

TORT REFORM 1999: A BUILDING WITHOUT A FOUNDATION

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I. INTRODUCTION

For the better part of thirty years, corporate and other interests bent on avoiding responsibility for their misdeeds have led a battle to "reform" the civil justice system in a manner that tilts the legal playing field substantially and shamelessly in their favor. Acting under the umbrellas of various "citizens" groups, such as the American Tort Reform Association, the Civil Justice League, and Citizens Against Lawsuit Abuse, these business interests have sought to scale back the rights of American consumers by heightening negligence standards, abolishing centuries-old legal doctrines, capping damage awards, and instituting other reforms that effectively deny the American public access to the courts.

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Using their political muscle and a nonstop propaganda machine to create a false impression about “runaway juries” and to demonize lawyers who work for ordinary people, they have manufactured myths and anecdotes about supposed cases with the singular purpose of furthering their political agenda by enraging the public over a civil justice system supposedly gone awry. The tales they tell, though, have little relationship to the facts. Two scholars from the American Bar Foundation found:

Underlying this promise for legal reform are the familiar refrains of a litigation explosion, a lawsuit crisis, a liability crisis, an insurance crisis, skyrocketing jury awards, unscrupulous attorneys, and on, and on. This legal system run amok is blamed for everything from the unavailability of essential health care and medicines, the loss of business competitiveness in the world economy and the concomitant effects on economic well-being and jobs, to the closing of public parks and the demise of high school football. These costs and others are presented as a justification for immediate, fundamental reform in the civil justice system

. . . We are skeptical of the efficacy of many proposed and enacted reforms, and we are concerned about the consequences of those measures. Beyond the self-interest of those groups lobbying for reform, we can see little reason for endorsing this reform agenda. We come to this position after spending a number of years collecting and analyzing data on civil jury verdicts from different parts of the country. We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.¹

Others have expended great effort to track down the stories told by these “tort reformers” and have found the renderings to be nothing less than substantial distortions calculated to advance political goals. For example, University of Wisconsin law professor, Marc Galanter, has investigated some of the most frequently used examples of supposedly indefensible case results and found, upon review of the actual facts, the cases reached entirely logical ends.²

The distorted discourse on the civil justice system has also moved beyond such traditional fora for political rhetoric as editorials, op-eds, and sympathetic talk-show hosts. It now finds expression in what these groups routinely brandish as “scholarship.” Politically motivated conservative think tanks such as the Manhattan Institute,

1. STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* ix-x (1995).

2. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726-31 (1998) (setting forth stories of lawsuits that were publicized in a misleading manner).

the Hudson Institute, and the Beacon Hill Institute; and polemical writers such as Peter Huber and Walter Olson publish works of dubious scholarship that are passed off as authoritative commentaries on a supposedly out-of-control civil justice system.

Unfortunately, these works are often taken at face value by uncritical members of the press, politicians and political groups looking to justify their own preconceived policy objectives, and a public that often has no means to obtain better information. In fact, much of the tort reformers' arguments have saturated the public to such an extent that many prospective jurors come to court with the mistaken belief that plaintiffs, who have suffered serious injury as a result of another's negligence, are merely out to enrich themselves at the expense of an unlucky, deep-pocketed corporation.³

Others have noted this trend as well. According to information culled from court reporters in personal injury suits, juries sided with plaintiffs 52% of the time in 1992, down from 61% in 1987.⁴ Plaintiffs' success in product liability jury trials dropped from 54% in 1987 to 43% in 1992, and in cases concerning consumer products, that success dropped from 55% to 39% in the same time period.⁵ Plaintiffs' success in medical malpractice cases has not been any better, with plaintiffs prevailing in only 25% of cases against doctors in 1992, down from 42% in 1987.⁶ The reasons for this drop are clear, according to one expert:

Jury specialists say the powerful and deep-pocketed advocates of reform have spread their message so successfully in the media that juries have changed their behavior. "The publicity of the business and insurance groups has played a major role in shifting both public and judge opinion," says Theodore Eisenberg, a professor at Cornell Law School. "Either there was a liability crisis or people got sold one, and attitudes changed in a way that led to more victories for defendants."⁷

Given the overwhelming evidence offered by independent scholars that there was no litigation explosion, it is clear that the people did, in fact, get sold one.⁸ More serious scholarship, written primarily by

3. See Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 244-45 (Mar.-Apr. 1996) (stating how skeptical jurors often "blamed the victim"); see also Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, WALL ST. J., Mar. 21, 1994, at B1; Amy Singer, *Selecting Jurors: What to Do About Bias*, TRIAL (Apr. 1996) at 29.

4. See Felsenthal, *supra* note 3, at B1.

5. See *id.*

6. See *id.*

7. *Id.*

8. A study done by a jury consulting firm found that 75% of jurors believe that awards are too large, and two-thirds say there are too many lawsuits. See *id.* Another study found that when exposed to an insurance company advertisement complaining about large jury awards, mock jurors awarded significantly less pain-and-suffering damages than

disinterested academic observers, has shown how bereft of rigor and validity the tort reformers' research truly is. Contrary to the claims that are made, the empirical evidence amply demonstrates that there is no litigation explosion,⁹ and juries do not act irrationally or prejudicially against wealthy defendants in awarding damages.¹⁰ In fact, studies demonstrate that awards, all things being equal, are no more or less consistent "if the defendant is a health care provider or the negligent driver of an automobile."¹¹ The bottom line is that the jury verdicts are not influenced by the availability of "deep pockets."

One would hope that the appearance of systematic scholarship debunking the work of pro-tort reform scholars would put an end to their specious arguments and occasional legislative successes. Unfortunately, that is not the case. Rather than focus on provable facts, the tort reform propaganda is recycled from state to state, and the troublesome reality that reputable scholars have discredited it is either ignored or rationalized.

The Florida Legislature also bought the bill of goods being sold by tort reformers and adopted the rhetoric of the majority's political patrons in attempting to justify legislation. When Governor Jeb Bush signed House Bill 775 into law on May 26, 1999,¹² the business community finally achieved its goal of securing the most far-reaching legislative restriction of citizens' and consumers' rights in more than a decade. This year's victory was the culmination of a three-year legislative battle that had raged in and out of the halls of the legislature and marked the first comprehensive tort reform legislation enacted into law since the Tort Reform and Insurance Act of 1986.¹³ The enactment was a tribute to raw power, as first the Senate, then the House of Representatives, and finally the Governor's Office changed hands and the new officeholders felt an obligation to reward the

those mock jurors who did not see the advertisement. See Elizabeth F. Loftus, *Insurance Advertising and Jury Awards*, A.B.A. J., Jan. 1979, at 69-70.

9. See DANIELS & MARTIN, *supra* note 1, at 238-43; see also Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 U. MD. L. REV. 1093, 1103 (1996) (stating that the number of civil lawsuits per capita that has been filed is lower than at previous times in the nation's history).

10. See Hans, *supra* note 3, at 248; see also DANIELS & MARTIN, *supra* note 1, at 238-43; VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 160-63 (1986); NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 193-202 (1995); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 86 (1992) (explaining why empirical evidence does not support the theory that juries grant larger damage awards against wealthier defendants).

11. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 908 (1994) (footnote omitted).

12. Fla. HB 775 (1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400).

13. See Act effective July 1, 1986, ch. 86-160, 1986 Fla. Laws 695.

business community that had so assiduously supported them. The result was that a longstanding business wish list of legal changes was enacted.¹⁴

Unfortunately for the business community, there was absolutely no factual basis to claim that legal relief from liability was necessary. Florida was not experiencing an insurance crisis, a litigation explosion, or a declining economy. In fact, objective data showed just the contrary.¹⁵ Therefore, as part of their public relations plan, the business community adopted the rhetorical device of claiming that legal liability amounted to a "tort tax" that was exacted upon all Floridians. Specious research from the national tort reform movement was the only empirical evidence presented to the legislature in support of tort reform.

In Parts II through III, this Article will briefly examine House Bill 775 and its genesis, and then trace the bill through the legislative process that eventually enacted it as law. It will also look at some of the key provisions of the bill and their effects on tort litigation. Part IV of this Article will place the issue of tort reform in the context of constitutional requirements. Finally, Parts V through VIII will critically review the so-called scholarship used to justify tort reform. It will look at studies used to support the passage of Florida tort reform laws and point out their fallacies.

II. THE JOURNEY TO FLORIDA "TORT REFORM"

The efforts of the business community and the legislature that culminated in 1999 took three legislative sessions to bear fruit. In 1997, legislation was considered but not passed.¹⁶ In 1998, legislation was passed, but vetoed.¹⁷ And, in 1999, legislation was passed and signed into law.¹⁸ The provisions of these three sweeping pieces of legislation are compared in detail in the appendix to this Article.

Late in the 1997 Legislative Session, the House Committee on Financial Services took up a proposed committee bill that was entitled the "Florida Accountability and Individual Responsibility (FAIR) Liability Act."¹⁹ The bill, which included a variety of tort reforms, was taken up and passed out of committee in record time amidst an un-

14. See generally Kenneth D. Kranz, *Tort Reform 1997-98: Profits v. People?*, 25 FLA. ST. U. L. REV. 161 (1998) (providing a brief overview of the history behind recent "tort reform" efforts in Florida).

15. See *id.* at 182.

16. See Fla. HB 2117 (1997) (proposed amendment to chs. 95, 768, 772 (1997)).

17. See Fla. CS for SB 874 (1998).

18. See Fla. HB 775 (1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400).

19. Fla. H.R. Comm. on Fin. Servs., PCB 97-06 (1997) (proposed Fla. HB 2117 (1997)).

usually heavy-handed display of legislative strong-arming.²⁰ Among other things, House Bill 2117 included a statute of repose for product liability cases, the elimination of the owner's vicarious liability for the use of *any* personal property by someone other than the owner, limitations on punitive damages, and a further restriction on the application of the doctrine of joint and several liability.²¹ Under the House Rules in effect at the time, House Bill 2117 was carried over and left pending for consideration during the 1998 Session.²²

In the new session, Senate President Toni Jennings created the Senate Select Committee on Litigation Reform and charged it with the following mission:

The . . . select committee will conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee will determine what civil litigation reforms would enhance the economic development climate of the state while continuing to preserve the constitutional guarantees citizens have to seek redress through the courts.²³

Both the House Judiciary Committee, previously uninvolved with the issue, and the new Senate committee conducted hearings throughout the fall and winter of 1997-98. During these hearings, Tort Reform United Effort (TRUE), a coalition of business associations and other pro-tort reform interests, unveiled with great fanfare the results of an "economic study" it had commissioned.²⁴ The study, which became known as the Fishkind Report, has been criticized by economist Frederick Raffa for making naked and unsubstantiated claims that Florida's tort liability system costs each Floridian \$655 per year,²⁵ that House Bill 2117 would reduce the volume of tort liti-

20. See Kranz, *supra* note 14, at 169 n.34 (providing a detailed description of the handling of this bill).

21. See Fla. HB 2117, §§ 2, 3, 6-8 (1997). See Appendix for a complete listing of the provisions of this bill.

22. Under Rule 96 of the 1996-98 House Rules, bills were carried over from the first session of a legislative biennium to the next. This rule is no longer in effect. See FLA. H.R. RULE 96 (1996-98).

23. Press Release from Office of the Fla. S. Pres. Toni Jennings (Aug. 14, 1997) (detailing the mission of, and reasons for creating, the Select Committee on Litigation Reform) (copy on file with authors).

24. See Fishkind & Assocs., Inc., *The Economic Impact of Tort Reform in Florida: An Analysis of HB 2117, the Florida Accountability and Individual Responsibility (FAIR) Liability Act 1997, (Oct. 22, 1997)* [hereinafter Fishkind Report] (unpublished report, copy on file with authors). See also *infra* Part V (discussing the Fishkind Report in greater detail). Press release from Tort Reform United Effort, Media Advisory (Oct. 27, 1997) "TRUE Coalition Details Economic Impact of Tort Reform in Florida," (providing notice of a press conference to be held the following day) (copy on file with authors).

25. In contrast, economist Frederick Raffa found that the cost of liability insurance per capita in Florida, in 1991, was \$156 and \$203 in 1995. See Frederick A. Raffa, Ph.D., *Comments on the Economic Analysis Contained in the Economic Impact Report Prepared*

gation in Florida and lower litigation costs, and that House Bill 2117 could reasonably be expected to lower tort costs in Florida by \$1 billion.²⁶ TRUE immediately began trumpeting that “abusive lawsuits costs every Floridian \$655 annually,”²⁷ an outlandish exaggeration and little more than an advocate’s fantasy to support a political agenda.²⁸ The report’s principal author subsequently and implausibly opined that the \$1 billion savings per year “translates into an increase of over 28,000 jobs, \$470,000,000 in income and \$1,475,000,000 in total sales.”²⁹ The report became the most important, if not exclusive, source of the notion that the tort reforms under consideration would have a positive impact on Florida’s economy.

The 1997-1998 hearings led to several new bills being filed for the 1998 Session.³⁰ The House Civil Justice & Claims Committee divided up the various issues and addressed them in separate committee bills. The House bills included House Bill 3871, relating to products liability; House Bill 3873, relating to punitive damages; House Bill 3875, relating to premises liability; House Bill 3879, relating to comparative fault and joint and several liability; and House Bill 3881, relating to a variety of procedural reforms.³¹ Once introduced, all of the House bills went straight to the floor and were passed out of the House early in the session.

