J. 23 (1993).

<sup>406</sup> American Tort Reform Association, *2001 State Tort Reform Enactments (As of June 30, 2001)*, at [http://www.atra.org/wrap/files.cgi.117437\\_tort-record.htm](http://www.atra.org/wrap/files.cgi.117437_tort-record.htm) (last visited Aug. 1, 2002).

standards.<sup>407</sup> Florida increased the burden of proof for nursing home punitive damages verdicts from preponderance of the evidence to clear and convincing evidence.<sup>408</sup> The Florida legislation caps punitive damages in nursing home cases at three times compensatory damages or a total of \$1 million. Nevada, Oklahoma and West Virginia limited the amount of money defendants need to post during the appeals process.<sup>409</sup> Table One provides a telescopic view of tort reform in the states, confirming the dramatic success of the movement to limit liability.

TABLE ONE:<sup>410</sup>

## TORT REFORMS ENACTED IN THE STATES SINCE 1980

Type of Tort Limitations	Number of States Adopting Reform <sup>411</sup>
Recovery of Punitive Damages	32
Joint & Several Liability Limitations	35
Prejudgment Interest Reform	13

<sup>407</sup> *Id.*, at <http://www.atra.org/enact> (last visited Jan. 19, 2002).

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> This table is adapted from American Tort Reform Association, *Tort Reform Record At-A-Glance*, at [http://www.atra.org/wrap/files.cgi.117437\\_tort-record.htm](http://www.atra.org/wrap/files.cgi.117437_tort-record.htm) (last visited Aug. 1, 2002).

<sup>411</sup> Five states do not recognize punitive damages as a common law remedy: Louisiana, Nebraska, Massachusetts, New Hampshire and Washington. Punitive damages limitations have taken diverse forms. The majority of states have raised the burden of proof from preponderance of the evidence to the clear and convincing evidence standard. A few states have limited multiple punitive damages in mass tort cases. A large number of states have capped the size of punitive damages, usually to a given ratio of compensatory damages. Alaska, for example, limits punitive damages to \$500,000 or three times compensatory damages, whatever is greater. Colorado's 1986 tort reform limits punitive damages to the size of compensatory damages. A growing number of states allocate a portion of punitive damages to state funds. Three states have adopted judge-assessed punitive damages measures. CONN. GEN. STAT. ANN. § 52-240b (West 2001) (noting application to product liability actions); KAN. STAT. ANN. §§ 60-3701(a)-(b), 60-3702(a)-(b) (2001) (providing that court "shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount"); OHIO REV. CODE ANN. § 2315.21(b) (Baldwin Supp. 2001) (stating that "the amount of those punitive or exemplary damages shall be determined by the court"). A number of academics also favor judge-assessed punitive damages to control the size of punitive damages awards. Montana requires juries to render unanimous verdicts in punitive damage cases. Georgia, Maryland, Montana, North Dakota and Utah restrict the use of financial evidence of the defendant's wealth in assessing punitive damages. Nine states provide drug and medical product manufacturers with immunity from punitive damages if they comply with Food & Drug Administration standards. Exceptions are made for fraud and criminal withholding of information in several jurisdictions. American Tort Reform Association, *Punitive Damage Reform*, at <http://www.atra.org/issues.flml?id=19> (last visited Aug. 1, 2002).

Collateral Source Rule	22
Non-economic Damages (Pain & Suffering)	11
Products Liability Limitations	14
Class Action Reform	2
Attorney Retention/Sunshine (Disclosures About Representation)	3
Appeal/Bond/Reform	9

Table One demonstrates that the majority of states have enacted one or more tort law limitations. The products liability reform depicted in Table One, for example, increases the obstacles to plaintiffs' recovery through retrenchments such as "restrict[ions on] joint liability, . . . restrict[ions on] the collateral source rule and the eliminat[ion] of product supplier contribution claims against plaintiff's employers."<sup>412</sup>

The tort reformers are not satisfied with their impressive record of convincing legislators to enact restrictions at the state level. In addition, they propose federalizing tort law rather than maintaining states' rights. Reformers often justify centralized products liability law because of the indeterminacy created by "state-by-state variations in rules governing the obligations of manufacturers and sellers."<sup>413</sup> However, if the reformers were truly interested in uniformity, they would be urging federal legislation to enact punitive damages in the aberrant jurisdictions of Louisiana, Massachusetts, Nebraska, New Hampshire and Washington that do not recognize common law punitive damages. Similarly, the supporters of a federal tort law takeover do not support uniformity when it comes to the standard of proof for punitive damages. No reformer has suggested that Congress require Colorado to lower the standard of proof to obtain punitive damages from beyond a reasonable doubt to clear and convincing evidence or preponderance of the evidence.

Tort reform is portrayed as a grass roots populist movement, but corporate special interests are the real underwriters of this campaign.<sup>414</sup> The Texans for Lawsuit Reform (TLR), one of two principal tort reform lobbying groups

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<sup>412</sup> PHILLIPS ET AL., *supra* note 217, at 1415.

<sup>413</sup> *Id.*

<sup>414</sup> Molly Ivins, *Clinton Earns a Reprieve for Quashing Tort Reform*, SEATTLE TIMES, Mar. 25, 1996, at B5.

in Texas, received more than half of its Political Action Committee ("PAC") money (\$2,850,834) "from just 20 donors—most of whom made fortunes in toxic chemicals, construction, energy or other dangerous industries with elevated legal liabilities."<sup>415</sup> PACs, businesses and individuals affiliated with TLR and The Texas Civil Justice League, the state's other major tort reform lobby group, contributed \$4.1 million to George W. Bush's two gubernatorial campaigns, outspending every other special-interest donor.<sup>416</sup> A study by Texans for Public Justice found that "Enron and its executives contributed \$146,500 to Bush's 1994 Gubernatorial Campaign Committee."<sup>417</sup>

In 1995, Enron supported Texas tort reform as part of a larger ideological movement spearheaded by the ATRA and its corporate allies. The thrust of this and other tort reform movements is to limit the rights and remedies of ordinary Americans, not the rights of corporations to file lawsuits.<sup>418</sup> Retrenchment is turning tort law, once an almost exclusive province of state common law, into a statutory subject. Part II documents how organized interest groups fund and support the retrenchment of tort law. Enron based its business model on information exchange that created the potential for new ways of concealing wrongdoing on a vast scale. Tort remedies need to be strengthened, not weakened, in an era when vast amounts of money can be moved with the click of a mouse.

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<sup>415</sup> Press Release, Texans for Public Justice, Bush, Lay Shielded Errant TX Businesses From Lawsuits (Feb. 12, 2002), at [http://www.tpj.org/Lobby\\_Watch/enron-1r.html](http://www.tpj.org/Lobby_Watch/enron-1r.html) (last visited July 28, 2002) (examining political contributions from 1994 through 2000).

<sup>416</sup> Press Release, Texans for Public Justice, The Governor's Gusher: The Sources of George W. Bush's \$41 Million Texas War Chest (Jan. 20, 2000), at <http://www.tpj.org/reports/gusher/cover.html> (last visited Aug. 8, 2002).

<sup>417</sup> Press Release, Texans for Public Justice, Despite President's Denials, Enron & Lay Were Early Backers of Bush (Jan. 11, 2002), at <http://www.tpj.org/press-releases/enron.htm> (last visited Aug. 8, 2002). See also Press Release, Texans for Public Justice, Texans for Lawsuit Reform: How the Texas Tort Tycoons Spent Millions in the 2000 Elections (Nov. 2001), at <http://www.tpj.org/reports/tlr/tlr.pdf> (last visited Aug. 8, 2002). "Tort reform" interests contributed heavily towards George W. Bush's presidential bid, as well. At least 75% of the members of the Texas Civil Justice League contributed to Bush's presidential campaign. See Alan C. Miller, *Texas Corporate Interests Financed Bulk of Bush Races*, L.A. TIMES, July 14, 1999, at A1. According to the Center for Public Integrity, and as has been widely reported, Enron was the single largest patron of Bush's political career.

<sup>418</sup> Professor Dobbs cites a Roscoe Pound Foundation study documenting that corporate members of the ATRA and Products Liability Alliance filed 38,000 lawsuits between 1991-94 in five populous states alone. DAN B. DOBBS, *THE LAW OF TORTS* 1094 n.8 (2000).

The tort reform movement has successfully stopped tort expansion in its tracks and retrenched many common law tort doctrines. Since 1986, forty-five states and the District of Columbia have enacted at least one limitation on plaintiffs' tort rights and remedies.<sup>419</sup> The first wave of legislative tort reforms occurred in the early 1980s, enacted in response to a perceived "insurance crisis" in the field of medical malpractice. Tort reformers blamed rising medical malpractice premiums on progressive judges who expanded the doctrine of *res ipsa loquitur* by permitting juries to infer negligence from the mere occurrence of an untoward result following medical treatment, and that recognized a duty of due care by physicians to disclose the risk of treatment to patients.<sup>420</sup> During the past two decades, thirty-two states placed limitations on a plaintiff's ability to obtain punitive damages.<sup>421</sup> The purpose of punitive damages is to punish and deter egregious misconduct inimical to the social welfare. Arbitrary caps limit the remedy's efficiency. Such caps permit a corporate entity to accurately predict its punishment in advance and to incorporate that cost into the price of doing business.<sup>422</sup> Thus, corporations spread the costs to consumers rather than avoiding negligent behavior.

At early common law, joint tort liability was a narrow doctrine that "referred to vicarious liability for concerted action."<sup>423</sup> The rationale for doing away with joint liability is the assumption that the defendants should not pay more than the percentage of fault attributable to them.<sup>424</sup> Corporations oppose joint and several liability because it makes a co-defendant responsible for paying an entire award if the other party is bankrupt or otherwise insolvent. In jurisdictions where there is only several liability, the defendant pays only her share of the claim and there is no need for contribution. However, joint and

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<sup>419</sup> American Tort Reform Association, *ATRA's Accomplishments*, at <http://atra.org/about.htm> (last visited Nov. 13, 2001).

<sup>420</sup> Joseph A. Page, *Deforming Tort Reform Liability: the Legal Revolution and its Consequences*, 78 GEO. L.J. 649, 649 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)).

<sup>421</sup> American Tort Reform Association, *Tort Reform Record At-A-Glance*, at [http://www.atra.org/wrap/files.cgi/7437\\_tort-record.htm](http://www.atra.org/wrap/files.cgi/7437_tort-record.htm) (last visited July 23, 2002).

<sup>422</sup> See generally PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 127 (1988) (noting that punitive damages are "routine when the injury is serious and a wealthy institution is numbered among the accused").

<sup>423</sup> PROSSER, *HANDBOOK*, *supra* note 35, at 291.

<sup>424</sup> *Id.*

several liability gives a co-defendant who is paying more than her fair share, the possibility of contribution or indemnity.<sup>425</sup>

Thirty-five states limited joint and several liability as the result of tort reform.<sup>426</sup> Joint liability brings common sense to the common law where concurrent tortfeasors produce an indivisible injury.<sup>427</sup> The abolition of joint liability reallocates the risk that a co-defendant will not be able to pay his share of the damages to the plaintiff. Courts should not limit the innocent plaintiff's ability to obtain a full recovery unless the court has a reasonable basis for doing so.<sup>428</sup>

The collateral source rule is another pro-plaintiff doctrine that has been limited by tort reform legislation in twenty-two states.<sup>429</sup> The collateral source rule provides that a plaintiff's award is not deducted for sums received by his employer, insurance or other sources. The rationale for the collateral source rule is that the defendant must pay the full cost of wrongdoing even if the plaintiff has other sources of compensation such as insurance or medical policies provided by employers. Elimination of the collateral source rule results in the defendant "receiv[ing] a windfall as a result of the plaintiff's thrift or others' largesse."<sup>430</sup> Additionally, evidence of

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<sup>425</sup> "Contribution provides for recovery over in part, where the tortfeasors are legally liable only for a portion of the damages as between or among themselves. Indemnity provides for full recovery over, as for example where the indemnitee is only vicariously liable to the plaintiff for the actual fault of the indemnitor." PHILLIPS ET AL., *supra* note 217, at 1287.

<sup>426</sup> Joint liability is imposed when two or more tortfeasors share responsibility for a tort. For example, an employer and employee may be jointly and severally liable for a tort. In this case, the employer is vicariously liable whereas the employee is directly liable. Tortfeasors may have joint liability when they contribute to a single, indivisible injury, as is frequently the case with toxic torts. The doctrine of joint and several liability is a pro-plaintiff doctrine because it permits lawsuits against parties "severally, or separately, for their joint tort." Joint liability makes each defendant liable for the plaintiff's compensatory damages. In the event that an insolvent co-defendant is unable to pay, the co-defendant able to pay must pay the entire judgment. A defendant who is required to pay the entire judgment then seeks contribution or indemnity from his co-defendant. The doctrine places the risk that a tortfeasor will be insolvent on the tortfeasor, not the tort victim.

PHILLIPS ET AL., *supra* note 217, at 1287.

<sup>427</sup> See *id.* at 1292.

<sup>428</sup> RESTATEMENT (SECOND) OF TORTS § 433A, cmts. h, i (2000).

<sup>429</sup> American Tort Reform Association, *Tort Reform Record At-A-Glance*, *supra* note 428.

<sup>430</sup> PHILLIPS ET AL., *supra* note 217, at 1414.

collateral sources may be prejudicial in creating an impression of plaintiff's malingering or lack of need.<sup>431</sup>

## 6. Piecemeal Federal Legislative Tort Reform

Tort retrenchers pursue narrow tort reform legislation that benefits selected categories of defendants, while at the same time pursuing their long-term goal of comprehensive tort reform nationwide.<sup>432</sup> Comprehensive federal tort reform has not yet been enacted, but the retrenchers have succeeded in enacting piecemeal tort reform benefiting special industries. The following examples provide a sampling of their success:

- The General Aviation Revitalization Act of 1994 was the first federal products liability bill enacted into law. This statute "set an 18-year statute of repose for small aircraft and aircraft parts."<sup>433</sup> This legislative limitation prevents plaintiffs from suing under any products liability theory if an airplane or the part that proved to be defective is eighteen years or older.<sup>434</sup>
- The Biomaterials Access Assurance Act of 1998 is a federal statute immunizing companies that supply raw materials such as silicone or components for medical implants.<sup>435</sup>
- The Year 2000 Information and Readiness Act provides immunity to computer software manufacturers for the Y2K problem or other year-2000 related claims.<sup>436</sup>
- The Prison Litigation Reform Act of 1995 places limits on the rights of prisoners to recover for a variety of lawsuits including the unprotected exposure to asbestos hazards.<sup>437</sup>

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<sup>431</sup> *Id.*

<sup>432</sup> Terry Carter, *Piecemeal Tort Reform: Rather Than Chase Broad Legislation on the Hill, Lawyers Are Picking Their Battles—and Winning*, 87 A.B.A. J. 51 (2001).

<sup>433</sup> See General Aviation Revitalization Act of 1994, Pub. L. No. 103-298 (1994), 108 Stat. 1552 (codified at 49 U.S.C. §§ 401.01-401.20 (1996)). See generally Bob Van Voris, *Clinton's A Surprising Tort Reformer*, NAT'L L.J., Aug. 14, 2000, at 14; 49 U.S.C. § 401.01 (1994) (imposing statute of repose that completely cuts off products liability of the manufacturer of small aircraft and parts for defects after eighteen years).

<sup>434</sup> Van Voris, *supra* note 433, at 14.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> Paul Wright, *Tort "Reform" Hurts Prisoners*, NAT'L L.J., Aug. 28, 2000, at A22.



- The Teacher Liability Protection Act of 2001 passed the Senate with a vote of 98 to 1. This act immunizes teachers, principals and administrators from lawsuits arising out of “reasonable steps to maintain discipline.”<sup>438</sup>

Additionally, comprehensive federal products liability limitations have been proposed in nearly every session of Congress since the early 1980s.<sup>439</sup> The Insurance Institute notes that “[v]arious reform measures have been proposed since the product liability reform campaign began, from limiting punitive damages to the first successful claimant in suits involving a single product and a single manufacturer, to capping noneconomic damages at \$100,000 or \$250,000.”<sup>440</sup>

The widespread successes of the tort reformers in the state legislatures and their more limited victories in Congress owe much to the academic proponents who provide pro-tort reform scholarship and who often testify in favor of these “reforms.”

