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TORT REFORM SYMPOSIUM COMMENT

NOT-SO-PEACEFUL COEXISTENCE: INHERENT TENSIONS IN ADDRESSING TORT REFORM

Jeffrey W. Stempel*

I. INTRODUCTION

The Tort Reform Symposium reproduced in this issue of the *Nevada Law Journal* reflects provocative analysis of the issues by distinguished analysts. Symposium commentary has been substantive and civil – no easy matter when addressing a topic that has become popularized in a type of “sound bit du jour” manner over the past months and where emotions and perceived financial stakes run high. The Symposium featured a day of reflection (and of course some argumentation and advocacy) by reasonable people with expertise in the field.¹ Similar events have dotted the landscape of law reform debate since at least the “first” tort reform “crisis,” the medical malpractice insurability imbroglio of the 1970s. We are now in what might be termed the third tort reform movement of modern times (the second being the very hard insurance market, especially for product liability insurance, during the mid-1980s).²

As Professor Michael Green’s comments trenchantly remind us, all of this has a familiar ring: insurers and tort defendants claim unfairly escalating liability, plaintiffs’ lawyers and consumer groups counterattack, and (for the most part), insurers and defendants obtain some of the relief they seek. The tort reform victories are not so overwhelming as to completely unravel the historical rights of victims or the power of courts generally, but some constriction of rights inevitably occurs. During periods of quiescence, plaintiffs and consumers take back some lost territory through common law victories expanding claimant rights, or through specific legislation. Statutes that permitted states to sue tobacco companies for state-paid health care costs during the 1990s are an

* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas (UNLV). Special thanks to Dmitri Shalin and the UNLV Center for Democratic Culture for creating this tort reform symposium and to Dean Richard Morgan for his strong support of the Symposium and similar efforts at the university and law school. Thanks also to Boyd Law faculty, students, and participants, particularly long-distance travelers Professor Michael Green and Nancy Udell.

¹ See Symposium, *Justice and Democracy Forum: The Law and Politics of Tort Reform*, 4 NEV. L.J. at 377 (2003) [hereinafter Symposium].

² See Symposium, *supra* note 1, at 422 (remarks of Michael Green).

example.³ Arguably, Nevada Revised Statutes Chapter 40, which governs claims for defective construction, is another example.⁴

But plaintiffs and consumers during the past thirty years have probably not been net gainers relative to inflation and population growth. While plaintiffs may have won some doctrinal victories, defendants have had no shortage of the same. In fact, this particular time period contained what Professors Theodore Eisenberg and James Henderson call the “quiet revolution” in product liability claims, leading to common law doctrine and adjudication favorable to defendants.⁵ It was also an era of civil procedure rule “reform” that systematically favored defendants.⁶ Meanwhile, the U.S. Supreme Court also weighed in on behalf of defendants and insurers, making it easier for defendants to get sum-

³ See Symposium, *The Florida Tobacco Litigation*, 25 FLA. ST. U. L. REV. 731 (1998) (reviewing and assessing one state’s legislation, litigation, and large settlement with tobacco manufacturers for injuries and attendant health care costs allegedly caused by tobacco products).

⁴ See 2003 Nev. Stat. 362 (establishing the regime for making construction defect claims, including mandatory mediation and recovery of counsel fees for claimants). During the 2003 Session of the Nevada Legislature, contractors were successful in obtaining some of the amendments they sought to Chapter 40, primarily the express provision of a defendant’s right to inspect and repair allegedly defective construction. See Sharon A. Steen, *SB 241: Changes in Construction Defect Law*, COMMUNIQUE, Aug. 2003, at 14.

⁵ See Theodore Eisenberg & James A. Henderson, Jr., *The “Quiet Revolution” in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992). Subsequently, Professor Henderson and Brooklyn Law School Professor Aaron Twerski, two noted critics of product liability decisions seen as too favorable to plaintiffs, served as Reporters for the American Law Institute’s revision of Section 402A of the RESTATEMENT (THIRD) OF TORTS (2002). The resulting version of Section 402A (including Illustrations and the Reporter’s Note) is generally regarded as more favorable to defendants than its predecessor.

⁶ See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 51 ALA. L. REV. 529 (2001) (examining activity surrounding the 2000 Amendments to the Federal Rules of Civil Procedure and finding the process substantially captured by defense interests, particularly those of product liability defendants); Elizabeth G. Thornburg, *Give the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999) (concluding that the direction of federal civil litigation generally, and Federal Rules of Civil Procedure amendments in particular, have favored defendants); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965 (1998) (concluding that a variety of changes during the 1970-1997 period effectively reduced claimant access to courts with negative social effects); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (concluding that discovery is neither as excessive or problematic as suggested by interested groups urging contraction of discovery); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construction? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993) (tracing the history of civil litigation and finding an ongoing battle between those favoring more open courts and those favoring greater restriction, with the latter group coming into dominance); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (reviewing the Supreme Court’s 1986 summary judgment trilogy and finding that it makes substantial change in summary judgment practice designed to provide more frequent pretrial dismissal of many claims).

mary judgment,⁷ harder for plaintiffs to introduce expert testimony in their cases,⁸ and dramatically limiting punitive damages as a matter of a constitutional right.⁹

If keeping a scorecard, one would be hard-pressed not to conclude that defendants have been the overall winners in both the chronic and episodic tort reform battles of the past thirty years.¹⁰ Yet, neither have they been able to deliver a knockout punch – though not for want of trying. The legal, political, social, economic, and rhetorical battle over tort reform continues. Compromise resolves most of the issues for a time, but final consensus remains elusive.

Why have these and similar explorations of tort litigation failed to produce greater consensus? Why does the issue of tort reform continue to be so divisive and the divisions so repetitive (the “deja vu all over again” noted by social critics Yogi Berra and Mike Green)?

In my view, the disagreements are chronic, recurring, and intractable for a number of reasons that are – not surprisingly – similarly chronic, recurring, and intractable. Fortunately, however, the social forces at war over the tort system are also sufficiently balanced, such that neither side is likely to gain a clear upper hand capable of imposing its will on the rest of society (although the

⁷ See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988). Some of the Court's decisions on proof at trial have also proven unduly helpful to civil litigation defendants in the hands of the lower courts. See Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

⁸ See David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1 (2003) (reviewing the Supreme Court's 1993 Daubert opinion and its progeny creating greater barriers to the introduction of expert testimony); Eric Berkman, *10 Years After "Daubert": Landmark Case Has Been Bad News for Plaintiffs*, LAW. WKLY. USA, Aug. 18, 2003, at 1 (quoting Federal Judicial Center senior research associate Joe Cecil that there is among analysts a “consensus that plaintiffs have a greater burden than they did before *Daubert*” and quoting Southwestern University Law Professor Myrna Raeder that “Since *Daubert*, the number of summary judgments issued in civil cases has skyrocketed.”).

⁹ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (holding that the Due Process clause of the Constitution requires courts to regulate the size of punitive damage awards and suggesting that even in cases of reprehensible defendant conduct, punitive damage awards should not ordinarily be more than a single-digit multiple of the amount of compensatory damages awarded. This is a major shift from prior United States Supreme Court precedent and traditional state willingness to allow multiples in the 30-40 times compensatory damage range). See also *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (2002) (also expressing reservations about punitive damages, remitting a \$30 million award to \$19 million, and requiring that portion of the award be given to charity rather than pocketed by plaintiff).

¹⁰ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002) (empirical study of appellate cases suggests plaintiffs do not enjoy a disproportionate victory); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947 (concluding that “defendants have a substantial advantage over plaintiffs on appeal” and this advantage is greater in tort actions than commercial claims); Susan Massmann, *Courts Inclined to Overturn Unreasonable Jury Awards*, CLAIMS, Mar. 2003, at 23.

defendant community will probably continue to win somewhat more than the plaintiff community in the foreseeable future). This is the coexistence to which I refer in the title of this Comment. It is not particularly peaceful, but it is a relatively nonviolent and contained coexistence. Unfortunately, the situation is unlikely to fundamentally change any time soon. However, there are some areas of common ground that hold promise for effecting an operational compromise, even if ideological or social consensus remains an elusive target.