The Chairman of the Senate Select Committee on Litigation Reform, Senator John M. McKay, (Bradenton, Repub.) filed Senate Bill 874, which combined the Select Committee’s recommendations into a single bill.³² Senate Bill 874 was referred directly to the Senate Rules Committee (bypassing the Senate Judiciary Committee), which

by Fishkind & Associates, Inc. for Tort Reform United Effort 3 (unpublished report, copy on file with authors).

26. Fishkind Report, *supra* note 24.

27. Press release from Tort Reform United Effort, (Oct. 28, 1997), “TRUE Business Coalition Details Economic Impact of Tort Reform in Florida” (outlining findings presented at press conference) (copy on file with authors).

28. There are numerous methodological and other problems with this “research,” not the least of which is that the report’s authors equate tort costs with insurance premiums on a dollar-for-dollar basis and fail to consider any of the numerous benefits of the tort system and other costs that would be incurred without it. *See infra* Part V (discussing problems with this research).

29. Letter to Senator John McKay from Henry Fishkind (Dec. 10, 1997) (attachment to December 18, 1997, memorandum from Greg Krasovsky, Staff Director of the Senate Select Committee on Litigation Reform to all Select Committee members) (copy on file with authors).

30. Technically, House Bill 2117 was also still before the Legislature. *See supra* note 22 and accompanying text. However, the Legislature took no action on House Bill 2117 in 1998.

31. *See* Fla. HB 3871 (1998); Fla. HB 3873 (1998); Fla. HB 3875 (1998); Fla. HB 3879 (1998); Fla. HB 3881 (1998).

32. Under the Senate Rules, the Select Committee did not have the authority to file a committee bill. *See* FLA. S. RULE 2.39 (1996-1998).

adopted a committee substitute for the bill.³³ The full Senate passed Committee Substitute for Senate Bill 874 almost a month after the House had taken up its bills.

The subsequent Conference Committee Report on Committee Substitute for Senate Bill 874, like its predecessor, House Bill 2117, addressed joint and several liability, punitive damages, a products liability statute of repose, and vicarious liability (limited, however, to vicarious liability only with regard to the operation of motor vehicles rather than to all types of personal property).³⁴ It also included a variety of additional substantive and procedural changes to the civil justice system.³⁵

The recommendations of the conference committee were adopted by both houses; the bill passed the House by a vote of 70-46 and the Senate by a vote of 24-16. The bill was promptly vetoed by Governor Chiles, who said:

I made it clear to the 1998 Florida Legislature that I could not accept a civil reform bill that gave untoward economic windfalls to big business, that did not provide adequate compensation to innocent victims, and that failed to protect Florida consumers. I urged the Legislature to enact a balanced bill that corrected the problems in our civil justice system, while ensuring that there remain adequate remedies to victims of unlawful harm.

. . . .

Unfortunately, a deeply divided Legislature sent me a highly controversial and extreme bill that would leave Floridians exposed to potentially harmful products and actions without adequately compensating victims for injuries those products and actions will cause. This bill would make some helpful changes to our civil justice system, but because this bill will do much more harm than good to Floridians, I am compelled to veto Committee Substitute for Senate Bill 874.

. . . .

. . . This bill does not promote a strong economy, but exposes our citizens to risk and injury, and imposes upon our taxpayers unwarranted and unjustified expenses. That is not fair to Floridians. The people of Florida, and visitors to our state, deserve to be protected and compensated in the unfortunate event that they are injured or victimized. This bill would not only erode those protections significantly, but it would shift the costs of the system from wrongdoers to Florida taxpayers. As Governor, I am duty bound to

33. See Fla. CS for SB 874 (1998).

34. See Fla. CS for SB 874 (1998).

35. See Appendix for a detailed listing of all of the provisions of Committee Substitute for Senate Bill 874 (1998).

protect our citizens, and I must ensure that those who commit wrongful acts remain primarily responsible for paying for those wrongful acts. I cannot allow this bill to become the law of this state.³⁶

Following the November 1998 general elections, the business community knew it would soon be working with a Republican governor³⁷ who, during the campaign, had declared that he would have signed Committee Substitute for Senate Bill 874 had he been governor in 1998.³⁸ The newly-elected legislature moved quickly to rekindle the tort reform flames. Senate sponsors split up the tort reform issues among four bills for the 1999 Session. Senate Bill 236 (Jack Latvala, Palm Harbor, Repub.) addressed rental motor vehicle vicarious liability and the statute of repose for products liability cases, Senate Bill 374 (John F. Laurent, Bartow, Repub.) addressed procedural issues and included revisions to joint and several liability, and Senate Bill 376 (Tom Lee, Brandon, Repub.) addressed negligent hiring, premises liability, and punitive damages.³⁹ Workshops and hearings on the bills were conducted by the Senate Judiciary Committee during February and March 1999, and the bills were brought to the floor for a vote during what was only the second week of the 1999 Session.⁴⁰

The House rolled everything into one committee bill, House Bill 775, introduced by the House Judiciary Committee. House Bill 775 went to the floor and was approved in the House by a vote of 86-33 on the same day that the Senate took up its bills.⁴¹ Upon receipt of House Bill 775, the Senate substituted the language of the four Senate bills for the House language and immediately sent it back to the House on March 10, 1999. With a stalemate occurring between the two houses, each refusing to accede to the other, the compromise bill emerged from negotiations in conference committee over the next

36. Veto of Fla. CS for SB 874 (1998) (letter from Gov. Chiles to Sec'y of State Sandra Mortham, May 18, 1998) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.) [hereinafter Chiles].

37. Republican Jeb Bush was elected to replace the retiring Democratic Governor, Lawton Chiles. Although the newly elected legislators take office upon election in November, the governor is not inaugurated until the following January. See FLA. CONST. art. III, § 15(d); FLA. CONST. art. IV, § 5(a).

38. See Peter Wallsten, *Lawsuit Limits a Campaign Issue*, ST. PETE. TIMES, Aug. 22, 1998, at 4B.

39. Taken together, the four bills addressed most of the provisions in Committee Substitute for Senate Bill 874; however, not all of these provisions were identical to those in the enrolled version of Committee Substitute for Senate Bill 874. The bills collectively bore more similarity to the original Committee Substitute for Senate Bill 874, as adopted by the Senate Rules Committee.

40. The bills were taken up on second reading on March 9, 1999 and on third reading on March 10; each bill passed by a vote of 39-0.

41. It was taken up and amended on March 9, 1999 and passed, as amended, on March 10 (introduced and placed on calendar March 2, 1999).

three weeks. The new bill differed from both the House and Senate proposals (as well as from the prior year's Committee Substitute for Senate Bill 874) in a number of ways, but retained the major themes of the earlier proposals.⁴² On April 30, 1999, after substantial debate, the House adopted the Conference Committee Report and passed the bill, as amended, by a vote of 84-33. The Senate followed suit shortly thereafter by a vote of 25-14. Governor Bush signed the bill into law on May 26, 1999.⁴³

III. SIGNIFICANT ISSUES IN HOUSE BILL 775

The enacted law contains the following four core issues that have been key elements of the tort reform movement and are calculated to have the most substantial impact on tort practice: joint and several liability, punitive damages, products liability statute of repose, and motor vehicle vicarious liability.

A. *Joint and Several Liability*

Joint and several liability refers to the doctrine under which tortfeasors who are jointly at fault in causing the harm are each potentially held individually liable for total damages caused by all of the joint tortfeasors.⁴⁴ Dean John W. Wade has explained that the notion of assigning a percentage share of fault to each of several defendants but holding each 100% liable to the plaintiff was developed *for the benefit of defendants*.⁴⁵ Previously, a plaintiff could sue any tortfeasor who was the proximate cause of the plaintiff's injury and recover fully. It fell to the defendant to bring separate actions against other responsible actors for contribution. Permitting the joinder of multiple wrongdoers and assigning percentages of fault eliminated the burden on defendants of pursuing a multiplicity of actions with potentially inconsistent results. The percentage share did not represent the amount of harm defendant caused, but rather the amount he could be required by other joint tortfeasors to contribute.⁴⁶

For example, if a plaintiff visited three doctors, each of whom negligently failed to diagnose the plaintiff's cancer, each could be 100% liable to the plaintiff. To insist that each doctor caused only one-third of the plaintiff's injury, or that the same negligence caused only one-fourth of the harm when yet another doctor was responsible

42. See Appendix for a complete listing of provisions compared to the 1998 and 1997 legislation.

43. See Fla. HB 775 (1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400).

44. See BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

45. See John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 194-97 (1986).

46. See *id.*

for misdiagnosis is irrational. It is even more irrational to insist that it is more equitable for the innocent plaintiff, rather than the negligent defendant, to bear the risk of nonrecovery from one or more joint tortfeasors.⁴⁷

The misconception of the doctrine of joint and several liability among legislators interfering with the centuries-old common-law concept has generally and directly been attributed by scholars to an “intensive, lavishly financed campaign”⁴⁸ for “special-interest legislation . . . primarily for the benefit of insurance companies.”⁴⁹ “Reform” of joint and several liability—of the kind enacted in House Bill 775—is merely the result of “raw interest group politics” with little regard to fairness.⁵⁰

The doctrine of joint and several liability has been a part of the common law since early times and was explicitly adopted in Florida by the Florida Supreme Court in 1914.⁵¹ When the Florida Supreme Court discarded the harsh doctrine of contributory negligence in favor of comparative negligence in 1973, the court retained the doctrine of joint and several liability.⁵² Shortly thereafter, the Florida Supreme Court and the legislature, nearly simultaneously, created a right of contribution—the right of one joint tortfeasor who has paid more than his share of a judgment to seek reimbursement from the other joint tortfeasors.⁵³

The application of the doctrine of joint and several liability was substantially limited by the legislature in 1986 as part of the Tort Reform and Insurance Act of 1986.⁵⁴ The changes included: 1) abolition of joint and several liability for noneconomic damages; 2) abolition of joint and several liability for economic damages except with respect to a defendant whose fault for the injury equals or exceeds that of the plaintiff; and 3) retention of joint and several liability in cases where the total damages are \$25,000 or less, notwithstanding the foregoing. This scheme was further altered by a 1993 Florida Supreme Court decision, which decreed that juries are required to re-

47. *See id.* at 197.

48. *Id.* at 207.

49. *Id.* at 209.

50. Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1148 (1988) (arguing joint and several liability is consistent with notions of corrective justice).

51. *See Louisville & Nashville R.R. Co. v. Allen*, 65 So. 8 (Fla. 1914).

52. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

53. *See* FLA. STAT. § 768.31 (1975) (taking effect while the Florida Supreme Court was preparing its decision in *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975)).

54. *See* Act effective July 1, 1986, ch. 86-160, § 60, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.81(3) (1987)).

duce a defendant's liability by apportioning fault to persons who are not parties to the suit— including parties immune from suit.⁵⁵

Chapter 99-225, Florida Laws, further limits joint and several liability by imposing a series of caps on damages and fault thresholds.⁵⁶ The new law provides a scheme so Byzantine that it can only be explained as a creature of political compromise. Under the new law, application of the doctrine of joint and several liability to a particular defendant whose fault equals or exceeds that of a particular plaintiff is determined as follows:

- A defendant whose fault is 0-10% is not subject to joint and several liability; *except*, if the plaintiff is without fault, a defendant whose fault is less than 10% is not subject to joint and several liability;
- For a defendant whose fault is more than 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of \$200,000; *except*, if the plaintiff is without fault, then for a defendant whose fault is at least 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of \$500,000;
- For a defendant whose fault is at least 25% but not more than 50%, joint and several liability does not apply to that portion of economic damages in excess of \$500,000; *except*, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of \$1,000,000; and,
- For a defendant whose fault is greater than 50%, joint and several liability does not apply to that portion of economic damages in excess of \$1,000,000; *except*, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of \$2,000,000.⁵⁷

In addition, chapter 99-225, Florida Laws, also eliminates the across-the-board application of the doctrine of joint and several liability to cases where the total damages are \$25,000 or less and addresses the issue of how the alleged fault of a nonparty (per *Fabre v. Marin*)⁵⁸ is to be handled. A defendant's joint and several liability is specified as being in addition to the defendant's proportional liability for economic and noneconomic damages.

55. See *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

56. See Act effective Oct. 1, 1999, ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419 (codified at FLA. STAT. § 768.81 (1999)).

57. See Ch. 99-225, § 27, 1999 Fla. Laws at 1419. As under current law, a defendant is liable for its proportional share of both economic and noneconomic damages and is not subject to the doctrine of joint and several liability if its percentage of fault is less than the plaintiff's. See *id.*

58. See *Fabre*, 623 So. 2d at 1185 (discussing issue of nonparty fault).

The 1999 Act further substantially limits a plaintiff's ability to recover *economic* losses such as medical expenses. This adverse impact is directly related to the seriousness of the injury, and it obviously and most harshly affects the most catastrophically injured claimants—those with large medical expenses. As was pointed out by Governor Chiles in his veto message for the predecessor bill, an injured person's necessary medical expenses rendered uncollectible from the wrongdoer by this provision will not somehow magically disappear but will instead become a burden that is shifted to the innocent—the injured victim, the health care system, and the taxpayers.⁵⁹ Moreover, what may appear to some to be generously high caps on the damages subject to joint and several liability are illusory because they are tied to high fault thresholds. The \$1,000,000 cap (\$2,000,000 if plaintiff is faultless) only applies to a defendant who is more than 50% at fault, even if the defendant's share of damages would be \$5,000,000 if they were 40% at fault.