## PART II: TORT SCHOLARSHIP AS A BATTLEGROUND OF SOCIAL THEORY

### A. *Back To The Future of Tort Law*

Abner Mikva, President Clinton’s White House Counsel and a former federal circuit court judge, recently spoke at Harvard University Law School urging students “to help bring justice back to law.”<sup>441</sup> Judge Mikva observed that, “[t]he dominant forum for discussing these issues at law school campuses is now run by a group with a staunch conservative

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<sup>438</sup> Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. §§ 6731-6738 (2002).

<sup>439</sup> The Reporters note that overall the Restatement (Third) “has been warmly received by the courts. The Restatement (Third) has already been cited in more than 170 reported decisions. In some areas it is clear that the Restatement positions will carry the day and provide closure on issues that have up to now been somewhat problematic.” In 1982, Robert Kasten, a Wisconsin Republican, introduced The Uniform Products Liability Act, S. 44, 98th Cong. (1983). This bill provided for compulsory bifurcation, clear and convincing evidence, judge-assessed punitive damages and state sharing of punitive awards. *Id.* In 1992, the Senate rejected S. 640 while H.R. 3030 died in committee. Since 1980, however, tort reform efforts continue to succeed at the state level.

<sup>440</sup> Ruth Gastel, *The Liability System*, INS. ISSUES UPDATE (June 2002).

<sup>441</sup> See Judge Abner J. Mikva, Remarks at American Constitution Society Events (Jan. 11, 2001) (transcript available at <http://www.Americanconstitutionsociety.org/mikva1.htm>) (last visited Aug. 8, 2002).

agenda.”<sup>442</sup> He noted, “[w]hat’s missing is a counter force to make our democracy run like it should.”<sup>443</sup> Judge Mikva argued that legal education is increasingly shaped by the conservative agenda of The Federalist Society for Law & Public Policy when it comes to issues such as privacy, free speech, racial profiling and the American tort law system.

### B. *The Roots of Neo-Conservative Tort Law*

Neo-conservative tort law has become a dominant paradigm during the period in which the Federalist Society for Law and Public Policy Studies rose to prominence. In less than two decades, The Federalist Society has established chapters at 150 of America’s 182 accredited law schools.<sup>444</sup> This organization has 25,000 members and an annual operating budget of \$3 million.<sup>445</sup> The Federalists sponsor over 300 major speaking and debate events each year at American law schools.<sup>446</sup>

The Federalist Society has played a significant role in making neo-conservative viewpoints mainstream in America’s law schools:

The Federalist Society is quite simply the best-organized, best-funded, and most effective legal network operating in this country. Its rank-and-file includes conservative lawyers, law students, law professors, bureaucrats, activists, and judges. They meet at law schools and function rooms across the country to discuss and debate the finer points of legal theory and substance on panels that often include liberals—providing friction, stimulus, and the illusion of balance.<sup>447</sup>

The Federalist’s Board of Visitors includes prominent supporters of tort reform during the Reagan Administration

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<sup>442</sup> *Id.*

<sup>443</sup> *Id.* (speaking at Harvard Law School’s chapter of the American Constitution Society (ACS), a student group organized to further liberal causes, former New York Governor Mario Cuomo, former U.S. Solicitor General Drew Days, and Laurence H. Tribe, Tyler professor of constitutional law at Harvard Law School are members).

<sup>444</sup> Letter from Executive Director, Eugene B. Meyer, The Federalist Society for Law and Public Policy Studies: Why Give?, at <http://www.fed-soc.org/whytogive.htm> (last visited July 23, 2002).

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> Jerry M. Landay, *The Conservative Cabal That’s Transforming American Law*, WASH. MONTHLY, Mar. 1, 2000, at 19.

such as Edwin Meese III and William Bradford Reynolds.<sup>448</sup> Members of the Federalist Society criticize the perceived “political correctness” of the American Association of Law Schools (“AALS”), contending that this organization gives short shrift to conservative views.<sup>449</sup>

An American Bar Foundation (“ABF”) study concluded that the tort crisis is manufactured by “interest groups . . . creating and fostering a negative characterization of the civil justice system in order to . . . justify solutions that inure to their benefit.”<sup>450</sup> The Federalist Society’s *ABA Watch* pilloried the ABF because its statistical research uncovered no empirical evidence that America is suffering from a litigation crisis.<sup>451</sup>

The Federalist Society views the judiciary as a battleground for advancing tort retrenchment and other conservative causes. Its members have been critical of the American Bar Association’s (“ABA”) role in selecting judges, arguing that the ABA treats conservative candidates unfairly. While members of the Federalist Society don academic robes when sponsoring law school events, its lobbying arm supports cutbacks in tort remedies through a federal takeover of tort law in the field of products liability.

### C. *Underwriting Tort Reform*

It is not merely through the strength of its ideas that The Federalist Society has become so prominent over the last two decades: The organization is extremely well funded. The conservative John M. Olin Foundation authorized \$371,000 in grants to the Federalist Society in 1999.<sup>452</sup> A Lexis search using the term “John M. Olin Foundation” yielded more than two hundred hits in the “law review” file alone. Many leading law and economics scholars receive funding from the John M. Olin Foundation.<sup>453</sup> Endowed chairs in the name of John M. Olin are

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<sup>448</sup> Terry Carter, *The In Crowd: Conservatives Who Sought Refuge in the Federalist Society Gain Clout*, 87 A.B.A. J. 46 (2001).

<sup>449</sup> Andrea Billups, *Law Professors Argue Group Excludes Conservative Views; Association Offers Biased Panels at Meetings, They Say*, WASH. TIMES, Jan. 6, 2000, at A3.

<sup>450</sup> *Id.*

<sup>451</sup> The Federalist Society for Law and Public Policy Studies, *ABA Watch* (Aug. 1997): *The American Bar Foundation and Tort Reform*, available at <http://www.fed-soc.org/publications/ABAwatch/August1997/tortreform.htm> (last visited July 23, 2002).

<sup>452</sup> John M. Olin Foundation, Inc., *Schedule of Grants: 1999*, at <http://www.jm-of.org/grants/1999f.htm> (last visited July 23, 2002).

<sup>453</sup> See, e.g., Kenneth E. Scott, *Mutual Funds as an Alternative Banking*

found in the nation's leading law schools. The late William E. Simon, former U.S. Treasury Secretary under President Nixon, was president of the John M. Olin Foundation. Further, Olin funds a large number of programs including endowed chairs, working papers, symposiums and research projects.<sup>454</sup>

The Olin Foundation makes no secret of its social and political agenda. The Foundation's website states that its mission "is to provide support for projects that reflect or are intended to strengthen the economic, political and cultural institutions upon which the American heritage of constitutional government and private enterprise is based."<sup>455</sup> The Foundation's founder, John Merrill Olin,<sup>456</sup> was committed to "the preservation of the principles of political and economic liberty as they have been expressed in American thought, institutions and practice."<sup>457</sup>

The John M. Olin Foundation is a major financial supporter of the neo-conservative movement in American tort law. The Foundation finances conservative work in law and economics in the law schools.<sup>458</sup> The Federalist Society's budget comes largely from "conservative donors such as the Sarah Scaife Foundation, the John M. Olin Foundation, the E.L. Wiegand Foundation, and the Lynde and Harry Bradley Foundation."<sup>459</sup>

The influx of conservative dollars into American law schools is part of a larger spending spree supporting conservative causes. Some conservative foundations tend to give in tandem. For instance,

The Bradley Foundation works so closely with the Olin, Scaife, and Smith Richardson foundations that they are known in funding circles as the "four sisters." Together, they helped found and have for a quarter century or more faithfully supported such established

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System (John M. Olin Prog. L. Econ. Stanford L. Sch. Working Paper No. 142, May 1997).

<sup>454</sup> See, e.g., Robert A. Anthony, *Interpretive Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994) (acknowledging the support of the John M. Olin Foundation).

<sup>455</sup> See John M. Olin Foundation, Inc., *History & General Purposes*, at [http://www.jmof.org/history\\_purposes.html](http://www.jmof.org/history_purposes.html) (last visited July 23, 2002).

<sup>456</sup> The Olin Foundation's website states that it was "established in 1953 by John Merrill Olin (1892-1982), inventor, industrialist, conservationist and philanthropist." *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> The American Law and Economics Association was awarded a \$143,648 grant with \$101,200 disbursed by the end of 1999. *Id.*

<sup>459</sup> *Id.*

institutions of the Right as the Heritage Foundation, the Cato Institute, the American Enterprise Institute, the Federalist Society, Free Congress Research and Education, Citizens for a Strong Economy, the Hoover Institution and the Manhattan and Hudson institutes.<sup>460</sup>

In only two years, between 1992 and 1994, "the National Committee on Responsive Philanthropy found that twelve 'core' conservative foundations donated a stunning \$210 million" to promote conservative activities.<sup>461</sup> The John M. Olin Foundation provides millions of dollars to fund research institutes at almost all of the top-ranked law schools.<sup>462</sup>

TABLE TWO:  
JOHN OLIN FOUNDATION 1999 LAW SCHOOL GRANTS<sup>463</sup>

Selected Law School Funding by John M. Olin Foundation, 1999	Amount of Funding <sup>464</sup>
Columbia University Law School; John M. Olin Program in Law & Economics	\$423,750
Cornell University Law School; John M. Olin Program in Law & Economics	\$500,000
George Mason University School of Law; Institute in Law & Economics for Federal Judges	\$506,633
Georgetown University Law Center;	\$169,000
Harvard University Law School	\$6,000,000
Northwestern University Law School	\$109,666
Stanford University Law School; Program in Law & Economics	\$1,250,334
The University of California, Berkeley, School of Law (Boalt Hall)	\$430,167

<sup>460</sup> MARK DOWIE, *AMERICAN FOUNDATIONS: AN INVESTIGATIVE HISTORY* (2001).

<sup>461</sup> Robert Parry, *Who Buys the Right?*, THE NATION, Nov. 18, 1996, at 5.

<sup>462</sup> Nan Aron et al., *Economics, Academia and Corporate Money In America: The 'Law & Economics' Movement*, 25 ANTITRUST L. & ECON. REV. 37 (1994) (reporting John M. Olin Foundation funding initiatives for law and economics movement in law).

<sup>463</sup> John M. Olin Foundation, Inc., *Total Grants Paid, 1999*, at [http://www.jmof.org/grants\\_1996.html](http://www.jmof.org/grants_1996.html) (last visited July 25, 2002).

<sup>464</sup> Totals include faculty fellowships. Some grants are multi-year.

University of Kansas Law School; Economic Institute for State Court Judges	\$50,000
University of Michigan Law School; John M. Olin Program in Law & Economics	\$260,000
University of Chicago Law School; John M. Olin Program in Law & Economics	\$2,465,000
University of Notre Dame Law School	\$50,000
University of Southern California Law School; The Program in Law	\$608,151
Yale University Law School; Law & Economics Program	\$1,895,855
Total Law School Funding by John Olin Foundation	\$17,183,556

#### D. *The Federalist Campaign to Limit Tort Remedies*

Neo-conservatives created the Federalist Society to counter what they viewed as the domination of law schools by “left-leaning scholars who were indifferent—if not hostile—to [conservative thought].”<sup>465</sup> The Federalist Society consists of interlocking directorates of the legal academy’s most powerful conservative branches, the defense law firms representing Big Tobacco and other powerful interests, including leading stalwarts of the conservative judiciary. As one commentator described a Federalist Society meeting:

The room bulges with partners from among the most powerful law firms in the land: New York’s venerable Sullivan & Cromwell; Chicago’s Kirkland & Ellis . . . Washington’s own Wilmer, Cutler & Pickering ([former George Bush White House Counsel C. Boyden] Gray’s firm); and Los Angeles powerhouse Gibson, Dunn & Crutcher (its Washington office is home to Theodore Olson—whose contributions to [former Solicitor General Kenneth] Starr’s efforts are colorfully documented in the Conason and Lyons excerpts referred to above).

And then there are the judges. No fewer than eight federal judges, most of whom are still active on the bench, will sit on panels or

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<sup>465</sup> Letter from Executive Director, *supra* note 444.

speak from the podium during this three day affair. Their discussions range from the technical to the deeply ideological. Former federal judge Robert Bork comments on the “inertia” and “weariness” he has observed in American liberalism—themes drawn from his recent book, “Slouching Toward Gomorrah.” And Supreme Court Justice Clarence Thomas attacks the American Bar Association for being too socially conscious—advancing a slate of liberal positions “that go beyond representing the interests of lawyers as a profession.”<sup>466</sup>

The “formidable influence of the Federalist Society” is illustrated by the fact that ten of the first federal judges nominated by the current Bush Administration are members.<sup>467</sup> Although The Federalist Society professes to take no official stand on controversial legal policy issues, the organization coordinates its activities with other conservative groups in favor of tort reform.<sup>468</sup> The Lawyers for Civil Justice, a pro-tort reform alliance, hosted a meeting for industry and defense bar leaders including the “United States Chamber of Commerce, Federalist Society, Defense Research Institute, [and the] American Tort Reform Association” to “improve the coordination among several groups already addressing . . . issues” such as tort reform.<sup>469</sup> The Federalist Society’s support of a national products liability regime is inconsistent with its support of state rights in other areas such as government regulations affecting the environment.<sup>470</sup>

#### E. *Tort Reform Alliances*

The Tort Reform Summit 2000 was sponsored by many pro-tort reform organizations, including:

The Doctors Company, the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Federation of Independent Business, Citizens for a Sound Economy, Citizens for Civil Justice Reform, the American Tort Reform Association, the

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<sup>466</sup> Jerry M. Landay, *The Conservative Cabal That’s Transforming American Law*, WASH. MONTHLY, Mar. 1, 2000, at 19.

<sup>467</sup> Linda Gasparello, *Lawyer Groups Take on Federalist Society*, WHITE HOUSE WKLY, Aug. 14, 2001, at 156.

<sup>468</sup> See Barry Bauman, *Civil Justice Reform Perspectives: Industry, Defense Bar Meet to Increase Coordination on Civil Justice Actions*, METRO. CORP. COUNSEL, Mar. 2001, at 41.

<sup>469</sup> *Id.*

<sup>470</sup> The Federalist Society for Law and Public Policy Studies, *ABA Watch (August 1997): The American Bar Foundation and Tort Reform*, available at <http://www.fed-soc.org/publications/ABAwatch/August1997/tortreform.htm> (last visited July 23, 2002).

Civil Justice Association of California, the Civil Justice Reform Group, Lawyers for Civil Justice, the National Association of Neighborhoods, the Physicians Insurance Association of America, and the Washington Legal Foundation.<sup>471</sup>

These tort reform lobbies work together closely throughout the United States. In California, the tort reform coalition organized to thwart "legislation . . . which would have the effect of restricting judges from issuing protective orders and sealing settlement agreements."<sup>472</sup> Sunshine laws such as the proposed California statute are designed to provide information to the consuming public of hazardous products.

#### F. *Nineteenth Century Tort Wars*

The issues raised in America's law schools during the latter half of the 1800s were forerunners of the contemporary political and ideological attacks led by the Federalist Society and academic tort reformers. In the nineteenth century, law professors drew upon classical liberalism to split all substantive fields of law into either public or private domains.<sup>473</sup> Doctrinalists objected to the remedy of punitive damages, arguing that this blending of punitive and compensatory elements was doctrinally inconsistent with the symmetry of the private/public distinction.<sup>474</sup> Harvard Law School's Simon Greenleaf spearheaded the nineteenth-century movement to abolish punitive damages.<sup>475</sup> Professor Greenleaf

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<sup>471</sup> *Tort Reformers Meet to Honor Lawsuit Abuse Fighters*, BUS. WIRE, Sept. 12, 2000.

<sup>472</sup> Bauman, *supra* note 468.

<sup>473</sup> Substantive fields such as torts, contracts, agency and corporations were classified as private law subjects. In contrast, criminal law and administrative law were placed in the public law camp. This separation of legal subjects into rigid public and private domains had its origins in the natural-rights liberalism of John Locke. The public/private split was the organizing principle of American legal and political theory in the nineteenth century, with the emergence of the market as a central legitimating institution. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). A goal of nineteenth-century legal thought was to create a clear separation between public law (incorporating constitutional, criminal and regulatory law) and private law (including torts, contracts, property and commercial law). See generally Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (stating that public/private split became "the fundamental conceptual and architectural division" of classical legal theory).

<sup>474</sup> See 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 240 n.2 (16th ed. 1899).