There are numerous reasons for social division on this issue. Various sides of the tort reform debate ground their ideology based on radically different conceptions of reality, making meaningful dialogue difficult. Many participants in the debate have a view of the situation that is clouded by enormous personal economic interests. The tort reform debate also has an element of intractable-political-bogeyman class warfare, as consumers of modest means (through their surrogates) square off against largely well-paid owners, investors, executives, and professionals. The sociological culture of the groups involved also leads to a certain defensiveness, suspicion, and misunderstanding. Furthermore, there is an inherent conflict among key legal concepts that makes it difficult for even the most neutral observer to arrive at a sound, global, long-term “fix” for perceived problems of the litigation and dispute resolution system.

This Comment assembles and assesses the primary factors producing this “cultural cold war” of the law, particularly emphasizing factors of professional culture and imbedded tension in legal policymaking, which, in my view, have been under-emphasized by even the most discerning commentators in the area. Although these factors have produced a sub-optimal situation that is unlikely to change, there remain some attractive options for law reform that can satisfy the various interest groups and society as a whole. But implementing these sorts of changes will require serious shifts in thinking and behavior that may be too difficult to accomplish.

II. ANECDOTE-DRIVEN “ANALYSIS” AND THE UTILITARIAN POPULIST FALLACY

Tort reform proponents and opponents seem to live in two different worlds, at least according to the stories they tell and the degree to which these stories veer from reality. The classic quip about tensions in the Middle East and Northern Ireland (“one man’s terrorist is another man’s freedom fighter”) could apply to the tort reform camps.

As an example, consider the now notorious McDonald’s coffee case. As presented by tort reform advocates, this is a tale of a careless driver who spilled coffee on herself, unfairly blamed the coffee vendor, and then, due to the absurdities of an out-of-control legal system, obtained a seven-figure payoff. As Professor Rob Corrales detailed in his Symposium presentation, there is another, fuller side to the story much more favorable to the plaintiff. The vendor was not arguably at fault simply because it was a large corporation, but because McDonalds chose to sell its coffee at a temperature much hotter than that of many vendors, even while knowing that many of its patrons had been scalded by coffee at that 180 degree temperature. The plaintiff did not suffer a

nuisance injury, but rather sustained second and third degree burns to a sensitive area. Furthermore, the amount of the original award was set aside after appeal, with the case settling for a significant (six-figure) award that, while non-trivial, was hardly the lottery payoff portrayed by tort reform advocates. As a consequence of this case, McDonald's both lowered the temperature of its coffee and placed warnings on the cups.¹¹

Viewed in its totality, the McDonald's coffee case does not seem like the example of system failure originally trumpeted by the critics. To be sure, reasonable people can debate the underlying issues of assumption of risk, comparative fault, amount of compensation, and degree of defendant culpability. That, of course, is my point. The debate proceeds within a zone of reasonable differences, which is hardly the mark of a broken system. The outcome in the McDonald's coffee case may not be to everyone's liking, but, when fully understood it is clearly not absurd. Arguably, it reflects a good system encouraging more responsible behavior by vendors.

The same can be said for the horror stories told by plaintiffs' counsel and consumer groups of clamps left in stomachs during surgery, inebriated physicians, or buildings thrown up with cardboard and no fire walls (a real life construction defect nightmare as related by Bill Robinson).¹² The unfortunate occurrence of these events does not mean that the medical or homebuilding systems are corrupt or broken any more than the presence of controversial plaintiff verdicts makes the legal system infirm. Neither does taking a less emotional view of occasional wrongs mean that the victims of these wrongs should have their relief limited on the basis of an ideological (but not factual) belief that the legal system is "out of control." Some perspective is in order.

Both sides of the tort reform debate have engaged in unfortunate "broken system" rhetoric that comes close to demagoguery in many instances. Although I am trying to be fair (but am undoubtedly influenced by my own training as a lawyer), it seems clear to me that tort reform advocates have engaged in more of this than plaintiffs or consumers. University of Wisconsin Law Professor Marc Galanter has made something of a sub-career of examining this debate and has concluded that there is more myth than reality in the picture presented by many tort reformers.¹³ He has gone so far as to posit a "turn against law" during this time period. A significant part of this anti-law trend is fueled by the rhetoric, public relations, and lobbying efforts of the defense community.¹⁴

¹¹ See Symposium, *supra* note 1, at 419 (remarks of Professor Rob Correales).

¹² See *id.* at 382 (remarks of William J. Robinson).

¹³ See, e.g., Marc Galanter, "An Oil Strike in Hell": *Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc Galanter, "The Day After" the Litigation Explosion, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). Professor Galanter has also argued convincingly that even punitive damages, a much maligned aspect of the law, serves a useful social purpose. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993).

¹⁴ See Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (noting that although per capita litigation rates in America

Like any effective public relations campaign, the tort reform movement's efforts have some significant basis in reality, just not nearly as much as many interest groups would have you believe. There are frivolous claims that slip through the system and result in awards. Class action practice is a mess that often benefits lawyers more than clients. Some venues are laughably favorable to plaintiffs either because of jurors bent on income redistribution, judges dependent on the largesse of the plaintiff's bar, or both. Some awards are too high in relation to the harm done. Courts, forced to deal with individual cases, are not particularly good at setting social policy on risk management.¹⁵

But these admitted failings of the system do not mean that the system is "broken" or in need of immediate radical repair any more than the recent East Coast power outage means that the entire American energy system is a failure or that a murder in Manhattan indicates a need for housecleaning in the NYPD. Both sides of the Tort Reform debate, particularly the tort reformers, would be doing all of us a favor by shelving the "sky is falling" rhetoric in favor of a more restrained approach. For example, a good deal of the medical malpractice reform rhetoric suggests that physicians are being held to ever-escalating standards of liability.¹⁶ The actual adjudicatory track record is at least mixed and arguably more favorable to physicians than those suing them.¹⁷

rose after 1960, the 1930-60 time period had the lowest litigation rates in history; current litigation rates per capita are generally lower than those of the pre-1930 period). Again bowing to whatever subconscious prejudices I have on this issue because I am a lawyer, I cannot help but believe that some of this anti-law tide of the past quarter-century is a bad thing for society and the nation. To trot out the perhaps shopworn quote from the story of Sir Thomas More: "if you cut . . . down" the laws "d'you really think you could stand upright in the wind that would blow then?" See ROBERT BOLT, *A MAN FOR ALL SEASONS*, Act I 56, (Samuel French, Inc. 1966). This rhetorical question may be a little self-serving for the profession, but it has a large grain of truth. Robust legal structures provide a level of fair protection for all elements of society irrespective of popular political trends and social attitudes. Ironically, the business components of the tort reform initiative realize this. They, on the one hand, argue for "less law" where this is seen as beneficial to their cause (e.g., alternative dispute resolution; contraction of legal rights) but argue for "more law" when it is to their advantage (changes in civil procedure rules, greater requirements for expert testimony, more judicial intervention regarding punitive damages and jury verdicts). A more neutral approach on both sides would appreciate the wisdom attributed to Thomas More in Bolt's once-popular play: "I'd give the Devil the benefit of the law, for my own safety's sake." *Id.*

¹⁵ See generally Symposium, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Polity*, 80 TEX. L. REV. 1537 (2002); See also Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 41 DUKE L.J. 1251 (2002) (proposing reforms to make class action results more merit-based); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405 (2002) (proposing reforms to make fact-based class action resolution more frequent); Mark A. Hofman, *House OKs Class-Action Bill: Reform Backers Hopeful Senate will Follow Suit*, BUS. INS., June 23, 2003, at 1 (discussing congressional reservations about current class action practice); Lawrence H. Mirel, *Looking Out for Someone Else: Class Actions to Raid Insurance Coffers Recklessly Undermine Expert Decisions of State Regulators*, LEGAL TIMES, Dec. 16, 2002, at 44.

¹⁶ See, e.g., Joseph Montedonico & Mark H. Allenbaugh, *Chasing Doctors Away: The District Must Reform Its Tort Law to Keep Physicians from Running*, LEGAL TIMES, Aug. 4, 2003, at 60.

