

How should the Law of Products Liability be Harmonized? What Americans Can Learn from Europeans

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EXECUTIVE SUMMARY

As the twenty-first century unfolds and commerce becomes more and more globalized, there is a need to harmonize the law of products liability across nations. So far, unfortunately, efforts at harmonization have too often been in the direction of reproducing the costly features of United States tort doctrines—doctrines that have imposed spiraling costs on American manufacturers.

Even though the European Community recently altered its tort doctrines from a pure fault-based system to strict products liability, there are features of the European legal system that lessen the effects of even strict liability. Consequently, European courts are much less likely to hand out unpredictable and disproportionate damage judgments—unlike American courts, where ruinous verdicts are a potential in too many lawsuits.

Europe has escaped an American style litigation explosion by erecting barriers to excessive litigation. Such barriers include:

- Absence of contingent fees
- Loser pays winner's attorney fees
- Discouragement of massive discovery filings
- Lower damage judgments
- Absence of punitive damages
- Non-use of juries in civil cases
- Lower expectations of damages

Unless similar barriers to excessive litigation are created in the U.S., American companies face an ongoing competitive disadvantage relative to European manufacturers who operate in a more predictable, less costly, and less litigious legal environment. In one case, probably typical, Dow Chemical Corporation estimates that it spends *100 times* as much on litigation costs in the U.S. as opposed to Europe.

America prides itself on being the world's pre-eminent economic superpower, but if American economic preeminence is to survive in a highly competitive global marketplace, there must be changes in the American legal system. We should seek to reproduce here some of the features of the European system of litigation. It is time, in short, to give American firms the same legal protections that European firms enjoy, rather than waiting for Europeans to harmonize their legal systems with their aberrant American cousins.

In the course of our efforts to reshape the way Americans think about product liability law it will be necessary to examine, question, and eventually correct the way in which American courts have—over the last thirty years—usurped the law-making function of American legislatures. Achieving these changes will not be easy. However, critical reflection on the legal culture of the United States should begin with a global perspective on products liability law. Much work remains to be done in this vein: in particular there is a great need for empirical research and outreach education to American consumers, investors, and workers about the actual nature of the American Civil Justice System and its deficiencies compared to those found in other parts of the globe, particularly in Europe.

Harmonization of the American Civil Justice system with the European model must be achieved, however, if American manufacturers are going to be able to compete effectively in the global marketplace and if American consumers are going to continue to enjoy the benefits of technological innovation.

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INTRODUCTION: HARMONIZATION, STRICT PRODUCTS LIABILITY, AND THE LITIGATION TAX

As the twenty-first century unfolds, there should be further progress toward a global marketplace for American manufactured goods, and, accordingly, American policy makers in and out of government will need strategically to plan for commercial success in a global economy. One trend that seems already to be underway is the effort to harmonize the laws governing commerce both within geographical areas (such as the North American Free Trade Agreement and the European Community), and even across the entire community of nations. A particular problem which has preoccupied legal scholars, judges, and lawyers since the second half of the twentieth century has been the proper treatment for liability of manufacturers to consumers injured by their products. This law of “products liability” underwent drastic change since the nineteen-sixties, in America, from a rule that held that manufacturers were not liable unless they had been negligent in the manufacture of their products to a (mostly judge-imposed) rule that manufacturers were liable (even if there had been no negligence) if products left the factory in an “unreasonably dangerous” condition.² No one knows beforehand what an “unreasonably dangerous” condition is, and manufacturers’ liability, in the twentieth century, became one of the most litigated areas of contemporary jurisprudence.

The new, judicially imposed and judicially expanded products liability rules,³ which generally go by

the name “strict liability,” eventually resulted in million and billion dollar jury verdicts on a previously unimaginable scale. Coping with these jury verdicts, and the threat of future ones, has considerably added to the costs of manufacture of products for American businesses. These costs are generally passed on to the American consumer, and have been often described as a “litigation tax.” This “tax” increases the price of American consumer goods to Americans and to all other customers of goods produced by American corporations.⁴

The American law of products liability might also be described as a “high jackpot lottery” where some plaintiffs (and their lawyers) have reaped huge rewards, but where the costs of complying with an uncertain, and, in some cases, biased law, have unfairly impacted most Americans.

There has been considerable dispute about the precise amount of the “litigation tax.” Still, when one considers the litigation and regulation that has imposed hundreds of billions of dollars in costs through damage judgements, settlements, and regulatory compromises, it is impossible to conclude that these costs have been anything but considerable.⁵ Because of the

uncertain standards in the American judge-made strict liability rules, both in the content of the rules and the manner in which they have been applied in jury trials, American businesspersons have often been forced to settle products liability litigation at considerable cost. The result has been an American law of products liability that imposes unprecedented expense on businesses and consumers. The American law of products liability might also be described as a “high jackpot lottery” where some plaintiffs (and their lawyers) have reaped huge rewards, but where the costs of complying with an uncertain, and, in some cases, biased law, have unfairly impacted most Americans.⁶

Curiously, in recent years, as efforts internationally to harmonize laws have proceeded, the trend in

substantive law, at least with regard to the European Community, seems to have been toward the imposition of a rule of strict liability (along the American model), and toward creating the kind of climate for litigation that has imposed considerable costs on American manufacturers and consumers.⁷ Even so, because of some characteristics of the European legal systems, a regime of strict liability is not as costly in Europe as it has proven to be in America.⁸ Because of this favorable economic circumstance, it seems likely that American and foreign firms may determine that, all other things being equal, it makes more sense to sell manufactured goods in Europe (or other parts of the global marketplace) than it does to sell them in the increasingly-unfriendly litigation climate of the American market.⁹ Alternatively, because of peculiarities in the United States Court System, foreign manufacturers may be in a better position to market products in America than are American firms.¹⁰

In order to avoid circumstances in which American consumers would miss out on product development, circumstances in which American businesses would be inclined to shift operations out of the country, or circumstances in which foreign firms would be at a competitive advantage over American firms when selling products in America, it is now necessary to consider whether the factors that mitigate a law of strict products liability in Europe might be reproduced in America. Accordingly, though we might describe what has happened so far (in Europe at least) as a harmonization toward greater manufacturers' liability and greater costs imposed on consumers and manufacturers,¹¹ it is time to consider the feasibility and desirability of harmonizing in a different direction. It is now crucial to consider harmonization of the law in America with that of the European Community,¹² to reproduce, insofar as possible, the factors in Europe which have the potential for Americans to reduce the litigation tax and restrain the operation of our litigation lottery.

Thus, while so far virtually all the talk about "harmonization" seems to have resulted in moves to increase liability and costs in other countries, it is now time to consider a different kind of "harmonization," one that may reduce the uncertainty and unpredictability of the American law of products liability.¹³ Such a form of harmonization will not only bring our rules more into line with those in place in other parts of the globe, but result in a system that is fairer both to American businesses

and to consumers. Such harmonization might also reduce the likelihood that because of treaty obligations such as those of NAFTA, the United States itself could end up liable to foreign corporations because of the eccentric manner in which our tort system operates.¹⁴

How, then, might such a fairer system of "harmonization," one that is more "business and consumer friendly," be achieved? In a key article arguing that strict liability rules, even if applied by European courts, are not likely to result in dramatically increased costs to American corporations doing business in Europe, Professors Sandra N. Hurd and Frances E. Zollars point to the most significant factors in Europe which mitigate the effects of such rules. Their analysis of European practice serves as a framework for considering how American law might be "harmonized" with the European. While it might be difficult to accomplish "harmonization" with each and every one of these European practices, all are well worth considering. The salient features of what we might regard as the "mitigating aspects" of European products liability law, discussed by Hurd and Zollars, will now be considered in turn.

A POLITICAL AND SOCIAL CLIMATE WHICH DISCOURAGES LITIGATION

Hurd and Zollars first note that "The political and social climate in the European Community discourages litigation," because "[I]n many situations of product-related injury . . . there are no damages, or only minimal damages," and thus there is little incentive to sue to recover, because product-related injury is treated through "national health plans [which] provide free medical care, and [through governmentally-provided] employment compensation systems [which] protect against lost earnings."¹⁵

There seems to be considerable reluctance, on the part of many Americans, to adopt a nationalized system of health-care provision along the European model. When this was attempted in the early years of the Clinton administration, it seems to have been a "spectacular failure."¹⁶ It does appear, however, that efforts in this country are underway to provide relief for injury through private insurance systems in a manner that may eventually alleviate the need for lawsuits to recover damages.¹⁷

Perhaps those who wish to protect American consumers from the adverse effects of the American system of products liability law should enlist in the effort to provide

health insurance coverage for a greater percentage of Americans, to help duplicate this advantage of the European system. But even if we can duplicate in America the situation where there is adequate health-care provision for all, we also need further reform, to eliminate our “collateral source rule” in Tort actions. That rule now permits “double-recovery,” because it prevents evidence of health insurance benefits that have been paid to plaintiffs from being introduced to reduce amounts recovered against defendants.¹⁸ If the primary goal of our tort system is compensation for the injured, and if, as is generally argued here, American industry and American consumers can benefit if we can more closely harmonize our civil litigation system with that prevailing in Europe, the modest reform of eliminating the collateral source rule seems wise, but there is a risk that such reform efforts will be frustrated by American courts.¹⁹

The precise strategies for the more general provision of health insurance, and, indeed, the current national controversy over the provision of health-care services is too complex to receive complete treatment here, though, and it seems wise to move on to other concerns.