<sup>475</sup> Rustad & Koenig, *Historical Continuity*, *supra* note 339, at 1299 (citing GREENLEAF, *supra* note 474, at § 253).



argued that exemplary damages had no doctrinal basis in the Anglo-American legal tradition.

In a 1834 lecture at Harvard Law School, Greenleaf proposed a legal science in which law students classify legal doctrines into finite categories, much as botanists would create taxonomy of plant life.<sup>476</sup> Since the sole purpose of civil remedies was compensation, punitive damages were not classifiable and, therefore, illegitimate. "Damages," opined Greenleaf, "are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him or her from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his or her person or estate."<sup>477</sup>

Professor Greenleaf's assault on the remedy of punitive damages was strongly supported by railroads, utilities and the robber barons of the gilded age. Courts cited Greenleaf's tract against punitive damages in judicial opinions. Justice Foster of the New Hampshire Supreme Court denounced punitive damages as "an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."<sup>478</sup> The Colorado Supreme Court cited Professor Greenleaf in an 1884 decision, stating that punishment and compensation should be kept separate and distinct. A number of other courts used Greenleaf's treatise on evidence as authority for limiting or eliminating punitive damages.<sup>479</sup> Just as in the negligence era, contemporary law professors play an important role spearheading the theoretical rationale underlying the tort retrenchment movement.

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<sup>476</sup> *Id.*

<sup>477</sup> GREENLEAF, *supra* note 474, § 240.

<sup>478</sup> *Fay v. Parker*, 53 N.H. 342, 350-52 (1872).

<sup>479</sup> The movement to abolish punitive damages in the Classical Negligence Period was victorious in only a few states, including Connecticut, Massachusetts, New Hampshire, Washington, and the civil law jurisdiction of Louisiana, which refused to allow punitive damages absent statutory authorization. *See, e.g., O'Reilly v. Curtis Publ'g Co.*, 31 F. Supp. 364, 365 (D. Mass. 1940) (refusing to award punitive damages in Massachusetts); *Anderson v. Dalton*, 264 P.2d 853, 855 (Wash. 1952) (holding that punitive damages cannot be recovered except when explicitly allowed by statute); *Gugert v. New Orleans Indep. Laundries*, 181 So. 653, 656 (La. Ct. App. 1938) (noting that punitive damages were not recoverable under civil law); *Bruton v. Leavitt Stores Corp.*, 179 A. 185, 186 (N.H. 1935) (noting that penalties are not considered in damages); *Hanna v. Sweeney*, 62 A. 785, 785 (Conn. 1906) (declaring punitive damages inapplicable in Connecticut).

### G. *The Politics of Tort Law in the Legal Academy*

Today's law professors play a similar role to nineteenth century legal scholars in providing the theoretical justification for contemporary tort limitations. Conservatives often charge that today's "law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."<sup>480</sup> However, conservative tort scholars are not a beleaguered minority cast into a sea of liberalism. Through generous funding of those who support its conservative agenda, the Federalist Society has attracted "many of the most capable young lawyers and law students of their generation."<sup>481</sup> The Federalist Society website quotes the *New York Times* as crediting the organization with being so influential that they "have already begun to change the terms of legal debate and to revive legal doctrines that were for decades dismissed as historical curiosities."<sup>482</sup> Ronald Reagan praised the Federalists for "changing the culture of our nation's law schools."<sup>483</sup> This was not empty flattery. The attacks on the tort system by prominent Federalists have had a significant impact on legal education.

In a recent punitive damages symposium issue in the *Harvard Journal on Legislation*, Robert Klinck surveyed scholarly opinion and concluded, "the more prominent view [of law professors] appears to be that punitive damages need to be limited."<sup>484</sup> He noted that most tort scholars favor reforms such as "capping punitive damages, taking punitive damage decisions away from juries, [or] imposing more stringent burdens of proof for punitive liability. . . ."<sup>485</sup> Editors who favor tort reform reflect this neo-conservative consensus in the displacement of the liberal tort casebooks of the democratic expansionist era.

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<sup>480</sup> The Federalist Society for Law and Public Policy Studies, *Our Purpose*, available at <http://www.fed-soc.org/ourpurpose.htm> (last visited July 25, 2001).

<sup>481</sup> The Federalist Society for Law and Public Policy, *Why "Give"*, at <http://fed-soc.org/whytogive.htm> (last visited July 25, 2002).

<sup>482</sup> The Federalist Society for Law and Public Policy, *Why "Give"*, at <http://www.fed-soc.org/whatpeoplearesaying.htm> (last visited June 12, 2002).

<sup>483</sup> *Id.*

<sup>484</sup> Robert A. Klinck, *Reforming Punitive Damages: The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469, 472 (2001).

<sup>485</sup> *Id.*

## H. *The Tort Reform Motif of Leading Casebooks*

Casebooks remain the primary tool for socializing new generations of law students, and today's tort casebooks are far less inclined to endorse expansionary tort law than were the leading textbooks of the expansionary era. George Priest, the John M. Olin Professor of Law at Yale University Law School, criticized the tort casebooks of the 1960s and 1970s for their liberal agenda.<sup>486</sup> In recent years, Professor Priest has far less cause for concern.<sup>487</sup> Contemporary tort casebooks range widely from those endorsing an expanded role for torts to those favoring retraction.<sup>488</sup>

Walter Probert's 1991 study of six prominent tort casebooks concluded that the editors were more likely to endorse tort reform and alternatives to the tort system rather than to favor strict liability.<sup>489</sup> Several of the most prominent tort casebooks are written by leading tort reformers and members of the conservative school of law and economics.<sup>490</sup> The leading tort casebook over the past forty years has been *Cases and Materials on Torts* by Prosser, Wade, and Schwartz.<sup>491</sup> The early editions of the casebook, under Prosser's tutelage, endorsed strict liability and generally expanded tort duties. John Wade, one of Prosser's co-editors, strongly opposed

<sup>486</sup> Walter Probert, *The Politics of Torts Casebooks: Jurisprudence Reductus*, 69 TEX. L. REV. 1233, 1234 (1991) (citing George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985)).

<sup>487</sup> Professor Priest contends that radical tort retrenchment is necessary to stave off a tort crisis. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

<sup>488</sup> See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES (7th ed. 2001); ROBERT E. KEETON, CASES AND MATERIALS ON TORT AND ACCIDENT LAW (1999) [hereinafter KEETON, TORT AND ACCIDENT LAW]; DAN B. DOBBS & PAUL HAYDEN, TORTS & COMPENSATION: PERSONAL ACCOUNTABILITY & SOCIAL RESPONSIBILITY FOR INJURY (3d ed. 1997); PHILLIPS ET AL., *supra* note 217.

<sup>489</sup> Probert, *supra* note 486.

<sup>490</sup> Judge Keeton and his colleagues, for example, provide alternatives to the tort law compensation system, but do not explicitly endorse tort reforms such as caps. Judge Keeton and his colleagues criticize tort accident law as a system of compensation, but their approach is "basically friendly to the perceived goals of that law . . ." Probert, *supra* note 486, at 1236. Later editions of the Keeton textbook continue to propose alternatives to tort law, especially in its compensatory function. See KEETON, TORT AND ACCIDENT LAW, *supra* note 488. The two most liberal torts casebooks are Franklin and Rabin's *Tort Law and Alternatives* and Dobbs and Hayden's *Torts and Compensation*.

<sup>491</sup> VICTOR E. SCHWARTZ, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS (10th ed. 2000).

legislative tort reforms and argued that they “should be classed as special-interest legislation. . . .”<sup>492</sup>

Victor Schwartz, a “lawyer-lobbyist” and “the undisputed king of tort reform,”<sup>493</sup> succeeded to the role of senior editor of the Prosser casebook after the deaths of Prosser and Wade. Naturally, Victor Schwartz’s editorship embraces a pro-tort reform perspective. Probert noted: “The editors adopt the pejorative use of code words like ‘deep pocket.’ In asking whether joint and several liability should be abrogated, the reference is even to Mr. Deep Pocket.”<sup>494</sup>

In the latest edition, the editors accurately describe the “common law of torts [as] now riddled with statutory inroads.”<sup>495</sup> Schwartz edited a new section entitled “Courts v. Legislatures: Who Will Determine Tort Law?”<sup>496</sup> This section addresses court challenges to tort reforms that have been enacted by state legislatures.<sup>497</sup> It contains a study, a case note in Prosser’s book, financed by the conservative advocacy group, the Washington Legal Foundation (“WLF”).<sup>498</sup> The WLF study documented “ninety decisions at various levels by state courts holding state tort reform unconstitutional under state

<sup>492</sup> John W. Wade, *Strict Products Liability: A Look at its Evolution*, THE BRIEF, Fall 1989, at 8, 56.

<sup>493</sup> Terry Carter, *Tort Reform: Rather Than Chase Broad Legislation on the Hill, Lawyers Are Picking Their Battles—and Winning*, 108 A.B.A. J. 50 (2001).

<sup>494</sup> *Id.*

<sup>495</sup> VICTOR E. SCHWARTZ ET AL., *supra* note 491, at 1137.

<sup>496</sup> “Schwartz on Torts” Inserts Section on Legislatures v. Courts, 14 FED. & ST. INS. L. WK., Sept. 11, 2000 (describing chapter twenty-three in “[t]he latest edition of the most widely used casebook on torts—*Prosser, Wade & Schwartz’s Torts*”).

<sup>497</sup> See SCHWARTZ, *supra* note 491, at 1226 n.3.

<sup>498</sup> The Washington Legal Foundation’s website describes its conservative agenda:

National in scope and fully independent, we at WLF commit our resources to working with our friends in government and our legal system to maintain balance in the Courts and help our government strengthen America’s free enterprise system. The ideals upon which America was founded—individual freedom, limited government, free market economy, and a strong national security and defense—are the same principles which the Washington Legal Foundation defends in the public interest arena. By litigating precedent-setting issues in the courts and before government agencies; publishing and marketing timely and relevant legal studies; and ensuring maximum exposure through its extensive communications outreach program, the Washington Legal Foundation shapes public policy, serves as a counterweight to special interest legal organizations, and works with allies in the courts, legislatures, and the agencies at the federal and state levels.

Washington Legal Foundation, *Welcome to the WLF Web Site*, at <http://www.wlf.org> (last visited Feb. 1, 2002).

constitutions and about a hundred and twenty upholding such laws.<sup>499</sup> Not surprisingly, Professor Schwartz criticizes state courts that overturn legislative tort reform for failing to demonstrate an appropriate amount of deference to legislative decision-making.<sup>500</sup> He argues that the judicial branch is not an appropriate legal institution for overturning tort reform statutes because the judiciary is the least democratic branch of American government.<sup>501</sup>

In his capacity as counsel to the ATRA, Schwartz represents many of the defendants who are targeted in high profile products liability, toxic tort and mass tort actions.<sup>502</sup> The major contributors to ATRA and other tort reform coalitions include the defendants in these cases.<sup>503</sup> "Eleven national associations dedicated to reform tort laws nationwide" honored the work of Victor Schwartz and ATRA "for their outstanding efforts in the tort reform movement."<sup>504</sup> The tort reform award described Victor Schwartz as "a principal guiding force in the tort reform movement. He earned the Individual Award for his tireless efforts to draft legislative language, testify before Congress, participate in precedent-setting cases, and write tort casebooks."<sup>505</sup>

The same forces favoring restriction of tort remedies vehemently oppose campaign finance reform that would arguably lessen the power of special interests. States vary in

<sup>499</sup> SCHWARTZ, *supra* note 491, at 1233 n.1. This case note was drawn from Victor Schwartz's Washington Legal Foundation publication, "Who Should Make America's Tort Law: Courts or Legislatures." Gregory C. Read, *Stand Up and be Counted*, DEF. COUNS. J., Oct. 1, 2000, at 423 (describing 1997 study by Victor E. Schwartz, "courts have ruled more than 180 times on the constitutionality of the court reform statutes in the last decade, and 60 have been overturned").

<sup>500</sup> Victor E. Schwartz et al., *Stamping Out Tort Reform: State Courts Lack Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S-34 (citing testimony on behalf of the American Tort Reform Association).

<sup>501</sup> *See id.*

<sup>502</sup> The ATRA's website notes that this organization "is a broad based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who support civil justice reform." American Tort Reform Association, *ATRA's Mission*, at <http://www.atra.org/about.htm> (last visited Feb. 2, 2002).

<sup>503</sup> A journalist describes the ATRA and the U.S. Chamber of Commerce as spearheading a "half-dozen tort reform bills that died with the end of the last Congress, while their entrenched opponents—trial lawyers—are meeting with allies on the Hill to plot a defense." Tatiana Boncompagni, *High Risk, Low Priority*, MIAMI DAILY BUS. REV., Feb. 23, 2001, at A19.

<sup>504</sup> *Tort Reformers Meet to Honor Lawsuit Abuse Fighters*, BUS. WIRE, Sept. 12, 2000.

<sup>505</sup> *Id.*

whether their highest courts are appointed or elected, but judges have a certain independence of thought that allows them to objectively pursue democratic interests. The institutional role of the courts is to protect the rights of its citizenry, even against excesses of the legislative branch. State courts overturn state tort reforms frequently because these reforms violate specific state constitutional guarantees such as the right to open courts, equal protection and the prohibition against special legislation.<sup>506</sup>

The Prosser casebook is more moderate than some of its neo-conservative rivals. Probert's casebook content analysis concluded that Richard Epstein and Judge Richard Posner's books were substantially more slanted to the "political right" than the Prosser casebook.<sup>507</sup> Probert critiques these books as being dominated by an overarching purpose of advancing a conservative version of law and economics.<sup>508</sup> Richard Epstein, editor of *Torts*, is a member of the Federalist Society and a prominent libertarian.<sup>509</sup> Epstein's casebook was a revision of Gregory and Kalven's *Cases and Materials on Torts*.<sup>510</sup> The Gregory and Kalven book, first published in 1952, originally promoted "liability without fault as some possible ultimate goal, but the general expansion of liability in all of 'accident' law."<sup>511</sup>

Professor Kalven applauded the California Supreme Court's expansionary era decisions in *Rowland v. Christian*<sup>512</sup> and *Dillon v. Legg*.<sup>513</sup> Kalven praised the California Supreme Court as going "beyond eliminating the anomalous rule as to the social guest: it appears to have basically altered the allocation of functions between court and jury."<sup>514</sup> He hoped that in the next edition of his textbook the editors would be in a position to drop the section on status distinctions such as

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<sup>506</sup> Victor Schwartz coined the term "judicial nullification" to refer to courts overturning state tort reforms.

<sup>507</sup> See Probert, *supra* note 486, at 1240.

<sup>508</sup> *Id.*

<sup>509</sup> See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (7th ed. 2000).

<sup>510</sup> Professors Kalven and Gregory's casebook was in the tradition of liberal expansion in its support for strict liability. The casebook editors "use[d] the strategy of combining ultra hazardous activity and products liability into a single chapter: 'Common Law Areas of Liability Without Fault.'" See Harry Kalven, Jr., *Tort Watch*, 34 AM. TRIAL LAW. J. 1, 57 n.2 (1972).

<sup>511</sup> Probert, *supra* note 486, at 1235.

<sup>512</sup> 443 P.2d 561 (Cal. 1968).

<sup>513</sup> 441 P.2d 912 (Cal. 1968).

<sup>514</sup> Kalven, *supra* note 510, at 11.

trespasser, licensee and invitee in favor of a more liberal standard of reasonableness."<sup>515</sup> Professor Kalven's book "caught the spirit of tort law in process . . . a sort of moving picture of tort law in evolution."<sup>516</sup>

Thirty years after Harry Kalven advocated expansion of the law, Richard Epstein became the sole editor of the Gregory and Kalven casebook. Professor Epstein has a neo-conservative view of occupier liability problems and most other areas of common law doctrine. Epstein "believes that social welfare legislation, workers' compensation laws, labor laws, minimum wage laws, rent control laws, and progressive taxation laws are both unwise and unconstitutional."<sup>517</sup> Epstein joined fellow tort reformers, Peter Huber<sup>518</sup> and Richard Willard, "head of the Justice Department's Civil Division and Chief of the Reagan administration's Tort Policy Working Group, in a public forum entitled 'The Liability Crisis: Who's to Blame?'"<sup>519</sup> Epstein is openly critical and dismissive of liberal tort doctrine. He favors a society based upon a laissez faire philosophy of limited government.