¹⁷ Compare *Smith v. Parrott*, 833 A.2d 843 (Vt. 2003) (rejecting as a matter of law medical malpractice claim for "loss of chance" of survival), with *McMackin v. Johnson County*

To some extent, this perception of the problem results both from sloppy journalism by the national media and a trait of human psychology termed by behavioral economists. People appear to overrate the risk of rare but highly publicized events, in part, because these events become highly publicized due to their rarity, or new value. An example is injury by shark attack or lightning strike. When these tragedies occur they are sure to make the paper. As a result, people are inordinately conscious of and concerned about these dangers relative to far more mundane but more dangerous activities such as driving to the grocery store.¹⁸ Applied to the litigation context, this phenomenon results when large jury awards are reported while appellate reversal, new trial grants, judgment notwithstanding the verdict, and defense verdicts are far less likely to be reported. Over time, the popular perception becomes that plaintiffs are winning every darn malpractice suit. Yet, available evidence suggests not only that defendants win, but that malpractice defendants do better than the average defendant. Additionally, there are high transaction costs to making a medical malpractice, construction defect, or product liability claim due to the need for substantial discovery and expert testimony. If anything, this must pull potential plaintiffs, at least modestly, in the direction of foregoing even valid claims. But you would never know it from reading the paper. Alternatively, the resonating story of individual harm can lead to unfounded perceptions that medical care is much worse and more dangerous than is actually the case.¹⁹

The “broken system” rhetoric frequently finds a home in Nevada on the pages of the *Las Vegas Review-Journal*. Take, for example, the *Review-Journal*’s account of the dismissal of the McDonald’s obesity case (another McDonald’s case giving rise to tort reform anecdote). When reporting that the court had dismissed a claim against McDonald’s based on its sales of allegedly

Healthcare Ctr., 73 P.3d 1094 (Wyo. 1993) (permitting a “loss of chance” claim to proceed). See also Schmidt v. Mahoney, 659 N.W.2d 552 (Iowa 2003) (allegation – rejected by the Iowa Supreme Court – that a doctor’s failure to properly treat a motorist “caused” his seizure and bad driving that injured others).

¹⁸ See LARRY LAUDAN, *THE BOOK OF RISKS: FASCINATING FACTS ABOUT THE CHANCES WE TAKE EVERY DAY* (1994); Jane Spencer & Cynthia Crossen, *Fear Factors: Why Do Americans Feel that Danger Lurks Everywhere? Fixation on Risk, Fed by Labs, Law and Media, Haunts World’s Safest Nation; ‘Easier to Scare than Unscare,’* WALL ST. J., Apr. 24, 2003, at A1.

¹⁹ See Mary Alexander, *The Human Face of the Medical Malpractice Debate*, TRIAL, Apr. 2003, at 9 (noting the resonance of news accounts of death of seventeen-year old Jessica Santillan, who died at Duke University Hospital due to transfusion of the wrong blood type). Irrespective of the political uses to which Ms. Santillan’s death may be put by lawyers or politicians, I agree with Alexander and other plaintiffs’ lawyers that the tragic episode makes a powerful case against rigid damage caps. It also clearly illustrates how disastrous the consequences of malpractice can be at even the best institutions. See also Barbara Pinson, *Shine the Light on Texas’ Most Dangerous Doctors*, HOUS. CHRON., Apr. 21, 2003, at 19A (discussing problem physicians, the author, herself an M.D., relates her personal experience of being injured due to alleged misdiagnosis and mistreatment by surgeon with seventeen prior lawsuits. “Our regulatory system failed to protect me from this dangerous doctor”; “As an injured patient, I know the true measure of noneconomic damages – I face agony every day that has disrupted my life in too many ways”); James W. Gustafson Jr. & Thomas D. Masterson, *Challenging Hospitals that Tolerate Incompetent Doctors*, TRIAL, May 2003, at 18.

unhealthy food, the *Review-Journal* breathed a figurative sigh of relief, observing that “finally,” we had a decision by a “judge with common sense.”²⁰

Although no one (except perhaps political incumbents) likes a bland editorial page, neither do we need one that takes cheap shots with no factual basis. The clear implication of the *Review-Journal* slant on the McDonald’s fatty food case is that courts, as a whole, lack common sense. This assertion is a bit outrageous, even for a newspaper widely perceived as disliking lawyers, judges, and legal institutions generally. Like many academics, I have invested a good deal of my professional life being critical of judicial decisions and actions where I thought criticism was deserved. I am probably as big a “judge-basher” as one can find on the UNLV faculty, or any faculty this side of the 1930s legal realists at Yale. Yet even I would never suggest that the bulk of the bench lacks common sense or intelligence, competence, integrity, fairness, or a strong work ethic. But to read popular accounts or the articles of some tort reform proponents, one would think that judges and juries are airheads falling all over themselves to give money for hokey claims. The best empirical data assembled to date strongly suggests this is not the case.²¹ At some point, relentless rhetoric about “broken” systems may be effective short-term politics, but it is not fair argumentation and probably has deleterious long-term consequences for the system and society.

Perhaps the most effective public relations effort by those advocating medical malpractice reform has been to suggest that true medical malpractice seldom occurs, and that juries often mistake the uncertainties of human health for doctor error. In addition, this component of the tort reform lobby argues that medical malpractice claims encourage wasteful defensive medicine rather than useful deterrence of bad or risky practices. My own view is quite different. Although some of it is based on personal experience, available aggregate data suggests that medical malpractice occurs with disturbing frequency.²² Let me address each of the posited myths in turn.

As to the first common claim of tort reformers, the notion that malpractice is “over-claimed” rather than under-claimed, as the saying goes, you couldn’t prove it by me. I have had seven surgical procedures in my life: the routine tonsillectomy of youth; four knee operations; surgery to set a badly broken

²⁰ See Editorial, *Fast Food Lawsuit*, LAS VEGAS REV.-J., Jan. 27, 2003, at 6B.

²¹ Although this is not to say there are not actual problems with the status quo and proposals for reform worth considering. See, e.g., Gail B. Agrawal & Mark A. Hall, *What if You Could Sue Your HMO? Managed Care Liability Beyond the ERISA Shield*, 47 ST. LOUIS U. L.J. 235 (2003); Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909 (2002); David A. Hyman & Charles Silver, *You Get What You Pay For: Result-Based Compensation for Health Care*, 58 WASH. & LEE L. REV. 1427 (2001); Gary S. Mogel, *Malpractice Reforms Not A Cure-All*, NAT’L UNDERWRITER, Mar. 10, 2003, at 36. See generally Symposium, *Is the Health Care Revolution Finished*, 65 LAW & CONTEMP. PROBS. 1 (2002); Symposium, *Health, Law & Human Rights: Exploring the Connections*, 30 J.L. MED. & ETHICS 490 (2002); Symposium, *The Regulation of Managed Care Organizations and the Doctor-Patient Relationship*, 30 J. LEGAL STUD. 527 (2001).

²² See, e.g., Rita Rubin, *Patients’ Care Often Deficient, Study Says: Proper Treatment Given Half the Time*, USA TODAY, June 26, 2003, at 1A; *Half of What Doctors Know Is Wrong: An Issue Exploring Medicine and Its Myths*, N.Y. TIMES MAG., Mar. 16, 2003; Editorial, *To Aid Med Mal Reform, Physicians, Heal Thyselves*, BUS. INS., Feb. 17, 2003, at 8. See also *supra* notes 18-20.

ankle (complete with titanium screw that remains in the ankle); and hip replacement. Despite making me an orthopedic disaster, all of this has left me with considerable admiration for the American medical profession and its accomplishments. I have been impressed by the improvement of medical technology applied to my maladies, from the surgery in 1974 that gave my left knee that zippered “just missed the NFL” look to my 1993 arthroscopy that hardly left a trace and permitted me to walk the next day.

But I have also seen considerable variance in the skill of doctors and support staff and have been subjected to what most reasonable people would describe as negligence. My first knee surgeon probably did not adequately and completely remove loose material in the joint, at least according to the assessment of my second knee surgeon. Undoubtedly, this grating of loose material in the joint for three years was not therapeutic for the knee. But did I sue? Of course not; my damages were comparatively minor, hard to prove, and I had other things to do. But this is probably an instance of minor malpractice slipping through the cracks.

My third knee surgery involved spinal block anesthetic that left me with a splitting headache, even though I strictly followed orders to refrain from sitting up until the next day. I am pretty sure that a reasonable jury would conclude the I had been dosed with too much novocaine in the spine. But did I sue? Of course not. What are the damages for one headache, even a really bad headache that lasts for a day? And why would I want the hassle of litigation absent compelling circumstances?