Furthermore, there can *never* be more than one defendant in a case who will be jointly and severally liable for more than \$1,000,000 (or \$2,000,000 if plaintiff is faultless), and frequently, there will never be *any* defendant who can be held liable for that amount.

The complex formula contained in the law delivers inequitable, if not bizarre, results. For example, a 1% difference in a plaintiff's comparative fault results in a 100% difference in economic damages subject to joint and several liability (a faultless plaintiff can receive up to \$2,000,000 in damages subject to joint and several liability whereas a plaintiff who is 1% at fault is limited to a \$1,000,000 cap on damages subject to joint and several liability). And, if a plaintiff is faultless, a defendant who is 10% at fault will be subject to joint and several liability, but if the plaintiff is 1% at-fault, a defendant who is 10% at fault *will not* be subject to joint and several liability. Other aspects of the formula are mathematically imprecise and thereby leave the door open to different results from similar circumstances depending on how the calculations are performed.

B. Punitive Damages

Punitive damages are traditionally awarded in response to behavior worthy of especial condemnation. They are imposed to punish the defendant for extreme wrongdoing and to deter others from en-

59. In his letter to Secretary of State Sandra Mortham, Governor Chiles stated: "This [provision] has the potential to deny full compensation to those who need it most: those victims who suffer catastrophic injuries, some of whom may require a lifetime of medical care, or the families of victims who are killed by a wrongful act. If these costs are not borne by the wrongdoers, they inevitably will be unfairly borne by all Floridians." Chiles, *supra* note 36.

gaging in similar conduct.⁶⁰ The character of negligence necessary to sustain a recovery of punitive damages is the same as for conviction for manslaughter.⁶¹ Prior to the passage of chapter 99-225, Florida Laws, punitive damages could be awarded only if the conduct causing the injury to the claimant:

- (1) . . . was so gross and flagrant as to show a reckless disregard for human life or of the safety of persons exposed to the effects of such conduct; or
- (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or
- (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or
- (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.⁶²

Punitive damages “have long been a part of traditional state tort law.”⁶³ In fact, punitive damages were well-established as a part of the common law well before the American Revolution.⁶⁴ The U.S. Supreme Court recently reiterated:

“It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions *for more than a century* are to be received as the best exposition of what the law is, the question will not admit of argument. . . .”

. . . .

60. See *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981) (holding that before an employer can be held liable for punitive damages under the doctrine of respondeat superior, there must be a showing of fault on the employer's part).

61. See *Carraway v. Revell*, 116 So. 2d 16, 20 (Fla. 1959).

62. FLORIDA STANDARD JURY INSTRUCTIONS, § PD 1 (1997); see also *Carraway*, 116 So. 2d at 20 n.12.

63. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

64. See *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (validating exemplary damages as compensation, punishment, and deterrence). See also, 3 WILLIAM BLACKSTONE, COMMENTARIES 137-38 (reprinted 1992) (1765-1769).

"This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."⁶⁵

Florida law has been consistent with these teachings. The degree of punishment to be imposed has been a matter for the jury to decide, and punitive damages were to be held excessive only when they bore no relation to the amount a defendant was able to pay and when the tort lacked the required degree of malice or disregard for rights.⁶⁶

The 1986 Act imposed several statutory restrictions on punitive damages. It imposed on plaintiffs a prerequisite that the plaintiff first make an evidentiary showing of a reasonable basis for recovery before punitive damages could even be claimed.⁶⁷ It presumptively capped punitive damages at three times the amount of compensatory damages in any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty and involving willful, wanton, or gross misconduct; this was subject to a plaintiff being able to exceed the cap by a clear and convincing showing that the greater amount is not excessive.⁶⁸ Also, the state was given 60% of the amount of all punitive damage awards, which was amended in 1992 to 35%.⁶⁹

The 1999 legislation makes it more difficult for a plaintiff by requiring that the plaintiff prove entitlement to an award of punitive damages by clear and convincing evidence. It also limits the type of wrongful behavior for which punitive damages can be awarded. The current standard was changed to "intentional misconduct" or "gross negligence," which is defined in the bill to require "conscious disregard or indifference," in other words, essentially intentionally wrongful conduct.⁷⁰ As was the case with joint and several liability, the compromise that became the 1999 Act similarly applies a complex formula to cap punitive damages according to criteria linked with the

65. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991) (emphasis added) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)); *see also* *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) (stating that "[t]he discretion of the jury in [punitive damages] cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice").

66. *See* *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978); *Lassitter v. International Union of Operating Eng'rs*, 349 So. 2d 622, 626-27 (Fla. 1976).

67. *See* Act effective July 1, 1986, ch. 86-160, § 51, 1986 Fla. Laws 695, 748-49 (codified at FLA. STAT. § 768.72 (1987)).

68. *See id.* § 52, 1986 Fla. Laws at 749 (codified at FLA. STAT. § 768.73(1)(a), (b) (1987)).

69. *See id.* (codified at FLA. STAT. § 768.73(2)(b) (1987)). The state share was repealed by operation of a sunset provision. *See* Act effective July 1, 1995, ch. 92-85, § 3, 1992 Fla. Laws 821, 822 (repealing FLA. STAT. § 768.73(2)).

70. Act effective Oct. 1, 1999, ch. 99-225, § 22, 1999 Fla. Laws 1400, 1416 (amending FLA. STAT. § 768.72 (1999)).

nature of the wrongful conduct. Generally, punitive damages are limited to the greater of \$500,000 or three times compensatory damages. If the defendant's wrongful conduct was motivated solely by "unreasonable financial gain" and the defendant had actual knowledge of the dangerous nature of the conduct, then punitive damages are limited to the greater of \$2,000,000 or four times compensatory damages. Where at the time of *injury*, however, the defendant had *specific* intent to harm *the claimant*, there is no limit on punitive damages.

The 1999 Act goes on to limit multiple awards of punitive damages against an entity. The Act provides that there can be no punitive-damage award based on the same act or single course of conduct for which punitive damages have already been imposed by any court—a Florida court, any other state's court, or any federal court—unless the court determines by clear and convincing evidence that the total of any and all prior awards was insufficient to punish the defendant.⁷¹ In such cases, then, the court may allow the jury to award punitive damages.⁷² The court is allowed to "consider" whether or not the defendant has ceased the egregious conduct. If a jury verdict is allowed, the court is required to reduce it by an amount equal to the total amount of all earlier punitive damage awards made against the defendant for that act or course of conduct; however, the jury is not to be informed that this reduction will be made.⁷³

The law also immunizes employers from liability for punitive damages based on an employee's actions unless the employer actively participated in or approved the conduct, or engaged in grossly negligent conduct that contributed to the loss.⁷⁴ The 1999 Act provides an exception to the new caps and pleading requirements for cases involving child abuse, abuse of the elderly or developmentally disadvantaged, cases arising under chapter 400 (relating to nursing homes, ACLFs, etc.), and cases where the defendant was intoxicated.⁷⁵

The 1999 Act arguably drives punitive damages to the brink of extinction in Florida. The new law effectively outlaws punitive damages for anything but consciously intentional misconduct and only if that misconduct has not been previously punished and cannot be pawned off as the *ultra vires* act of an employee.⁷⁶ For the resolute plaintiff who manages to surmount all these hurdles, the 1999 Act

71. See *id.* § 23, 1999 Fla. Laws at 1416-17 (amending FLA. STAT. § 768.73 (1999)).

72. See *id.*

73. See *id.*

74. See *id.* § 22, 1999 Fla. Laws at 1416 (amending FLA. STAT. § 768.72 (1999)).

75. See *id.* §§ 24, 25, 1999 Fla. Laws at 1418-19 (codified respectively at FLA. STAT. §§ 768.735-.736 (1999)).

76. See *id.* §§ 22, 23 1999 Fla. Laws at 1416-17 (amending FLA. STAT. §§ 768.72-.73 (1999)).

provides deceptively generous limits. Although these caps may look generous at first blush, careful reading of the standards for both the second and the third tier reveal that, in practice, these levels may well turn out to be virtually unattainable because of the near impossibility of proving the requisite actual knowledge and intent to cause harm.⁷⁷ Punitive damages are even capped for “intentional misconduct” as defined in the statute!⁷⁸ Under the 1999 Act, there is, however, one theoretical level of wrongful conduct with regard to which no cap applies—it must involve a specific intent to harm *the claimant at the time of injury*.⁷⁹ The problem is that the conduct must be even worse than intentional misconduct and the burden of proof is more onerous.⁸⁰ It follows that since the requisite intent to harm the claimant must coexist in time with the claimant’s injury, it would seem that there can never be a non-capped punitive damages award when the manifestation of the injury occurs at some time after the wrongful act—as is the situation in every products liability case where the wrongful act takes place at manufacture.

C. Vicarious Liability of Motor Vehicle Owners

Vicarious liability refers to the doctrine whereby liability or responsibility for one person’s acts is imputed to another person, such as the employer of the person engaged in the wrongful act.⁸¹ Traditionally, vicarious liability has applied in the area of inherently dangerous devices. Florida courts have used this doctrine to hold the owner of a motor vehicle vicariously liable for injury caused by the negligence of another person whom the owner allows to use the vehicle.⁸² The rule applies equally to rental cars.⁸³ However, vicarious liability does not apply when the vehicle has been stolen or when the operator of the vehicle secures the vehicle by fraud and keeps the vehicle without authorization⁸⁴ or to the situation where injuries are caused by an employee of a repair facility with whom the car was left.⁸⁵

77. Consider that to reach the second tier, for example, the plaintiff must prove that “unreasonable financial gain” (whatever that means) was a defendant’s *sole motivation*. Even if that is possible, it passes only the first prong of the test in proving actual knowledge of the dangerous nature of the conduct. *See id.* § 23, 1999 Fla. Laws at 1417 (codified as FLA. STAT. § 768.73((1)(b))).

78. *See id.*

79. *See id.*

80. *See id.*

81. *See* BLACK’S LAW DICTIONARY 927 (7th ed. 1999).

82. *See* Southern Cotton Oil Co. v. Anderson, 86 So. 629, 631 (Fla. 1920).

83. *See* Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832, 836-37 (Fla. 1959).

84. *See* Hertz Corp. v. Jackson, 617 So. 2d 1051, 1053-54 (Fla. 1993) (“conversion” or “theft exception”).

85. *See* Castillo v. Bickley, 363 So. 2d 792, 793 (Fla. 1978) (“shop exception”).

The 1999 Act amends section 324.021, *Florida Statutes*, to cap the vicarious liability of motor vehicle owners.⁸⁶ The owner's liability is limited to \$100,000 per person/\$300,000 per incident, plus \$500,000 additional for economic damages if the vehicle lessee or operator has combined insurance coverage of less than \$500,000.⁸⁷ These caps apply to rental vehicles and to all privately owned vehicles operated by another with the owner's permission.⁸⁸ The bill contains an exception, however, that allows the assertion of liability for certain vehicles used in the owner's commercial activities, such as a fleet of delivery trucks, and for certain commercial vehicles used to carry hazardous products under certain conditions.⁸⁹ The 1999 Act provides a set-off against the owner's liability for all other available insurance or self-insurance covering the lessee or operator so that the owner's liability is directly reduced by the amount of such available insurance. Once again, the 1999 Act provides businesses with a windfall at the expense of the injured.

D. Product Liability Statute of Repose

A statute of repose creates a period of time within which an action must be commenced. In the products liability context where an action is based on manufacturing or design defect, a statute of repose cuts off a manufacturer's liability for injuries caused by a defective product when that product reaches an age equivalent to the repose period. If a person is injured by a defective product after its repose period has run, that person has no recourse against the manufacturer of the defective product.

At one time Florida had a twelve-year statute of repose for product liability actions.⁹⁰ Enacted in 1974, that law was declared unconstitutional, because, as applied, it violated the right of access to courts under Article I, Section 21 of the Florida Constitution.⁹¹ The Florida Supreme Court later receded from this decision,⁹² but the legislature shortly thereafter amended the law,⁹³ leaving no statute of repose in its place for products liability actions.

86. See Act effective Oct. 1, 1999, ch. 99-225, § 28, 1999 Fla. Laws 1400, 1421 (amending FLA. STAT. §324.021(9) (1999)).

87. See *id.*

88. See *id.* at 1421-22.

89. See *id.* at 1422.

90. See FLA. STAT. § 95.031 (1974).

91. See *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980), *overruled by Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659-60 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

92. See *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659-60 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

93. See Act effective July 1, 1986, ch. 86-272, § 2, 1986 Fla. Laws 2019-20 (amending FLA. STAT. § 95.031(2) (1985)).

There is, however, an eighteen-year federal statute of repose for certain general aviation aircraft.⁹⁴ The federal statute only applies to aircraft with a maximum seating capacity of twenty individuals. It does not apply to any aircraft used in scheduled commercial service, regardless of the aircraft's size.