In the famous *T.J. Hooper* case,<sup>520</sup> Judge Learned Hand found the owners of tugboats liable for the loss of two coal barges in an Atlantic storm. The cargo owners sued the owners of the tugs, arguing that the boats were unseaworthy because they lacked radio receiving sets by which they could have gotten weather warnings of approaching easterly gales. The tugboat owners defended on the ground that it was not the custom of the industry to have radios on board. The *T.J. Hooper* court concluded that industry custom was the floor, but not the ceiling, of due care: "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its

<sup>515</sup> Professor Kalven supported a general standard of reasonable care as opposed to the status-based distinctions of trespasser, licensee and invitee. He hoped that in the next edition of their casebook that the editors would be in a position to "drop that separate chapter on occupier liability!" *Id.*

<sup>516</sup> Probert, *supra* note 486, at 1236.

<sup>517</sup> Roger Parloff, *For the Record: Professor Richard Epstein*, AM. LAW., Sept. 1997, at 75.

<sup>518</sup> Peter Huber is a scholar at the Manhattan institute and the author of two pro-tort reform books, *Liability: The Legal Revolution and Its Consequences* (1988) and *Galileo's Revenge: Junk Science in the Courtroom* (1991).

<sup>519</sup> Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1707 (1993).

<sup>520</sup> 60 F.2d 737 (2d Cir. 1932).

measure; a whole calling may have unduly lagged in the adoption of new and available devices."<sup>521</sup>

Similarly, Judge Richard Posner, one of the founding fathers of the law and economics movement,<sup>522</sup> is the editor of another torts casebook that "pursues his theory of economic efficiency."<sup>523</sup> Probert notes that Posner's casebook reflects his conservative position in various ways: "He defends the owners of the sulfuric acid pool in the Britt case and the severely limited liability of employers early in the century against the perceived sentimentality of the modern position."<sup>524</sup>

Probert describes a fourth prominent torts textbook, *The Torts Process*, that is co-edited by James Henderson, Jr.,<sup>525</sup> who was the co-reporter with Professor Aaron Twerski of the liability-limiting Restatement (Third) of Products Liability. The American Law Institute's ("ALI") appointment of Henderson and Twerski reflects the deep involvement of tort scholars in the retrenchment movement.<sup>526</sup> Henderson's commentary in the teacher's manual is "every bit as reactive as the Epstein and Posner casebooks."<sup>527</sup> Henderson's commentary supports products liability reform, attacking rulings that he finds

<sup>521</sup> *Id.* at 740. Professor Epstein ridicules Judge's Hand's jurisprudence: The Hand formulation in *T.J. Hooper* has been influential in the controversial fields of medical malpractice and products liability providing a doctrinal rationale for plaintiffs to prove negligence even where the physician (or manufacturer) complied with industry custom: There are many competitors for this questionable honor, but Hand's famous *bon mot* is perhaps the most influential, and mischievous, sentence in the history of the law of torts.

Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Torts*, 21 J. LEGAL STUD. 1, 38 (1992) (viewing law and economics as advancing values such as private property, autonomy and possessive individualism); see also RICHARD A. POSNER, *ANTITRUST LAW* (1976) (elaborating conservative view of law and economics as maximizing wealth; elaborating the theory that justice, at least in antitrust law, is wealth maximization). Law and economics is a broad theory of law that includes conservatives such as Posner and Epstein, as well as, liberals and even critical legal scholars. Alex M. Johnson, Jr., *An Appeal for the "Liberal" Use of Law and Economics*, 67 TEX. L. REV. 659 (1989) (arguing that law and economics is inherently apolitical and useful to liberal as well as conservative scholars); see, e.g., Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

<sup>522</sup> See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

<sup>523</sup> Probert, *supra* note 486, at 1240.

<sup>524</sup> *Id.*

<sup>525</sup> JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* (5th ed. 1999).

<sup>526</sup> PHILLIPS ET AL., *supra* note 217, at 491.

<sup>527</sup> Probert, *supra* note 486, at 1244.



objectionable.<sup>528</sup> A fuller content analysis of casebooks would likely reveal a steady drift toward more conservative interpretations of tort doctrine.

# I. *The Death of Strict Products Liability in Legal Scholarship*

## 1. Rise of Strict Products Liability

Products liability is a term describing the legal liability of manufacturers<sup>529</sup> for injuries caused by defective products.<sup>530</sup> Section 402A of the Restatement (Second) of Torts is entitled “Special Liability of Seller of Product for Physical Harm to User or Consumer.”<sup>531</sup> The ALI approved section 402A<sup>532</sup> and all but a few jurisdictions follow it.<sup>533</sup> The Restatement (Second) has special rules for cases involving design defects, the failure to warn or inadequate warning and products with manufacturing defects. The ALI’s endorsement of strict products liability “marked the first recognition by the Institute of privity-free strict liability for sellers of defective products.”<sup>534</sup> Courts and state legislatures widely adopted section 402A, making it law in all but a few states by the early 1980s. Section 402A makes a

<sup>528</sup> *Id.* at 1246.

<sup>529</sup> Manufacturers are defined broadly to include principal manufacturers, component manufacturers and assemblers.

<sup>530</sup> Plaintiffs in products liability actions will plead multiple theories based on Article 2 breach of warranty U.C.C. §§ 2-312-315, negligence and strict products liability. The focus in a strict products liability case is the product rather than the manufacturer’s failure to use due care.

<sup>531</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 3 (1998) (tracing the history of strict products liability). In 1964, the ALI first endorsed the concept of strict liability in products liability when it adopted § 402A as part of the Restatement (Second) of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement (Second) is still the law of strict products liability adopted by most jurisdictions. Few courts have yet adopted principles from the Restatement (Third) but it is quite likely that the Restatement (Second) will give way to the Restatement (Third) through judicial tort reform.

<sup>532</sup> Press Release, American Law Institute, The American Law Institute Publishes Restatement of the Law (Third) Torts: Products Liability (May 1997), at <http://www.ali.org> (last visited June 1, 2002).

<sup>533</sup> Massachusetts declined to adopt section 402A but has embraced the policies of strict products liability in its version of the implied warranty of merchantability and other provisions of Article 2 of the U.C.C. *See* MASS. GEN. LAWS ANN. ch. 106, § 2-314 (1998). Massachusetts, for example, eliminated the defense of privity in its version of section 2-318. Suppliers of goods may not disclaim either the implied warranty of merchantability or fitness for particular purpose in Massachusetts. *See id.* § 2-316A. Massachusetts has in effect a functional equivalent of section 402A in its version of Article 2 of the U.C.C.

<sup>534</sup> PHILLIPS ET AL., *supra* note 217, at 1246.

manufacturer liable for placing a product on the market with a defect that makes it unreasonably dangerous to consumers and injuries result.<sup>535</sup> Strict products liability is an "attempt to minimize the costs of accidents and to consider who should bear those costs."<sup>536</sup> The underlying rationale of strict liability is to place the burden of precaution on the manufacturers because they have superior information about the product that makes them the "cheapest cost avoider."<sup>537</sup>

Section 402A of the Restatement (Second) adopted Justice Roger Traynor's majority opinion in *Greenman v. Yuba Power Products, Inc.*<sup>538</sup> Judge Traynor explained that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>539</sup>

In the 1978 case of *Barker v. Lull Engineering Co.*, California permitted consumers to establish design defects by either the consumer expectation test or the risk/utility test.<sup>540</sup> A number of other jurisdictions developed a risk/utility test based upon seven factors that should be weighed to determine if the product is defective.<sup>541</sup>

<sup>535</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>536</sup> *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 152 (N.J. 1979) (discussing Judge Guido Calabresi's efficiency-based argument for strict products liability).

<sup>537</sup> See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1960).

<sup>538</sup> 377 P.2d 897 (Cal. 1962) (recognizing the doctrine of strict products liability).

<sup>539</sup> *Id.* at 901.

<sup>540</sup> 573 P.2d 443, 452 (Cal. 1978). The court held that a jury may be instructed that a product is defective in design if:

(1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

<sup>541</sup> See *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 826-27 (N.J. 1978) (adopting seven factor test of Dean Wade considering: (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole; (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury; (3) The availability of a substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by exercise of care in the use of the product; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of

Since the 1980s, there has been a backlash against strict products liability, blaming strict products liability for a decline in American competitiveness and for a nationwide insurance affordability crisis. The ALI strict products liability in design cases with its approval of The Restatement (Third) Products Liability in 1997. The new Restatement replaced the Restatement (Second)'s strict liability approach to design cases<sup>542</sup> with an older negligence-based approach.<sup>543</sup> A plaintiff must provide evidence of prior similar accidents or there is no duty to warn under the risk-utility analysis advocated by the Restatement (Third) of Products Liability § 2(c).<sup>544</sup> The ALI's Restatement(Third), approved in May 1997, "drops all references to strict products liability. Its view is that courts have mostly come to apply negligence standards in determining design and warning defects, even when they maintained the language of strict liability."<sup>545</sup> The Restatement (Third) was very controversial because the stakes were so high.<sup>546</sup> Marshall Shapo argues that the old, informal ALI norm that members agree to "check their clients at the door" is no longer adequate given the politicization of the ALI's codification projects.<sup>547</sup>

The Fifth Circuit in *Krummel v. Bombardier Corp.*<sup>548</sup> observed that the Restatement (Third) is pro-defendant in requiring "more extensive evidence in order to find liability."<sup>549</sup> Plaintiffs in design defect and inadequate warning cases must

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the obvious condition of the product, or of the existence of suitable warnings or instructions; and (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance).

<sup>542</sup> "After [Prosser] published his seminal 'Assault upon the Citadel' law review article in 1960, there was little doubt that the Final Draft—ultimately adopted by the ALI in 1964—would embrace strict liability." Paul Scrudato, *Reassessing Liability for Defective Design of Drug*, N.Y. L.J., Aug. 16, 2001, at 1.

<sup>543</sup> The focus of strict products liability has been to try the product, not the manufacturer. The negligence-based regime of the Restatement (Third) shifts the focus from the product to whether the manufacturers did or did not produce a safe product. In a strict products liability regime, a manufacturer could have exercised the highest level of care and still be liable. In contrast, a negligence regime finds the manufacturer liable only if it acted unreasonably.

<sup>544</sup> *Krummel v. Bombardier Corp.*, 206 F.3d 548, 551-52 (5th Cir. 2000) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206-7 (7th Cir. 1995)).

<sup>545</sup> DOBBS & HAYDEN, *supra* note 488 § 927.

<sup>546</sup> *Carlin v. Superior Court*, 920 P.2d 1347 (Cal. 1996).

<sup>547</sup> Marshall S. Shapo, *Private Organization, Public Responsibility*, 23 LAW & SOC. INQUIRY 651, 653-54 (1998) (advocating a new ALI disclosure rule that members reveal their client's interests, as well as publish the positions taken in plenary sessions on any codification project).

<sup>548</sup> 206 F.3d 548 (5th Cir. 2000).

<sup>549</sup> *Id.* at 552.

produce "[s]ome sort of independent assessment of [the] advantages and disadvantages, to which some attach the label 'risk-utility balancing'" in order to prove a product defective.<sup>550</sup> The risk-utility test is more restrictive than the "consumer expectations" test of section 402A.<sup>551</sup> Under section 2(c) of the Restatement (Third) a defective product exists "because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . ."<sup>552</sup>

Professors Henderson and Twerski portray the Restatement (Third) as a value-neutral summation of the consensus that evolved in the states, rather than an entirely new theory of products liability.<sup>553</sup> Professor Twerski discounts claims that the Restatement (Third) is a tort reform project.<sup>554</sup> In

<sup>550</sup> *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. a (1998)). Two types of design defect tests have evolved in strict products liability cases: (1) consumer expectation and (2) risk utility. Courts frequently draw upon section 402A cmt. i to develop jury instructions for the consumer expectation test:

The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

*Ortho Pharm. Corp. v. Heath*, 722 P.2d 410, 413 (Colo. 1986) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1968)). The risk utility test compares a product's utilities to its dangers. California, like many other jurisdictions, permits the plaintiff to prove design defect through either the consumer expectation or risk/utility test. See *Barker v. Lull Eng'g Co.*, 572 P.2d 443, 452 (Cal. 1978).

<sup>551</sup> The consumer expectations test holds a manufacturer strictly liable for any condition not contemplated by the ultimate consumer that will be unreasonably dangerous to him or her. In contrast, the risk-utility analysis weighs a product's risks against its benefits. If a product's utility, as designed, outweighs its risks, the product's design is not defective. Section 1 of the Restatement (Third) makes each seller in the chain of distribution liable if there is proof that the product was sold with a defect. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). The Restatement (Third) has largely replaced the consumer expectations test with the risk/utility test. Consumer expectations is no longer the test for defect, but a single factor that may be considered when assessing design.

<sup>552</sup> *Id.* § 2(c).

<sup>553</sup> James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1529 (1992) [hereinafter Henderson & Twerski, *Proposed Revision*]. The Restatement reporters are only two of the many tort scholars who are part of the anti-tort law movement in American law schools.

<sup>554</sup> Aaron D. Twerski, *The Restatement Process and Major Changes in the Restatement (Third): In Defense of the Products Liability Restatement*, 8 KAN. J.L. & PUB. POLY 27, 30 (1998) ("This Restatement is not a tort reform project in any shape, form or matter. That's not the way our vision of the law is, and that is not what this Restatement does.").

their view, the Restatement project merely updated the law to reflect the "pace of American products liability litigation."<sup>555</sup> The professors argue that the courts had already scaled back products liability law in a "quiet revolution" beginning in the 1980s.<sup>556</sup>

It is debatable whether the Restatement (Third) reflects state court developments. As Frank Vandall noted: "The Reporters state that the reasonable alternative design requirement is supported by the majority of the jurisdictions. However, this is not accurate. The Reporters refer to ten jurisdictions that have adopted the reasonable alternative design requirement by case law and four jurisdictions that have adopted it by legislation."<sup>557</sup> Vandall's reading of the case law casts doubt on Henderson and Twerski's claim that the Restatement (Third) is merely restating the law. Professor Vandall contends that the ALI reporters chose a design defect test adopted by only a minority of jurisdictions. A more progressive and modern test would permit plaintiffs to prove a design defect through either the risk/utility or consumer expectations tests without the necessity of establishing an alternative design through expert testimony.

The Restatement (Third) has had mixed success in the state and federal courts.<sup>558</sup> The Georgia Supreme Court found it doubtful that a majority of states endorse the reasonable

<sup>555</sup> Henderson & Twerski, *Proposed Revision*, *supra* note 553, at 1530.

<sup>556</sup> See generally Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 741 (1992) [hereinafter Eisenberg & Henderson, *Quiet Revolution*]. The empirical work of Theodore Eisenberg and James Henderson shows a "quiet revolution" that has sharply reduced the success rates of plaintiffs in products liability litigation. They reported those plaintiffs' "success rates in published opinions fell from 56% in 1979 to 39% in 1989, a drop of 29%." *Id.* They showed that pro-defendant reforms in the states are correlated with the increased percentage of defense victories. See generally *id.* Eisenberg and Henderson stated:

We posit that a pro-defendant revolution began in the early to mid-1980's and continued through at least 1989. We base this assertion on declining plaintiffs' success in products litigation, on pro-defendant trends in explicit lawmaking in products cases at both trial and appellate levels, and on steadily declining products filings in federal courts.

*Id.* at 743-44. See also generally Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUST. SYS. J. 21 n.2 (1993).

<sup>557</sup> Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994).

<sup>558</sup> James A. Henderson, Jr., & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7, 8 (2000) (noting that the Restatement (Third) has already been cited in 170 judicial opinions).

alternative test in design cases.<sup>559</sup> A prominent legal scholar argued that

[f]orcing a plaintiff to prove reasonable alternative design would defeat one of the main policy reasons for having a cause of action in strict liability—that theories of negligence are often difficult to prove—because a reasonable alternative design requirement would add a challenging element to the strict liability action.<sup>560</sup>

For the foreseeable future, the Restatement (Third) will continue to be a battleground for the fate of products liability.

### PART III. THE FUTURE OF TORT LAW

#### A. *Condemned to Repeat the Past?*

The beginning of a new millennium is a good time to speculate on the future of tort law. Tort retrenchment is jeopardizing the social role of tort law in protecting the public from corporate and individual misbehavior. Women, consumers, workers and the elderly are just a few of the groups that have benefited from the expansion of tort law after World War II. Through the centuries, tort law has provided important protections for average citizens against powerful interests. Tort rights and remedies are rapidly evolving to confront information age wrongs such as online defamation, the spread of computer viruses, online harassment, e-mail spam, identity theft and fraudulent Internet marketing schemes. New torts on the horizon have the potential for deterring corporate wrongdoing in cyberspace.