A far greater anesthesia problem occurred during my 1989 ankle surgery, another spinal block that was, in my view, mishandled. Part way through the procedure, despite being sedated, I could not help but notice that the surgical team was becoming a bit agitated and was scrambling, seemingly worried. When one of the nurses gasped “Oh god, his pulse is down to 12,” that really got what was left of my attention. Within seconds, one of the doctors was pounding on my chest and throwing some adrenalin into my IV tube. After a few tense minutes (maybe only seconds but seemed much longer), my heart came back closer to normal and the procedure was completed.

After I was back in my hospital room, the anesthesiologist dropped by to chat and engage in some damage control. This is, of course, figurative page six from the implicit “how to minimize malpractice claims” manual taught to physicians: develop some sort of relationship with the patient so they are less likely to sue. Although I am likely to be more immune to this type of charm offensive than most patients, it still is not a bad idea. I liked the doctor just fine and appreciated the visit, but would have appreciated it more if he had been willing to confess a little error. These things do not just happen. They happen when the anesthesiologist fills your spine too high with too much novocaine that begins to put the heart muscle to sleep. Fortunately, the situation was rectified while I still had a pulse.

Months later, a doctor friend practicing at the hospital confided that the case had merited much discussion during an incident review session and there was clear consensus that the doctor and hospital were vulnerable to a malpractice claim. I am sure my friend, being a loyal member of the medical fraternity, only told me this after it was quite apparent that I had fully recovered and had

no thought of suing. Why should I? I was still alive and the orthopedic surgeon had done a boffo job on my badly broken ankle. But I remain convinced that this was one act of medical malpractice for which no one was called to account.

What if the worst had happened? What if I had died on the operating table (assuming I can get readers to agree that this would have been a bad thing)? Should the damages of my estate or spouse's wrongful death suit be artificially capped, even for noneconomic damages? What if I was a spouse who did not work outside the home? What about a worst case scenario: I survived, but in a semi-vegetative state for twenty or thirty years, in pain and vaguely aware of the situation. That is a hard thing on which to put a price. But personally speaking, I regard that sort of pain, suffering, degradation, and truncation of quality of life as both worse than death and worth more than the \$350,000 now provided by Nevada's cap on noneconomic medical malpractice damage.²³

This raises the question of another myth of sorts that surrounds medical malpractice tort reform: the notion that all doctors and medical providers are created equal, and that all are excellent. That, of course, is hogwash. All doctors and medical staff are not any more equal than are all lawyers, accountants, bankers, carpenters, bricklayers, plumbers or left-handed pitchers. Some are just better than others at what they do. Of course, not every doctor can be the medical equivalent of Randy Johnson.²⁴ The best we can hope for is adequate minimal competence, a goal we seek through education, training, licensing, supervision, and, where necessary, discipline. But these systems can neither work perfectly nor completely level the field. There will be differences in the skill, care, and consistency of medical providers, just as there are differences in other fields. As part of an effort to better understand malpractice dispute patterns, both the medical and legal communities should admit this inconvenient fact and attempt to assess its role in malpractice claim patterns. My own trial hypothesis is that the quality of medical care has a significant impact on the frequency and severity of medical claims. Where claims are higher than "normal," as appears to be the case in Nevada, the medical community must acknowledge the awkward possibility that this results from inferior quality rather than more litigious patients or a more encouraging legal system than that found in other states.

As to the second common claim of tort reformers, lack of deterrence and defensive medicine, I again disagree. Recently, as a consequence of approaching age fifty, I had the pleasure of my first colonoscopy. For better or worse, it was an incomplete pleasure. As the examination progressed, the doctor concluded at the first major hairpin turn in the organ (technically termed "grotesque redundancy"). The doctor stopped, fearing that continuing the procedure raised an unacceptable risk of perforation of the colon and chance of

²³ I should also give credit where credit is due. During my hip replacement surgery at the Mayo Clinic in Rochester, Minnesota during 2002, I had an almost Nirvana-like anesthetic experience, waking up rather alert after total anesthesia with no lingering ill side effects. In fact, the entire experience was superb and the artificial hip appears to be working well. My personal experience suggests that the Mayo Clinic's reputation for excellence is well deserved.

²⁴ Star pitcher for the Arizona Diamondbacks baseball team.

infection. He quickly arranged for a barium enema X-ray procedure to examine the remainder of the colon.

Was this foolish defensive medicine, or was it wise deterrence occasioned not only by the doctor's medical judgment, but by fears of litigation if the colonoscopy had continued and caused damage to the colon? Although no one can be sure, I was extremely pleased that the doctor made this decision of caution. Less than two years ago, a doctor conducting a similar procedure on my father made the opposite decision, resulting in perforation and infection that nearly killed my father. He was saved only by emergency surgery and hospitalization that cost considerably more than a barium enema X-Ray piggybacked onto a colonoscopy. If what I got was the much maligned "defensive medicine," then I owe unnamed attorneys thanks and can only hope that similar caution is being induced all over America because of the tort and litigation system.

Of course, the differences between my treatment and my father's treatment can also be read to mean that the litigation system makes little difference in comparison to the physician's own professional judgment. One doctor decided to refrain from challenging the grotesque redundancy while another forged ahead with disastrous, nearly-fatal results. The more cautious doctor was also working in a state with a less plaintiff-friendly malpractice regime. Although extrapolation based on personal experience is always risky, my conclusion is that medical skill and judgment can vary enormously. Malpractice does occur with disturbing frequency but is usually not catastrophic and usually does not become the subject of a compensation claim. The existence of medical malpractice claim rights for patients encourages greater caution by medical providers, which is more of a good thing than a bad thing, even though there is some social cost occasioned by defensive medicine. But whatever the legal regime, professional skill and judgment remains important, probably primary, in determining the pattern of malpractice claims.

Another part of the competing perceptions of reality in the tort reform debate relates to professional burdens and status. This factor is discussed in greater length in Part III, below, regarding professionalism and tort reform. Plaintiff lawyers, for example, rail against limits on recovery of compensatory or punitive damages on grounds of fairness and deterrence. But the thinly-veiled reality for many of these lawyers is that they will take home one-third, forty percent, or even half of any such awards to plaintiffs. If these trial lawyers really cared so much about their clients, one would expect to see more graduated and creative fee schedules so that clients reaped more of the benefits from successful prosecution of a civil litigation claim.

For doctors, the countervailing example is the cultivated (by doctors and other tort reformers) perception that doctors are under relentless economic pressure as a result of legal claims. We hear of doctors "fleeing" plaintiff-friendly jurisdictions or being hit with large increases in malpractice premiums. Part of this story is true: doctors have it tougher than they did thirty to fifty years ago in terms of the investment costs in training, equipment, staff, overhead, and insurance. Add to that the tougher time they have gaining fair payment by insurers for their services and there is no doubt that these are not the salad days of the medical profession. Doctoring has become more bureaucratic and stress-

ful. But relatively little of this seems to be the result of the legal system. It appears to have much more to do with the changing market for the delivery of medical services.²⁵ Plaintiff lawyers did not increase the cost of medical school or bring additional competitors into previously undersupplied areas like Las Vegas. Lawyers were not the driving force behind HMOs, managed care, or slow-pay health insurance. Neither did trial lawyers increase employee costs, equipment costs, or overhead. The free market did that just fine by itself.

Although plaintiff claims have, of course, had some impact on malpractice insurance premiums, insurance policy availability and pricing results from a number of factors besides claim frequency and severity. In other words, even if everything tort reformers say about a broken system is true, following the tort reform blueprint will not necessarily lead to lower insurance prices in a given region at a given time. As described in some detail during the Symposium by Bill Bradley, the experience of having Nevada's largest medical malpractice insurer acquired by a national insurer, which was intent on raising premium dollars for investment through foolishly low pricing, resulted in large spikes in premiums and the national insurer exiting not only the Nevada market, but the entire business altogether.²⁶

Although, as might be expected, various groups debate what drives insurance "crises" and premium increases,²⁷ the current jump in medical malpractice has something in common with the jump in product liability premiums that took place in the 1980s, with overly aggressive underwriting designed to gather premium dollars to take advantage of high interest rates. In both cases, a dramatic downturn in investment income by insurers was followed by dramatic increases in premiums or decreases in availability. Furthermore, this cycle of "hard markets" (insurance is costly and tough to get) and "soft markets" (insurance is relatively cheap and easy to get) seems to repeat itself irrespective of developments in the tort system.