The 1999 Act creates a twelve-year repose period but permits extension for defective products if the manufacturer has represented that the product has an expected useful life of longer than ten years, in which case the repose period runs to the end of the expected useful life or twelve years, whichever is greater.⁹⁵ This looks good on paper, but one must wonder how many manufacturers will actually subject themselves to this voluntary exception. With respect to commercial aircraft, the law contains two conflicting provisions. In one place, the 1999 Act clearly states that there is no repose period for such aircraft; but, in another place, it indicates—albeit in a somewhat oblique fashion—that there is a twenty-year repose period (unless the manufacturer warrants a longer expected useful life) on such aircraft.⁹⁶ The Act also contains exceptions for escalators, elevators, improvements to real property, and a twenty-year repose period for vessels.⁹⁷

The 1999 Act also provides a short-sighted exception for latent disease-causing products by waiving the repose period if the injury does not manifest itself within twelve years.⁹⁸ Still, it only applies if exposure to the product occurs within twelve years of sale.⁹⁹ This proviso effectively provides substantial immunity to manufacturers of products like asbestos or DES and leaves their victims to suffer without recourse.

The new law purports to provide for tolling of the repose period during the concealment of defects by a manufacturer.¹⁰⁰ This tolling provision, however, only applies if the injured person is able to prove that the officers, directors, or managing agents of the manufacturer had *actual knowledge* of the defect and took *affirmative steps* to conceal the defect.¹⁰¹ As with so many of the Act's provisions, what at first looks like a refuge for the victim is rendered illusory in actual practice by an impossible burden for a plaintiff to overcome. Unlike

94. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

95. See Act effective Oct. 1, 1999, ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. §§ 95.031(2)(b)1, 3 (1999)).

96. See *id.*

97. See *id.* Improvements to real property are already subject to a fifteen-year statute of repose pursuant to section 95.11(3)(c), *Florida Statutes*. See FLA. STAT. § 95.11(3)(c) (1997).

98. See Ch. 99-225, § 11, 1999 Fla. Laws at 1411 (amending FLA. STAT. §§ 95.031(2)(b)1, 3).

99. See *id.*

100. See *id.*

101. See *id.*

most of the Act, the new statute of repose takes effect July 1, 1999 (as opposed to October 1), and it applies retroactively to products already on the market.¹⁰² However, any action that would otherwise be barred by the new changes and that arose before the effective date can be brought before July 1, 2003.¹⁰³ Once again, the legislature has granted to businesses a financial windfall at the expense of Florida consumers.

IV. CONSTITUTIONAL RIGHTS AT STAKE

While there are considerable economic and conceptual flaws that plague the 1999 Act, it is also critical to understand that the right of the people to seek redress for their injuries in court is a constitutional right of the first order. As was declared by the U.S. Supreme Court in the most seminal decision in all of constitutional law: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."¹⁰⁴ This essential duty was made explicit in the constitutions of the vast majority of states.¹⁰⁵ Other states have interpreted their constitutions to embrace such a right.¹⁰⁶ Florida's constitution similarly and explicitly guarantees courts available "to every person for redress of any injury, and justice . . . administered without sale, denial or delay."¹⁰⁷

As such, meaningful access to the courts is a fundamental right—a right that the U.S. Supreme Court has also recognized.¹⁰⁸ The importance of this right cannot be overemphasized. No law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."¹⁰⁹ The vindication of rights that courts comprehend within this constitutional protection includes full and fair compensation for the full range of civil wrongs. In 1992, for example, the Supreme Court acknowledged that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the

102. *See id.* § 12, 1999 Fla. Laws at 1411.

103. *See id.*

104. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

105. Thirty-eight states have constitutional provisions that guarantee a right to a "certain remedy." JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW* § 6-2(a), at 347 n.11 (1996).

106. *See, e.g., Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1161 (N.M. 1988) (recognizing that a limit on liability violates an implicit guarantee to the fundamental right of access to the courts that is derived from the right of redress for grievances and the right to due process).

107. FLA. CONST. art. I, § 21.

108. *See United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971).

109. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964).

violation of his legal rights.”¹¹⁰ These injuries may well include emotional distress and pain and suffering.¹¹¹

The guarantee of access to the courts would be hollow indeed if it was capable of being eroded by the kinds of indirect restraints contained in the 1999 Act. Traditionally, however, the due process clauses of the nation’s state constitutions stand as a bulwark against such erosion by guaranteeing, at the most primary of levels, an opportunity to be heard “at a meaningful time and in a meaningful manner.”¹¹² As the Florida Supreme Court has recognized, legislation affecting the judicial process must assure “a fair trial in a fair tribunal.”¹¹³ The court went on to note that “[n]ot only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”¹¹⁴ So-called “reforms” that effectively tilt the civil justice playing field in a manner that encumbers the quest for fairness violate these fundamental constitutional tenets.

These rights cannot easily be swept away by countervailing governmental interests, especially ones as flimsy as those asserted by tort-reform advocates. The U.S. Supreme Court has recognized that even a legitimate concern that the enacted reforms are designed to address—“the dangers of baseless litigation”—are insufficient to justify legislative remedies that would seriously cripple the vindication of rights through the judicial process.¹¹⁵ The Florida Supreme Court has adopted a similarly strong stance against legislative interference with access to the courts. In *Kluger v. White*,¹¹⁶ the court held that the legislature was without power to abolish a common-law cause of action unless it provided an adequate alternative or was able to assert both overwhelming public necessity and a lack of alternatives.

In determining whether the legislature has met its burden, the court has conceded that deference should be given to legislative findings.¹¹⁷ In this instance, there are no legislative findings to consider. At the eleventh hour of this lengthy legislative process, there was a curious attempt to interject legislative findings into the final product to explain why the legislature was taking away the rights of

110. *United States v. Burke*, 504 U.S. 229, 235 (1992) (quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978)).

111. *See id.*

112. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

113. *Koehler v. Florida Real Estate Comm’n*, 390 So. 2d 711, 712 (1980) (quoting *In re Murchison*, 349 U.S. 133, 136 (1965) (finding that such fairness was “a basic requirement of due process”).

114. *Id.* (quoting *Murchison*, 349 U.S. at 136).

115. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 223 (1967) (citations omitted).

116. 281 So. 2d 1, 4 (Fla. 1973).

117. *See, e.g., University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993).

its citizenry. Near the end of the Conference Committee process, at a March 28 meeting of the Senate conferees, Senator Latvala, Chair of the Senate conferees, presented the members with the latest Senate proposal for their consideration. Among the other provisions in Senator Latvala's proposal, and one that appeared here for the first time during the three years of deliberation on the tort reform bills, was a collection of legislative findings that were obviously calculated to shore up the legislation against growing concerns over its unconstitutionality.¹¹⁸

As Senator Latvala, a nonlawyer, had served neither on the 1999 Senate Judiciary Committee nor on the 1998 Senate Select Committee on Litigation Reform, one must wonder at his remarkable ability to distill so concisely two years worth of largely technical legal testimony, which he was not present to hear. Senator John A. Grant (Tampa, Repub.), a member of the Conference Committee and Chair of the Senate Judiciary Committee, immediately challenged the inclusion of these findings pointing out that, based on what went on during committee deliberations, there was no factual basis for these

118. Section 1 of Draft Senate Amendment No. 0000.1a provided:

Section 1. Legislative findings.—The Legislature finds that the provisions of this Act serve overpowering public necessities, including:

- (1) Enhancing the predictability and uniformity of the civil justice system so that citizens and businesses can conform their conduct to avoid liability;
- (2) Preserving societal cohesion by encouraging citizens to resolve their disputes amicably, rather than by filing civil actions or engaging in litigious behavior;
- (3) Stimulating economic development and productivity by limiting economic waste and reducing the cost of obtaining liability insurance;
- (4) Strengthening the state's competitive posture;
- (5) Enhancing the state's ability to attract manufacturing businesses which provide stable and high-paying jobs, which in turn will help to create a tax base sufficient to fund the vital responsibilities of state government;
- (6) Aiding consumers by encouraging innovation and the development of new products and by reducing the cost of products currently on the market;
- (7) Protecting citizens and businesses from the threat of frivolous and protracted litigation which consumes resources, costs jobs and coerces undeserved settlements; and
- (8) Encouraging personal responsibility by moving away from a social-welfare model of allocating damages and toward a model which equates liability with fault;
- (9) In accordance with the Florida Supreme Court pronouncement in *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973), the Legislature finds that "in the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault"; and
- (10) In accordance with the Florida Supreme Court pronouncement in *Fabre v. Marin*, 623 So.2d 1182, 1187 (Fla. 1993), the Legislature finds that "there is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.

Section 1 of Draft Senate Amendment No. 0000.1a, dated 1:50 PM Apr. 28, 1999.

findings. Although no vote was taken on Senator Grant's point, the "findings" disappeared from subsequent drafts, never to return.¹¹⁹

The next day, when Representative Johnnie B. Byrd, Jr. (Plant City, Repub.) Chair of the House Judiciary Committee, presented the Conference Committee Report on the House floor, his remarks included his view on the bill's legislative intent. The script was essentially the same as the one Senator Latvala used, and the remarks made it clear that the major justification for passing the legislation was to promote economic development:

Finally members, I would say that the legislative intent of the conference report and the bill would be to enhance the predictability and uniformity of the civil justice system. The conference report would enhance substantial fairness in our system. Today people have to pay even when they are innocent of wrongdoing. The conference report would encourage an amicable resolution of disputes through alternate dispute resolution such as mediation and arbitration. *The conference report would help stimulate economic development and productivity. . . . It will encourage innovation in new products and it will enhance the ability to attract a better manufacturing base.* It will discourage frivolous litigation, and finally, encourage personal responsibility by moving away from social engineering and welfare in the tort system by equating liability with fault. That is an explanation, Mr. Speaker, of the conference report.¹²⁰

As icing on the legislative intent cake, Chairman Byrd's statements as to the "goals that the legislation was necessary to accomplish" were reiterated in a somewhat more straightforward form in the final House Judiciary Committee staff analysis of House Bill 775.¹²¹ These justifications track the language of the Latvala proposal challenged the prior day even more closely. Moreover, the staff analysis goes on to point out that "the conclusions stated by Chairman Byrd in 1999 were informed by his membership on the [House Civil Justice and Claims Committee during the hearings of 1997-98]."¹²² Thus, it seems that, by the admission of its own chair, nothing presented to the House Judiciary Committee during its 1999 deliberations furthered the stated legislative goals of the 1999 Act.

119. Fla. S. Conf. Comm. on HB 775, tape recording of proceedings (Apr. 28, 1999) (on file with Secretary) (discussion between Sen. Latvala and Sen. Grant regarding legislative findings).

120. Fla. H.R., transcript of House floor debate on Conference Committee Report on HB 775 at 4 (Apr. 30, 1999) (on file with authors) (statement of Representative Byrd) (emphasis added).

121. Fla. H.R. Comm. on Judiciary Analysis, HB 775 (1999) Staff Analysis 21 (final May 15, 1999) (copy on file with authors).

122. *Id.*

It is difficult to comprehend how Representative Byrd could claim to speak for the collective intent of the legislature regarding the final product when no legislative findings of fact were ever actually approved by a vote of *any* legislative body at any time during the period from 1997 to 1999. Further, Representative Byrd was the only member of the House of Representatives who served on the House Civil Justice & Claims Committee and the Conference Committee on Committee Substitute for Senate Bill 874 in 1998, as well as the House Judiciary Committee and the Conference Committee on House Bill 775 in 1999.¹²³ Representative Byrd, by his own admission, indicated that the facts on which he based his conclusions were not even considered by the same legislature that enacted House Bill 775 into law.¹²⁴

V. THE "TORT TAX"

Although legislative findings were stripped from the 1999 Act before passage, the attempt to justify tort reform as a necessary spur to economic well-being became the mantra uttered as though it abrogated constitutional obligations. For this purpose, tort reform proponents relied heavily, if not exclusively, on a paper that has become known as the "Fishkind Report."¹²⁵ The report, prepared as an advocacy piece for tort reform proponents acting under the umbrella of Tort Reform United Effort,¹²⁶ makes no effort to appear as a disinterested scholar's report. Instead of examining the whole of the literature, it is a poorly informed survey of reforms enacted in other states and what other pro-tort reform groups have claimed about the benefits of tort reform.

The overall weakness of the report is demonstrated by, among other things, the fact that fewer than three pages—largely consisting of pie charts that reveal the subjective judgments of small business representatives about how much they like being sued—out of a total of twenty-five pages are devoted to Florida-specific data.¹²⁷ Even so, the Fishkind Report concedes that to quantify the impact of the tort system on Florida "accurately" would amount to or present "a difficult, expensive, and time-consuming task."¹²⁸ It is a task that the author does not attempt. Instead, because of "limitations of time and money," he relies entirely on what he characterizes as "secondary

123. Coincidentally, there was similarly only one member of the Senate, Senator Burt, who participated on all of the committees and conference committees.

124. The 1997-1998 hearings during which Rep. Byrd formed his conclusions were conducted by the Legislature whose biennium ended in November 1998.

125. See Fishkind Report, *supra* note 24; see also *supra* text accompanying notes 25-29.

126. Fishkind Report, *supra* note 24 at cover page.

127. See *id.* at 23-25.

128. *Id.* at 21.

data."¹²⁹ Such secondary data almost exclusively consists of studies done by other tort-reform advocacy groups in other states, notably the Beacon Hill Institute, concerning Massachusetts. The only Florida-specific information was gleaned from the National Federation of Independent Business survey of Florida's small businesses, a poll that came to the unremarkable conclusion that most respondents fear lawsuits.¹³⁰ This conclusion, however, miserably fails to justify overriding constitutional rights. Notably, the survey did not find that most respondents had been sued or subjected to untoward liability.