#### B. *The Adaptation of Ancient Torts to Cyberspace*

Ancient torts descending from Blackstone's day serve a special function in the age of the Internet. For instance, wealthy English elites originally used trespass to chattels to defend against dispossession of their property. While this tort was used two centuries ago to redress an injury to a neighbor's livestock in pre-industrial England, today it redresses harms

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<sup>559</sup> Banks v. ICI Americas, Inc., 450 S.E.2d 671, 674 (Ga. 1994) (adopting a test for design requirement that does not require that the plaintiff prove a reasonable alternative design; stating that the plaintiff's proof of a reasonable alternative design is only one factor in Georgia's risk/utility test).

<sup>560</sup> See, e.g., Vandall, *supra* note 557, at 1418 (commenting on the draft of the Restatement (Third) of Torts).

caused to computer systems by unwanted spam e-mail or computer viruses.<sup>561</sup> In an online economy, injuries increasingly arise from the misuse of information technologies.

The ancient tort of trespass to chattels was updated for cyberspace in *Intel Corp. v. Hamidi*.<sup>562</sup> Hamidi, an ex-Intel employee, flooded the company's computer system with e-mails directed to 29,000 Intel employees.<sup>563</sup> When Intel was unable to block or otherwise filter out the messages, it sent a letter demanding that Hamidi cease sending the mass e-mails criticizing the company. After Hamidi refused to heed this warning, Intel sought injunctive relief based upon the tort actions of nuisance and trespass to chattels.<sup>564</sup> Intel ultimately dropped its nuisance theory and claim for damages, and only sought injunctive relief. The California Court of Appeals permanently enjoined Hamidi and his nonprofit organization from sending unsolicited e-mail to Intel's employees, ruling that Intel proved that its former employee trespassed Intel's computer system.<sup>565</sup> Applying the ancient tort of trespass to chattels to cyberspace, the court noted that tort rules have an inherent capacity to evolve to meet new social challenges. In this case, electronic signals generated and sent by computer were sufficiently tangible to constitute the tort of trespass to chattels. The court's analysis drew on

Prosser, who explains: "The earliest cases in which the action of trespass was applied to chattels involved asportation, or carrying off, and a special form of the writ, known as *trespass de bonis asportatis*, was devised to deal with such situations. Later the action was extended to include cases where the goods were damaged but not taken—as where animals were killed or beaten. Later decisions extended the tort to include any direct and immediate intentional interference with a chattel in the possession of another. Thus, it is a

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<sup>561</sup> See *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C98-20064, 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. Apr. 16, 1998) (applying trespass to chattels theory to spam e-mail and finding injury requirement fulfilled by the added costs for personnel in eliminating or responding to e-mail); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021-28 (S.D. Ohio 1997) (ruling that spam e-mail constitutes intermeddling with provider's computer system). See also RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (1979) ("Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action.").

<sup>562</sup> 94 Cal. App. 4th 325 (2001).

<sup>563</sup> *Id.* at 246.

<sup>564</sup> *Id.* at 247.

<sup>565</sup> *Id.* at 248.

trespass to damage goods or destroy them, to make an unpermitted use of them, or to move them from one place to another.”<sup>566</sup>

The *Hamidi* case is an example of the constitutionalization of tort law that began with the law of defamation.<sup>567</sup> The outcome of this case has important implications for the future development of information torts in cyberspace. The California Supreme Court recently granted Hamidi’s petition to review the appeals court decision.<sup>568</sup> The court will address the conflict between an ex-employee’s First Amendment right to criticize his former employer and the company’s rights under tort law to control information received on its computer system.<sup>569</sup> One of the difficulties that Hamidi will face is the necessity to prove state action, which is a requirement for any constitutional claim.<sup>570</sup> The lower court’s refusal to extend state action to a corporation’s e-mail system simply extends formalistic definitions of private property to cyberspace.

One of the dangers of a narrow view of state action in cyberspace is that tort law will have the effect of constraining the right to criticize corporate policies.<sup>571</sup> Civil libertarians argue that it is critical that citizens have a forum in cyberspace to criticize corporations such as Intel, who are powerful stakeholders in the Internet economy. If the California Supreme Court takes a formalistic approach to private property, Hamidi will not have a constitutional claim. The court could extend state action to include quasi-public forums in cyberspace. Intel’s argument is that senders of unwanted e-mail are trespassing on their e-mail system. It is arguable that there is no intermeddling of chattels because there is no physical disruption to Intel’s computer system. The extension of the trespass to chattels to intangible e-mails will have a chilling effect on Internet speech. The Supreme Court described the Internet as a “vast democratic forum[]” that is

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<sup>566</sup> *Id.* (citing PROSSER AND KEETON, TORTS § 14 (5th ed. 1984)).

<sup>567</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (ruling that the constitution requires that “actual malice” be proven in defamation cases involving public officials).

<sup>568</sup> *Intel Corp. v. Hamidi*, 43 P.3d 587 (Cal. 2002).

<sup>569</sup> *Intel Corp.*, 94 Cal. App. 4th at 325.

<sup>570</sup> If the court finds that Hamidi is trespassing on Intel’s private property, there will be no First Amendment claim because there is no state action.

<sup>571</sup> See generally Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000).



"open to all comers," which has created a "new marketplace of ideas" with "content [that] is as diverse as human thought."<sup>572</sup>

The Supreme Court has long recognized that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>573</sup> Increasingly, corporations like Intel issue their employees e-mail addresses and invite the public to interact via their website. A quasi-forum exists "when the public enjoys broad license to utilize certain property."<sup>574</sup> It is one thing to invite the public to use a corporate website and another to invite disgruntled members of the public to communicate directly with its employees. However, if a corporation can use tort law to censor anti-corporate speech, the Internet will be less of a democratic forum. If a corporation can transform all unwanted e-mail into trespasses, it is likely to have a chilling impact on the Internet.

*Hamidi* illustrates the ability of a corporation to creatively apply old torts to emergent social issues. A danger of blindly applying rules designed for another era is that important public policies may be supplanted. As Prosser notes, when "judicial decisions for railroads prove nonsensical for automobiles, courts have the ability and duty to change them."<sup>575</sup> Tort law's ability to accommodate new technologies fills the regulatory gap that inevitably occurs before new public law may be implemented.<sup>576</sup>

New torts on the horizon could be useful in controlling wrongdoing in cyberspace. One such tort, spoliation of evidence, is currently recognized in only a few jurisdictions.<sup>577</sup> It grants

<sup>572</sup> *Reno v. ACLU*, 521 U.S. 844, 868, 870, 880, 885 (1997) (citations omitted).

<sup>573</sup> *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (citations omitted).

<sup>574</sup> *People v. Leonard*, 62 N.Y.2d 404, 410, 477 N.Y.S.2d 111, 115, 465 N.E.2d 831, 835 (1984).

<sup>575</sup> Netanel, *supra* note 571, at 330.

<sup>576</sup> Legal lag results from the deliberation required in enacting legislation, especially when technologies are changing rapidly.

[E]ven the most forward-looking statute cannot anticipate all technological controversies. As a result, statutes have a way of lagging behind real life. This lag sometimes leaves litigants in a bind, particularly owners of intellectual property rights who may believe their rights have been violated in a manner not explicitly addressed by statutory schemes.

Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 404 (1997).

<sup>577</sup> See, e.g., *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 807 (7th Cir.

punitive damages for the destruction of digital documents. This tort may be necessary because of the difficulty of detecting wrongdoers who alter, manipulate or even morph identities to conceal their misdeeds. New computer software has been developed that automatically destroys records containing e-mail messages. The modus operandi of Internet wrongdoers frequently involves the use of pseudonyms, false identities, forged e-mail addresses and encryption to conceal their activities. Since much of the socially harmful misbehavior in cyberspace does not fall under existing criminal statutes, it is vital that tort remedies not be crippled by further retrenchment.

New computer software has been developed that automatically destroys records containing e-mail messages. The signature crimes of Internet wrongdoers include the use of pseudonyms, false identities, forged e-mail addresses and encryption to alter or destroy records. The tort of spoliation will need to be updated and expanded to cyberspace to deter the destruction or altering of smoking gun e-documents. The tort of spoliation could be used to sanction the destruction of electronic evidence. The advantage of having a separate tort of spoliation is that private plaintiffs may initiate actions. Discovery abuses and monetary sanctions are court-determined.<sup>578</sup>

### C. *Immunizing Unfair Business Practices in Cyberspace*

The Communications Decency Act of 1996 ("CDA") was originally enacted to protect the infant industry of Internet service providers ("ISPs"), such as America Online, CompuServe and Prodigy that faced an unpredictable legal environment.<sup>579</sup> Publishers are traditionally held liable for defamatory statements contained in their works, even if they had no prior knowledge of the statement's objectionable

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1995) (barring insurer's subrogation claim by spoliation of evidence); *Hazen v. Anchorage*, 718 P.2d 456 (Alaska 1986) (adopting intentional spoliation of evidence tort); *Murray v. Farmers Ins. Co.*, 796 P.2d 101, 106-07 (Idaho 1990) (holding that Allstate had a duty under Illinois law to preserve evidence).

<sup>578</sup> See Kristen M. Nimsgger & Michele C.S. Lange, *Managing Electronic Assets in a Post-Enron Environment*, CYBERSPACE LAWYER, May 2002, at 17 (arguing that the tort of spoliation and a wide array of monetary or discovery sanctions could punish and deter the electronic destruction of documents).

<sup>579</sup> 47 U.S.C. § 230 (a)-(b) (2001).

content.<sup>580</sup> In contrast, distributors are not held liable for defamatory statements contained in their materials unless it is proven that they had actual knowledge of the defamatory statements.<sup>581</sup> Before the passage of this act, it was unclear whether courts would classify service providers as publishers or as distributors.<sup>582</sup> Prior to 1996, courts sharply divided on whether service providers could be liable for information torts, such as defamation committed by their subscribers or third parties.

Congress entered the fray, and with section 230 of the CDA granted ISPs greater immunity than distributors.<sup>583</sup> By its plain language, section 230 created a federal immunity for any tort cause of action that would make service providers liable for information originating with a third party. Congress determined that it would be prohibitively expensive, if not impossible, for providers to monitor and censor all postings made on their services. Congress essentially deferred to industry standards, giving interactive service providers a chance to "self-regulate themselves without penalty of law."<sup>584</sup> Yet, section 230 places ethical companies at a competitive disadvantage because they cannot successfully pursue remedies against providers who facilitate unfair, deceptive and predatory practices in cyberspace.

Courts have greatly extended the impact of section 230 by insulating defendants from an even broader range of tort-based lawsuits.<sup>585</sup> In *Ben Ezra, Weinstein, & Co. v. America*

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<sup>580</sup> KEETON ET AL., *supra* note 135, at 810.

<sup>581</sup> *Id.* at 810-11.

<sup>582</sup> The case that led Congress to enact § 230(c)(1) was *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995). In *Prodigy*, a New York court found Prodigy to be a publisher rather than a distributor, and potentially liable for any defamatory content made in its newsgroups. The New York court denied Prodigy's motion to dismiss a defamation action made by a subscriber in a Prodigy newsgroup. *Id.* at 140. The CDA expressly overruled *Stratton Oakmont*, granting service providers a broad immunity for defamatory materials and other tortious activities committed by third parties on their service. Prior to the enactment of the CDA, the Southern District of New York addressed, in *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), whether a provider could be liable for defamatory statements made on an online forum. In short, the court was persuaded that CompuServe was a mere distributor.

<sup>583</sup> Section 230(e)(3) states that: "[n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3) (2001).

<sup>584</sup> *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000).

<sup>585</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44 (D. D.C. 1998) (dismissing claim on section 230 grounds in case involving defamatory postings); *Lunney v. Prodigy Services*

*Online, Inc.*,<sup>586</sup> the plaintiff was a publicly owned company that designed and manufactured corporate finance computer software.<sup>587</sup> In March 1997, the software company filed an action in New Mexico state court against America Online ("AOL"), asserting state law claims for defamation and negligence because the provider published incorrect information concerning the plaintiff's stock price and volume.<sup>588</sup> The software company claimed that AOL's publication of inaccurate information constituted defamation.<sup>589</sup>

The company also alleged that AOL failed to exercise reasonable care when it manipulated, altered and changed the stock information.<sup>590</sup> The lower court found section 230 of the CDA exempted AOL from this lawsuit.<sup>591</sup> The Tenth Circuit upheld the lower court, ruling that AOL was an "interactive computer service provider," but was not an "information content provider," as defined in section 230.<sup>592</sup> Therefore, section 230 immunized from tort liability for publishing inaccurate stock information.<sup>593</sup>

In another case, a court extended CDA immunity to Kinko's, Inc., a corporation that rents Internet-ready computers.<sup>594</sup> In *PatentWizard, Inc. v. Kinko's, Inc.*, an anonymous Internet user made disparaging remarks about a software package developed by a patent lawyer to assist inventors in obtaining patents.<sup>595</sup> The patent lawyer hosted a "chat room" session about software that had been recently

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Co., 94 N.Y.2d 242, 250, 723 N.E.2d 539, 542, 701 N.Y.S.2d 684, 687 (1999) (finding commercial online service provider not liable on libel claim because it did not "publish" allegedly defamatory e-mail message). See also *Blumenthal*, 992 F. Supp. at 49-50 (dismissing defamation case on section 230 grounds); *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001) (affirming lower court ruling that provider was immunized in cases in which an eleven year old was lured into sexual activity in America Online private chat room); *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1131-37 (E.D. Va. 1997) (dismissing cases involving defamatory online postings); *John Does v. Franco Prods.*, No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill., June 22, 2000) (immunizing provider for invasion of privacy claim filed by college athletes who were filmed without knowledge or authorization in various states of undress and whose photographs and videos were marketed on web sites).

<sup>586</sup> 206 F.3d 980 (10th Cir. 2000).

<sup>587</sup> *Id.* at 983.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> *Ben Ezra*, 206 F.3d at 983-84.

<sup>592</sup> *Id.* at 985-86.

<sup>593</sup> *Id.* at 986.

<sup>594</sup> *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D. S.D. 2001).

<sup>595</sup> *Id.* at 1070.

released by PatentWizard.<sup>596</sup> Plaintiffs claimed that the remarks "defamed them and interfered with their prospective business relationships."<sup>597</sup>

The plaintiffs were unable to identify the person making the remarks since Kinko's does not record the identities of persons who rent its computers.<sup>598</sup> Thus, the plaintiffs could not pursue legal remedies against the anonymous computer user.<sup>599</sup> The plaintiffs filed suit against Kinko's, alleging: "(1) negligent failure to monitor its computer network; (2) negligent failure to maintain proper and adequate records; (3) negligent spoliation of evidence; (4) intentional spoliation of evidence; (5) aiding and abetting defamation; [and] (6) aiding and abetting interference with prospective business relationships."<sup>600</sup>

The court dismissed the case. It agreed with Kinko's that section 230 created "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service," and that the federal immunity extended to all claims in the plaintiffs' case.<sup>601</sup>

Courts expanded section 230 beyond defamation to a wide variety of other traditional torts committed in cyberspace affecting individuals.<sup>602</sup> *John Does v. Franco Productions*<sup>603</sup> was a class action brought on behalf of a group of Illinois State University athletes who were videotaped without their consent

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<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

<sup>598</sup> *Id.*

<sup>599</sup> *PatentWizard*, 163 F. Supp. 2d at 1070.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 1070-71. The CDA provides in relevant part: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

<sup>602</sup> See, e.g., *Jane Doe One v. Oliver*, 755 A.2d 1000 (Conn. Super. Ct. 2000) (holding provider immune to claim that would have made it liable for improper e-mail message sent to plaintiff mother's employer).