Most telling, in the analysis of Hurd and Zollars, is their sensible observation that European countries “rely on legislation, not litigation, to bring about broad social change. Because there is relatively little expectation [in Europe] that reforms in consumer protection will be accomplished through policy making by the courts, there is no tradition of using them for that purpose.”²⁰ The implication is that harmonization of the operation of the product liability rules between Europe and America would require changing the very “litigation culture” of this country.²¹

It is notorious that we have more lawyers as a percentage of population than any other nation,²² and, in the last half of the twentieth century, at least, it does seem clear that litigation, especially in matters of constitutional law, was a means of bringing about broad social change. The results of that litigation, insofar as it moved America toward greater equality in the provision of education, in the exercise of the franchise, and in the equality of opportunity for Americans of different races and genders, were certainly salutary. Still, there are those who question whether courts are the best means of achieving social

change,²³ and America’s reliance on the courts in the late twentieth century may have had the unintended and harmful consequence of cheating Americans of the benefits of thoughtful social policy formulated by legislatures.²⁴

In any event, it is much less certain that the social policy that has been made through American courts reformulating the rules of private law, such as the law of products liability, has been as salutary as the social policy courts have imposed in the area of constitutional law. There are very good grounds for believing that the law of products liability, insofar as it has imposed increased costs on American businesses and consumers has harmed many of the people it was designed by judges to protect.²⁵ By driving up the costs of products through the litigation tax (or the “tort tax,” as it has also been called),²⁶ a regressive tax measure at best, products liability rules probably redistributed wealth from most consumers to a few lucky plaintiffs and their lawyers,²⁷ hardly a result in keeping with our democratic system.

Worse, because of the widespread ownership of stock in manufacturing corporations on the part of most Americans

(through participation in pension plans, through investment in mutual funds, or through attendance at endowed universities) the reduction in profits as a result of the costs imposed by American liability rules have been felt by the majority of Americans who are investors.²⁸ As this is written the country seems to be experiencing marked stagnation if not decline in the stock market, and most Americans have seen their retirement funds and other stock portfolios dramatically decline in value.²⁹ Much of this decline is due to overly optimistic assessments of firms during the dot-com boom of the 1990’s,³⁰ but it still seems reasonable to attribute part of it to a litigation climate in which billion-dollar verdicts and settlements have become almost common. Accordingly, it is appropriate to consider whether there might be some means of shifting America away from a “litigation culture” inclined to solve social problems through the courts, towards one closer to the European model. In order to do this it is necessary to consider the specific “legal rules and procedures” which Hurd and Zollars note “create barriers to litigation” in Europe.³¹

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THE ERECTION OF "BARRIERS" TO LITIGATION

Contingent Fees. The first of these "barriers" is that "Contingent fees are virtually unknown in Europe; indeed, they are prohibited in most [European Community] countries [footnote omitted]." "Contingent Fees" are arrangements whereby lawyers can be retained by allegedly injured plaintiffs, but no fees are due to counsel unless counsel produces a monetary settlement or judgement for the plaintiff. Counsel's fees are then taken from the settlement or judgement, and will generally be a substantial portion of the recovery, as much as 30-40%, or more.³² Since any recovery is supposed to be based on damage to the plaintiff, it should be obvious that paying a substantial percentage of recovery to lawyers short-changes plaintiffs, unless damage figures are inflated. There is evidence that plaintiffs who retain lawyers on a contingency fee basis receive less than 50% of any recoveries,³³ and the reality in America is also that high lawyers' contingency fees are driving up the amounts of damage recoveries. This is true because inflated amounts are being inserted for non-economic damages such as pain and suffering,³⁴ and perhaps also because plaintiffs lawyers' will inevitably lose some cases, and must recover substantial sums in those they win to cover their costs.³⁵

Hurd and Zollars state that in Europe, "The unavailability of contingent fee arrangements means that many fewer cases are litigated. There is no incentive to litigate a case in which the amount of the plaintiff's recovery would not be enough to cover the costs of prosecuting the case."³⁶ The availability of contingent fees in this country, of course, means that a plaintiff often incurs no costs in bringing an action.³⁷ Explaining why contingent fees are prohibited in Europe and encouraged in America is not particularly easy, and the prospects for eliminating them are daunting.

Contingent fees were not permitted in the early years of the United States, just as they are not now permitted in most countries, because they were regarded as unduly encouraging litigation.³⁸ Nevertheless, the argument for contingent fees—that people who would otherwise not be

able to have the benefit of legal assistance in bringing lawsuits had real claims that needed redressing and would otherwise not have their day in court³⁹—proved compelling in all American jurisdictions.

Perhaps it is true that contingency fees help the otherwise helpless, but it seems at least equally plausible that those who benefit the most from contingent fees are the lawyers who comprise the Plaintiffs' Bar in this country.⁴⁰ Since their influence over state and federal legislatures, or at least state courts, is now quite powerful,⁴¹ there may not be much of a chance of eliminating contingent fees in most American jurisdictions. Still, it does not now seem to be generally understood by the American public that a products liability system in which contingent fees play a prominent role (1) encourages the bringing of suits that may be without merit, (2) encourages the settling of suits as a relatively inexpensive means for defendants of dealing with claims that may even be frivolous (settling them for their "nuisance value," as it is often called),⁴² and (3) finally results in a situation where the aggregate costs of such "nuisance settlements," in

adding to the "litigation tax," are considerable. If these facts ever were to become generally known, perhaps American public sentiment might turn against contingency fees, and some legislation might discourage them.⁴³

It seems likely that the existence of contingency fees, by raising the costs to the public of manufactured goods, damages the public. But even so, since it is the poor (who cannot afford to pay lawyers on a non-contingency basis) who allegedly benefit from the availability of contingency fees, to argue against contingency fees risks being characterized as "anti-democratic," or at least insensitive to the needs of the economically challenged. Neither of these are risks that many in the American academy or in American politics are willing to take. It is probably for this reason that contingency fees have rarely been subjected to sustained criticism in the American press, or in legislative chambers. Again, however, if the existence of contingency fees could be demonstrated convincingly to have an adverse economic impact for most Americans, this might change, and politicians and scholars might dare more easily to criticize them.

There is evidence that plaintiffs who retain lawyers on a contingency fee basis receive less than 50% of any recoveries, and the reality in America is also that high lawyers' contingency fees are driving up the amounts of damage recoveries.

There is clearly a need for empirical data on the effects of contingency fees, or for the promulgation of what data exists.⁴⁴ Nevertheless, because of what we might call the prevailing “democratic” justification in America for contingency fees—that they permit poor people to take on large and powerful corporations—eliminating or reducing the availability of contingent fees for legal services might be the most difficult aspect of achieving harmonization with European norms. It is something of a paradox, if the democratic justification for contingency fees is strong in this country, why there seems no pressure to adopt it in Europe, where democratic arguments are, of course, now the *sine qua non* of politics.⁴⁵ One wonders whether Europeans have figured out that the costs imposed by contingency fees have anti-democratic implications, or whether Europeans are simply more hostile to lawyers and lawsuits than we are. Certainly the Europeans have grave reservations about the costs of lawsuits, especially on prevailing parties, as is indicated by another clear trend in European law.

In effect, then, by lowering the potential costs of unsuccessful lawsuits, the American legal system encourages the bringing of lawsuits of dubious merit.

Loser Pays Winner’s Attorney’s Fees. Another “barrier” to the bringing of expensive products liability suits in Europe is that there “the losing party is, in most cases, responsible for paying the [prevailing party’s] litigation costs,” and “attorney’s fees typically are awarded to the prevailing party.”⁴⁶ Hurd and Zollars remark that

A plaintiff [in Europe] who is faced with the possibility of having to pay not only his or her own costs and attorney’s fees but those of the other party as well if the lawsuit is unsuccessful will be effectively discouraged from initiating a lawsuit unless the likelihood of prevailing is very high. This is particularly true when a consumer is suing a corporate defendant who has the ability and resources to make litigation extremely expensive.⁴⁷

For reasons that are obscure, the custom of imposing all costs, including attorneys fees of the winning party, on the losing one, never really took hold in this country. There were some exceptions to the “American Rule” where the successful party cannot recover his or her fees (as distinguished from the “English Rule” where such recovery

takes place), but, generally, in the United States, the American rule has prevailed to this day.⁴⁸

In effect, then, by lowering the potential costs of unsuccessful lawsuits, the American legal system encourages the bringing of lawsuits of dubious merit. Again, because of the thinness of the empirical literature on the topic, one is driven to speculation,⁴⁹ but it appears that the same motives that may have led to the availability of contingency fees—the sympathy for wronged plaintiffs—may have argued for the American practice of not imposing all the costs of litigation on the losing party.

If an American plaintiff knows that he will not have to bear the costs of any attorney’s fees, neither his own nor the other party’s, there is more of an incentive to participate in a lawsuit, more of an opportunity to vindicate his purported legal rights, and, indeed, more of an opportunity to gain the help of a lawyer. Conversely, if American plaintiffs had to run the risks of the payment of attorneys fees for the other side if they lost, even contingent arrangements with lawyers for

their own fees might not be enough to induce them to bring lawsuits in doubtful cases. This would be particularly true, if defendants had the resources to pay their own (probably fairly expensive) counsel.