Fundamental to the Fishkind Report's analysis is the adoption of the idea that "most [economic] studies treat tort costs as a tax,"¹³¹ because businesses "either insure themselves against a loss, or . . . 'self insure' by raising their prices."¹³² Why the decision to insure oneself constitutes a tax is never explained and is inconsistent with the definition of a tax. A tax is defined as "a pecuniary burden laid upon individuals or property for the purpose of supporting the government"; a tax is distinguishable from a penalty, which is "in the nature of a punishment and is collectible usually by fine or by suit."¹³³ Instead, it is obvious that tort reformers have latched onto the "tax" terminology because of its value in the public opinion war, regardless of its inaccuracy. Criticizing the civil justice system as exacting a "tort tax" was a tactic widely adopted and employed by tort reform advocates in Florida during the debate over the 1999 Act.

The misguided idea that every American pays a "tort tax" to fund a lawsuit industry that is economically counterproductive first gained prominence in polemicist Peter Huber's book, *Liability: The Legal Revolution and Its Consequences*.¹³⁴ The "scholarship" Huber posited has been thoroughly discredited by reputable scholars, who have derided it as misleading, shaky, and riddled with errors.¹³⁵ Despite these criticisms, Huber's much-repeated assertion that the liability system costs the economy \$80 billion directly and \$300 billion indirectly¹³⁶ has had considerable staying power even though the figures are built on artifice. After Vice President Dan Quayle repeated the numbers, Professor Galanter detailed their specious origins:

Those who beat the antilawyer drum tell us, to take a statement made by the vice-president to a group of business leaders last Oc-

129. *Id.*

130. *See id.* at 23-25.

131. *Id.* at 21.

132. *Id.* at 22.

133. *Liberis v. Nee*, 10 F. Supp. 336, 337 (N.D. Fla. 1935).

134. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988).

135. *See, e.g.*, Kenneth J. Cheseboro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. L. REV. 1637, 1655-58 (1993) (recounting some of the many critiques).

136. *See HUBER, supra* note 134, at 4.

tober, that “the legal system . . . now costs Americans an estimated \$300 billion a year.” Three hundred billion? Where does that come from? The vice-president has it from the Council on Competitiveness (which he chairs), whose “Agenda for Civil Justice Reform,” released August 13, 1991, borrows it from an article in *Forbes*, which in turn took it from liability guru Peter Huber, who, it is fair to say, made it up.

From a single sentence spoken by corporate executive Robert Malott in a 1986 roundtable discussion of product liability, Huber, in his 1988 book *Liability: The Legal Revolution and its Consequences*, adopted an unsubstantiated estimate that the direct costs of the U.S. tort system are at least \$80 billion a year—a number far higher than the estimates in careful and systematic studies of these costs. Huber then multiplied Malott’s surmise by 3.5 and rounded it up to \$300 billion—and called that the indirect cost of the tort system. The 3.5 multiplier came from a reference in a medical journal editorial concerning the effects on doctors’ practices of increases in their malpractice premiums. Huber’s book contained no discussion of the applicability of this multiplier. It would appear that Huber, who has recently taken to lecturing on the dangers of “junk science,” certainly knows whereof he speaks.¹³⁷

The \$300 billion figure, the first and most repeated figure when claims are made that tort liability constitutes a form of tax, has also been ridiculed by scores of scholars and other prominent legal thinkers. Judge Roger Miner of the U.S. Court of Appeals for the Second Circuit, a conservative Reagan appointee, said that the “\$300 billion figure has been ‘demonstrated to be a product of casual speculation and not derived in any sense from investigative or statistical analysis.’”¹³⁸ Similarly, *The Economist* has scored the figure as having “no discernible connection to reality”¹³⁹ and for being “impossible to justify.”¹⁴⁰ Economist Peter L. Kahn said Huber’s numbers are “totally misleading” and “immensely overstate the cost of the tort system to society.”¹⁴¹ A law professor who examined the underlying sources for Huber’s claims found that they amount to a “huge exaggeration” and

137. Marc Galanter, *Pick a Number, Any Number*, AM. LAW., Apr. 1992, at 84.

138. Henry J. Reske, *In Defense of Lawyers: Conservative Judge Challenges Quayle Statistics*, A.B.A. J., Jan. 1993, at 33 (quoting Judge Roger J. Miner).

139. *Order in the Tort*, ECONOMIST, July 18, 1992, at 8, 13.

140. *Not Guilty*, ECONOMIST, Feb. 13, 1993, at 63 (explaining that increased tort litigation is not the cause of rising legal costs in the U.S.).

141. Peter L. Kahn, *Pricing the U.S. Legal System*, CHRISTIAN SCI. MONITOR, Sept. 11, 1992, at 19 (addressing the inaccuracy of statistics that are often quoted by tort reform advocates).

are “so misleading that they amount to little more than scare tactics.”¹⁴²

At the most elemental level, it is improper to view the costs associated with securing all Americans access to the courts as a tax. One leading scholar, now a federal appellate judge, has written that it is nonsensical to consider anything other than losses in evaluating the economic impact of accidents.¹⁴³

Others agree. Professor Richard Abel has written that “successful tort claims do not *create* liability costs, they merely *shift* [the costs] from victims to tortfeasors [wrongdoers]. It is the *tortfeasors* who create liability costs by injuring victims. . . . If liability costs are high, it is because injuries are frequent and serious.”¹⁴⁴ Professor Mark Rahdert echoes this point, warning against shifting liability, and its associated costs, away from those who cause injuries:

Shifting liability away from the manufacturer inevitably shifts it toward the victim. It makes the victim (and his or her cost-spreading pool) the bearer of the risk and, to the extent of that risk, the indirect insurer of the marketing initiative. Given that some victims are likely to be uninsured and others underinsured, what we have to ask is whether the social benefits of the marketing initiative in question justify imposing on a select group of victims the social and personal costs of uncompensated injury. In a society where the value of compensation for injury is esteemed, that is a choice we should never make lightly.¹⁴⁵

Professor Rahdert further asserts:

It is probably not particularly helpful to describe tort law as though it were tax law. There is a distinct rhetorical flavor to all arguments about the tort system that use the language of taxation

Perhaps the best way to get rid of the rhetoric is to eliminate the tax metaphor and to view the issue, less metaphorically, in insurance terms instead.¹⁴⁶

In fact, if one views the costs of liability not as a tax, but as an insurance cost, the justification for tort reform falls flat on its face.

Despite the ridicule heaped on it by scholars, the idea of the “tort tax” has remained a powerful rhetorical tool in the arsenal of the tort

142. Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 547, 579 (1990) (pointing out fallacies in figures used as support for tort reform efforts).

143. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS passim* (1970).

144. Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 446 (1987).

145. MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* 161 (1995).

146. *Id.* at 157-58.

reformers. Instead of relying on Huber's discredited, and even outdated, \$300 billion figure, tort reformers now trot out studies like the Fishkind Report as though they are authoritative. Yet these studies also suffer from poor methodology, exaggerated addition, a studied indifference to the system's benefits, and most important, a fundamental misunderstanding of what constitutes tort costs—namely, that all manner of insurance costs can be attributed to the tort system. By adopting the “tort tax” theory of other studies, the Fishkind Report compounded the flaws and errors that such studies contain.

A. *Beacon Hill Institute Study*

One of the “tort tax” “studies” most heavily relied upon by the Fishkind Report was produced by the Beacon Hill Institute.¹⁴⁷ Beacon Hill applied the national tort-cost figures to Massachusetts and concluded that the “tort system imposes an implicit tax—a ‘tort tax’—that penalizes business for creating jobs and capital, with predictable, negative effects on the economy.” Based upon this conclusion, Beacon Hill urged support of a civil justice reform measure that would “place new limits on the rights of tort plaintiffs under Massachusetts law.”¹⁴⁸

The Beacon Hill study starts with a figure of \$161 billion nationally.¹⁴⁹ Using inaccurate and flawed methodology, Beacon Hill adds

147. See BEACON HILL INSTITUTE, *ECONOMICS OF CIVIL JUSTICE REFORM IN MASSACHUSETTS* (1998).

148. *Id.* at v.

149. See *id.* at i (citing TILLINGHAST-TOWERS PERRIN, *TORT COSTS TRENDS: AN INTERNATIONAL PERSPECTIVE* (1995)) [hereinafter TTP REPORT]. The authors of the Tillinghast-Towers Perrin report, an insurance industry consulting firm, arrived at the figure by adding insurance benefits paid for injuries or damages caused by insureds, their costs for handling insurance claims or providing legal representation to insureds, and insurance company overhead. See *id.* at 5. TTP admits that much of the figure is derived from mere guesswork because there are no reliable figures for much of its calculation. See *id.* at 6. The \$161 billion figure is further inflated because it charges costs and expenses of the insurance industry to the tort system without accounting for the profits that insurance companies make off the premiums or the dividends paid to mutual policyholders (which under the Byzantine accounting methods used by the insurance industry are counted as “losses” rather than profit). Further, the wealth insurance companies generate by investing liability premiums—the bulk of the insurance industry's profits—is also not subtracted from the supposed societal costs. See generally ANDREW TOBIAS, *THE INVISIBLE BANKERS* (1982). Indeed, if one makes the claim that liability premiums are a cost to society, then it naturally follows that the investment return on these premiums must be considered a benefit somehow. Insurance companies are certainly not reluctant to disclose their losses, especially if it advances the tort reform cause, but these losses do not mean the insurance companies are not profitable.

This omission is readily acknowledged by TTP in its study:

The tort system also provides indirect benefits that are not measured in this study. Such benefits include a systematic resolution of disputes, thereby reducing conflict, possibly including violence. In this sense, compensation for pain and suffering is seen as not only fair, but beneficial to society as a whole. An-

an unarticulated and unknown percentage of other forms of insurance, including homeowners, farm owners, multi-peril, and product liability insurance (the last of which they incredibly and impossibly claim costs \$652 billion in Massachusetts—most likely a typographical error) to create their “tort tax.” Yet, the costs the Institute totals are not those of the tort system, but that of the insurance industry as a whole. Still, Beacon Hill claims its estimate is a conservative one because it does not calculate court costs, litigation costs, unnecessary medical procedures, or the disappearance of products or whole industries.¹⁵⁰

The Beacon Hill Report is the source for the Fishkind Report’s figure of a Florida tort tax of \$655 per person. Dr. Frederick Raffa of the University of Central Florida recalculated the Beacon Hill data, deleting the costs of multi-peril insurance that is unrelated to the tort system and arriving at net costs based on a comparison of per capita insurance premiums with per capita claims/benefits. He and arrived at a much lower per capita net insurance cost of \$156.37 in 1991 and \$203.25 in 1995.¹⁵¹ This analysis demonstrates that the claimed tort tax was strategically inflated to serve a political purpose.

Still, Beacon Hill’s reliance—and by extension, the Fiskind Report’s reliance—on insurance costs as a means of estimating the costs of the tort system is wholly inappropriate. Insurance, of course, is the means by which society spreads risks. Individuals purchase insurance on the chance that they may suffer a loss in the future, paying only a fraction of that potential loss. Most of us will not recoup those premiums paid, but some will suffer extraordinary losses that the money put into the insurance pool will cover. In many instances, neither insurance nor insurance payouts will have anything to do with the tort system. To achieve a sufficiently shocking figure about the cost of the system, the Beacon Hill “tort tax” toters throw in everything, including the kitchen sink. All paid insurance premiums are tallied in the analysis, including homeowners, crop and farm insurance, and other multi-perils. As a result, Beacon Hill charges the tort

other indirect benefit is that the tort system may act as a deterrent to unsafe practices and products.

TTP REPORT, *supra* at 9.

Robert Sturgis, the lead author of the TTP report, has been quoted in reference to an earlier report as saying, “we have settled upon a definition of gross cost without regard for the social and economic benefits that may be derived from the system.” Galanter, *supra* note 9, at 1142 n.193 (quoting Robert W. Sturgis, Address to the American Insurance Association (Nov. 14, 1985), *cited in* NATIONAL UNDERWRITER, Nov. 11, 1985). The result is a wildly inflated figure for tort costs.

150. See BEACON HILL INSTITUTE, *supra* note 147, at 54.

151. See Frederick A. Raffa, Comments on the Economic Analysis, *in* Fishkind & Assocs., Economic Impact Report 3 (1998) (unpublished report prepared for Tort Reform United Effort 3 (unpublished report, copy on file with authors)).

system with responsibility for hurricane, fire, flood and other damages that are often regarded as acts of God and unlikely to be the objects of tort liability.¹⁵²

As Floridians know even better than most, the damage incurred during natural disasters such as hurricanes, floods and tornadoes can be devastating and may amount to billions of dollars. Proponents of the “tort tax” notion, however, fail to explain why these costs should be attributed to the legal system. The fact is, the only lawsuits likely to arise from such natural catastrophes—rare by any measure—either would be *against* an insurance company for the bad-faith denial of a claim under a person’s disaster insurance policy or *by* an insurance company to recover for its payout against a contractor whose work was guaranteed to stand up to such catastrophes. Here, as is typically the case, the civil justice system exists to hold people and companies accountable for their clear responsibilities. Without such a system, our economy would be permeated with fraud and populated by con artists who know that they will never need to live up to their promises.