Furthermore, because of the McCarran-Ferguson Act,²⁸ insurers are largely exempt from federal antitrust regulation (although they are of course regulated by the states on many fronts). As a result, insurers have relative freedom to act collectively and they do so.²⁹ Regardless of whether this may

²⁵ See Joseph B. Treaster, *Aetna Settles Dentists' Suit Over Delays in Payments*, N.Y. TIMES, Aug. 19, 2003, at C5 (involving payments of more than \$2.25 million); Joanne Wojcile, *HMOs Thriving in Orange County*, BUS. INS., Aug. 18, 2003, at 19 ("The HMO market is strong there because plans have responded to physician complaints that reimbursement rates were too low" and not necessarily because of California's medical malpractice tort regime, as is frequently argued by Nevada tort reform proponents); Sarah Hoffman Jurand, *Doctors' Suit Against HMOs Certified as a Class Action: Patients' Class Denied*, TRIAL, Dec. 2002, at 62; See also Reni Garner, *Eye Surgeon Wins \$31M "Bad Faith" Verdict Against Disability Insurer*, LAW. WKLY. USA, Mar. 24, 2003, at 20.

²⁶ See Symposium, *supra* note 1, at 393 (remarks of Dean Hardy).

²⁷ Compare J. Robert Hunter, *Consumer Advocate Challenges Insurers on 'Crisis' in Med Mal Mkt.*, NAT'L UNDERWRITER, Oct. 7, 2002, at 16, with Raymond R. Mazzotta, *Hunter Fires Blanks with "Smoking Gun,"* NAT'L UNDERWRITER, Nov. 11, 2002, at 12.

²⁸ 15 U.S.C. §§ 1011-1015 (2000).

²⁹ See JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 2.03-.05 (2d ed. 1999 & Supp. 2003) (summarizing the McCarran-Ferguson Act exemption of insurers from federal antitrust law and state regulation; insurers are allowed substantial discretion to collaborate).

violate the “boycott, coercion, or intimidation” exception to McCarran-Ferguson’s antitrust immunity, it suggests that insurance pricing and behavior is not inexorably tied to the success of tort claimants.³⁰

In short, the issue of insurance availability and the effect of litigation on the cost of goods or services is too complex to lay at the feet of tort claimants. Additionally, much of the clamor for tort reform overlooks another possibility for the rise of insurance premiums: a good part of the premium increase may be the result of plaintiff claims. But if these plaintiff claims are valid, why is the solution to impose greater legal burdens on plaintiffs? An equally valid solution would appear to be to require that tortfeasors bear increased insurance costs as the price of continuing to do business or stopping doing business if they cannot internalize the costs of any injury they inflict. Although “Keep Our Doctors in Nevada” or “Keep Our Builders in Nevada” may be great campaign slogans, it may be that Nevada is better off if some doctors or builders go elsewhere to inflict damage.

Finally, there is the financial bottom line, as driven home by Rick Harris’s anecdote about his conversation with a doctor friend who complained about a steep rise in medical malpractice premiums.³¹ To be sure, the premiums had gone up substantially. But nonetheless, the doctor was still making a multi-million dollar income. One presumes that Rick’s friend is a more financially successful doctor than most, but how do I know? Maybe the bulk of doctors make \$3-4 million per year, in which case quarter-million dollar malpractice premiums would not seem like cause for alarm or reason to constrict plaintiffs’ legal rights. Before determining when tort law patterns really call for legislative or judicial change, we should at least know the financial situation of the persons claiming to be financially aggrieved by the system; and the persons or entities seeking change should have to prove their hard times rather than ask the policymakers to simply take them at their self-interested word.³²

Thus far, I have only briefly touched upon the type of differing world views attending the tort reform debate and the murky facts and excessive rhetoric involved. Although it is perhaps the classic “wimpy” academic response to call for further study, substantial changes in the law should probably not proceed until we know much more than we do now about the actual face of tort claims, insurance, and the economic status of the interested parties.

³⁰ See generally *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (permitting state attorney general’s action against insurers alleging anticompetitive behavior to go forward; undisputed facts of the case reveal extensive collaboration by insurers and control of influence of key large insurers).

³¹ See Symposium, *supra* note 1, at 440 (remarks of Richard Harris, Esq.).

³² This goes, of course, for lawyers and insurers as well as doctors. My own pet idea for legislative and lobbying reform is this: Anyone lobbying for legislative action must not only disclose the manner in which they may benefit from the legislation but must also submit to the legislature their federal tax returns for the preceding three years. Whether to believe doctors or plaintiff lawyers on the issue of tort reform has something to do with the economic situation of these actors. If doctors are doing well in spite of higher insurance costs, this argues against tort reform (at least as a form of relief for doctors). If plaintiff lawyers are doing well, this is a factor in evaluating their opposition to tort reform and claim to represent society’s less fortunate, as well as for evaluating specific proposals such as contingency fee regulation.

III. FORGETTING AND FAILING TO EXPLORE THE LESSONS OF BEHAVIORAL SCIENCE

Behavioral sciences help to show the degree to which both sides of the debate may have some valid points about cognitive errors made in analysis and adjudication.³³ Although human beings are amazingly thoughtful, their thoughts are frequently not perfectly rational or rigorous. They make mistakes of analysis or valuation through a variety of what might be termed processing or analytical errors. To list some of the major ones briefly:

Constructed Preferences or Heuristic Errors. These are errors of analysis stemming from what might be termed misconfiguration of the problem. "Alternative descriptions of the same choice problems lead to systematically different preferences."³⁴ Framing affects judgment, sometimes adversely. If a problem is framed improperly, it is assessed improperly. One obvious example in the tort reform arena is the degree to which proponents and opponents both seek a particular framework for political ends. To follow on the discussion from the previous section, if the problem of higher insurance costs is framed as a problem of higher claim costs, this produces a self-fulfilling prophecy (higher claim costs must be the reason for higher insurance costs) which, in turn, unwisely constrains the range of potential solutions to only those actions that reduce claim costs when other factors may be more important. It also creates an inevitable momentum in favor of restricting claims even though past claims may have been legitimate and should be permitted.

There are also a number of prominent cognitive tendencies labeled "biases" by behavioral theorists. These include:

- *Extremeness Aversion.* This is a commonly-observed trait in people who avoid taking what they would view as extreme positions based on the context and framing of the questions. This leads to "compromise affects" when people are presented with conflicting data or positions. Applied to jury decisionmaking, this trait suggests that juries are intrinsically reluctant to make large awards or to completely reject a claim of loss, but have some tendency to compromise the claims of plaintiffs and defendants in this regard.³⁵
- *Hindsight Bias.* "People often think, in hindsight, that things that happened were inevitable, or nearly so. . . . Judgments about whether someone was negligent may well be affected by this bias."³⁶ This cognitive trait is clearly one supporting tort reformers, particularly when viewing the outcomes of medical procedures. For example, a jury may see an adverse surgical outcome as the result of malpractice even though the doctor and medical team were doing everything properly from a pre-event perspective.

³³ See *Introduction to BEHAVIORAL APPROACH SCIENCE AND THE LAW, LAW AND ECONOMICS*, (Cass Sunstein ed., 2000) [hereinafter *BEHAVIORAL APPROACH*] for an excellent overview of this discipline and examples of the cognitive errors frequently made by people in assessing matters.

³⁴ See *id.* at 1-3.

³⁵ *Id.* at 3-5.

³⁶ *Id.* at 3-4.

- *Optimistic Bias*. “Even factually informed people tend to think that risks are less likely to materialize for themselves than for others” and they have “systematic overconfidence in risk judgments.”³⁷ Such optimism bias would appear to apply to patients, doctors, home buyers, and home builders. It would seem that this bias could create negligent or even foolish behavior by any of these actors, depending on the context. For example, a confident doctor, like a confident pilot, inspires confidence. But confidence under the influence of the optimistic bias can become overconfidence, leading to rushed or inopportune surgery or unwise flight through a thunderstorm area.
- *Status Quo Bias*. This is a trait of human nature that makes humans demand a great deal of proof or persuasion to justify change.³⁸ Applied to litigation, it probably makes juries more pro-defendant than is commonly presumed. Making a financial award to a plaintiff, even when justified by persuasive legal claims, is something of a “Robin Hood” move in that it takes resources from one party for the benefit of another, altering the status quo. Applied to public policy, legislation, and elections, the status quo bias probably operates to increase the burden on those seeking a change in laws or government.
- *Self-Serving Bias*. Self-serving bias is the tendency to overrate one’s own contributions to a household or entity. It is a “belief that one deserves more than other people tend to think” and “affects both parties to a negotiation (including litigation settlement) and this makes agreement very difficult.” Applied to litigation and tort reform, the effect of self-serving bias probably works to make plaintiffs feel abused by the system (e.g., long waits for trial; cross-examination) and defendants feel unduly burdened by litigation and unfairly forced to pay for something that was not anyone’s “fault,” but rather simple bad luck.