The only way such suits might still be brought is if plaintiff’s lawyers were able to indemnify potential plaintiffs from the possible liability for defendant’s legal costs. But if this were to happen it would be even more clear than it already is that the American Plaintiffs’ Bar has a vested interest in litigation (especially in its settlement value), and the Plaintiffs Bar might find itself in a difficult social and political position.⁵⁰

If one is inclined to try to reduce the “litigation tax,” by discouraging the bringing of lawsuits, it is clear that there would be substantial merit in the adoption of the European solution of having the losing party pay the winner’s legal costs. Indeed, there is already powerful statutory precedent for such a solution in the availability of legal fees from losing parties for prevailing parties in civil rights litigation, and some other forms of litigation which public policy seeks to promote.⁵¹ This might be an area where the analogies to public law practice would

work in favor of lowering the costs to American business, and these analogies ought to be pursued.⁵²

Discovery Discouraged. Hurd and Zollars also believe that the different rules regarding discovery procedures provide another “barrier” to litigation in the European Community. In America discovery is now widely available, but in the European Community “Some countries do not permit discovery [footnote omitted] and some allow only very limited discovery closely supervised by the court.”⁵³ Hurd and Zollars conclude that “The inability to acquire information through the discovery process may make it more difficult for the plaintiff to prove his or her case or to ascertain additional causes of action.”⁵⁴ By reducing the availability of discovery, then, litigation is discouraged. The costs of discovery in this country, particularly for defendants, are very high indeed, and it seems likely that it is the avoidance of these costs, in large part, that raises the “nuisance value” as a result of which settlement often occurs. Perhaps it is the threat of substantial costs in the discovery phase of litigation which is the most profound inducement to settle early.⁵⁵

It would appear, then, that if discovery were to be made more difficult in America, this would be advantageous to defendants in products liability lawsuits both in discouraging “nuisance value” settlement of frivolous litigation,⁵⁶ and in discouraging the bringing of lawsuits (as in Europe) because of the lack of information on which they could be grounded. The increased availability of discovery seems to be a twentieth century phenomenon (as well as many of the other features of products liability litigation in America that we have examined), and, perhaps, is as driven by the interests of the Plaintiffs’ Bar as are some of the other features of current American products’ liability practice.⁵⁷ Again, because of the substantial political wherewithal of these lawyers, elimination of easy discovery seems unlikely, unless the costs to the public of the settlement of “nuisance suits” can be made more evident. Discovery works both ways, however, and it may have value in helping defendants to determine when plaintiffs’ cases are without merit. The merits of discovery must be weighed against its costs before there is any wholesale campaign to cut back on it, a campaign with a dubious chance of success, at best.

Lower Damage Judgements. Still another “barrier” to excessive damage awards in the European Commu-

nity, even if there is now a standard of “strict liability,” is the fact that there is very little occurrence there of judgments that are of great monetary value. The kind of multi-million, or even multi-billion dollar damage awards that have recently become common in American courts simply do not seem to happen with great frequency in Europe. Hurd and Zollars explain this phenomenon, “in part” because “salary scales and health care costs are generally lower in the EC, making damages much lower in an absolute sense.”⁵⁸ More important, perhaps, as Hurd and Zollars indicate, “allowable damages [in Europe] often do not include the non-economic damages permissible under the law in the United States. [And, further, even when non-economic damages for items such as pain and suffering are allowed, they are significantly limited by law or tradition.”⁵⁹ There have been some attempts, in the state legislatures and in Congress, to enact civil justice reforms that would limit damage amounts for non-economic damages such as pain and suffering. These attempts have so far failed in the United States Congress, and have had, at best, uneven success in the states because of state court decisions that have questioned their permissibility under the state or federal Constitution.⁶⁰ It is only fairly recently that American courts have allowed substantial damage judgments for non-economic injury. Nevertheless, perhaps because of the powerful influence of the plaintiff’s bar, changing our “law and tradition” to reject huge damage judgments (or, more properly, returning our “law and tradition” to the prior status of allowing only modest amounts for “non-economic” damages) is proving to be quite difficult.

Punitive Damages. There is one particular element of “non-economic” injury that may be the most important difference between what is done in the European community and what often occurs in America, and that is “punitive damages.” Punitive damages are those which are not based on the economic injury to the plaintiff, or even on non-economic injury, but rather on an amount sufficient to “punish” the defendant for allegedly wrongful conduct by deterring him and others from future wrongdoing.⁶¹ Hurd and Zollars state that of all the Member States of the European Community “only Ireland permits punitive damages in products cases.” What are the chances of “harmonizing” American tort law in the direction of eliminating or reducing punitive damages?

There seems to be little doubt that the punitive damages element is the most unpredictable and most substantial factor in crippling damage assessments in American products liability cases.⁶² Indeed, the potentially arbitrary use of punitive damages has led the United States Supreme Court to conclude that under some circumstances punitive damage awards may violate the United States Constitution because they are not in accordance with due process.⁶³ There have also been some legislative reform efforts that have sought to reduce punitive damage awards, but like other attempts at damage limitations by state and federal legislatures, they have only met with limited success.⁶⁴ Even the Supreme Court's condemnation of punitive damages awards as potentially violative of due process holds little promise of elimination of the proliferation of punitive damage awards.

The greatest difficulty of eliminating punitive damages, in the end, flows from another crucial difference between the European and American civil justice systems—the heavy reliance, in America, on juries for the resolution of products liability claims. It is the juries, in recent years, that have been awarding massive products liability claims, and, in particular, punitive damages.⁶⁵ If there is to be “harmonization” between European and American practice, there may have to be some serious rethinking, on the American side, about the role of juries generally, or at least the role of juries in products liability litigation.

Non-use of Juries. As Hurd and Zollars stress, “European courts do not use juries for tort suits at either civil or common law; damages are determined by the court.”⁶⁶ The difficulty with using juries for determining damages in products liability lawsuits, we are now beginning better to understand, is that juries may be subject to rhetoric which will sway them, especially against corporate defendants. Particularly where jurors are themselves persons of modest means—and this is common, as anyone who has participated in a jury understands—the temptation to engage in a bit of redistribution to a similarly situated plaintiff may be all but irresistible.⁶⁷ Anyone who has been involved in the defense of products liability

litigation has observed this phenomenon of jury demographics and retributive human nature, and it is a difficulty that, in this country, may be one of the most intractable.

It is at least theoretically possible to suggest that members of juries could be made aware that when they render excessive verdicts against corporations they are damaging the real human stakeholders in the corporations—the shareholders, the employees, the consumers of products, and the members of the communities in which the corporations are located.⁶⁸ Still, it seems far easier for jurors, swayed by the rhetoric of clever plaintiff's counsel, to reify corporations and see them as inhuman, bloodless lucre-seeking monsters.⁶⁹ Or, if there is a human aspect of corporations that can be discerned by members of a jury, at trial at least, it may be only the well-educated and elegantly coiffed and clothed appearance of corporate officers and directors, or their lawyers. In short, large jury verdicts in products-liability actions have become a kind of class-warfare, celebrated in fiction,⁷⁰ and promoted by demagogic politicians for their

particular partisan purposes.⁷¹ Sadly, even some law professors appear to have praised the use of judgements in tort cases as political tools in a struggle of weak individuals against evil corporations.⁷²

In any event, if there is to be “harmonization” of American products liability law and practice in a manner that brings it closer to that of Europe, there is going to have to be a national discussion about the role of the American jury in products liability cases. That discussion ought to consider how the behavior of juries in products liability cases accords with not only current policy needs in this country, but also with the Constitutional design.

Consider the original conception of the jury's role that existed at the time of the Constitution. Defenders of the jury have a strong argument to make that jury discretion is a fundamental attribute of American Constitutional law, as indicated by the fact that the Seventh Amendment to the United States Constitution guarantees jury trial in suits at common law involving more than \$20. Aside from the problem that \$20 in 1789, when

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the Constitution was adopted, may have meant something quite different from \$20.00 now, it does seem clear that this provision in the federal Constitution still permits some experimentation by the states in altering the performance of the traditional jury.⁷³ Moreover, the insistence on the importance of the jury in the Bill of Rights may have reflected a very different conception of the job of the jury from that it now seems to be engaged in.

Both before and after the American Revolution, the jury was regarded as a safeguard from government oppression, as a protection against a government which sought to infringe on the rights of property or person of the American colonists, and, later, the citizens of the early American republic.⁷⁴ There is some suggestion that jurors were originally used because of their particular knowledge of the facts of a given legal dispute, but by the end of the eighteenth century their role was to be that of impartial citizen arbitrators in a trial, charged with the objective determination of the facts of particular disputes.⁷⁵ By the early Nineteenth century it had become clear that even in criminal cases, while the jury had the power to ignore the legal instructions of the judge, it had no right to do so, and the jury's job was neutrally to apply the law as given to them by the judge.

By the beginning of the Nineteenth century, we Americans had adopted a conception of popular sovereignty whereby the democratic underpinnings of our Constitution were to be secured by reposing law making power in only two categories of popular institutions. One of these, to be used for regular law making, was the state and federal legislatures, where the people or their representatives elected the members. The other repositories of popular law making power were the institutions used for making and Amending Constitutions. These were the bodies of representatives chosen expressly for the purpose of Constitutional conventions, or the state and federal legislatures which eventually approved such Amendments, or, occasionally, the people voting *en masse* to approve Constitutions or Amendments.

These were the means by which regular and fundamental law was to be made, and, most important, neither juries, nor courts, were supposed to have the

power to make law. This was especially true with regard to the taxing power, which power was at the core of our revolutionary war, as the slogan "no taxation without representation" suggests. It seems evident that our current law of products liability, especially insofar as it adopts "strict liability" as the rule, is pretty clearly judge-made. It follows, then, that allowing juries total discretion to apply virtually unlimited punitive damages with redistributive effects, in effect allowing juries to levy a "litigation tax," is completely—we might say doubly—counter to our tradition.