<sup>603</sup> *John Does v. Franco Prods.*, No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill., June 22, 2000) (holding that ISPs were immunized from tort lawsuits even where they participated in web hosting and web design activities). See also *John Does v. Franco Prods.*, No. 99-C7885, 2001 U.S. Dist. LEXIS 8397 (N.D. Ill., June 20, 2001) (certifying class for purposes of injunctive but not monetary relief); *John Does v. Franco Prods.*, No. 99-C7885, 2000 U.S. Dist. LEXIS 9848, (N.D. Ill., July 12, 2000) (granting motion to dismiss University defendant on grounds of qualified immunity and finding that plaintiffs did not show violation of clearly established right when Illinois State University officials failed to inform them of videotapes made without their consent); *Blumental v. Drudge*, 992 F. Supp. 44, 47, 50 (D. D.C. 1998) (dismissing defamation case against America Online on grounds of section 230 immunity despite the fact that columnist had a contractual arrangement with AOL to provide exclusive content); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (dismissing all claims, based on immunity).

in “various states of undress by hidden cameras in restrooms, locker rooms, or showers.”<sup>604</sup> The videotapes were sold on a number of websites that transmitted still images of nude or partially clothed young male athletes on the Internet.<sup>605</sup> The athletes’ cause of action against the Illinois State University for failing to notify the athletes of the existence of the tapes was dismissed on the ground of qualified immunity.<sup>606</sup> Section 230(c) of the CDA immunized the websites in this case.<sup>607</sup>

Tort remedies adapted to Internet wrongdoing have the potential to play an important role in punishing and deterring fraud, hacking and other misdeeds on the Internet. Tort law has been more effective than criminal law in protecting cyberspace consumers and users. By the time a criminal statute can be enacted to counter an Internet-related threat, the creative cyber-criminal finds new technologies to bypass an essential element of the prohibited act or offense.

### 1. Internet Insecurity

Internet security is a substantive field where new tort rights and remedies are urgently needed. In July of 2000, a hacker broke into the University of Washington Medical Center’s internal network and downloaded computerized admissions records for four thousand heart patients.<sup>608</sup> The medical facility would have been negligent had it permitted this action by failing to implement industry standard security protocol. This troubling security breach raises the question of whether the website victim of hacker activity may be liable for its contributory or comparative negligence if data about patients or other third parties is intercepted or altered. For example, if a hospital did not have adequate firewalls or encryption, it might be liable for failing to comply with security standards. The broader liability question is whether a website owes a duty to maintain a secure computer network.<sup>609</sup> If a

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<sup>604</sup> *Franco Prods.*, No. 99-C7885, 2000 U.S. Dist. LEXIS 8645, at \*2.

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at \*10-16.

<sup>608</sup> Kevin Poulsen, *Hospital Records Hacked Hard*, Infowar.com, at [http://www.infowar.com/hacker/00hack\\_120700a\\_j.shtml](http://www.infowar.com/hacker/00hack_120700a_j.shtml) (last visited June 1, 2002).

<sup>609</sup> Microsoft SQL Server Version 7.0 and Microsoft Data Engine (MSDE) 1.0 for example, permit unauthorized users “to execute shell commands” permitting hackers to access secured, non-published files. U.S. DEPT OF JUSTICE, NIPC ADVISORY 01-003 (Mar. 8, 2001), available at <http://www.usdoj.gov/criminal/cybercrime/NIPAdv->

website fails to meet a minimum industry standard for Internet security, it should be liable under the traditional formula for negligence.

In the brick and mortar world, a possessor's duty to an invitee may include an obligation to protect the invitee from harm by third party criminals.<sup>610</sup> Tort law's remarkable capacity to adapt and evolve to meet new threats and dangers makes it an important institution of social control in cyberspace.

## 2. Gender Justice in Cyberspace

Tort law has the capacity to evolve to police new forms of misbehavior such as Internet fraud, online stalking, the invasion of privacy and defamatory postings on websites. Tort remedies are essential because criminal law often lacks the flexibility to deter and punish these forms of wrongdoing. For example, Internet wrongdoers have harmed women by maliciously posting personal information on sadomasochistic websites and by using new morphing technologies to superimpose their victim's face onto pornographic pictures. Tort remedies may be the only defense women have against cyber stalking or threatening e-mail transmissions from angry ex-husbands, spurned boyfriends or infatuated strangers.<sup>611</sup>

## 3. Innominate Torts in Cyberspace

One possible source of expanded tort liability in cyberspace is greater use of the innominate tort action. The concept of innominate torts was first identified by Holmes and Pollock in "what came to be called the theory of prima facie tort, which holds that any intentional infliction of harm is tortious unless the defendant can justify his action on policy or ethical grounds."<sup>612</sup> Section 870 of The Restatement (Second) of

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isory.htm (last visited Aug. 18, 2001).

<sup>610</sup> *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193, 1195-96 (Cal. 1984) (holding college responsible for crime in campus parking lot because of prior similar incidents and the failure to take prompt remedial steps of warning students of the danger).

<sup>611</sup> To date, no court has found an Internet website liable for providing information to online stalkers on how to locate their prey.

<sup>612</sup> Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1178 (1996) (emphasis added) (discussing the prima facie tort as a concept derived from Holmes and Pollock).

Torts proposed tort liability for defendants who intentionally injured another and could show no justification or excuse. This wrongdoing is sometimes called the innominate or prima facie tort.<sup>613</sup> The innominate tort concept has not been widely adopted, but may become necessary to punish and deter Internet torts.

Online stalking, for example, does not fit neatly into the traditional tort of assault because it lacks the element of imminence. The plaintiff must demonstrate that she was in apprehension of an imminent battery to recover for assault. Tort law cannot adapt to meet the exigencies of cyberspace unless creative courts and legislatures are willing to again expand rights and remedies, as in the progressive period of American tort law.

## CONCLUSION

The American tort system is not an uncontrolled monster. Rather, our tort system is a useful and necessary legal institution to punish and deter information age wrongs, such as online defamation, the spread of computer viruses, online stalkers, e-mail spammers, identity thieves, the invasion of privacy and fraudulent marketing schemes. In every historical period, tort law has moderated and mediated abuses of power. Without viable tort remedies, corporations suffer no significant penalty when they choose to enhance their own profits by endangering the consuming public.

In his 2002 budget proposal speech, President George W. Bush asked Congress for "civil justice reform to help restore America's economy."<sup>614</sup> Before Congress enacts further retrenchment, it should study the impact of the tort reforms already in place. Torts in cyberspace are already being stymied by state tort retractions and federal piecemeal reforms like section 230 of the Communications Decency Act of 1996.

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<sup>613</sup> Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 870 cmt. 1 (1979)). Section 870 states that, "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances." RESTATEMENT (SECOND) OF TORTS at § 870 (1968).

<sup>614</sup> The ATRA commended President Bush "for including a call for civil justice reform in his budget message." American Tort Reform Association, *President Bush's 2002 Budget Proposal Calls for Tort Reform*, at <http://www.atra.org/alert.flml?aid=7309> (last visited Feb. 22, 2002) (urging Congress to pass pending bills on "meaningful class action reform, and strong medical liability reform").



Internet-related immunities enacted to limit the liability of AOL, CompuServe and other service providers have been expanded by courts to apply to virtually every Internet-related tort occurring on a website. This broad immunity has had the unanticipated negative consequence of preventing online companies and software companies from vindicating their rights to redress predatory conduct on the Internet.

Tort law, for example, has not yet developed a cyberspace equivalent to the traditional concept of premises liability. Presently, no case has required websites to prevent the misuse or abuse of Internet sites by criminals. The twenty-first century will require a stronger and more flexible tort law, not one that has been crippled by immunities, caps and barriers to full recovery.

The World Trade Center and Pentagon attacks on September 11, 2001 confirm that the Internet can be an instrumentality for the commission of acts of terror. The Taliban is believed to have posted encrypted messages in pornographic chat rooms as a method of evading law enforcement surveillance.<sup>615</sup> One emergent issue is whether a website should have a duty of care to report suspicious activity or wrongdoing reported to it. Websites currently have no duty to warn the public of dangerous or fraudulent activities occurring in chat rooms, listservs or advertisements, even if they have definite notice. A strong argument can be made that a website should have at least some responsibility for warning the public of known criminal activity.

Currently, a broad immunity insulates the Internet provider from liability for torts or crimes committed through an Internet address. In the wake of the World Trade Center bombing, a host of fraudulent websites were designed to gather donations under the pretense of collecting money for the victims and survivors. Within an hour of the disaster, there were numerous bulk e-mail campaigns promoting "bogus relief efforts."<sup>616</sup> Immunity is breeding irresponsibility because websites have no incentive or duty to protect their visitors and the general public.

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<sup>615</sup> Stanley A. Miller II, *Data Protections on Internet May Have Helped Plotters; Encryption Software Could be Used to Keep Plans Secret, Experts Say*, MILWAUKEE J. SENTINEL, Sept. 16, 2001, at 2A.

<sup>616</sup> Brian Krebs, *Spammers Raise Money For Bogus "Victims & Survivor Fund"*, Infowar.com, Sept. 13, 2001, at [http://www.infowar.com/law/01/law\\_091401a\\_j.shtml](http://www.infowar.com/law/01/law_091401a_j.shtml) (last visited June 7, 2002).

The high cost of terrorism insurance has led to new calls for tort reform. The ATRA argues that businesses need protection “from litigation abuse in the event of future terrorist attacks.”<sup>617</sup> A proposed federal statute, H.R. 3210,

would bar punitive damages; bar non-economic damages in excess of the defendant's direct proportion of responsibility for the plaintiff's physical harm; cap attorney's fees, and bar suits against companies, building owners, security firms, or other businesses on the grounds that those entities were negligent and failed to protect people against attack.<sup>618</sup>

Before Congress passes further liability limitations, it should examine the impact of further tort retrenchment on all sectors of society. Without a powerful American tort monster, the public is at risk from a variety of threats from terrorists, pornographers, harassers and other predators.

#### APPENDIX ONE:

##### AMERICAN TORT LAW TIMELINE: 1200-2002

##### I. *ABSOLUTE LIABILITY TIMELINE: 1200-1825*

- 1066: The Norman institution of the jury is incorporated into the English legal system by William the Conqueror.<sup>619</sup>
- 1348 or 1349: *I. de S. v. W. de S.*<sup>620</sup> is the first common law case to recognize assault as a form of trespass to the person.<sup>621</sup>
- 1616: *Weaver v. Ward*<sup>622</sup> is the first case to suggest “that a defendant might not be liable, even in a trespass

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<sup>617</sup> American Tort Reform Association, *Job Losses Make the Case for Terrorism Reinsurance Legislation*, Feb. 21, 2002, at <http://atra.org/alert.flml?aid=7329> (last visited Feb. 24, 2002) (citing congressional testimony).

<sup>618</sup> *Id.*

<sup>619</sup> Stephen Landsman, *The History and Objections to the Civil Jury Systems*, in ROBERT E. LITAN, VERDICT: ASSESSING THE CIVIL JURY SYSTEM (1993).

<sup>620</sup> 34 Eng. Rep. 722 (K.B. 1366).

<sup>621</sup> 3 JAMES BARR AMES & JEREMIAH SMITH, A SELECTION OF CASES ON THE LAW OF TORTS 1 (3d ed. 1910) (noting that case was decided in 1348 or 1349).

<sup>622</sup> 80 Eng. Rep. 284 (K.B. 1616).

- action, for a purely accidental injury occurring entirely without his fault."<sup>623</sup>
- 1647: In *Smith v. Stone*,<sup>624</sup> the court rules that a man carried onto the plaintiff's land against his will by a third party is not liable for trespass.
- 1669: In *Tuberville v. Savage*,<sup>625</sup> conditional threats unaccompanied by imminent threats are determined to not constitute an assault.
- 1691: In *Smithson v. Garth*,<sup>626</sup> an English court imposes joint and several liability against several individuals acting in concert that produced the indivisible injury suffered by the plaintiff.<sup>627</sup>
- 1697: *The Statute of 5-6 William & Mary c. 12* abolishes the criminal side of the writ of trespass, leaving it as a purely civil action.<sup>628</sup>
- 1704: In *Cole v. Turner*,<sup>629</sup> the least touching of another in anger is held to constitute a battery.
- 1763: The court in *Huckle v. Money*<sup>630</sup> is the first to recognize the remedy of exemplary damages, the precursor to the American doctrine of punitive damages.
- 1768: Sir William Blackstone publishes *Commentaries on the Laws of England* (1765-1769). Volume III of the *Commentaries*, entitled *Private Wrongs*, covers the tort law of the mid-eighteenth century.
- 1784: *Genay v. Norris*<sup>631</sup> is the first American case to recognize the remedy of punitive damages. It

<sup>623</sup> SCHWARTZ ET AL., *supra* note 491, at 5. Weaver, the plaintiff, was accidentally injured by a musket shot fired by another militiaman during a military exercise.

<sup>624</sup> 82 Eng. Rep. 533 (1647).

<sup>625</sup> 86 Eng. Rep. 684, 684 (1669) (noting the plaintiff's threat: "If it were not assize-time, I would not take such language from you.").

<sup>626</sup> 83 Eng. Rep. 711 (1691).

<sup>627</sup> The doctrine of joint and several liability evolved out of this case. Under joint and several liability, when the negligent acts of two or more persons combine to cause an injury, the action may be against the whole or either party. John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 194 (1986).

<sup>628</sup> SCHWARTZ ET AL., *supra* note 491, at 5.

<sup>629</sup> 87 Eng. Rep. 907 (1704). The court also ruled that inadvertent contact, such as when two or more people meet in a narrow passage without violence, does not constitute a battery. *Id.*

<sup>630</sup> 95 Eng. Rep. 768 (C.P. 1763).

<sup>631</sup> 1 S.C. L. (1 Bay) 6 (1784).

- involved a physician spiking his rival's wine with cantharides, a drug that causes excruciating pain.<sup>632</sup>
- 1799: *Cruden v. Fentham*<sup>633</sup> is the first case to recognize the defense of assumption of risk.
- 1799: The English case of *Merryweather v. Nixon*<sup>634</sup> is the first judicial recognition of the doctrine of joint and several liability.
- 1809: *Butterfield v. Forrester*<sup>635</sup> is the first case to recognize the defense of contributory negligence as a complete defense in a tort law case.
- 1814: In *Merest v. Harvey*,<sup>636</sup> the court upholds an exemplary damages award where the actual damages were slight.
- 1837: *Priestly v. Fowler*<sup>637</sup> is the first case to recognize the fellow-servant rule barring recovery when a co-worker is at fault.
- 1842: The doctrine of privity of contract bars a lawsuit filed by a horse-drawn mail coach, which overturned due to a defective wheel, in *Winterbottom v. Wright*.<sup>638</sup>
- 1842: The doctrine of the last clear chance is first recognized in *Davies v. Mann*.<sup>639</sup>
- 1851: The Supreme Court, in *Day v. Woodworth*,<sup>640</sup> upholds a punitive damages award in a trespass action, ruling that the measure of damages is based upon the "enormity of [the] offense" rather than the compensation to the plaintiff.<sup>641</sup>

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<sup>632</sup> *Id.*

<sup>633</sup> 170 Eng. Rep. 496 (1799).

<sup>634</sup> 101 Eng. Rep. 1337 (K.B. 1799).

<sup>635</sup> 103 Eng. Rep. 926 (1809).

<sup>636</sup> 128 Eng. Rep. 761 (1814).

<sup>637</sup> 150 Eng. Rep. 1030 (1837).

<sup>638</sup> 152 Eng. Rep. 402 (1842) (developing the rule that no manufacturer or seller of a product was ever liable to anyone unless there was privity of contract).

<sup>639</sup> 152 Eng. Rep. 588 (1842). In *Davies*, a plaintiff tied his donkey to the side of a highway and it was killed by a team of horses riding down the highway at high speed. The court held that a plaintiff might recover despite his contributory negligence if the defendant could have avoided the accident and had the "last clear chance." Professor William Prosser argued that the "last clear chance" created undue complexity in the negligence doctrine and referred to it as the "jackass doctrine." PROSSER, HANDBOOK, *supra* note 35, at 437 n.99 (discussing *Davies v. Mann*, 152 Eng. Rep. 588 (1842)).

<sup>640</sup> 54 U.S. 363, 371 (1851) (stating that punitive damages is "smart money" to punish wanton and malicious conduct).

<sup>641</sup> *Id.*

- 1852: In *Thomas v. Winchester*,<sup>642</sup> recovery is permitted for the fatal consequences of the mislabeling of poison by a druggist despite the lack of privity of contract.
- 1854: In *Hadley v. Baxendale*,<sup>643</sup> an English court uses the concept of foreseeability to limit a plaintiff's recovery in a contract case.
- 1856: In *Blyth v. Birmingham Waterworks, Inc.*,<sup>644</sup> Justice Alderson states, "[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."<sup>645</sup>
- 1859: The first American treatise on tort law is published by Frances Hilliard.<sup>646</sup>
- 1860: The first English treatise on tort law is published.<sup>647</sup>
- 1875: The first court to recognize the railroad turntable doctrine (the attractive nuisance doctrine) permitting child trespasser to recover for injuries was *Sioux City v. Pacific Railroad Co.*<sup>648</sup>
- 1876: In *Phillips v. Barnet*, the court, to preserve family harmony, holds that spouses may not sue each other.<sup>649</sup>
- 1897: In *Wilkinson v. Downton*,<sup>650</sup> a practical joker told a woman her husband was seriously injured in an accident. The court permits the plaintiff to recover for the extreme emotional distress caused by this practical joke.