Moreover, treating liability insurance premium payments as a tort cost in other areas of recovery is a flaw of considerable dimension. Premiums finance the insurance industry, and their treatment as a tax turns that industry into little more than a parasite eating away at the economy. Yet, rather than robbing the economy of wealth, insurance premiums create significant investment profits that help pay insurance benefits, fuel other economic development, and generate real tax revenues. These profits and benefits do not materialize out of thin air, as the Beacon Hill study would have one believe, but are an offsetting economic advantage that the study fails to take into account. Nor does the study consider any benefits that might be derived from the tort system in the form of safer products, deterrence against negligent activity, or a reduction in the expenses that would otherwise have to be picked up by government and taxpayers.

Misrepresentation of the costs perhaps attributable to the tort system permeates the study. For example, Beacon Hill includes data from commercial liability,¹⁵³ which is usually a function of contract rather than tort law. Yet, the proposed reforms supposedly “tested” by the Beacon Hill study do not limit the right of businesses to sue, but only limit—by Beacon Hill’s own admission—tort plaintiffs.

One point the Beacon Hill study makes repeatedly is that tort costs are synonymous with state-levied taxes. Besides being little more than self-serving rhetoric, substituting tort costs for taxes in its

152. See BEACON HILL INSTITUTE, *supra* note 147, at 60.

153. *Commercial liability* here refers to litigation between businesses. See *id.* at 89.

econometric models compounds the distorted views regarding the “likely” impact of tort reform upon such economic indicators as employment, new capital, and tax revenues. The study’s authors go to great pains to show the theoretical similarities between tort costs and taxes. Rather than prove this point with either logic or empirical results, however, the authors rely on faulty assumptions and essentially view the comparison as self-evident, when it clearly is not.

For instance, in their introduction they write: “For analytical purposes, we can characterize the expansion in tort liability as a form of taxation. To be sure, it is an implicit and not an explicit form of taxation.”¹⁵⁴ Later, they “identify expansive tort liability as an implicit tax not to embrace perplexing language, but because there are well-developed principles concerning the economic analysis of taxation that can be extended to the economic analysis of expansive tort liability.”¹⁵⁵ In other words, the authors admit that they have to label tort costs as a tax in order for their models to work.

If one takes the position that these costs are not a tax at all, especially since they are not levied by a government entity to raise revenue, and they may not even be costs as much as transfer payments, then their econometric modeling is useless. It is a tempting and politically expedient idea for companies to equate any cost of doing business other than their internal production costs, research and development, marketing distribution, and other costs to a “tax,” given the general public’s disdain for taxes.

Still, these outside costs, such as insurance costs or the costs of complying with safety and other regulations, are also part of the production costs; they prevent businesses from imposing important costs on the general public. Just as society picks up the tab for cleaning up toxic waste that has been left behind by companies failing to adhere to environmental regulations, so does society ultimately pay for treatment of negligence victims whose injuries are not fully compensated by tortfeasors. Liability is part of the cost of doing business in America and in no way resembles a “tax.” Professor Rahdert’s point, mentioned earlier, bears repeating:

It is probably not particularly helpful to describe tort law as though it were tax law. There is a distinct rhetorical flavor to all arguments about the tort system that use the language of taxation

Perhaps the best way to get rid of the rhetoric is to eliminate the tax metaphor and to view the issues, less metaphorically, in insurance terms instead. From this perspective we have a group of indi-

154. *Id.* at 2-3.

155. *Id.* at 31.

viduals . . . who, by virtue of their common behavior, face a common risk of injury.¹⁵⁶

The Beacon Hill study expends significant space blaming Massachusetts' lack of competitiveness and the decline of its manufacturing sector on its tort liability system. However, the study relies on arguments about the impact of the tort system on competitiveness that have been made about the nation, not about an individual state like Massachusetts. While neutral scholars have refuted the basic premise advanced regarding the tort system's adverse impact on competitiveness, the idea that national statistics can be extrapolated to an individual state is dubious, at best, and is inconsistent with the reality of the Massachusetts economy.¹⁵⁷ Massachusetts, according to its own Department of Economic Development, has been enjoying a considerable economic rebirth. In 1998, for example, the unemployment rate was 3.3%,¹⁵⁸ duplicating a low last reached ten years earlier. As a point of comparison, the Massachusetts unemployment rate has been below the very good national rate for five straight years.¹⁵⁹

In addition, 1998 saw an increase of 61,000 jobs, setting a new state record of 3,225,900, while growth in personal income of Massachusetts residents was the second highest in the nation. Personal income per capita in Massachusetts was the third highest in the nation, 23% above the nation's average.¹⁶⁰ If, as the Beacon Hill study claims, Massachusetts were suffering a competitiveness problem, it would not have been third among states—trailing only California and Texas—in fastest-growing companies and second in fastest-growing high-tech companies.¹⁶¹ In fact, 93% of high-tech chief executive officers rated the Massachusetts business climate as “good” or “outstanding.”¹⁶² Even the tort reform-oriented Associated Industries of Massachusetts gave the state a comfortably favorable business confidence rating.¹⁶³ A report card on the states, developed by the Corporation for Enterprise Development, gave Massachusetts its highest rating in “business vitality and development capacity” and placed it, along with only six other states, none of which were in the Northeast or considered a large industrial state, on its honor role.¹⁶⁴ Moreover, investors found nothing wrong with the state's competi-

156. RAHDERT, *supra* note 144, at 157-58.

157. *See supra* Part V.A.

158. *See* Massachusetts Dep't of Econ. Dev., *Massachusetts Economic Highlights* (visited May 19, 1999) <<http://www.state.ma.us/econ/keyindic.htm>>.

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

tiveness; venture capital investments in Massachusetts rose 40% from 1996 to 1997.¹⁶⁵

Ignoring these achievements, the Beacon Hill study adheres to the notion that tort costs are a "tax," which is problematic because companies tend to avoid states that have a high-tax burden because they add to the cost of doing business. The facts in Massachusetts belie the study's assumption, as do economic indicators, such as the number of business start-ups, in other states, such as California, New York, Texas, Florida and Pennsylvania, cited by the Beacon Hill study¹⁶⁶ as having the highest total tort costs. Each of these states actually have the highest number of business starts, ranking no lower than seventh among the states.¹⁶⁷ Obviously, contrary to the Beacon Hill study's assumption, the tort system the authors decry in those states has not discouraged new businesses. In fact, data suggests it may have produced the opposite result.

Another flaw in the argument posed by the Beacon Hill study is shown by the data presented regarding company relocation. They cite a survey that questioned manufacturers who opened new plants about their reasons for locating where they did. Tax considerations ranked only fifth most important among reasons for plant location in a regional search; taxes were not given much consideration in local plant searches.¹⁶⁸ But the more intriguing result of the survey it cites authoritatively is that liability or tort system concerns are never mentioned as a factor, a finding that clearly undermines any argument that the tort system is the root of all adverse business decisions. In addition, the study cites another survey that looked at areas of concern to business executives in Massachusetts. Again liability is not specifically mentioned, though the Beacon Hill study authors suggest, without foundation, that the perception among executives of hostility toward business derives in part from current tort law. They make this leap in logic on the basis of surveys of executives about liability performed by the National Federation of Independent Business and Associated Industry of Massachusetts. These surveys, not surprisingly, show the Federation's concern over liability.¹⁶⁹ The Fishkind Report cites the same national survey for its only Florida-specific data.

The Beacon Hill study's *coup de grace* is the chart showing the economic effects of tort reform using the results from the models.¹⁷⁰ It

165. *See id.*

166. *See id.* at tbl.12.

167. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 547 tbl.853 (1997) (citing DUN & BRADSTREET CORP., A DECADE OF BUSINESS STARTS and BUSINESS FAILURE RECORD).

168. *See* BEACON HILL INSTITUTE, *supra* note 147, at 44-45.

169. *See id.* at 87-88.

170. *See id.* at vi.

posits four different tax breaks that might possibly come out of tort-reform efforts in Massachusetts, and it projects results onto various economic indicators. These predictions are aptly called “scenarios,”¹⁷¹ because they seem more rooted in fiction than in fact. Scenario I asserts that Massachusetts tort costs would fall to the national average as a result of reforms, even though the authors provide no empirical evidence to buttress this claim.¹⁷² Scenarios III and IV also suffer from a lack of empirical evidence to undergird their assumptions.¹⁷³ The authors simply make unfounded postulates about the real impact tort reform would have on cost. By using 1970 figures to arrive at their projections, they are in essence picking a year out of a hat and guessing accordingly.

The only scenario with an assumption rooted in empirical results is Scenario II, which uses the Illinois tort-reform efforts as a model.¹⁷⁴ But the empiricism used in the study is seriously flawed. According to Beacon Hill, in 1996, the year after comprehensive tort reform was passed in Illinois, a study of the Cook County tort system showed a 26.6% drop in the number of tort filings, based on a figure supplied by tort reform supporters, the Illinois Civil Justice League (ICJL). Reliance on this figure is misplaced. First, Illinois experienced a flood of tort claims, filed immediately before the law went into effect to avoid the harshness of the draconian measure.¹⁷⁵ Therefore any drop in tort filings was most likely an artificial result of claims being filed earlier than they otherwise would have been in an attempt to beat the effective date of the law. Second, and most important, the Illinois law was enjoined as unconstitutional in its Cook County implementation—in part in February 1996 and more fully in May 1996.¹⁷⁶ In December 1997, the Illinois Supreme Court invalidated the law *in toto* on constitutional grounds.¹⁷⁷ Whatever drop may or may not have occurred in Cook County tort filings cannot be said to be a function of the actual operation of the statute there—because it was not operational for most of the year. The authors of the Beacon Hill study, nonetheless, use this figure to lessen their tort cost estimate by 26.6% and use the resulting change in the “tort tax”

171. See *id.* at 81-82.

172. See *id.* at 81.

173. See *id.* at 82.

174. See *id.* at 81.

175. See Laura Duncan, *A Year Later, Tort Reform Is Changing the Business of Law*, CHI. DAILY L. BULL., Apr. 27, 1996, at 1.

176. See David Bailey, *Law Capping Non-Economic Damages Ruled Unconstitutional*, CHI. DAILY L. BULL., May 22, 1996, at 1; David Bailey, *Two Tort Law Changes Ruled Unconstitutional*, CHI. DAILY L. BULL., Feb. 27, 1996, at 1.

177. See *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997).

to arrive at their misleading and speculative impact figures presented in Table 1 of their study.¹⁷⁸

Regardless of the validity of the ICJL tort filing change figure, there is absolutely no reason to believe that a percentage drop in tort filings will lead to the *exact* same drop in tort costs. Such reasoning assumes a one-to-one relationship between filings and tort costs, which is an indefensible position to take. There are far too many other factors involved in torts and insurance premiums—award size, accident rate, and insurance profits, for example—to speculate on the relationship between filings and costs. In addition, the tort costs that would be most affected by the drop in tort filings, court and litigation costs, are not even included in the Beacon Hill study's figures.

The Beacon Hill study sells itself as a serious look at the economic impact of the tort system. It relies on sophisticated econometric models adapted from earlier studies on the effect of taxation to give the impressive veneer of rigor. Without commenting on the merits of these earlier studies, it is easy to dismiss the Beacon Hill study as worthless. The study makes the mistaken and popular analogy between insurance premiums and taxes, wildly inflates the actual costs of the tort system, and relies on assumptions that have absolutely no factual or empirical basis. The Beacon Hill study, designed to arrive at desired results regardless of the evidence it confronts, ultimately delivers answers that tort reformers want to hear.

B. National Bureau for Economic Research

Albeit on a considerably smaller scale, the Fishkind Report also attempts to duplicate the study conducted under the auspices of the National Bureau for Economic Research (NBER), which it calls a model for these kinds of studies.¹⁷⁹ The NBER purports to show that tort reforms have a positive impact on a state's economy.¹⁸⁰ Confidence in the study is misplaced. The NBER study has never appeared in a peer-reviewed journal, where it would have been subjected to a rigor that is obviously lacking in its marshaling of facts and analysis. Even so, the study's authors found that tort reform produced no increases in productivity or employment in either manufacturing or health care—the two areas that tort reformers claim are most hurt by the liability system.

In addition, the NBER researchers could not rule out other possible reasons for the increased output they claim to have found in

178. See BEACON HILL INSTITUTE, *supra* note 147, at vi.

179. See Fishkind Report, *supra* note 24, at 21.

180. See THOMAS J. CAMPBELL ET AL., THE CAUSES AND EFFECTS OF LIABILITY REFORM: SOME EMPIRICAL EVIDENCE 2 (National Bureau of Econ. Research Working Paper No. 4989, 1995) (examining the relationships between productivity and employment in industry and liability reform).

states that enacted tort reform, such as tax cuts or demographic shifts. This failure to account for significant variables that may influence productivity, employment, and growth undercuts the study's credibility and its relevance. In fact, the authors themselves recognize this flaw. In their conclusion, they write:

However, the results are also consistent with three other alternative hypotheses. First, the observed association between liability law and productivity and employment may be due to other state-level public policies that are correlated with both the instruments and the status of liability law but not captured by the fixed effects. For example, politically conservative states or states with high densities of lawyers may adopt policies other than liability reforms that increase employment or productivity.¹⁸¹

Without accounting for these other effects, the authors cannot authoritatively claim that liability reform leads to increased economic output. Indeed, one does not have to be an economist to recognize that the tax structure of a state and other efforts made to attract and keep businesses are more likely to have a large effect on productivity and employment levels.