Not only does the current manner in which products liability juries operate interfere with the legislature's prerogative to make law, it imposes taxation without the traditional form of representation. Moreover, by the middle of the Nineteenth century, the American common law of torts had pretty clearly arrived at a firm rule that there ought to be no liability imposed without some form of fault, a fault such as negligence for example.⁷⁶ If it is true, then, that at common law liability is based on fault, then resting jury discretion in products liability cases, where "strict liability" is now the rule, is not the way it was done at common law, and there is no basis for resting claims about jury prerogatives on the Seventh Amendment.⁷⁷

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Lower Expectations. Hurd and Zollars conclude their treatment of the differences between the American and European approaches to damages in products liability cases by observing that even with strict liability, damage judgements in Europe are likely to be smaller because, since there is an absence of contingency fees, there is no need for plaintiffs lawyers' to seek larger damage judgements in order to offset those occasions when they lose, and thus collect no fees.⁷⁸ Summing up, Hurd and Zollars make the obvious point that the countries in the European Community "in contrast to the United States, simply have lower expectations of what is a reasonable level of damages."⁷⁹

Taking into account that Europeans have lower expectations of damages, unless there is some movement to "harmonize down" American damage judgements in products liability cases, at least where all other things are equal, simple cost-benefit analysis will lead American,

European, and other manufacturers to market their goods in Europe rather than the United States. Manufacturers, owing a duty to shareholders to maximize profits, ought, quite properly, to sell goods where costs are lower. Should this happen, the result will be not only that fewer products will be available here, there is a risk that manufacturing itself may be moved closer to the markets where costs are lower, and, eventually this could lead to loss of jobs for Americans, and loss of revenue to American communities.

RECONSIDERING STRICT LIABILITY

There are reasons to wonder whether a strict liability regime makes any sense in a nation where technology is still being developed (or, indeed, in any other).⁸⁰ The idea behind strict liability is to further the creation of a regime of “enterprise liability.” In such an economic regime—theoretically at least—all the costs of production, including damages caused by defective products, are borne by the industry itself.⁸¹ Pursuant to this notion, goods are priced in manner that allows industry to pass the costs of the enterprise on to consumers. This has a surface appeal, but is not necessarily the best way to encourage the development of new technologies.

New technologies, it has been convincingly argued, need a sort of capital subsidy during the take-off stages of their growth.⁸² One of the most prominent American legal historians has argued that such a subsidy was, in effect, provided to American industry, in the Nineteenth century, through the tort system. Harvard Law School Professor Morton Horwitz argued that the costs of development of national transportation systems, and the development of commerce and manufacturing was aided by the implementation of the “fault” or “negligence” principle (and the abandonment of earlier English and colonial strict liability standards).⁸³ Similar subsidization, by lowering the costs of doing business in Nineteenth Century America, was supplied by the development of the doctrine of shareholder limited liability for corporations.⁸⁴

If it was true that all Americans eventually benefited from the explosive economic growth of this country in the Nineteenth and Twentieth centuries, and if it is

true that limiting liability generally made it possible for American commercial, manufacturing, and technological progress (which progress is now the envy of the world), perhaps we should be hesitant about adopting the “enterprise liability” notions as new technologies emerge. The very idea of strict products liability, then, ought to be questioned, and even more the American version, which raises the costs of damage judgements far beyond what is now occurring in other parts of the world.⁸⁵

There are some encouraging signs that the doctrine of strict products liability is being critically reexamined. Some American courts, recognizing the deleterious consequences of our strict products liability doctrines, are refashioning the law of products liability back toward a fault-based system, or at least one in which the law is not stacked in favor of plaintiffs.⁸⁶ Similar concerns appear to have led to changes in the ALI’s Restatement of Torts (Third) adopted in 1997, which appears to ameliorate somewhat the application of strict liability for manufacturers.⁸⁷ Nevertheless, there is still

reason to worry that the depths of the problems facing American businesses and consumers have not been sufficiently appreciated by lawmakers and commentators. As a recent very perceptive student note observed, “In the wake of a new millennium where our world thrives on job opportunities, consumer products and services, and the revenue of large corporations, it would be in our nation’s best interest to protect corporate defendants [against excessive damage awards, particularly from arbitrary punitive damages] yet this has not occurred.”⁸⁸

CONCLUSION: ACHIEVING HARMONIZATION AND RETHINKING THE JUDICIAL ROLE

Civil Justice Reformers in the United States who might seek constructively to harmonize American products liability law and legal institutions with European ones face a daunting task. After all, American courts have not only been responsible for the shift to strict liability in the late twentieth century, but lately they have also managed to throw up roadblocks to many civil justice reform efforts.⁸⁹ Legislation can be altered when a ma-

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majority can be elected which is sensitive to the need for legislative reform, but even where judges are elected, if a bench is bent on finding particular forms of civil justice reforms unconstitutional the task of replacing them is almost Herculean. Judicial elections are generally for longer terms than those of legislators, and public interest in judicial elections, as opposed to those for legislators, is minimal. Generally speaking, it is easier for the Plaintiffs' Bar, or other interested parties, to finance judicial election campaigns, and place judges on the bench sympathetic to their views, than it is for the proponents of Civil Justice reform.⁹⁰

In the late twentieth and early twenty-first centuries, moreover, there is widespread belief (especially in the academy) that judges ought to exercise wide discretion in Constitutional interpretation, in order to promulgate rules in keeping with American democratic ideals. This is what led to the imposition of strict liability, but, as already indicated, it is not at all clear that this is in accordance with the long-term needs of America. It is time for Americans to give more thought to whether American courts ought to continue to exercise what amounts to the discretion to make law. There are some champions of the bench's role in overturning civil justice reform who embrace this role for the bench as a way of preserving the current prerogatives of tort plaintiffs and their lawyers,⁹¹ but when courts make law it runs counter to the concept of popular sovereignty itself.

There has been a tendency, even among conservative academics, virtually to deify American judges, to champion their discretionary role, and even to suggest that it is better to trust them to make law than the legislatures, since the latter are more subject to capture by "special interests."⁹² It is time to recognize, however, that, especially where there are elections for judges, that the bench can also be captured by "special interests," and in some cases those special interests may be members of the plaintiffs' bar determined to preserve the status quo of large damage judgements.⁹³

In the last Presidential election, one of the most important issues was over the kind of people who ought to be placed on the federal bench. Then Governor Bush promised to appoint more judges who would be committed to "interpreting" rather than making the law, and he gave as his models Supreme Court Associate Justices Antonin Scalia and Clarence Thomas, the two Justices who had written most consistently in support of such a position. Vice-President Gore and his supporters, by contrast, railed against Scalia and Thomas, and made them campaign issues.⁹⁴

In order to harmonize American products liability law with the European, it will be necessary not only to educate legislators, and secure the passage of civil justice reform legislation, but also to continue this political debate and to educate the American public about what needs to be done about State court judges who are frustrating such reform efforts. The issues of the rule of law and the importance of who sits on the bench are beginning to be more important concerns in national politics, and, because most American products liability law is likely to remain state law, these issues ought to receive more consideration in state political campaigns, particularly for judges.

It would be easier if the American law of products liability could be harmonized with the European simply on the basis of passage of federal legislation, and while there might still be some hope for such a solution,⁹⁵ the Supreme Court's recent federalism jurisprudence makes it likely that any broad-based federal reform efforts could be found unduly to trench on the states' traditional domestic authority.⁹⁶ The struggle properly to harmonize American products liability law with European approaches, then, will be a difficult one, to be fought on many fronts. It is a worthy struggle, however, and the outcome will be of profound significance for the future of the American economy and the well-being of the American consumer.

It is time to recognize . . . that the bench can also be captured by "special interests," and in some cases those special interests may be members of the plaintiffs' bar determined to preserve the status quo of large damage judgements.

ENDNOTES

1. Raoul Berger Professor of Legal History, Northwestern University School of Law, Professor of Business Law, Kellogg School of Management, Northwestern University, Associate Research Fellow, Institute of United States Studies, University of London.

2. The key authority was California Supreme Court Justice Traynor's opinion in *Greenman v. Yuba Power Products, Inc.*, 377 Pl.2d 897 (Cal. 1962) (en banc), and the holding in that case made its way into the general law of torts through the American Law Institute's Restatement (Second) of Torts, Section 402A (1965), which provides, *inter alia*, that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . [even though] the seller has exercised all possible care in the preparation and sale of his product . . ."

3. For the celebration of those rules by the famous torts scholar William L. Prosser, see, e.g. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791 (1966). For a typical example of judicial employment and expansion of the doctrine, see, e.g., *Lovelace v. Astra Trading Corp.*, 439 F.Supp. 753 (D.C.S.D.Miss. 1977) (Explaining the doctrine of 402A and extending it to apply to the case of bystanders injured by products.)

4. The amount of such a tax on American industry and American consumers is staggering. One study reported in 1989 concluded that: "\$80 billion annually is attributable directly to litigation costs and increased insurance premiums [to deal with the threat of litigation] with another \$300 billion annually attributable indirectly to the [torts liability] crisis." William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S.Tex.L.Rev. 227, 249 (1995)[Hereafter referred to as "Worthington."]. After observing that sporting goods manufacturers estimate that 15 percent of the costs of their products is spent to cover the risk of litigation, and that manufacturers of football helmets put the figure at 55 percent, machine tool manufacturers at ten percent, and fifteen to twenty percent for step-ladders, Worthington concludes that "This cost burden acts as a mandatory tax on American manufacturers and as a surcharge on American consumers." *Id.*, at 250.