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<sup>642</sup> 6 N.Y. 397 (1852).

<sup>643</sup> 156 Eng. Rep. 145 (1854).

<sup>644</sup> 156 Eng. Rep. 1047 (1856) (holding that there was no negligence in installing water mains in the streets of Birmingham, England that could not withstand the effects of an unprecedented frost).

<sup>645</sup> *Id.* at 1049.

<sup>646</sup> See PROSSER, HANDBOOK, *supra* note 35, at 21.

<sup>647</sup> *Id.*

<sup>648</sup> 84 U.S. 657 (1875) (permitting children to recover despite the general rule of no duty of care owed to trespassers).

<sup>649</sup> 1 Q.B.D. 436 (1876).

<sup>650</sup> 2 Q.B.D. 57 (1897).

II. *THE RISE OF NEGLIGENCE: 1825-1944*

- 1834: *Joel v. Morrison*<sup>651</sup> is the first opinion to carve out an exception to the common law principle that a master is liable for a servant's torts.
- 1837: In *Vaughn v. Menlove*,<sup>652</sup> an English court holds a farmer liable for negligence even though he was ignorant of the risk that his hayrick would cause a fire that destroyed nearby cottages. The court's ruling adopts an objective standard of reasonable care in negligence actions.<sup>653</sup>
- 1842: The Supreme Judicial Court of Massachusetts becomes the first American court to recognize the fellow servant rule in *Farwell v. Boston & W.R.R. Corp.*<sup>654</sup>
- 1850: In *Brown v. Kendall*,<sup>655</sup> the defendant accidentally injured the plaintiff while separating two fighting dogs. Chief Justice Shaw advances the negligence theory by focusing on whether the defendant had employed reasonable care under the circumstances.
- 1890: Samuel D. Warren and Louis D. Brandeis publish *The Right to Privacy*.<sup>656</sup>
- 1891: In *Vosburg v. Putney*,<sup>657</sup> a twelve-year-old Wisconsin student kicked a fourteen-year-old classmate during class. What would have been a minimal injury turned out to be quite serious because the plaintiff had a preexisting condition. The court holds that the defendant is liable for all of the consequences of his intentional act.<sup>658</sup>

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<sup>651</sup> 172 Eng. Rep. 1338 (1834) (holding that the master was liable for injuries caused by his servant unless the servant was on a frolic).

<sup>652</sup> 132 Eng. Rep. 490 (1837).

<sup>653</sup> The defense of the ignorant farmer was rejected in favor of an objective standard for negligence. The standard for due care in negligence is what a reasonable person would do in the circumstances. Since *Vaughn*, a few exceptions have evolved, adjusting the negligence formula for children, invalids and persons with disability.

<sup>654</sup> 45 Mass (4 Met.) 49 (1842) (holding that the railroad was not liable for injuries suffered by a railway engineer from a switch tender employed by the same company in the absence of a showing that the railway knew of the employee's incompetence or retained an unfit employee).

<sup>655</sup> 60 Mass ( 6 Cush.) 292 (1850).

<sup>656</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 192 (1890) (describing privacy as a right to an "inviolable personality").

<sup>657</sup> 50 N.W. 403 (Wis. 1891).

<sup>658</sup> *Id.*

- 1893: In *Booth v. Rome, W. & O.T.R.R. Co.*, the court rules that proof of negligence is required in blasting cases unless the explosion is accompanied by an actual physical invasion of property.<sup>659</sup>
- 1896: In *Mitchell v. Rochester Railway Co.*,<sup>660</sup> the court denies a plaintiff's recovery for a miscarriage caused by fright from the defendant's onrushing team of horses, because of the absence of physical impact.
- 1916: Judge Benjamin Cardozo authors the opinion in *MacPherson v. Buick Motor Co.*,<sup>661</sup> holding a manufacturer liable for injuries caused to the plaintiff when the wooden wheel of his Buick collapsed, causing the car to turn over injuring him.
- 1917: In *New York Central R. Co. v. White*,<sup>662</sup> New York's workers' compensation statute is held constitutional. Worker compensation statutes, adopted nationwide, require workers to give up their tort remedies in return for a limited, but no-fault compensation.
- 1917: In *Lipman v. Atlantic Coast Line Railroad Co.*,<sup>663</sup> the court imposes a heightened standard of care upon common carriers to protect the traveling public.
- 1920: Congress passes the Jones Act, permitting recovery for negligent injuries or death of seamen on the high seas.
- 1928: Justice Cardozo authors *Palsgraf v. Long Island Railroad Co.*,<sup>664</sup> which finds no liability without proximate causation. The proximate cause or no duty doctrine restricted recovery to harms within the range of reasonable foreseeability.
- 1935: In *Reingold v. Reingold*,<sup>665</sup> the court holds that a nineteen-year-old minor cannot sue his parent for negligent operation of a motor vehicle, invoking the doctrine of parental immunity.

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<sup>659</sup> 140 N.Y. 267, 35 N.E. 592 (1893).

<sup>660</sup> 151 N.Y. 107, 45 N.E. 354 (1896).

<sup>661</sup> 217 N.Y. 382, 111 N.E. 1050 (1916). Judge Cardozo stated "[i]f the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." *Id.* at 389. This case extended doctrine first recognized in *Thomas v. Winchester*, 6 N.Y. 397 (1852) from poisons to other consumer products.

<sup>662</sup> 243 U.S. 188 (1917).

<sup>663</sup> 93 S.E. 714 (S.C. 1917).

<sup>664</sup> 162 N.E. 99 (N.Y. 1928).

<sup>665</sup> 181 A. 153 (N.J. 1935).

- 1938: Congress passes the Food, Drug and Cosmetic Act to monitor the safety of food and drugs.<sup>666</sup>
- 1939: The American Law Institute membership approves the Restatement (First) of the Law of Torts.
- 1944: Judge Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>667</sup> becomes the first to articulate the policy reasons underlying strict products liability.

### III. PROGRESSIVE TORT LAW: 1945-1980

- 1947: The American Law Institute amends section 46 of the Restatement of Torts to recognize an action for intentional infliction of emotional distress.<sup>668</sup>
- 1947: Judge Learned Hand devises the famous negligence formula of B>P(L) in *United States v. Carroll Towing, Inc.*<sup>669</sup>
- 1950: The United States Supreme Court in *Feres v. United States*<sup>670</sup> holds that the federal government is immune from any suit filed by soldiers for injuries sustained while serving with the military.
- 1952: *State Rubbish Collectors, Assoc. v. Siliznoff*<sup>671</sup> is the first judicial recognition of the intentional infliction of emotional distress.
- 1954: In *Duty v. General Finance Co.*,<sup>672</sup> the court requires proof of physical injury to recover for the tort of the intentional infliction of mental distress.
- 1959: In *Martin v. Reynolds Metals Co.*,<sup>673</sup> the Oregon Supreme Court holds that the release of gaseous and particulate fluorides from an aluminum smelter constituted a trespass. In this case, the corporation permitted gases and particulate to settle on the plaintiff's land, making the land unfit for raising livestock.

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<sup>666</sup> Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-395 (2000)).

<sup>667</sup> 150 P.2d 436 (Cal. 1944).

<sup>668</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

<sup>669</sup> 159 F.2d 169 (2d Cir. 1947) (noting that the burden of precaution (B) must be less than the probability of injury (P) times the gravity of the injury (L)).

<sup>670</sup> 340 U.S. 135 (1950).

<sup>671</sup> 240 P.2d 282 (Cal. 1952).

<sup>672</sup> 273 S.W.2d 64 (Tex. 1954).

<sup>673</sup> 342 P.2d 790 (Or. 1959).



- 1962: In *Battala v. State*,<sup>674</sup> New York overrules the long-standing rule that there could be no recovery for the negligent infliction of mental distress in the absence of physical impact.
- 1963: *Greenman v. Yuba Power Products Inc.*<sup>675</sup> becomes the first appellate case to recognize the doctrine of strict products liability in an opinion authored by Justice Roger Traynor.
- 1964: The United States Supreme Court in *New York Times v. Sullivan*<sup>676</sup> holds that the constitutional protection for speech and press limits defamation lawsuits brought by public officials.
- 1964: In *Petition of Kinsman Transit Co.*,<sup>677</sup> a ship owner negligently secured one of his boats to a dock. The boat broke loose and caused extensive economic losses, partially because city was negligent in not raising a drawbridge. The court holds city and ship owner liable, rejecting claim of proximate cause.
- 1965: The American Law Institute approves the Restatement (Second) of Torts § 402A, recognizing strict products liability. Section 402A does not require plaintiffs to prove negligence or fault in order to recover for products liability.
- 1965: The American Law Institute approves section 519 that provides for strict liability for "abnormally dangerous activities."
- 1967: In *Fisher v. Carrousel Motor Hotel*,<sup>678</sup> an African-American plaintiff is held to have a valid cause of action for assault and battery when a restaurant employee "snatched the plate from [plaintiff's] hand and shouted that he, a Negro, could not be served in the club."<sup>679</sup> This case is an example of tort law vindicating civil rights.

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<sup>674</sup> 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

<sup>675</sup> 377 P.2d 897 (Cal. 1963).

<sup>676</sup> 376 U.S. 254 (1964).

<sup>677</sup> 338 F.2d 708 (2d Cir. 1964).

<sup>678</sup> 424 S.W.2d 627 (Tex. 1967). The *Fisher* court upheld a remedy for battery and punitive damages when the black engineer was accosted by a white restaurant employee when waiting in line for a buffet luncheon at a NASA conference. The employee seized the plate from the plaintiff, telling him that they did not serve Negroes. This racist incident and the use of tort remedies to redress the injury occurred prior to the passage of the 1964 Civil Rights Act.

<sup>679</sup> *Id.* at 628-29.

- 1967: In *Gleitman v. Cosgrove*,<sup>680</sup> the court denies recovery for a new tort of wrongful life. The court rejects the argument that a mother would have undergone abortion knowing of the risks of contracting German measles during pregnancy.
- 1967: *Toole v. Richardson-Merrell, Inc.*<sup>681</sup> is the first appellate case approving the awarding of punitive damages in a strict products liability action. The defendant was charged with falsifying test results and marketing the unsafe anti-cholesterol drug, MER/29.
- 1968: The California Supreme Court abolishes visitors categories of trespasser, licensee and invitee<sup>682</sup> in favor of a negligence-based approach to landowner liability in *Rowland v. Christian*.<sup>683</sup>
- 1969: New York's highest court, in *Spano v. Perini Corp.*,<sup>684</sup> overrules the long-established precedent that actual proof of negligence is required in blasting cases absent physical invasion. Chief Judge Fuld rules that the question is which party should bear the cost of resulting damage from dangerous activities such as blasting, not whether the activity is lawful.
- 1970: In *France v. A.P.A. Transport Corp.*,<sup>685</sup> New Jersey partially repudiates parental immunity.
- 1970: In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,<sup>686</sup> an owner of an apartment building is found liable for negligent security in a case involving a criminal attack on a tenant in a common hallway. The case becomes precedent for the development of premises liability.<sup>687</sup>

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<sup>680</sup> 227 A.2d 689 (N.J. 1967).

<sup>681</sup> 251 Cal. Rptr. 398 (1967).

<sup>682</sup> Under the common law, the duty of care owed by possessor of land depends upon the status of the entrant. Business invitees are owed the highest duty, followed by licensees and trespassers.

<sup>683</sup> 443 P.2d 561 (Cal. 1968).

<sup>684</sup> 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

<sup>685</sup> 267 A.2d 490 (N.J. 1970).

<sup>686</sup> 439 F.2d 477 (D.C. Cir. 1970).

<sup>687</sup> Premises liability verdicts are increasingly based upon a theory of inadequate security where the landowner failed to take reasonable precautions to prevent criminal acts.

- 1970: A California court, in *Fletcher v. Western National Life Insurance Co.*,<sup>688</sup> recognizes the tort of outrage against an insurance company for bad faith refusal to settle a claim.
- 1974: The FDA approves the Copper-7, an intrauterine contraceptive device (IUD) developed by G.D. Searle. Thousands of women using the Copper-7 developed pelvic infections, loss of fertility or were forced to undergo hysterectomies from the consequences of these devices.
- 1975: In *Li v. Yellow Cab Co.*,<sup>689</sup> the California Supreme Court adopts a pure comparative negligence statute based upon the extent of fault of the parties.<sup>690</sup>
- 1976: In *Tarasoff v. Regents of the University of California*,<sup>691</sup> the Supreme Court of California holds that a psychiatrist has an affirmative duty to warn of his patient's dangerous propensities.
- 1976: Congress enacts the Medical Device Amendment to the federal Food, Drug and Cosmetic Act that gives the FDA authority to regulate medical devices such as breast implants.<sup>692</sup>
- 1978: The court in *Bergstreser v. Mitchell*<sup>693</sup> recognizes a cause of action for a plaintiff against two physicians who botched a caesarian section on the infant's mother in a prior delivery, causing the infant to suffer brain damage.
- 1979: The FDA grants Pfizer, Inc. approval to market the Bjork-Shiley convexo-concave heart valve. Fractured Bjork-Shiley heart valves caused 123 deaths as well as serious injuries.<sup>694</sup>

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<sup>688</sup> 89 Cal. Rptr. 78 (1970).

<sup>689</sup> 532 P.2d 1226 (Cal. 1975).

<sup>690</sup> States have adopted a wide variety of comparative negligence regimes. In a pure comparative negligence state such as California, the liability of the defendant is proportional to his wrong. If a plaintiff were 75% responsible for her injury, the defendant would pay only 25% of the costs of the injury. In a modified comparative negligence system, a plaintiff may be barred from recovery if the plaintiff's negligence exceeded that of the defendant.

<sup>691</sup> 551 P.2d 334 (Cal. 1976).

<sup>692</sup> Medical Device Amendments to Federal Food, Drug and Cosmetic Act, Pub. L. No. 94-295, 90 Stat. 575 (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.).

<sup>693</sup> 577 F.2d 22 (8th Cir. 1978).

<sup>694</sup> SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION OF THE COMMITTEE ON ENERGY AND COMMERCE, *The Bjork-Shiley Heart Valve: "Earn As You Learn": Shiley*

- 1980: The California Supreme Court, in *Sindell v. Abbott Laboratories*,<sup>695</sup> adopts market share liability permitting DES daughters to recover for reproductive injuries occurring many decades after their mothers ingested the anti-miscarriage drug.
- 1980: Congress enacts the federal Superfund law governing hazardous waste sites.<sup>696</sup>

#### IV. TORT RETRENCHMENT: 1981-PRESENT

- 1981: In *Grimshaw v. Ford Motor Co.*,<sup>697</sup> a California appellate court remits a punitive damages award from \$125 million to \$3.5 million, in this famous Ford Pinto products liability case.
- 1981: In *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*,<sup>698</sup> the Klan engaged in a number of intimidating actions against a group of Vietnamese fishermen. The court concludes that the Klan is guilty of statutory violations and also liable in tort for the wrongful interference with contractual relations.<sup>699</sup>
- 1983: In *Bigbee v. Pacific Telephone & Telegraph Co.*,<sup>700</sup> the California Supreme Court recognizes a negligence cause of action for the mispositioning of a telephone booth too close to a major roadway. This case becomes a favorite tort horror story often repeated by President Ronald Reagan.
- 1986: New Hampshire abolishes the remedy of punitive damages.<sup>701</sup>
- 1987: New Jersey, Ohio and Oregon adopt a Food and Drug Administration ("FDA") defense to punitive damages. Drug and medical device manufacturers are immunized from punitive damages if they can prove

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*Inc.'s Breach of the Honor System and FDA's Failure in Medical Device Regulation*, H.R. NO. 26-766, 101st Cong. (1990).

<sup>695</sup> 607 P.2d 924 (Cal. 1980).

<sup>696</sup> Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. §§ 9601-9675 (1999).