Another limitation of the NBER study is that it treats all tort reforms as equally effective. For instance, it is impossible to tell from the study whether damage caps work better or even differently than do changes in joint and several liability. A conclusion that treats each type of tort reform the same is extremely implausible. Instead of separately examining the effects of different tort reforms, the authors combine them into a single variable.¹⁸² They simply count the number of tort reforms a state has in place and use that figure to test for effects on productivity and growth.¹⁸³ There is no indication of which reforms are effective; instead they assume that the more reforms you have, the more effect there appears to be.¹⁸⁴ The suggestion that all tort reforms are created equal and that piling them on constitutes good economic strategy is grossly at odds with other studies. For instance, in its review of the literature regarding the effectiveness of malpractice reform efforts, the United States Congress Office of Technology Assessment found that studies showed various reforms had discernibly different effects.¹⁸⁵

One of the NBER study's authors, Daniel Kessler, noted the limitation of his study in an interview with the *ABA Journal*: "This paper is *not the final word on anything*. It doesn't give us an answer, but

181. *Id.* at 28.

182. *See id.* at 11.

183. *See id.* at 18.

184. *See id.* at 19.

185. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-BP-H-119 IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 73 (1993).

the results do suggest that this is worth looking into.”¹⁸⁶ The Fish-kind Report treats the study as the final word, despite Mr. Kessler’s contrary declaration.

VI. THE STRENGTH OF THE FLORIDA ECONOMY

Despite the doomsday rhetoric of the tort reformers that is intended to justify the changes enacted by the new law, the Florida economy has been doing quite well, especially when compared with neighboring states. At the same time the legislature was sprinting toward tort reform, Governor Jeb Bush declared that the state was “remarkably strong. Incomes are growing, unemployment is low, and in the last two and a half years alone, over 110,000 Florida families have left the welfare rolls, a decline of over [fifty] percent!”¹⁸⁷ These declarations should not be treated as mere political puffery; Bush’s claims were not a reflection on his then-incipient leadership of the state, but on his Democratic predecessor.

The empirical data bears out this pride in the state economy. Florida’s gross state product (GSP) rose from \$273 billion in 1990 to \$326.1 billion in 1996 (in 1992 dollars), an increase of 19.5%.¹⁸⁸ During the same time period, while the nation was experiencing an economic boom, its gross domestic product (GDP) rose only 14.5%.¹⁸⁹

Employment trends were similarly favorable. Unemployment in Florida fell from 5.5% to 5.1% between 1995 and 1996, while the national rate fell only from 5.6% to 5.4%.¹⁹⁰ *Florida Trend* reported that in May 1996, Florida’s unemployment rate fell further to 4.9%, with metropolitan areas such as Jacksonville, Orlando, Tampa-St. Petersburg, Gainesville and Tallahassee experiencing a rate below 4%.¹⁹¹

Another important economic indicator is new businesses, where Florida, with more than 13,000 new businesses begun in 1997, ranked third in the country, behind only California and New York.¹⁹²

186. Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., Jan. 1996, at 28 (emphasis added).

187. Governor John Ellis “Jeb” Bush, State of the State Address (Mar. 2, 1999), FLA. H.R. JOUR. 11, 11 (Reg. Sess. 1999), available at <http://www.state.fl.us/leog/speeches_remarks/3-2-99_sosaddress.html> (visited Apr. 5, 2000).

188. See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 454, tbl.719 (1998) (citing U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS (June 1998)).

189. See *id.*

190. See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 397, tbl.621 (1996) (citing U.S. BUREAU OF LABOR STATISTICS, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT (1995)); U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 401 tbl.626 (1997).

191. See Tom Fullerton, *Retailing’s Uncertain Outlook*, FLA. TREND, Sept. 1996, at 17.

192. See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 553 tbl.878 (1998) (citing DUN & BRADSTREET CORP., A DECADE OF BUSINESS STARTS and BUSINESS FAILURE RECORD).

Enterprise Florida, a public-private partnership organized to improve the economic quality of life in Florida, Florida has noted:

[Florida] leads the nation in the number of incorporations and was designated by Business Facilities magazine in its May 1997 issue to be the best place in the nation to expand a business. . . . In 1997, 20 of Money magazine's top 80 communities with the highest quality of life were in Florida. For these and other reasons, corporations are moving to Florida in increasing numbers to take advantage of the state's assets and resources.¹⁹³

Enterprise Florida goes on to state:

In recent years, Florida has emerged as one of the world's fastest growing markets, experiencing an explosion of international growth as a major economic hub of the Southeastern United States. With a gross state product of \$368.9 billion, if the State of Florida were a sovereign nation, it would rank as the world's 16th largest market economy and [fifth] in the Americas.¹⁹⁴

As a marketplace, Florida is also a leading state, suffering no adverse effects from the nature of its legal system. The business press has celebrated its positioning for business. *Expansion Management* indicated that "[t]he structure is in place for the state to continue its leadership in the medical devices industry, and to take off in biotechnology."¹⁹⁵ It is ranked third, behind only California and Texas, as a location for health technology businesses.¹⁹⁶ Furthermore, along with Texas, Florida also boasts one of "the most profitable banking markets anywhere."¹⁹⁷

In another area of economic evaluation, personal income, Florida continues to perform well. The Bureau of Economic and Business Research found that Florida's per capita personal income, which grew 5.1% in 1996, outpaced both the national average of 4.8% growth and the Southeast region's rate of 4.7%.¹⁹⁸

Housing starts are another key economic indicator to determine the strength of an economy. The building and purchase of homes sends positive ripples throughout the economy, as producers of raw

193. Enterprise Florida, *Doing Business in Florida (1999)* (document previously published on the World Wide Web, on file with author).

<<http://www.floridabusiness.com/advantages/climate.html>>.

194. *Id.*

<<http://www.floridabusiness.com/advantages/economy.html>>.

195. Lance Yoder, *Florida Assembles Winning Pieces in Health Technology Puzzle*, EXPANSION MGMT., Mar. 1999, at 1.

196. *See id.*

197. Kyle Parks, *Finding Ways to Make Money*, FLORIDA TREND, Jan. 1997, at 44.

198. *See* Press Release from Bureau of Economic and Business Research, University of Florida, Florida Personal Income Release (June 25, 1999) (citing U.S. Bureau of Economic Analysis), available at <<http://www.BEBR.ufl.edu/PressRelease/fpi.htm>> (visited Apr. 5, 2000).

materials, builders, contractors, and the makers of products used to fill the home with furniture and appliances all see an increase in business. Florida's housing market has been booming.¹⁹⁹ Florida was first in the nation in housing starts in 1996, with the starts spread well between large metropolitan areas and smaller cities and towns.²⁰⁰

One economic observer concluded:

The sun still shines a little brighter on Florida's economic landscape than elsewhere. The slowdown in the national economy barely cast a shadow through much of Florida, which saw gross state product (GSP) expand at a robust 5% pace during 1995. Employment and income continued to rise and commercial vacancy rates dropped to their lowest levels in nearly a decade. Job seekers and retirees continued to flock to the State, pushing Florida's population to more than 14 million.

. . . .

Florida's economic outlook remains one of the brightest in the nation and should remain so through the rest of the decade.²⁰¹

John M. Godfrey, an adjunct professor of economics and finance at Jacksonville University, opines that Florida's performance in all the key economic drivers will keep the economy healthy in the foreseeable future. "Without exception, all [polled economists] believed that Florida will again outperform the nation by a significant margin in the coming year." He writes, "Florida's business can take some comfort, as well as pride, in knowing that its market will experience some of the nation's best economic conditions in 1996 and beyond."²⁰²

While the Fishkind Report and tort reformers in general ignored the robust Florida economy, they did place all their marbles on insurance costs. Here, too, there is no support for their dire descriptions of the state of the Florida insurance industry. Florida's overall insurance profitability has remained steady, with an average return on net worth of 11% from 1988-1997.²⁰³ During the last five years of that period, which saw losses drop and profits rise further, Florida outperformed Alabama, Georgia, and South Carolina.²⁰⁴ Similar re-

199. See John M. Dunn, *Construction: More Work, Less Profit*, FLA. TREND, Jan. 1997, at 52.

200. See *id.*

201. Mark P. Vitner, *Florida Continues to Shine*, FLA. TREND, May 1996, at 6, 8. Mark Vitner is vice president and an economist at First Union Capital Markets Group in Charlotte, NC.

202. John M. Godfrey, *Pretty Picture*, FLA. TREND, Aug. 1996, at 16.

203. See NATIONAL ASS'N OF INS. COMM'RS, PROFITABILITY BY LINE BY STATE IN 1997 (1998) (excluding figures from 1992 in which catastrophic losses were suffered due to Hurricane Andrew).

204. See *id.*

sults were obtained with respect to private-passenger liability coverage, with Florida's return on net worth averaging 9.9% from 1988-1997 and experiencing even greater profits from 1993-1997, again outperforming the states listed previously.²⁰⁵ For commercial automobile liability, Florida posted an average return on net worth of 9.03% from 1988-1997 and again outperformed Alabama and Georgia.²⁰⁶

These figures have made the Florida insurance market one of the most profitable in the country. Before the Florida Senate Committee on Banking and Finance, at the same time the legislature was rushing to enact tort reform, Insurance Commissioner Bill Nelson testified:

Despite its hurricane risk, the Conning [& Company] study [of the property and casualty market in all fifty states] ranks Florida's insurance market number one in the country in desirability as a place to [sic] business in commercial lines and number three in personal lines. And no other big state was even in the top ten.²⁰⁷

In fact, profitability was so high that Nelson ordered a June 1998 reduction in rates from four major insurers because of success in fighting insurance fraud and crackdowns on drunk drivers.²⁰⁸ Insurers and regulators agreed that "overall claims are on the decline in frequency and severity."²⁰⁹

The vice president of the Florida Insurance Council, the industry's lobbying arm, forecast a record year in 1997 and saw a robust and profitable market down the road.²¹⁰ It is clear that no insurance crisis engulfed the state.

VII. THE DETERRENT EFFECT

One of the many failures of the tort-reform reports that pass as studies, especially those that make the "tort tax" claim, is their failure to ascribe any benefits to the tort system. Primary among these benefits is the deterrent effect that it has on negligent behavior and unsafe products. Conservative law-and-economics scholar and federal appellate judge, Richard Posner, has noted that "although there has

205. *See id.*

206. *See id.*

207. Bill Nelson, Florida Treasurer and Insurance Commissioner, Remarks Before the Florida Senate Committee on Banking and Finance (Mar. 3, 1999), *available at* <<http://www.doi.state.fl.us/Consumers/Alerts/remarks.html>> (visited Apr. 5, 2000).

208. *See* Press Release from Fla. Dep't of Ins., Insurance Rates to Fall Again for Many Drivers (Jun. 12, 1998), *available at* <<http://www.doi.state.fl.us/Consumers/Alerts/Press/1998/pr061298.html>> (visited Oct. 5, 1999).

209. *Id.*

210. *See* David Villano, *Reversal of Fortune*, FLA. TREND, Jan. 1997, at 42.

been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters."²¹¹

One industry in which consumers have clearly seen safety benefits derived from the tort system is the automobile industry. The tort system, coupled with consumer safety efforts and increased regulation, has led to the withdrawal of unsafe cars, such as the Corvair, and the development and subsequent improvement of new safety devices. In an analysis of the impact of product liability on automobile safety, John D. Graham found that while liability may not be the sole factor in leading to safety improvements in cars, it may act as a catalyst and quicken the process through which safety features are developed and implemented.²¹² Graham notes, for instance, that "the installation of rear-seat shoulder belts and the phaseout of belt tension relievers may have been hastened by liability considerations."²¹³ At times, Graham continues, liability risk may have been enough to spark safety improvements even when other factors, such as regulation and professional responsibility, were not present.²¹⁴

Another interesting finding by Graham, especially in light of tort reformers' claims that liability concerns impose an undue financial burden on manufacturers, is that the cost of liability is not all that important to industry: "The direct financial costs of liability are usually a relatively minor factor, at least from the perspective of large manufacturers."²¹⁵ What is more injurious to manufacturers is the adverse publicity that accompanies product liability suits, which may lessen consumer demand for unsafe products²¹⁶ and provide tort law with a considerable amount of its deterrent power.

When Ford Motor Company introduced the Pinto in the early 1970s, it situated the gas tank in such a way that the car was in severe danger of explosion in rear-end collisions.²¹⁷ People were killed

211. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987).

212. See John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120, 180 (Peter W. Huber & Robert E. Litan eds., 1991). Professor Gary Schwartz agrees with this idea of interaction:

An added observation is that insofar as there are various safety incentives that might serve as alternatives to tort, tort law has the capacity to *interact* with those other incentives in a beneficial way. For example, a party's basic sense of morality can be reinforced by the prospect of liability: A product designer might say that "this is the right thing to do; besides, it will reduce the risk of my company's liability."

Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 384-85 (1994) (citation omitted).

213. Graham, *supra* note 211, at 181.

214. See *id.*

215. *Id.* at 182.