For another estimate of the size of the Tort "tax," see the recent study, Tillinghast-Towers Perrin, *Tort Costs Trends: An International Perspective*, (New York, New York, 1995), which concluded that the cost of the United States Tort system for 1994 was \$152 billion. This figure, according to this study, has increased 125% over the past ten years. The study also noted that between 1930 and 1994 U.S. tort costs have grown almost four times faster than the overall rate of growth of the U.S. economy. The Tillinghast-Towers Perrin 1995 study also concluded that the U.S. tort system was the most expensive in the industrialized world, and that U.S. tort costs were 2.2% of U.S. Gross Domestic Product (GDP), a figure substantially higher than that of other developed countries studied and two and a half times the average of those studied. Finally, this study observed that the U.S. tort system returns less than 50 cents on the dollar to those damaged, and that less than 25 cents of each dollar represents actual economic loss to claimants.

5. See note 4, *supra*. See also Testimony of Lester Brickman before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Commerce Committee of the House of Representatives Hearing on Liability Reform, April 30, 1997 ("The tort tax is every bit as real as the sales tax and aggregates about 150 billion dollars a year; as a percent of GNP, it averages 2.2 times the tort costs of most European countries.") [Hereafter referred to as "Brickman."] See also, on the American "litigation explosion," Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991) (Detailing the harm done by the litigation explosion to America in general and American industry in particular, and highlighting the abusive tactics used by American litigators.)

6. Worthington, *supra* note 4, at 229. ("Rather than a respected institution, our tort system now has the aura of a high-jackpot lottery.") See also the authority cited for Worthington's statement, in his note 4, "Ruth

Marcus, Are Punitive Damage Awards Fair to Firms? Supreme Court Finally Agrees to Referee High Stakes Disputes, Wash. Post, Sept. 23, 1990, at H1,H4 (stating that ‘punitive damages ‘have made civil litigation sort of like the lotteries you have in so many states’)(quoting [now United States Solicitor General] Theodore B. Olson).”

7. For a description and history of the movement toward “strict liability” in the European Community and the manner in which products liability rules apply in the different countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, and the United Kingdom), see generally Commission of the European Communities, Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM (2000) 893 final, Brussels, 31.1.2001 (Hereafter, “Commission Report.”). Directive 85/374, issued on 25 July 1985, “introduced in the Community the principle of objective liability or liability without fault. According to it, any producer of a defective movable must compensate any damage caused to the physical well-being or property of individuals, independently whether or not there is negligence on the part of the producer.” *Id.*, at 5. Directive 85/374 provided for periodic review of the law of member states with regard to products liability, and also provided for some variation among the law of member states. *Id.*, at 5. In 1999, the Commission adopted a “Green Paper on Liability,” which contained proposals for modifications of the law of products liability, in a direction which generally would have imposed greater liability on manufacturers, and asked for comments from all interested parties as to how the 1985 Directive had worked in practice, and to what extent it ought to be modified. *Id.*, at 5-6. According to the Commission Report issued after the receipt of comments on the Green Paper. These comments are available at: http://europa.eu.int/comm/internal_market/en/goods/liability/replies.htm.

The Commission Report indicated that the law of products liability in the European Community was generally in harmony with the 1985 Directive, and that the Directive, “functions properly in practice.” *Id.*, at 8. The Commission Report did note, however, that because of the United States “legal framework of which US product liability law forms part,” according to figures presented by Belgian industry, “the US legislation [regarding products liability, which presumably includes common law doctrines] renders exports from Europe to the United States two times (for textiles and steel), five times (for food stuffs) and ten times (for pharmaceuticals) more expensive than exports to other countries.” *Id.*, at 9.

The Commission Report did not recommend changes in the 1985 Directive, but did recommend further study of the “economic impact for industry, insurance companies, consumers and society as a whole . . . of introducing producer liability also in case of development risk and of eliminating maximum financial limit for serial incidents.” *Id.*, at 29. These measures would, of course, impose further liability on manufacturers.

8. See generally Sandra N. Hurd & Frances E. Zollars, Product Liability in the European Community: Implications for United States Business, 31 *Am. Bus. L.J.* 245 (1993) (Explaining all the reasons why even if the European Community were to adopt a rule of strict products liability damage judgements recoverable in Europe by plaintiffs would be significantly less than they would be in America) .

For other evidence that the strict liability regime in the European community is significantly less costly than the American regime, see, e.g. Gregory Bond, In Search of Balance Between Science and Societal Concerns in Shaping Environmental Health Policy, March 12, 1999, a presentation at the First Annual Isadore Bernstein Symposium, “Environmental Health Policy: Whither the Science?” (University of Michigan School of Public Health)(www.dow.com/environment/reports/speech4.html), stating:

Far and away, the U.S. has the highest tort costs. To further illustrate the point, in 1996, Dow [Chemical Corporation] in the U.S. spent one dollar on litigation expenses for every 160 dollars of U.S. sales, whereas in Europe we spent one dollar on litigation for every 40,000 dollars in sales. There is essentially no difference in the types of products we are selling that can account for this cost differential. I have responsibility for advising on risk management for Dow products globally, and my European, Canadian, Asian and Latin American colleagues just cannot comprehend our complex U.S. legal justice system where people can win huge financial judgments based on emotions and absent any scientific facts. Additionally, the litigation environment in which we operate has a tendency to stifle critical self-analysis.

A quick mathematical calculation will indicate that in 1996 Dow was spending 250 times as much (figured as a percentage of sales) in litigation expenses in the U.S. as compared to Europe. Dow's most recent figures indicate that the gap has narrowed from the 1996 ratio to a point where Dow spends \$1.00 on litigation costs for every \$71 in sales, but in Europe the figure is \$1.00 on litigation for every \$7,000 in sales. In rough figures, then, Dow now spends 100 times as much (as a percentage of sales) in the U.S. as it does in Europe, though both in the United States and Europe the amount that must be spent for litigation as a percentage of sales is increasing dramatically. [Marsha Rabiteau, Presentation to the Steering Committee of the Institute for Legal Reform of the United States Chamber of Commerce (January 11, 2000) (quoting a speech by the general counsel of Dow Chemical)].

9. For a study of how American products liability law, and, in particular, its rule of "strict liability" hurts American firms chances for competing in the global marketplace, and results in a failure to market some goods in this country, see, Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?* 9 J.L. & Com. 167 (1989). Cortese and Blaner observe, for example, that as a result of the increased exposure to damage judgements in the 1970's and 1980's "U.S. businesses have paid insurance costs that were twenty to one-hundred times higher than their foreign competitors." *Id.*, at 182.

10. *Id.*, at 180-181, noting that while U.S. firms may be strictly liable in U.S. Courts not only for the products they sell here, but also for the products they sell abroad, foreign firms, even if they may have some exposure for the goods they sell here, will most likely not be liable for the products they sell abroad, and thus they will have a competitive advantage, because of lower overall costs, over U.S. firms. This may enable them to offer goods at lower prices than can American firms, and thus drive American firms out of business. It appears that this has happened already "in the U.S. sporting goods and pharmaceutical industries, where foreign manufacturers have completely taken over the markets for hockey equipment, trampolines and other gymnastic equipment, (footnote omitted) as well as the markets for certain vaccines and contraceptive devices." *Id.*, at 188.

11. See generally Commission Report, note 7, *supra*.

12. The idea that harmonization of American civil law with that of other countries in a manner that reduces the excessive verdicts and other foibles of the current American tort system is beginning to penetrate the consciousness of legal scholars. See, e.g. Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 B.Y.U.L.Rev. 229 (arguing for the need for such harmonization).

13. On the unpredictability of the American law of strict products liability, see, e.g., Worthington, *supra* note 4, at 230 ("By its very definition, strict tort liability arises irrespective of conduct. [footnote omitted] It has no moral foundation on which to distinguish conduct which is acceptable from that which is unacceptable. Decision making is random, and conduct is judged *ex post* rather than *ex ante*. As a result of its philosophical failure, the doctrine [of strict products liability] lacks the moral foundation and predictability necessary to command either respect or obedience.")

14. For a discussion of the kind of risks the United States faces because a foreign corporation victimized by an excessive tort judgement might seek a remedy under NAFTA, see Michael I. Krauss, *NAFTA meets the American Torts Process: O'Keefe v. Loewen*, 9 Geo. Mason L. Rev. 69 (2000) (Discussing a case where a Canadian corporation which suffered a \$500 million adverse verdict in a Mississippi torts case sought a remedy against the United States under NAFTA) .

15. Hurd & Zollars, *supra* note 7, at 254.

16. For statements that the failure of the Clinton Administration's health-care initiative was a "spectacular failure," see e.g. Jules Witcover, *Taking stock as Clinton's time runs out; Legacy: Bill Clinton's record is a mixture of good intentions and bad judgment, with the economy providing an antidote for poisonous personal behavior*, *The Baltimore Sun*, January 15, 2001, P.1M, Barbara J. Saffer, *White Women not Wild about Hillary;*

Pollsters Wonder how She Can Win without Big Shift, *The Washington Times*, December 7, 1999, P.A1, Al Kamen, Sunday in the Loop, *The Washington Post*, September 19, 1999, Sunday Magazine, P.W04.