Another set of traits affecting human cognition is generally classified under the rubric of “*heuristics*” and includes:

- *Availability*. “People tend to think that risks are more serious when an incident is readily called to mind or “available.”³⁹ This can result in pervasive biases in risk assessment based on media portrayals of risk and litigation outcomes. As discussed in Part I of this Comment, it can result in people who will refuse to swim in the Pacific Ocean for fear of the once-a-decade shark attack but who fail to wear a seat belt while driving to work, despite the far greater risk of injury or death. The narrative power of individual episodes is also important. In the infamous statement of Joseph Stalin, an instinctive behavioral scientist, “a single death is a tragedy, a million deaths a statistic.” Applied to perceptions of litigation, this explains why people focus inordinately on the multi-million dollar verdict but forget or remain ignorant of the overall picture more favorable to defendants.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.* at 5.

- *Social Influence*. Operating under this heuristic, persons unsure of the right answer follow the crowd.⁴⁰ Applied to politics and public opinion, this produces the well-known “bandwagon” effect. Applied to litigation, it probably assists the quest for jury agreement but also probably tends to prompt judicial behavior to converge on a mean. Put another way, if most judges think that pain and suffering damages of more than \$500,000 are too high for most cases, you, too, will create an informal but flexible cap in judicial review of jury awards.
- *Anchoring*. Use of an initial value (even one that is absurd) affects probability judgments. At the risk of stating a tautology, people tend to be anchored by an anchor – in either direction.⁴¹ Applied to litigation claims, this suggests that plaintiff counsel are rewarded for asking jurors for a large amount (e.g., claiming a million dollars pulls up the jury horizon and increases the ultimate amount) or defendant counsel are rewarded by refusing to acknowledge any liability or damage to a claimant (asking for a verdict of zero pulls down the jury horizon and decreases the ultimate amount of any plaintiff’s award). As to the anchoring heuristic, my own common sense antenna, and that of most trial lawyers I know, suggests some inherent limits. A plaintiff asking for \$10 million for a hangnail is likely to be laughed out of court. Likewise, a defendant who accuses an amputee of imagining injury loses credibility. But where counsel act within some arguable range of the reasonable, anchoring as part of trial presentation seems likely to affect the size of awards.
- *Case-based decisions*. This is the tendency of people to avoid sweeping decisions and instead to make incremental, situation-specific decisions about particular problems at hand.⁴² Applied to litigation, it suggests that defendants can mute “send them a message” monetary awards by appealing to the more case-specific orientation of most jurors. Similarly, plaintiff counsel can mute defendant efforts to suggest that a plaintiff’s verdict in the case at hand will be the first of a line of dominos leading to the fall of the company or economy. Applied to politics, this suggests that voters and policymakers may be more comfortable addressing an isolated aspect of tort reform (e.g., medical malpractice, construction defects) rather than taking global action affecting the entire system. Such case-based decisions can be good or bad, depending on one’s agenda. One implication I draw is that the more comprehensive tort reform program advocated by the organization Common Good will be difficult to sell merely because it is comprehensive. On the other hand, more targeted and incremental efforts such as the Common Good proposal for medical malpractice reform may receive a kind reception.⁴³

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Symposium, *supra* note 1, at 407 (remarks of Nancy Udell, Esq.) (describing the Common Good package of medical malpractice reforms).

Another group of behavioral science concepts can be classified as *valuation* traits among people. These include:

- *Loss Aversion*. Unsurprisingly, people do not like to lose the money or property they possess. More precisely, people appear to place a greater value (and correspondingly greater sorrow in the event of loss) on loss of a dollar they currently possess than on a dollar they are unable to attain.⁴⁴ This trait appears to hold, regardless of the event that occasioned the past or future loss and the equities of the past or future deprivation. What matters is the wealth endowment effect. Taking something you already have seems to hurt more than preventing you from gaining the same thing.
- *Mental Accounting*. To the average person, money “comes in compartments” rather than being fungible.⁴⁵ Because of this, it can be hard to convert normative judgments into dollar amounts due to the absence of a market. The problematic aspects of mental accounting undoubtedly explain some of the variance in tort awards (both by juries and judges) but do not immediately supply a solution to the difficulties of conversion.

In addition, behavioral scientists have observed in humans an ingrained tendency toward reciprocity and fairness, labeling people as *homo reciprocans*, creatures who will reciprocate in kind when assisted and appear not to violate social norms of fairness even when it is in their economic interests to do so.⁴⁶

Because the application of behavioral science concepts is relatively new to law, it is too soon to determine the degree to which law will embrace this field and too early to determine the consequences of any such incorporation. However, these basic concepts certainly illuminate litigation, public opinion, and policymaking. At this juncture, it appears that some behavioral science axioms support the case for tort reform while others suggest that the human element of the system is not defective. Although the scholarly jury is still “out” in this area, one lesson to be learned is the need for humility in assessment and caution in changing the status quo.

IV. PROFESSIONAL FRICTION AND MISUNDERSTANDING

Much of the push for tort reform has come from persons arguing that modern litigation distorts or undermines private markets. Interestingly, the “father” of modern market theory and veneration had this to say about professionals and their compensation:

We trust our health to the physician; our fortune and sometimes our life and reputation to the lawyer and attorney. Such confidence could not safely be reposed in people of a very mean or low condition. Their reward must be such, therefore, as may give them that rank in society which so important a trust requires. The long

⁴⁴ See BEHAVIORAL APPROACH, *supra* note 33, at 5-6.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 8 (although it is doubtful that Enron, WorldCom, or Tyco executives were part of the sample group in question).

time and great expense which must be laid out in their education, when combined with this circumstance, necessarily enhance still further the price of their labour.⁴⁷

In other words, Adam Smith thought that financial reward and social status for doctors and lawyers was a necessary evil to facilitate their effective discharge of professional duties. Most likely, this is still a proposition on which doctors and lawyers agree. But in many other respects, doctors and lawyers have moved far away from the brotherhood and mutual interest Smith bestowed upon them. In today's third wave of modern tort reform, doctors and lawyers are cast as antagonists locked in a zero-sum game to maintain or regain economic and social standing.⁴⁸

In 2002 and 2003, doctors have clearly been the winners in this tug-of-war. The 2002 Special Legislative Session in Nevada produced a significant tort reform bill, one which caps noneconomic damages at \$350,000 unless the injury inflicted was the result of "gross" malpractice proven by clear and convincing evidence.⁴⁹ Perhaps thinking that nothing succeeds like success, the physician lobby immediately returned to the 2003 legislature seeking even more tort reform – even before there had been any significant experience under the 2002 legislation. Specifically, doctors sought to reduce the cap on economic damages to \$250,000 and to remove the verbal exceptions that could permit awards above the cap, to limit awards of counsel fees, and to essentially abolish joint-and-several liability in medical malpractice matters.⁵⁰ The legislature did not act, setting the stage for voter consideration of this proposal in the November 2004 election. A competing initiative supported by the Nevada Trial Lawyers, which would increase the noneconomic damages cap for non-wage earners, will also be on the ballot.⁵¹

Momentum continues to be with the doctors on the issue of tort reform in that they continue to exert political energy and keep the issue of medical practice reform in the press, presenting a picture of a profession under siege and in need of protection. The lead organization in this effort, "Keep Our Doctors in Nevada," even picked a name that exerts some subtle coercive pull on voters and politicians: if doctors don't get what they want, they may pull up stakes and go elsewhere, leaving Nevada with insufficient medical services. It is a threat and a plea designed to get both attention and sympathy, and it illustrates one of the differences between the professions and a natural advantage doctors hold over lawyers. A lobbying effort to "keep our lawyers in Nevada" would probably provoke more than a little laughter and not much legislative aid. Examining the reasons behind this helps illuminate the differences between law and medicine and their correspondingly different public perceptions.