216. See *id.* at 181, 182.

217. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360 (Cal. Ct. App. 1981).

as a result of this design defect.²¹⁸ Ford knew there was a problem with the location of the gas tank and that it could be easily remedied.²¹⁹ In every crash test of at least twenty-five miles per hour, the fuel tank ruptured, causing leakage that violated federal regulations.²²⁰ Yet, in order to save money, they deferred the safety improvement, a fuel bladder, for two years.²²¹ In upholding a punitive award of \$3.25 million, which had been reduced from \$125 million, the appellate court said:

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.²²²

Ford compounded this indifference by petitioning the National Highway Transportation Safety Administration (NHTSA) to abandon or postpone fuel tank regulations, arguing that the standard would force American manufacturers to spend \$137.5 million to prevent an estimated 360 deaths and injuries from occurring, which Ford calculated to be worth only \$49.5 million.²²³ In other words, Ford engaged in a cost-benefit analysis accepting that it might ultimately be held liable for \$49.5 million in damages, resulting in a savings to the corporation of \$88 million, by not correcting the fuel tank problem. The tort system, with its threat of punitive damages, is designed to prevent corporations from making such callous calculations about the value of human lives.

Here, the liability judgment forced Ford to make important institutional changes to improve product safety. Still, other companies that have exhibited a callous disregard for consumer safety have been hauled into court.²²⁴ Chrysler, for example, chose not to make

218. *See id.* at 359.

219. *See id.* at 361.

220. *See* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Product Liability*, 60 MO. L. REV. 1, 78 (1995) (explaining the facts that were disclosed prior to a ruling against Ford Motor Co. in a product liability suit).

221. *See* Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 825 (1997) (arguing that punitive damages effectively encourage product manufacturers to consider the public health impacts of their decisions).

222. *Grimshaw*, 174 Cal. Rptr. at 384.

223. *See* Bogus, *supra* note 219, at 78-79.

224. Ford was not the only automaker that cut corners on fuel-tank safety. GM produced millions of pick-up trucks with dangerous side-saddle gas tanks from 1973 to 1987.

an inexpensive adjustment to a minivan doorlatch, which resulted in the death of a ten-year-old boy.²²⁵ From 1984 to 1995, at least thirty-seven passengers were ejected and killed from Chrysler minivans whose rear lift gates had opened, according to the NHTSA.²²⁶ Evidence at the wrongful-death trial of the little boy showed that Chrysler knew the rear gate latch was defective, that the latch design had not been used in any automobile in twenty years, and that it had destroyed documents and crash-test results related to the latch.²²⁷ Though Chrysler knew that the latch could be strengthened for as little as twenty-five cents per van in 1990, it did not do so “because the move would have undercut Chrysler’s position with safety regulators that there was no problem with the latches.”²²⁸

In a striking similarity to the Ford Pinto case, an internal memorandum, which revealed the company’s disregard for consumer safety, became a smoking gun. The memorandum disclosed Chrysler’s attempt to use political muscle in Congress to prevent a federal recall. The December 9, 1994, memo from a top company official to Chrysler chairman, Robert Eaton, and president Robert Lutz stated that officials from the NHTSA “told the auto maker that the latch problem ‘is a safety defect that involves children.’”²²⁹

The memo noted that . . . Chrysler’s vice president for Washington affairs[] suggested that ‘[Chrysler] mount an aggressive effort in Washington to prevent the adverse use of bureaucratic power within NHTSA, specifically their funding from Congress, the process which allows NHTSA to design tests for the public record that play to the media and trial lawyers before ruling on a defect . . .’

The memo concluded: ‘If we want to use political pressure to try to squash a recall letter [from the NHTSA], we need to go now.’²³⁰

These two examples are part of a legion of instances where lawsuits have forced the adoption of important safety features. There are, of course, many more. Without the threat of meaningful tort actions, irresponsible companies have little financial incentive to make needed safety modifications.

The trucks were vulnerable to catastrophic explosions during side-impact collisions. *See id.* at 81. This design defect has been alleged to have resulted in the death of more than 300 people, but GM settled these cases rather than institute an expensive recall of the vehicles. *See id.* At one trial, former GM engineers testified that GM knew as early as 1980 from its own crash tests that the fuel tank design was indefensible, and that GM lawyers had collected and shredded damning documents. *See id.*

225. *See* Milo Geyelin, *Costly Verdict: Why One Jury Dealt a Big Blow to Chrysler in Minivan-Latch Case*, WALL ST. J., Nov. 19, 1997, at A1.

226. *See id.*

227. *See id.*

228. *Id.*

229. Nichole M. Christian et al., *Chrysler Is Told to Pay \$262.5 Million by Jurors in Minivan-Accident Trial*, WALL ST. J., Oct. 9, 1997, at A6.

230. *Id.*

Other industries, such as the chemical industry, have made significant safety improvements as a result of liability exposure.²³¹ Massachusetts Institute of Technology (MIT) professors Ashford and Stone found that the tort system has not only stimulated the development of safer products and processes, but it also has spurred significant technological innovations that have resulted in chemical hazard reduction.²³² As a result of the Bhopal disaster, in which thousands were killed when a Union Carbide plant emitted deadly methyl isocyanate gas into the surrounding area, many chemical firms reduced the amount of dangerous chemicals stored near population centers. Major chemical manufacturers such as Dow Chemical, Hoffman-LaRoche, Monsanto, and Dupont have all used less deadly chemicals in their processing or have improved their chemical containment practices.²³³ Another commentator details some of the industry-wide changes made, in part because of toxic tort liability worries:

In the aftermath of Bhopal, many American companies reevaluated their operating risks. Companies worked to reduce their on-site stockpiles of hazardous chemicals and to better monitor the remaining stocks. . . . Many companies more closely scrutinized the transport of chemicals to and from their plants. Shipments are now more often routed through less-populous areas. To further reduce transport hazards, some companies have created on-site facilities for producing materials they formerly shipped in. Others participate more in community-education programs about the products being made, and many have developed or revised detailed community notification and evacuation plans in the event of a major emergency. Finally, more firms have engaged consultants to study the reduction of risk in the handling of hazardous substances.²³⁴

After extensively studying the effect of the tort system on chemical liability and innovation, Ashford and Stone came to the conclusion that the reforms suggested by traditional tort reformers are seriously misplaced:

These observations and conclusions indicate that the recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant underdeterrence already exists. Thus proposals that

231. See Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 367 (Peter W. Huber & Robert E. Litan eds., 1991).

232. See *id.* at 368.

233. See *id.* at 400.

234. Rollin B. Johnson, *The Impact of Liability on Innovation in the Chemical Industry*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 428, 449 (Peter W. Huber & Robert E. Litan eds., 1991).

damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease.²³⁵

While other commentators, especially Peter W. Huber, have suggested that liability discourages innovation, a common refrain of the tort reform movement, others recognize that tort liability does have safety incentive effects.²³⁶ Another scholar, Rollin B. Johnson of Harvard University, argues that the current liability system may provide incentives for safety and innovation. Johnson further argues that attempts to change the system may do more harm than good:

It would be difficult to argue that the uncertainty and unpredictability of the tort system does not affect business planning to some degree. And some risk-averse companies may decide to abandon certain lines of research and development because of concern over liability, leaving those areas open to foreign competitors. But such actions arguably increase the average safety of products, while preserving opportunities for American competitors willing to assume the risk and creating incentives for producers to innovate to make alternative and even safer products.

On the whole, it is difficult to evaluate the magnitude of the disadvantages of the present system and even more difficult to weigh them against the advantages of the deterrence they provide against the introduction of truly hazardous products. Furthermore, the possibility of an occasional "excessive" award may provide greater deterrent value at lower net cost to society than universally applicable regulations do. . . . The liability system might benefit from some fine-tuning to make the system more responsive, less expensive, and more equitable. But such attempts may actually make it less effective.²³⁷

Indeed, the common claim that the tort system inhibits the development of new products, and thus leads to economic stagnation or reduced competitiveness, seems misguided. As Rahdert points out, "[t]he rapid proliferation of new products and services in our econ-

235. Ashford & Stone, *supra* note 230, at 419.

236. See generally W. Kip Viscusi & Michael J. Moore, *An Industrial Profile of the Links Between Product Liability and Innovation*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 81 (Peter W. Huber & Robert E. Litan eds., 1991).

237. Johnson, *supra* note 234, at 450.

omy is ample evidence that stagnation due to tort liability is the exception, not the rule."²³⁸

Experience in the pharmaceutical industry is consistent with these conclusions.²³⁹ In her study of prescription drug safety, Judith Swazey interviewed pharmaceutical company attorneys, who credited the product-liability system with providing a deterrent which has, in turn, led to safety improvements. One attorney she interviewed remarked,

For certain classes of drugs, liability concerns have probably led to safer products, in conjunction with FDA requirements. . . . I personally don't think that the litigation threat is that serious. . . . I believe—though it's heretical—that the liability crisis is largely a myth when one looks at available information such as the actual number of cases. . . . Tort law is a law of what ought to be—compensation for injury and, when warranted, punishment.²⁴⁰

Another product liability attorney working for a pharmaceutical company agreed: "Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence."²⁴¹

Risk managers, those responsible for reducing liability exposure for companies, associations, governmental units, and other organizations, may have a valid perspective on whether tort law actually deters risk. Professor Gary Schwartz interviewed risk managers for several public agencies in California, including city managers, state motor vehicle department managers, and managers from the UCLA Medical Center. He asked them about the impact of liability on their safety efforts, or whether the impetus to improve safety was simply a desire to do the right thing. He found:

All of them emphasized that their efforts were due to the combination of both. A risk manager starts with the idea that accident avoidance is good for its own sake. But the prospect of tort liability provides an important reinforcement as well as an essential way to sell the risk manager's proposals to others in the organization.²⁴²

In fact, this need to sell to others in an organization can itself be a function of the search for cost savings. As one Los Angeles city manager explained to Schwartz, officials "are not much affected by abstract appeals to safety. Indeed, funding will generally be denied

238. RAHDERT, *supra* note 144, at 161.

239. See generally Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 291 (Peter W. Huber & Robert E. Litan eds., 1991).

240. *Id.* at 297.

241. *Id.*

242. Schwartz, *supra* note 211, at 415-16.

'unless we can tie it to cost savings for the City.'"²⁴³ Schwartz found one risk manager, the director of Non-Profit Risk Management, started his job with considerable skepticism over whether the tort system effectively deterred, but his job experiences led him to believe that "tort liability exerts a significant influence."²⁴⁴

Similar results were obtained in a survey of risk managers for major corporations by the business-oriented Conference Board, which "found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial."²⁴⁵ The survey noted that, of 232 major corporations, concerns about products liability encouraged approximately 22% to improve manufacturing procedures, 32% to improve product safety design, and 37% to improve labeling.²⁴⁶ The appearance of the first survey, which countered tort reformers' arguments that the liability system was ruining American businesses, prompted a second survey of 2,000 corporate CEO's, a third of whom, despite a self-interest in tort reform, admitted that they had improved the safety of products and nearly one-half of whom improved their product warnings.²⁴⁷

Schwartz himself attempted a cost-benefit analysis of tort liability, focusing on the medical malpractice system, though in a self-admittedly conservative fashion. By comparing the cost of medical malpractice insurance and the estimated cost of practice changes due to liability, with the Harvard medical malpractice study estimate that medical injuries had been reduced by 11% and the number of medically negligent injuries by 29%, Schwartz concluded:

Given the \$130 billion total for actual medical injuries in 1984, the malpractice system can be understood as having reduced the cost of injuries by \$19.5 billion. Since this estimated safety benefit is considerably higher than the \$15 billion estimated cost of the medical malpractice regime, that regime seems to have been cost-justified.²⁴⁸

VIII. CONCLUSION

Tort reform is an idea that has been so fervently adopted by the business community that it has lost all basis in reality. "Reforms" are desired more as a trophy on a mantelpiece²⁴⁹ than in furtherance of

243. *Id.* at 416 n.196 (citation omitted).

244. *Id.* at 416.

245. *Id.* at 409.

246. *See id.* at 408-09.

247. *See id.* at 409.

248. *Id.* at 440.

249. In the aftermath of the passage of House Bill 775, one industry lobbyist declared, "I don't know what the poor people got, but the rich people are happy, and I'm ready to go

any demonstrated need. Legislation such as House Bill 755 is constructed in an air of supposition and lack of understanding. Two scholars recently and correctly observed that:

Current tort reform is a blunderbuss. Based on anecdote and designed to favor defendants, reform measures fail to address the tort system as it stands. . . . Rather than heed those [unsubstantiated and demonstrably false] fictions, legislators and voters should turn their attention to our growing knowledge of how the tort system truly operates.²⁵⁰

The empirical evidence demonstrates that the tort system's substantial benefits outweigh the relatively small costs that may legitimately be charged to it. Instead, the data demonstrates that the civil justice system still provides the best opportunity for an average person to achieve redress of injuries against wrongdoers, regardless of wealth or rank. As *The Economist* has reported:

So much fury is levelled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly.²⁵¹

home." Lucy Morgan, *Bill Flurry Gives Bush Happiness and Worry*, ST. PETE. TIMES, May 1, 1999, at 7B (quote of lobbyist J.M. "Mac" Stipanovich commenting on the measures passed by the Florida Legislature during the 1999 session).

250. Deborah Jones Merritt & Kathryn Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 398 (1999).

251. *The Way Those Crazy Americans Do It*, ECONOMIST, Jan. 14, 1995, at 29 (British ed.).