17. As this is written there are efforts in the Congress and in the White House to pass a patient's "bill of rights." It is unclear whether this effort will be successful, and it is equally unclear whether, even if such a bill passes, it will help or hurt the effort to stem deleterious litigation. For the machinations over the probably forthcoming patients' bill of rights, see, e.g. Robert Novak, G.W. Bush Shows his Tough Side to Congress, *Augusta Chronicle*, August 8, 2001, PA04 (indicating that the President will get what he wants), John F. Dickerson et. al. Bush's Two Sides; Working the Hill on HMO Reform, he can be Dazzling, or Bafflingly Distracted. But Can He Win?, *Time*, August 6, 2001, P.20 (discussing the issues, and asking whether the President can succeed in getting a Patients Bill of Rights that restricts lawsuits against HMO's.)

18. It is the normal rule in tort cases that the only damages that ought to be recovered are those needed to make the plaintiff whole. According to the "collateral source rule" as it is now administered in American Courts, however, evidence of benefits flowing from a "collateral source," such as health care insurance, are inadmissible to reduce damage recovery from defendants, because "The defendant wrongdoer should not . . . get the benefit of payments that come to the plaintiff from a 'collateral source' (i. e., 'collateral' to the defendant)." 2 Harper and James, *The Law of Torts*, 1343, Section 25.22." *Pryor v. Webber*, 263 N.E.2d 235, 236 (Ohio 1970). The reason for the rule evaporates, however, where the defendant will pass on costs to consumers and others, and where punitive damages and other features of the civil justice system are operating in a manner injurious to society as a whole.

19. The attempt to eliminate the "collateral source rule," in Ohio, for example, was recently struck down by the Ohio Supreme Court, in a lamentable decision frustrating Ohio Civil Justice Reform. Ohio Academy of Trial Lawyers, 715 N.E.2d at 1062,1089-90 (Ohio 1999). For criticism of the Ohio decision, see, e.g., Jonathan Tracey, Note: General Law Issue: Ohio Ex Rel. Ohio Academy of Trial Lawyers v. Sheward: The End Must Justify the Means, 27 N. Ky. L. Rev. 883 (2000) (the court improperly "twisted two constitutional rules to invalidate the law.")

The frustration of Tort Reform measures by courts would appear to re-impose significant economic costs on consumers and on the economies of states that have passed such measures. According to Thomas J. Campbell, *The Causes and Effects of Liability Reform: Some Empirical Evidence*. National Bureau of Economic Research, Inc. Working Paper # 4989 (1995), when states pass such civil justice reform measures, there are productivity increases of from 7 to 8% in the state, and increases in employment of from 11 to 12%, and if multiple tort reform measures are passed increases can range from 10 to 20% for productivity and employment. Conversely, Campbell found, when states pass measures that increase potential tort liability such as comparative negligence rules or rules requiring the payment of prejudgment interest, there are significant decreases in productivity and employment.

20. Hurd & Zollars, *supra* note 7, at 254.

21. See, e.g. Roger Clarke, Books, *The Independent* (London), August 18, 2001, Features, P. 11, briefly commenting on Jonathan Harr's book *Funeral Wars*, and noting "how [Harr] represented a Biloxi undertaker in his battle against an aggressive Canadian funeral parlor conglomerate. The resulting massive damages award ruined the company and made the Wall Street Journal wonder about the future of US business in the shadow of this unpredictable 'American Tort monster'. [Concludes Charke:] This pretty straightforward account [of Harr's] will convince you that the downfall of America lies in its uncontrollable litigation culture."

22. See, e.g. Greg Torode, Courtroom Circus a Poor Way to Solve Leadership Crisis, *South China Morning Post*, November 19, 2000, P.12 ("It is, of course, all a sign that America's politics reflects its society. America boasts more lawyers per head of population than any other nation and is probably easily the most litigious.") Dick Feagler, Playing the Game: Wheel of Misfortune, *The Plain Dealer* (Cleveland), April 18, 2000, P. 1B ("The law schools of America annually disgorge more lawyers into our population than any reasonable citizenry can absorb. These lawyers emerge, on the make, into a world full of competition. Naturally, they

are hungry to earn back their law school tuition and make enough extra to strut with their peers.”) For an attempt to argue that we don’t have too many lawyers or too much law see Marc Galanter, *Too Many Lawyers? Too Much Law?*, 71 *Denv. L. Rev.* 77 (1993).

23. The most notable recent example of the argument is Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, Paperback Ed., 1993).

24. For the frustration of Americans with their legislatures, see, e.g. Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 *Temple L.Rev.* 1291 (1995). For some commentary on the tension between courts and legislatures as law-makers, and the concomitant separation of powers problems, see, e.g., Susan Thompson Spence, *The Usurpation of Legislative Power by the Alabama Judiciary: From Legislative Apportionment to School Reform*, 50 *Ala.L.Rev.* 929 (1999), Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule With an Attorneyship Model of Representation*, 69 *N.Y.U.L.Rev.* 477 (1994) (Arguing that legal scholars’ notions that the courts should act to remedy legislative failures to act flows from an incorrect conception of the legislative role), Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 *N.C.L.Rev.* 1254 (2000) (Arguing that Courts, under the guise of “interpretation” should not usurp the legislature’s role), Hans A. Linde, *Monstanto Lecture: Courts and Torts: “Public Policy” without Public Politics?*, 28 *Val. U.L.Rev.* 821 (1994) (Arguing that the formulation of public policy ought to be for legislatures, and that when courts set aside tort reform measures they may be acting improperly). For the general argument that courts in the twentieth century, particularly the federal courts, have usurped the Constitutional role assigned to legislatures, see Stephen B. Presser, *Recapturing the Constitution: Race, Religion and Abortion Reconsidered* (1994).

25. See generally Worthington, *supra* note 4, and sources there cited.

26. See Brickman, quoted in Note 5, *supra*.

27. For the suggestion that it is the American lawyers who have benefited from American torts law, see, e.g., Worthington, *supra* note 4, at 263-264: “In the end, perhaps only the legal profession has truly benefited from Justice Traynor’s great experiment.” For further sources in support of Worthington’s claim see those cited in his footnote 170, and, in particular his quotations of two English judges: “In decrying the magnitude of contingent fee awards received by American attorneys, Lord Denning declared that, to his ‘English eyes,’ the American contingent fee system ‘savoured of champerty.’ [citation omitted] Lord Shaw observed: ‘It is notorious in the United States that the scale of damages for injuries of the magnitude sustained by the plaintiff is something in the region of ten times what is regarded as appropriate by the conventional standards of the courts of [England].’” See also Brickman, *supra* note 5.

28. See, to similar effect, Stuart Taylor Jr., *Paying Reparations for Ancient Wrongs is Not Right*, *The National Journal*, April 7, 2001, *Legal Affairs*, P.1005, Vol.33, No.14 (Observing, making an analysis much like that in the text, that “When we seek to punish corporations, we actually punish ourselves, because we’re the ones [as investors and consumers] who end up paying.”)

29. See, e.g. Jennifer Fischl-Kruger, *Gold Funds Are Glittering As Stock Market Lags*, *Investors Business Daily*, August 24, 2001, P.B2 (Most investors in the recent market have lost money, except for those who invested in gold), Tom Walker, *Buying Opportunities Set Stage for Recovery of Bull Market*, *Atlanta Journal and Constitution*, July 2, 2001, P.1S (Noting the widespread damage suffered by investors, but suggesting that buying opportunities now abound, and the end of the Bear market may be near.)

30. For some reports on why the dot-com boom went bust, see, e.g. Gary Hoyle, *Revising the Script in E-Commerce Class*, *Toronto Star*, August 16, 2001, P.K03 (The dot-coms went bust because managers hadn’t learned the basics of management), Tom Walker, *Business Press: The “New Economy” Receives Second Look*, *Atlanta Journal and Constitution*, August 14, 2001, P.3C (Reviewing a special issue of *Business Week* reporting that the Dot-Com’s went boom because of “irrational exuberance”), Matthew Lynn, *Come the Retribution*, *Sunday Business*, August 12, 2001, P.19 (Noting the allegation that the villains in the dot-

com boom and bust “are the global investment banks who stand accused of pumping up the boom, peddling absurdly over-inflated shares and pushing mergers that left companies burdened with debts that will in many cases prove ruinous.”)

31. Hurd & Zollars, *supra* note 7, at 254.

32. “The typical contingent fee paid by an American client ranges from 25% to 50%, depending on the stage of the case at the time of resolution [footnote omitted]. A limit of 25% generally exists for cases settled before trial. [footnote omitted]. A fee of one-third or 30% of a judgment is standard for cases tried. [footnote omitted]. A 40% to 50% fee could be paid to an attorney if [he or] she was required to appeal [footnote omitted] or undertake other proceedings following judgement [footnote omitted].”

“However evidence exists which suggests that many attorneys obtain standard fees of 40% and 50% in cases settled before trial.” Angela Wennihan, *Let’s Put the Contingency Back in the Contingency Fee*, 49 *SMU L. Rev.* 1639, 1643 (1996).

33. *Ibid.*

34. For the notion that the contingency fee system has resulted in inflated “pain and suffering” damage figures which amount to fraud, see, e.g. Brickman, *supra* note 5.

35. For general discussion of the operation of contingent fees, see, in addition to Brickman, *supra* note 5, Lester Brickman et.al., *Rethinking Contingency Fees* (Manhattan Institute, 1994), and Olson, *supra* note 5, at 31-50 .

36. Hurd & Zollars, *supra* note 7, at 254.

37. See generally, F.B. MacKinnon, *Contingent Fees for Legal Services* (1964).

38. For the history of contingent fees in America, see, e.g., Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 *DePaul L. Rev.* 231, 248 (1998).

39. See, e.g., Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, 1976 *Litig.* 27 (1975-1976) (Arguing that without contingency fees most people would not be able to get into the courthouse).