⁴⁷ ADAM SMITH, *THE WEALTH OF NATIONS*, BK 1, Ch. 10, 111 (Prometheus Books ed. 1991).

⁴⁸ See Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002); M. Gregg Bloche, Comment, *Trust and Betrayal in the Medical Marketplace*, 55 STAN. L. REV. 919 (2002).

⁴⁹ See Irwin Simon, *Medical Malpractice Legislation*, COMMUNIQUE, Aug. 2003, at 30 (summarizing this and other aspects of the 2002 Legislation, Assembly Bill No. 1 of the special session, which became effective Oct. 1, 2002).

⁵⁰ *Id.* at 31.

⁵¹ *Id.*

Unlike lawyers, doctors touch the lives of nearly everyone. Despite the absence of universal health insurance, virtually everyone is seen by a doctor sometime (not counting birth) because of the health care infrastructure and the frequency of medical needs. By contrast, many people never have professional contact with a lawyer.⁵² Unless the family doctor is obnoxious, there will probably be some reservoir of goodwill supporting doctor-based political initiatives. Correspondingly, it will be easier for doctors, manufacturers, or other interest groups to call upon public sympathy and support, demonizing relatively unknown attorneys if necessary.

In addition, a good deal of lay contact with doctors is non-threatening, routine, and affirming (e.g., regular checkups, finding out that the tickle in your throat is just a tickle). By contrast, lay interaction with lawyers is more mixed. There are constructive interactions, such as estate planning (although even that can be uncomfortable for many people) and home sales. But many of the interactions may be termed “destructive,” such as when a person is embroiled in litigation, faced with a domestic dispute, fired from a job just before a pension vests, and so on. Under these circumstances, many individuals may associate lawyers with negative experiences while associating doctors with positive experiences.

To be sure, there are acute and traumatic circumstances confronting the doctor-patient relationship (e.g., massive bleeding in the ER; emergency surgery) that usually far-outstrip the drama of even the hottest preliminary injunction hearing. But here, too, doctors appear to have an advantage. Doctors do not operate in an adversary system. When a patient is treated at the hospital, the doctor and everyone else in the room is attempting to make the patient better (perhaps negligently, but at least everyone is trying to be part of the solution rather than part of the problem). No other medical professionals attempt to impede the treating physician. Contrast this with many, perhaps most, of legal activity in an adversary system. Litigation is obviously different than medicine. Roughly half of the lawyers involved in any matter are trying to thwart one of the parties. Many transactions also have an element of opposition and competition despite whatever “win-win” rhetoric may accompany the deal.

Additionally, medical and legal outcomes are dogged by a significant difference. Even where medical treatment does not produce an optimal “cure,” neither is it a contest. All of the patients on “Ward J” at the local hospital can live or get healthy without impeding the recovery or survival of the patients in “Ward K.” The same is not true in law. Again, roughly half of those using legal services are likely to have some disappointment or sense of loss from adverse verdicts, sub-optimal or thwarted transactions, property settlement, visitation rights, disappointing inheritance, regulatory imposition, etc. A large percentage of legal events leave some participants at the short end of the stick. This is simply not the case with medicine. To be sure, adverse outcomes are disappointing, even tragic. But they are not the norm. Neither is contention or conflict. Doctors and adversely-affected patients or their representatives take

⁵² See BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); Russell G. Pearce, Patrick W. Shea, & Jeffrey W. Stempel, Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980).

medical practice emotionally and personally. But disappointment and conflict are not a chronic part of medicine as with many areas of law. Thus, doctors start with an embedded advantage over lawyers in the battle for the hearts and minds of politicians and the public.

But both doctors and lawyers also have something in common: they are professionals by training and acculturation. This gives them a kinship of expertise, self-regulation, codes of conduct, frequent exercise of discretion, and probably no shortage of ego. In recent times, both doctors and lawyers have found their professional status under siege. Doctors have been hit with managed care and third-party payer controls on top of whatever other economic and legal pressures they face. Many lawyers have similar pressures from insurers who retain them and increasing government regulation, such as the Sarbanes-Oxley Act of 2002.⁵³

One of the interesting ironies of the medical malpractice debate is the way in which insurers have been able to play Iago with lawyers and doctors in the roles of Desdemona and Othello (readers can decide who is who). Insurers have been a source of a good deal of trouble for both lawyers (e.g., case management guidelines) and doctors (medical payments restrictions, delays and set-offs).⁵⁴ Yet somehow, the liability insurer cousins of the health insurers, HMOs, and managed care administrators who have largely made life miserable for physicians during the past thirty years, have convinced doctors that lawyers are to blame for all of their problems.⁵⁵ This is the Stockholm Syndrome on steroids: doctors carrying the tort reform water for insurers who make poor

⁵³ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at 15 U.S.C. § 7201 (2002)).

⁵⁴ Consider the advertisements in the campaign for tort reform, including one run in Nevada suggesting the following syllogism: (a) "My Husband Died Because the Trauma Unit Was Closed"; (b) "Because of High Insurance Costs"; (c) "Because of a Lawsuit"; and (d) "He Would Have Surely Lived if it was Open"; therefore, (e) "The Lawyers and Their Lawsuits are Responsible for Closing the Trauma Unit and Killing My Husband." I hope I don't have to work too hard to convince readers of the *Nevada Law Journal* that this sort of answer would probably flunk the proximate cause aspect of a basic first-year torts exam. The fairest thing to say is probably that the trauma center may have closed for any number of reasons. The second fairest thing to say is that there is no certainty that the husband at issue would have survived if the trauma center had been next door. The third fairest assessment is probably that insurance for medical facilities is problematic and bears examination. Poor operations or self-serving conduct by insurers may have been the most important factor in the close of the trauma center. A fourth possibility is that the trauma center wasn't very good and any lawsuit that brought about its closure was a public service. At some point, one can think that the availability of medical services is a lawyer-centered problem, but one would have to try a lot of other possible explanations before getting to this point. My point is simply that this kind of "2 + 2 = Blame the Lawyers" thinking has become an unfortunate characteristic of the tort reform debate and lobbying efforts.

⁵⁵ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Reviewing a \$145 million award of punitive damages affirmed by a nearly unanimous Utah Supreme Court, which found sufficient reprehensible misconduct (a Company-wide scheme to chisel the near-fiduciary policyholders and to target the "weakest of the herd"), the United States Supreme Court reversed in a 6-3 vote. But only Justice Ginsburg seems to have disagreed on the merits and supported the Utah Supreme Court and the punitive damages award on the merits. Justices Scalia and Thomas dissented because they did not believe that the Due Process clause of the Fourteenth Amendment authorized federal courts to supervise state court punitive damages awards.

underwriting decisions (e.g., problematic doctors continue to get coverage, raising rates for competent physicians who never had a claim), cut rates and then triple them when the investment climate changes, exit states, and stop writing coverage abruptly. A sociologist from Mars would find doctor affinity with insurers and antipathy toward lawyers a bit amazing.

Without doubt, lawyers have something to do with this to the extent some lawyers have failed to make serious efforts at ADR, been unduly combative or even abusive to defendant physicians, or even brought unfounded claims. And even under the most civil of circumstances, attorneys become the personified embodiment of a legal attack on a doctor's professional competence. That may explain some of the antipathy, but still fails to explain why insurers have been able to figuratively hold the coat of the medical profession while blaming problems on the legal profession.

Some of the answer, much of it underemphasized in the mainstream tort reform literature, may be the socio-professional divide that develops between doctors and lawyers well before they are faced with malpractice litigation. To some extent, the tension between the professions is almost hereditary or genetic. To the extent that a doctor's parent is a professional, the parent is far more likely to be a doctor than a lawyer. So, too, with lawyers and their parents. The pathologies of professional misunderstanding may infect both doctors and lawyers before they even arrive at college for pre-med and pre-law courses.