<sup>697</sup> 174 Cal. Rptr. 348 (1981).

<sup>698</sup> 543 F. Supp. 198 (S.D. Tex. 1982).

<sup>699</sup> The court found that Klan members carried guns and rode in shrimp boats to intimidate the Vietnamese fishermen. However, the court dismissed the assault charge, since there was no imminent apprehension of immediate harm. *Id.* at 219.

<sup>700</sup> 665 P.2d 947 (Cal. 1983).

<sup>701</sup> N.H. REV. STAT. ANN. § 507:16 (1986).

that they complied with pre-approval processes and did not withhold from or misrepresent to the agency any information that was "required, material, and relevant."<sup>702</sup>

- 1987: The court in *Ayers v. Jackson Township*<sup>703</sup> finds that the plaintiff's ingestion of water contaminated with toxic chemicals was an immediate and direct physical impact and injury, permitting recovery for emotional distress.
- 1987: Georgia enacts a "state sharing" statute requiring tort claimants to remit 75% of all punitive damages to the state treasury. Georgia, Iowa, Kansas, Montana, New Jersey, North Dakota, Ohio and Oregon enact tort reform statutes increasing the burden of proof for recovering punitive damages to clear and convincing evidence.
- 1989: In *Kociemba v. G.D. Searle & Co.*,<sup>704</sup> a Minnesota federal district court upholds a \$7 million punitive damages award in a products liability case involving the Copper-7 IUD, leading to the settlement of thousands of similar cases.<sup>705</sup>
- 1989: In *Masaki v. General Motors Corp.*, a Hawaii court raises the standard of proof in punitive damages cases from a preponderance of the evidence to clear and convincing evidence.<sup>706</sup>
- 1991: In *Anderson v. Eli Lilly & Co.*,<sup>707</sup> New York's highest court dismisses claim by the husband of a DES victim for loss of consortium.
- 1991: In *Enright v. Eli Lilly & Co.*,<sup>708</sup> New York's highest court denies a cause of action to a DES granddaughter.
- 1993: The Fifth Circuit holds that FDA approval preempts state tort liability in a medical device case.<sup>709</sup> The

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<sup>702</sup> N.J. STAT. ANN. § 2A:58C-5 (West 1987); OHIO REV. CODE ANN. § 2307.80(c) (Baldwin 1987); OR. REV. STAT. 30.927 (1987).

<sup>703</sup> 525 A.2d 287 (N.J. 1987).

<sup>704</sup> 707 F. Supp. 1517 (D. Minn. 1989).

<sup>705</sup> Steven Morris, *Searle Reaches Settlement in Copper-7 Suits*, CHI. TRIB., June 16, 1989, at 1.

<sup>706</sup> 780 P.2d 566 (Haw. 1989) (holding that punitive damages are not recoverable unless proven by clear and convincing evidence).

<sup>707</sup> 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991).

<sup>708</sup> 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1991).

<sup>709</sup> *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1421-22 (5th Cir. 1993).

- First Circuit holds that pre-market FDA approval of collagen preempted all tort liability.<sup>710</sup>
- 1993: The United States Supreme Court affirms a \$10 million punitive damages award in a business torts case. The Court rejects a claim that the punitive damages award is excessive and violates defendant's due process rights.<sup>711</sup>
- 1993: In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>712</sup> the Supreme Court places new limits on expert testimony, making the trial judge responsible for determining whether a theory has a valid scientific basis.
- 1994: In *Honda Motor Co. v. Oberg*,<sup>713</sup> the Supreme Court holds that an Oregon statute prohibiting judicial review of the size of punitive damages was unconstitutional.
- 1994: The General Aviation Revitalization Act of 1994 becomes the first federal tort reform statute enacted. The measure imposes an eighteen-year statute of repose for small aircraft.<sup>714</sup>
- 1995: The American Law Institute approves drafting of a new products liability model law, replacing strict liability with negligence-based standards.
- 1995: Caps on punitive damages are instituted as a tort reform in Illinois, Indiana, New Jersey, North Carolina and Oklahoma. Indiana enacts a FDA defense to punitive damages. Texas enacted a far-reaching statute, raising the standard for obtaining punitive damages, capping damages and limiting choice of venue.
- 1996: In *BMW of America, Inc. v. Gore*,<sup>715</sup> the Supreme Court finds a punitive damages award grossly excessive, and violative of the Due Process Clause of the Fourteenth Amendment. This is the first time in American history that the Supreme Court finds a punitive damages award to violate a defendant's due process rights.

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<sup>710</sup> King v. Collegen Corp., 983 F.2d 1130, 1132-37 (1st Cir. 1993).

<sup>711</sup> TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

<sup>712</sup> 509 U.S. 579 (1993).

<sup>713</sup> 512 U.S. 415 (1994).

<sup>714</sup> 49 U.S.C. § 40101 (1994).

<sup>715</sup> 517 U.S. 559 (1996).

- 1996: The Supreme Court in *Medtronic, Inc. v. Lohr*<sup>716</sup> holds that the recipient of a pacemaker classified as a Class III medical device by the Medical Devices Amendment is not preempted by FDA regulations from filing a products liability lawsuit for the defective device.
- 1996: The Small Business Job Protection Act of 1996 provides that punitive damages and non-economic damages are taxable.<sup>717</sup>
- 1997: Congress passes the Volunteer Protection Act<sup>718</sup> "provid[ing] a wide range of tort immunities to volunteers working for charitable organizations."<sup>719</sup>
- 1997: Texas becomes the first state to permit lawsuits against HMOs for the denial of medical treatment.<sup>720</sup>
- 1997: President Clinton signs the Amtrak Reform & Accountability Act of 1997, imposing a \$200 million cap on damages for Amtrak accidents.<sup>721</sup>
- 1997: In *AmChem Products, Inc. v. Windsor*,<sup>722</sup> the Supreme Court rules that a class action by diverse asbestos claimants violated Rule 23 of the Federal Rules of Civil Procedure.
- 1997: In *Zeran v. America Online Inc.*,<sup>723</sup> the court finds that AOL is entitled to immunity under section 230 of the Communications Decency Act for defamatory statements posted on its service.
- 1997: The American Law Institute approves Restatement (Third) of the Law of Torts at its annual meeting.
- 1998: The Biomaterials Access and Assurance Act of 1998<sup>724</sup> immunizes the suppliers of raw materials incorporated into medical products from products liability lawsuits. The Biomaterials Access Act lowers

<sup>716</sup> 518 U.S. 470 (1996).

<sup>717</sup> Small Business Job Protection Act, Pub. L. No. 104-188, 110 Stat. 1755, § 1501(a)(2) (codified as amended in scattered sections of 26 U.S.C.); see also Bob Van Voris, *Clinton's Surprising Tort Reformer*, NAT'L L.J., Aug. 7, 2000, at A1.

<sup>718</sup> 42 U.S.C. §§ 14501-14505 (Supp. III 1994).

<sup>719</sup> Andrew F. Popper, A *One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 123 (1998).

<sup>720</sup> See generally Kristin M. McCabe, *The Texas Health Care Liability Act: Texas is the First State to Listen to the Concerns of its Health Care Consumers, But How Much Has it Heard?*, 16 J. CONTEMP. HEALTH L. & POL'Y 565 (2000).

<sup>721</sup> 49 U.S.C. § 28103 (1997); see also Van Voris, *supra* note 717, at A1.

<sup>722</sup> 521 U.S. 591 (1997).

<sup>723</sup> 1929 F.3d 327 (4th Cir. 1997).

<sup>724</sup> 21 U.S.C. §§ 1601-1606 (1998).

- the standard for legal liability for producers of raw materials that serve as components in medical devices and implants.<sup>725</sup>
- 1998: Actress Pamela Anderson Lee and musician Brett Michaels enjoin an adult entertainment website from displaying images of them engaged in sexual intercourse on the ground that the publication of the tape invaded their right of publicity under California tort law in *Michaels v. Internet Entertainment Groups, Inc.*<sup>726</sup>
- 1998: In *Doe v. America Online, Inc.*,<sup>727</sup> a Florida court holds that AOL is shielded from tort liability for a subscriber's use of an AOL chat room to advertise and transmit pornographic images of a child.
- 1999: In *Anderson v. General Motors*,<sup>728</sup> a California jury awards the victim of a products liability case \$107 million in compensatory damages and \$4.8 billion in punitive damages. The trial judge remits the punitive damages award to \$1 billion in this case where the plaintiff was severely burned by an exploding gas tank in a General Motors vehicle.
- 1999: The federal government sues the cigarette industry to recoup medical expenses to smokers.<sup>729</sup>
- 1999: Florida Governor Jeb Bush signs a comprehensive bill limiting joint and several liability, capping damages, instituting a twelve-year statute of repose and limiting the liability of rental companies.
- 1999: eBay, the leading online auction house, files suit against a competitor for trespassing on its website with robotic agents.<sup>730</sup>
- 2000: In *Engle v. R.J. Reynolds Tobacco Co.*,<sup>731</sup> a six-person Miami, Florida jury awards \$145 billion in punitive

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<sup>725</sup> Popper, *supra* note 719, at 123.

<sup>726</sup> 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>727</sup> 781 So.2d 385 (Fla. 2001) (holding that computer service provider with notice of a defamatory third-party posting is entitled to immunity under section 230 of the Communications Decency Act of 1996).

<sup>728</sup> No. BC-116-926 (Cal. Super. Ct. July 9, 1999).

<sup>729</sup> *United States v. Philip Morris, Inc.*, No. 99-CV24967 (D.D.C., Sept. 22, 1999).

<sup>730</sup> *eBay Sues Bidder's Edge*, ZDNET NEWS, Dec. 10, 1999, at <http://www.zd-net.com> (last visited June 1, 2001).

<sup>731</sup> No. 94-08273 CA-22 (Fla. Cir. Ct. July 14, 2000). See generally Rick Bragg, *Florida Judge Upholds Jury's \$145 Billion Punitive Damage Award in Tobacco Trial*, N.Y. TIMES, Nov. 7, 2000, at A18. See also Philip Morris, *Engle Verdict Defies Common*



- damages against five tobacco companies. In the first phase of the trial, the jury finds cigarettes to be dangerously defective and that the companies' conduct in marketing cigarettes warrants punitive damages.
- 2000: In *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,<sup>732</sup> the Tenth Circuit upholds the dismissal of a defamation and negligence lawsuit by a software manufacturer against an Internet Service Provider that published inaccurate data about the plaintiff's stock. The court holds that the provider is exempt from publisher liability as a service provider under section 230 of the CDA.
- 2000: In *Pegram v. Herdrich*,<sup>733</sup> the Supreme Court holds that treatment decisions by HMOs through their physician employees are not fiduciary acts and thus are preempted by the Employee Retirement Income Security Act of 1974 (ERISA).<sup>734</sup> The Court rejects the claim that physician owners with incentives to ration care are necessarily ERISA fiduciaries.
- 2000: In *United States v. Simon*,<sup>735</sup> the Fourth Circuit holds that a defendant who violated an employer's Internet usage policy as well as criminal statutes has no reasonable expectation of privacy in his office computer.
- 2000: In *John Doe v. Franco Productions, Inc.*,<sup>736</sup> a federal district court holds that defendants providing web-hosting services are service providers and therefore

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*Sense*, at [http://www.philipmorris.com/pressroom/press\\_releases/englephase3b.asp](http://www.philipmorris.com/pressroom/press_releases/englephase3b.asp) (last visited Sept. 1, 2002).

<sup>732</sup> 206 F.3d 980 (10th Cir. 2000).

<sup>733</sup> 530 U.S. 211 (2000).

<sup>734</sup> The plaintiff in *Pegram* was experiencing pain in her groin. Her physician discovered an eight centimeter inflamed mass in her abdomen. Despite this inflammation, the physician decided that the plaintiff would have to wait eight days for an ultrasound diagnostic procedure. During the delay, the plaintiff's appendix ruptured, causing peritonitis. The plaintiff sued her physician for malpractice. The defense was that the malpractice action was preempted by ERISA. The plaintiff filed a fraud charge based on the claim that physicians were rewarded for limiting medical care such as the ultrasound diagnostic procedure. The district court dismissed the claim, but the Seventh Circuit held that the plaintiff stated a claim for fraud on a fiduciary theory. The Supreme Court held that the plaintiff was not a fiduciary and her claim was preempted. According to the court, the fact that there were incentives for reduced care did not make the claimant a fiduciary. *Pegram*, 530 U.S. 211.

<sup>735</sup> 206 F.3d 392 (4th Cir. 2000).

<sup>736</sup> No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill., June 21, 2000).

- immunized from tort liability by section 230 of the CDA. In this case, college athletes were secretly videotaped in various states of undress and the videos were sold on the Internet. The court rejects the argument that by offering web-hosting services the host is transformed into a creator of those web pages.<sup>737</sup>
- 2000: In *Kremen v. Cohen*,<sup>738</sup> a court levies a \$65 million judgment against an online defendant who fraudulently pirated the sex.com domain name.<sup>739</sup>
- 2001: In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>740</sup> the Supreme Court holds that the Due Process Clause requires a reviewing court to apply a de novo standard of review rather than deferring to the lower court.
- 2001: In *Intel Corp. v. Hamidi*,<sup>741</sup> a California Court of Appeals extends the ancient tort of trespass against chattels to an ex-employee who flooded the company's computer system with mass e-mails.
- 2001: Colorado enacts the Construction Defect Action Reform Act,<sup>742</sup> prohibiting damages for improvements in residential property if the construction complies with building codes and industry standards.
- 2001: Colorado adopts inmate litigation reform, prohibiting inmate lawsuits unless all administrative remedies have been exhausted.<sup>743</sup>
- 2001: Florida enacts Judicial Nominating Commission Reform, permitting only the governor to appoint members.<sup>744</sup>

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<sup>737</sup> *Id.*

<sup>738</sup> No. C 98-20718JW, 2000 WL 1811403 (N.D. Cal., Nov. 27 2000); see also Laurie J. Flynn, *Cybersquatting Draws Heavy Penalty*, N.Y. TIMES, Apr. 6, 2001, at C6.

<sup>739</sup> See Pham-Duy Nguyen, *U.S. Judge Orders Executive to Pay \$65 Mln in "Sex.com" case*, BLOOMBERG NEWS, Apr. 3, 2001.

<sup>740</sup> 532 U.S. 424 (2001).

<sup>741</sup> 94 Cal. App. 4th 325 (2001) (finding that electronic signals generated and sent by computer were sufficiently tangible to support a trespass cause of action in case where ex-employee flooded his company's computer system with mass e-mails).

<sup>742</sup> Construction Defect Action Reform Act, H.R. Con. Res. 1166, 108th Cong. (2001) (enacted).

<sup>743</sup> *Id.*

<sup>744</sup> Judicial Nominating Commission Reform, H.R. Cong. Res. 367, 108th Cong. (2001) (enacted).

- 2001: Florida enacts Long Term Care Facility Residents' Protection Act<sup>745</sup> that raises the burden of proof for awarding punitive damages in nursing home cases.
- 2001: Nevada, Mississippi, Oklahoma and West Virginia cap the amount defendants must pay to secure a bond for large punitive damages awards that are being appealed.<sup>746</sup>
- 2002: In *Wagner v. Miskin*,<sup>747</sup> a University of North Dakota physics professor wins a slander suit against a former student who accused him of being a pedophile and having odd sexual habits in online postings.<sup>748</sup>
- 2002: The Pennsylvania House of Representatives passes a tort reform statute that places limitations on the doctrine of joint and several liability.<sup>749</sup>

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<sup>745</sup> Long Term Care Facility Residents' Protection Act, S. Res. 1202, 108th Cong. (2001) (enacted).

<sup>746</sup> *Id.*

<sup>747</sup> No. 00-C-672 (N.D. C. Jud. Dist. Apr. 4, 2002); see also Scott Carlson, *North Dakota Professor Sues Former Student and a Web Site Over Allegations in an Article*, CHRON. HIGHER EDUC., Jan. 19, 2001, at A33.

<sup>748</sup> Thomas Bartlett, *Physics Professor Wins \$3 Million Judgment in Libel Suit Against Ex-Student*, CHRON. HIGHER EDUC., Apr. 26, 2002, at A14.

<sup>749</sup> Medical Care Availability and Reduction of Error Act, 13 PA. STAT. ANN. § 101-5108 (West 2002); see also Northeast Zone, *Pa House Passes Tort Reform Bill*, INSURANCE CHRON., June 10, 2002, at 4.