40. See generally Brickman, *supra* note 5.

41. See, e.g. Brickman, *supra* note 5 (Observing that the contingency fee system “yields plaintiffs’ lawyers well in excess of 18 billion dollars annually – wealth which is redistributed throughout the political and judicial process to purchase protection from public scrutiny [of contingent fee arrangements].”)

42. Settling for “nuisance value” means that the defendant settles at a sum that would be less than it would have to pay even to defend a claim against it in which it would eventually prevail. It is the price it has to pay to make the “nuisance” of the meritless lawsuit disappear. See, e.g., David J. Sokol, *The Current Status of Medical Malpractice Countersuits*, 10 *Am.J.L.&Med.* 439, 445 (1985) (Stating that the contingency fee system “encourages lawyers to accept cases without any preliminary investigation in the hope that the case can be settled for its nuisance value.”)

43. This assumes, of course, that such legislation would not, upon some pretext, be declared “unconstitutional” by some Court relying on state or federal constitutional grounds. As this has happened in other areas of civil justice reform, the possibility cannot be completely discounted. For the alarming trend of state supreme courts’ declaring civil justice reform measures “unconstitutional” on what may be dubious grounds, see, e.g., Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 *Seton Hall L.Rev.* 649 (2001), and sources there cited.

44. Information on the scope and the deleteriousness of contingency fees does seem to be available. See, e.g. Brickman, note 5, *supra*, but it has not yet penetrated the public consciousness. As Brickman observes:

By design, we know less about the hourly rates effectively being charged by the top third of the contingency fee bar than we do about the earnings of professional athletes; that is no accident. Contingency fee lawyers routinely obtaining these fees generally do not participate in bar-sponsored surveys of lawyers’ incomes.

They know better. Stealth sheathing obscures the connection between their enormous hourly rates, the effect such fees are having on the tort system and the increasing irrelevance of injury rates to recoveries.

Brickman, *supra* note 5 (unpaginated).

45. See, e.g. Stephen Glover, *Exposed: Blair's Balderdash about Europe*, Daily Mail (London), May 1, 2001, P.13 (indicating that German Chancellor Gerhard Schroeder defends a proposed European superstate on the grounds it would be more "democratic."), Martin Woollacott, *Comment & Analysis: There is a dying fall about the political life of the west: The generation that reinvented postwar Europe is passing on*, The Guardian (London), November 24, 2000, P.24 (Urging that reforms of the European Community be made in a democratic direction), Patrick Bishop, *Shake-Up Plan for Government of EU*, The Daily Telegraph (London), June 17, 2000, P.15 (Reporting on a plan by two French politicians to rework the government of the European Union in order to make it more democratic and comprehensible to its citizens).

46. Hurd & Zollars, *supra* note 7, at 254.

47. *Ibid.*

48. For the development of the "American Rule," in distinction to the "English Rule," see, e.g. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am.U.L.Rev. 1567 (1993).

49. Vargo, *supra* note 48, at 1635, also notes the thinness of the empirical data on the fee-shifting issue.

50. For the need of some very successful Plaintiffs' lawyers to conceal their success, particularly with contingency fees, lest the public rise up against them, see Brickman, *supra* note 5.

51. According to Vargo, *supra* note 48, at 1588, there are over 200 federal statutes and 2000 state statutes which provide for "fee shifting" to the winner where an important public policy, such as the discouraging of the deprivation of civil rights, is involved. Vargo also notes exceptions to the "American Rule" in the United States that have been applied through contractual arrangements, through doctrines such as the "common fund" or "substantial benefit" rules, and in cases where enforcement is sought of a contempt ruling or where one party has been proceeding in bad faith. *Id.*, at 1578-1587. There is, then, a substantial foundation on which a "loser-pays" system could be erected in this country.

52. Unfortunately for the argument made here, most of the precedent for the abandonment of the "American Rule" detailed in Vargo, *supra* note 48, is limited to recovery for successful plaintiffs, but what is now probably needed in America is a full "loser pays" rule like that employed in England. For arguments that we need such a rule, see, e.g., Olson, *supra* note 5, at 37-38, 46, 64-65, 328-329, Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 794-800 (1966), Gregory A. Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 La. L. Rev. 763, 782-800 (1989), Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution*, 9 Vill. L. Rev. 400, 414 (1964), William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202, 211-18 (1966) (suggesting statutory reform that would provide attorney's fees to prevailing party); *Comment, Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 637-55 (1974), and other sources cited in Vargo, *supra*, note 48, in Notes 15 and 210.

53. Hurd & Zollars, *supra* note 7, at 254.

54. *Ibid.*

55. For a report on some empirical studies regarding discovery, that find a more frequent and extended occurrence in products liability cases, see Judith A. McKenna and Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C.L.Rev. 785 (1988).

56. For an additional study of litigation costs, paying special attention to the expenses of discovery, noting the propensity on the part of defendants to settle to avoid such costs, and reaching a conclusion that "Our tort system's current imposition of high litigation costs is not only inefficient, but also unfair to defendants," See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 Ind.L.J. 59, 108 (1997).

57. This is strongly suggested, for example, by William Nelson's study of New York Civil Procedure reforms in the twentieth century, which he describes as tracking federal civil procedure reforms, with both sets of reforms tending to favor the interests of litigating plaintiffs. William E. Nelson, *Civil Procedure in Twentieth-Century New York*, 41 *St. Louis L.J.* 1157 (1997).

58. Hurd & Zollars, *supra* note 7, at 255.

59. *Ibid.*

60. See, e.g., Victor E. Schwartz, Mark A. Behrens, and Leah Lorber, *Tort Reform Past Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 *Wm.Mitchell L.Rev.* 237 (2000) (Noting the need to restructure the battle for civil justice reform to meet the challenge of state judges who throw out civil justice reform laws on dubious constitutional grounds). For further criticism of these decisions see, e.g. Presser, *supra* note 43, George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 *Seton Hall L. Rev.* 683 (2001), and Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 *Seton Hall L. Rev.* 688 (2001), but see Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 *Seton Hall L. Rev.* 672 (2001)(Attempting to defend state courts findings that tort reform measures are unconstitutional.)

61. As "punitive damages" were recently described in useful student comment:

Punitive damages awards essentially serve the same purpose as fines and penalties, which are imposed "to punish or deter conduct that violates public policies of the state or federal government." [footnote omitted] In addition to this specific deterrence factor, punitive damages are often used to send a social message of general deterrence. The imposition of punitive sanctions "signals to the entire community that certain socially harmful behaviors will not be tolerated.

Meghan A. Crowley, *From Punishment to Annihilation: Engle v. R.J. Reynolds Tobacco Co. – No More Butts – Punitive Damages Have Gone Too Far*, 34 *Loy. L.A. L. Rev.* 1513, 1514 (2001). That's the theory, at least. The practice is probably different. Thus, in America:

Punitive damages are penal in nature and are supposedly awarded only if the jury finds the defendant acted maliciously, outrageously or wantonly. [footnote omitted] However, studies show that juries award punitive damages even when they find no willful misconduct by the defendant. [footnote omitted]. A recent GAO Study of five states found that appellate courts reversed punitive damage awards in 100 percent of the cases in which they had been awarded. [footnote omitted]

Cortese and Blaner, *supra* note 8, at 177.

62. See, e.g. Crowley, *supra* note 61, at 1514 ("since the late 1970s, there has been an 'unprecedented [increase in both the amounts and the] numbers of punitive awards in ... mass tort situations.' [footnote omitted] As a result of this phenomenon, it seems the purpose of punitive damages awards is progressing from punishment to annihilation.")

63. See, e.g. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

64. For the story of the limited successes and some failures of civil justice reform efforts in the area of punitive damages and other topics discussed here, see, e.g. Schwartz, Behrens, and Lorber, *supra* note 60.

65. See, e.g. Cortese and Blaner, *supra* note 8, at 177. See also Hurd & Zollars, who say "The jury system in the United States has been credited with responsibility for unreasonably high damage awards; that problem does not exist in the EC." Hurd & Zollars, *supra* note 7, at 255.

66. Hurd & Zollars, *supra* note 7, at 255.

67. Cf. Jeffrey Abramson, 1998 *U.Chi.Legal F.* 125 ("People vote their demographics on juries every bit as much as they do in other voting contexts, so the best we can do is to represent groups fairly on the jury according to their share of the local population.")

68. And it has actually been done. See note 28, *supra* (article by Stuart Taylor, Jr.).

69. For the difficulties in conceptualizing corporations, even for legal academics, see, e.g. Gregory A. Mark, *Comment: The Personification of the Business Corporation in American Law*, 54 *U.Chi.L.Rev.* 1441(1987).

70. The best of the bunch is probably John Gresham, *The Runaway Jury* (1996) (Through essentially ideological arguments, a nefarious juror gets his colleagues to bring in the first billion dollar judgment against a tobacco company.)

71. The recent machinations involving suits against asbestos companies, tobacco companies, and even Microsoft are good examples of that kind of demagoguery.

72. See, e.g., Marshall Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 *Stan. L. Rev.* 330, 333, 334-335 (1970) (Arguing that the law of torts "must be made to deal more explicitly with the question of what large enterprises and other clusters of power owe to the individual caught in their coils," and that the law of torts ought to develop in a direction that "will present an analogue of recent developments in constitutional law, focusing on legal checks on private groups that act with power governmental in function." For a sharp criticism of this proposed academic use of the law of torts for political purposes, see James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 *Ind.L.J.* 467, 523 (1976), where he explicitly criticizes Shapo's argument and states of such proposals, "These are commentaries which tend to speak of the common law torts judgment as a tool of harassment in modern political warfare, and whose disregard for judicial integrity approaches recklessness."

73. For a discussion of some of these efforts, and perhaps a bit too much alarm expressed at the possible erosion of the jury's prerogatives, see Alan Howard Scheiner, *Note: Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 *Colum L.Rev.* 142 (1991).

74 See on this point Scheiner, *supra* note 73. For some examples, see the *Trial of the Seven Bishops*, the *Zenger Trial*, and the *Henfield Trial*, excerpted in Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History* 10-27, 31-54, 181-188 (4th ed. 2000), the accompanying comments and sources there cited.

75. For the history of the jury see, e.g. Scheiner, *supra* note 73, and sources there cited.

76. On this point see generally Oliver Wendell Holmes, Jr., *The Common Law*, Chapter One (1881), and Morton J. Horwitz, *The Transformation of American Law 1780-1860*, 85-101 (1977).

77. See, e.g. *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937), where, on similar grounds, the Seventh Amendment Right to Jury trial claim regarding damage judgements by the NLRB was rejected by the Supreme Court, since there were no NLRB proceedings at common law. This argument about the American common law has to be qualified with the suggestion in Horwitz, *supra* note 76, that there may have been a time when American liability under the American common law of torts was not fault-based. Holmes disagreed, however, believing that torts in America always had to do with fault. There does not seem to be consensus on this issue among American legal historians. See generally Robert J. Kaczorowski, *The Common-Law Background of Nineteenth Century Tort Law*, 51 *Ohio St. L.J.* 1127 (1990) (Indicating that we may never know whether the nineteenth century American tort law was exclusively fault-based, but arguing generally that the law of torts in America in the nineteenth century required actors to behave in a community-dictated reasonable manner.)

78. *Hurd & Zollars*, *supra* note 7, at 255. This is implicit rather than explicit in *Hurd & Zollars*, as they only note that "because there is no contingent fee system [in the European Community], there is no danger that damage awards will be increased, as it is alleged happens in the United States, in order to cover the attorney's contingent fee." *Ibid.*

79. *Ibid.*

80. For the strong arguments against strict liability, see Worthington, *supra* note 4 and for a prediction that the doctrine is doomed, see David G. Owen, *The Fault Pit*, 26 *Ga. L. Rev.* 703, 723 (1992) ("The Great Strict Liability Experiment in products liability has mostly proved a failure, and its continuing decline, although sometimes wavering, appears inevitable.") quoted in Worthington, *supra* note 4, at fn. 3.

81. For the widespread adoption of the notion of "enterprise liability" throughout the United States in the second half of the twentieth century, see, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. Legal Stud.* 461, 518 (1985). For a

typical statement by a state court, see, e.g. *West v. Caterpillar Tractor Co., Inc.* 336 So.2d 80, 92 (Fla.1976) (“The obligation of the manufacturer must become what in justice it ought to be – an enterprise liability The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade . . .”)

82. The classic argument to this effect is Walter. W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* [3d ed., 1990).

83. Horwitz, *supra* note 76.

84. See generally Stephen B. Presser, *Piercing the Corporate Veil Ch.1* (1991, updated annually).

85. An excellent summary of the problem is to be found in Worthington, *supra* note 4, at 246-247. As he explains:

While not the sole culprit, strict tort liability has been a significant contributor to the decline in competitiveness of American industry. Product innovation is discouraged. [footnote omitted]. Discovery and creative theories of liability discourage variance from the status quo. Vast resources are diverted from research and development to pay the spiraling cost of defending lawsuits. The availability of liability insurance, once accepted as a given by the doctrine’s founders, is either unavailable or available only at extreme cost or on limited terms. Products are withdrawn from the market, and, in some instances whole industries have disappeared as a result of the threat of litigation [footnote omitted]. In an ever-increasing global economy, American industry is taxed by a doctrine unknown to the rest of the world. [footnote omitted]. Statistical and anecdotal analyses fail to measure the true depth of the effects of strict tort liability, but merely portray what has been lost. The products not produced, the factories not built, the jobs not created, the medicines not developed – these are the immeasurable costs.

86. This development is chronicled in James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. Rev.* 479 (1990), and Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 *UCLA L. Rev.* 731 (1992). See also Worthington, *supra* note 4, at 271-280, and sources there cited, for the argument that America is returning to a “fault-based” rather than a “strict liability” system.

87. There seems to be no doubt that difficulties in applying 402A from Restatement of Torts (Second) led to revisions in Restatement of Torts (Third) with regard to products liability. For this reason it seems safe to suggest that a concern with excessive verdicts recovered by plaintiffs played a role, and that the provisions in Restatement of Torts (Third) are somewhat more defendant (manufacturer) friendly, particularly in the area of design defects and product safety warnings, where the Restatement (Third) basically seeks to return the law of torts to a fault-based or negligence standard. There is a strong debate over this in the law reviews, however. For the suggestion that Restatement (Third) is a very balanced approach to the problem of products liability, see Victor E. Schwartz, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law: The Restatement (Third) of Torts Products Liability: The American Law Institute’s Process of Democracy and Deliberation*, 26 *Hofstra L. Rev.* 723 (1998). For the charge that the proposed draft went too far in the direction of moving away from strict products liability, see, e.g. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 *Vand.L.Rev.* 631 (1995), and for the suggestion that Restatement (Third) went some distance toward appropriately exploding the doctrine of strict products liability, but did not go far enough, see, David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 *U.Ill. L. Rev.* 743. For the Restatement Reporters’ defense of the line they drew, and the process they were engaged in, see James A. Henderson, Jr. & Aaron D. Twerski, *Postscript: Arriving at Reasonable Alternative Design: The Reporters’ Travelogue*, 30 *U.Mich. J.L.Ref.* 563 (1997), and Aaron D. Twerski, *Inside the Restatement*, 24 *Pepp.L.Rev.* 839 (1997).

88. Crowley, *supra* note 61, at 1515.

89. See, e.g., Presser, *supra* note 43.

90. Stephen B. Presser, et.al. *White Paper: The Case for Judicial Appointments* (Federalist Society for Law & Policy 1999).

91. See, e.g., Philip H. Corboy et. al., *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 *Loy. U.Chi.L.J.* 183, 244 (1999)(Arguing that courts should function as a “lawmaking partner” with the legislature.)

92. Probably the most famous critic of legislatures along these lines is Richard Posner. See, e.g. See, e.g. Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 *J. Law & Economics* 201 (1971) (early expression of Posner’s theories), Richard A. Posner, *Economic Analysis of Law* (1973) (the first edition of Posner’s law and economics casebook, which developed his critique of legislatures and praise of judges along a broad spectrum of doctrines), Arthur A. Leff, *Commentary: Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451 (1974) (criticizing the first edition of Posner’s casebook, in large part because of its dim view of legislatures), and Richard A. Posner, *The Economic Approach to Law*, 53 *Tex. L.Rev.* 757 (1975) (defending his views against Leff and other critics). See also Richard A. Posner, *Overcoming Law* (1995) (a more recent elaboration and defense of Posner’s views).

93. For some sober reflections on the linkage between judicial law-making and massive expenditures by trial lawyers and others in judicial elections, see Justice Robert Young, *Reflections of a Survivor of State Judicial Election Warfare*, 2 *Civil Justice Report* 1 (June, 2001, Center for Legal Policy at the Manhattan Institute).

94. For example, “In his October 3, 2000, debate with Bush, Gore stated: ‘Governor Bush has declared . . . that he will appoint justices in the mold of Scalia and Clarence Thomas . . . I would appoint people that have a philosophy that I think will be quite likely [to be opposite those of Scalia and Thomas].” Quoted in Richard A. Posner, *Breaking Deadlock: The 2000 Election, the Constitution, and the Courts* 167, 167 n.19 (2001).

95. See, e.g. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 *Am.U.L.Rev.* 1573 (1997) (Proposing and setting forth the rationale for a federal statute to reduce punitive damages).

96. The two most important cases indicating reluctance on the part of the Supreme Court to support broad federal action based on the commerce clause when it interferes with traditional state prerogatives regarding law-making are *U.S. v. Lopez*, 514 U.S. 549 (1995) (Invalidating the Federal Gun-Free School Zones Act), and *U.S. v. Morrison*, 120 S.Ct. 11 (1999)(Invalidating portions of the federal Violence Against Women Act). For some commentary on the Supreme Court’s current and future federalism jurisprudence, indicating that concern over federalism will lead the court carefully to review Congressional legislation to see if it trenches on traditional state powers, see, e.g., Michael Peter Hatzimichalis, *Sovereignty, Federalism, and Property in the Balance: A Paradox in the Making*, 8 *J.L. & Policy* 707 (2000) (Generally praising the Court’s “new federalism”), Peter M. Shane, *Reuschlein Lecture: Federalism’s “Old Deal:” What’s Right and Wrong with Conservative Judicial Activism*, 45 *Vill. L. Rev.* 201 (2000) (generally critical of the Supreme Court), Susan Bandes, *Book Review: Erie and the History of the One True Federalism: Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America*. By Edward A. Purcell, Jr., 110 *Yale L.J.* 829 (2001)(Arguing that there is no such thing as “the one true federalism,” and that there are different federalisms for different times). Even though the Supreme Court may now be inclined narrowly to construe Congress’s commerce clause powers, there may still be some freedom to act in the products liability area. It is not unprecedented, even recently, for Congress to step in. When there was a recent threat of strict products liability, and pharmaceutical companies were refusing to produce the swine flue vaccine, Congress acted to limit the manufactures’ liability, and the manufacturers resumed production. Worthington, *supra* note 4, at 247.

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