Although it is hard to measure the long-running Hatfield-and-McCoy aspects of the doctor-lawyer relationship, the feud (encompassing both good-natured ribbing and some real venom) is apparent. Consider the long-standing joke offered by pre-law and law students to their medical counterparts: "200 years ago, lawyers were writing the Constitution. Doctors were putting leeches on George Washington." Doctors can respond with any number of lawyer jokes widely circulated among the general populace (e.g., "What do you call 300 lawyers at the bottom of the ocean? A good start.").⁵⁶

A good chunk of the tort reform imbroglio could probably be ameliorated if doctors and lawyers could rediscover and renew professional kinship rather than crafting morality plays featuring the other as villains. Both professions are under the greatest stress and serious threats to their professional models in a century. For both, there is the threat of reduced autonomy and independence as outside forces attempt to control and direct their professional judgment. For lawyers, the challenge is presented by profitable but micro-managing clients or insurers, who are technically third-party payers and not true clients, but who are big users of legal services with considerable clout. For both doctors and lawyers, there is a threat of increased government regulation and the risk that their traditional self-regulation will be supplanted by greater bureaucratic control. And for both there is the risk that economic factors that have already bent the traditional professional model of delivering services will distort it out of shape altogether.

⁵⁶ See also Marc Galanter, *LOWERING THE BAR: LAWYERS JOKES AND LEGAL CULTURE* (2002).

A classic illustration is the organization of the modern doctor's office. In an effort to enjoy economies of scale and the economic benefit from delegation of some duties to clerical and para-professional staff, the typical doctor's office today is more like Wal-Mart than Norman Rockwell. There is the usual intake bureaucracy, followed by a significant stint in the waiting room, serenaded by a loud television presenting something edifying like "The Price Is Right" or a "better abs" infomercial. This makes a patient feel downright treasured by his physician. Doctors have also moved fairly far away from the historical "professional-as-friend" model by attempting to force patients to sign arbitration agreements upon intake.⁵⁷ My own experience with the waiting time at the average doctor's office suggests that one-hour waiting times are now standard. The doctors (including ones I like and whose skills I value) no longer even apologize for a sixty-minute or ninety-minute wait. Apparently, this sort of delay is no longer even considered something meriting a perfunctory effort to make amends. Fortunately, in my line of work, there's always a lot of reading to be done, although I could do it much more productively in another setting (sans Bob Barker or the infomercial).

Of course, not every patient handles the wait well. Recently, one frustrated patient filed – you guessed – a lawsuit against a doctor who kept him waiting for three hours.⁵⁸ This kind of litigation is a bit silly, of course. But silly as the "long wait" lawsuit may be, it did not shock me; what shocked me was the comment on the suit made by Las Vegas doctor Rudy Manthei, Chairman of "Keep Our Doctors in Nevada." According to Dr. Manthei, patient pile-ups are an inevitable part of modern medical practice because the "only way to make it is to overbook patients and see as many as we can."⁵⁹ Clearly, Marcus Welby doesn't live here anymore. Although I should give Dr. Manthei points for candor, I also have to note that this sort of patient practice simply is not consistent with the delivery of professional services to clients rather than selling fungible goods to customers. Although the Marcus Welby-style cottage-industry of kindly family doctors making house calls may be a thing of the past, the professional ideal should still employ enough of a commitment to service so that a doctor actually begins the day intending to see a particular patient at the time scheduled rather than employing calendar Darwinism to raise profits.

After some reflection, I realized that I should not have been so taken aback by Dr. Manthei's admitted style of operation. I was once a patient of Dr. Manthei's – for one eye examination appointment – and my experience was perfectly consistent with the cavalry charge style of scheduling suggested by his statement. His office (Nevada Eye and Ear, a modern name much easier to remember than Drs. Smith & Jones, etc.) was large, modern, and reasonably

⁵⁷ See Joelle Babula, *Valley Health Care: Group Won't Arbitrate Medical Cases*, LAS VEGAS REV.-J., Aug. 7, 2003, at B1 (quoting an American Arbitration Association official: "It's not fair to ask a person who's going in for medical treatment to sign an arbitration agreement . . . Unless a patient indicates they want arbitration after a dispute, we won't handle it anymore.").

⁵⁸ See Joelle Babula, *Las Vegas Patient's Patience Runs Out: Man Sues Doctor for Three-Hour Wait*, LAS VEGAS REV.-J., July 29, 2003, at 1A.

⁵⁹ *Id.* at 5A.

comfortable, but not comfortable enough to make the long wait all that sufferable. My recollection is that I was in the waiting area for about two hours, followed by several minutes in the examination room, where I was first seen by an assistant. The real doctor himself did not arrive until perhaps the 2.5 hour mark, which then featured about 3.5 minutes of physician care.

Although Dr. Manthei seemed knowledgeable and competent, the whole experience left me a bit cold, and the office struck me as a mill. Perhaps a mill operated by skilled doctors, but a mill nonetheless. I never went back and instead now see a different eye doctor who operates his own small practice. In my visits thus far to this doctor (Mark Dubrova), I have never waited more than ten minutes, never been screened by a para-professional, and never felt hurried. To the contrary, Dr. Dubrova is willing (or at least has convinced me and other patients that he is willing) to take whatever time is necessary to answer patient questions. For me, at least, the experience as a Dubrova patient has been substantially preferable to being a Manthei patient.

Of course, it would not surprise me to find out that Dr. Manthei makes a lot more money than Dr. Dubrova. But if something goes wrong with an eye treatment or diagnosis, which doctor is more likely to be sued by a patient? One need not be a rocket scientist to see the difference in their practice operations and to anticipate its potential effect on the number and intensity of possible malpractice claims.⁶⁰ My thesis is that smaller, more human-scale practices engender more patient goodwill and can reduce medical malpractice exposure as a practical matter (and perhaps reducing incidents of malpractice because a less hurried physician is more directly involved in providing medical services). Of course, doctors are free to practice in a more modern manner to gain a more profitable economy of scale. But in doing so, they should realize that they will need to invest some of those higher gross revenues in the purchase of more medical malpractice insurance to compensate for the human professional capital that is not being spent.

Although this is another area where lawyers may parallel doctors, the differences between the two professions remain significant, even in this relatively "minor" area of client relations. Comparing the modern, Manthei-style medical clinic to a high level law office underscores the difference. I doubt if an attorney at Lionel Sawyer & Collins, Beckley Singleton, or Gordon & Silver⁶¹ has ever kept a client waiting in the lobby for more than ten minutes. And during whatever waiting time occurs, the client is offered more comfortable surroundings and refreshments in lieu of the "Price is Right" or details on the wonder-ab machine. In this strata of law practice, lawyers continue to give far more personalized service than doctors.

But medical care in America is far more egalitarian than legal care. The same insurance that has bureaucratized medicine has also expanded public access to even the finest medical care. Very few individuals in need of legal services can afford any of the three law firms mentioned in the paragraph above. But with enough time and persistence, anyone with a good health insur-

⁶⁰ Dr. Mark Dubrova also enjoys an additional layer of deterrent protection in that his father, Dr. Max Dubrova, is one of my favorite former students (although I don't think this has affected my assessment of the younger Dubrova's medical operation).

⁶¹ These firms all have offices in Las Vegas, Nevada.

ance plan can usually get to see even a world-renowned physician. For example, my hip replacement at the Mayo Clinic was done by the same surgeon who replaced the hips of former president George H.W. Bush and former first lady Barbara Bush. By contrast, an ordinary layman would have no realistic chance of hiring Barry Richard or David Boies, the lawyers most prominently involved in the *Bush v. Gore*⁶² litigation.

But despite giving medical care its due on this score, the different practices on client waiting reflect different professional norms, even when comparing apples to apples. If instead of a large, elite business law firm we compared large medical clinics to law firms aimed at individuals rather than businesses, we would continue to see a gulf between the two worlds. For example, in a law firm geared toward review and intake of personal injury claims, one expects that most of the initial screening will be by legal assistants and there will be some waiting, or the requirement of a second visit to see a lawyer, if the case is one of interest to the firm. But would even the busiest personal injury mill keep a prospective client waiting three hours or more before getting to talk to at least a staff member? I doubt it. Like other aspects of the tort reform debate, the role of practice organization and delivery could stand more examination and appreciation. Many doctors, and perhaps a significant number of lawyers, should at least consider the possibility that larger operations and more detached client relations may be the source of a good deal of problems, such as declining status and more frequent claims.

V. POLITICS AND ECONOMICS CLOUDING AND CROWDING OUT SUBSTANTIVE RATIONALITY; DEEP-SEEDED POLARIZATION OF SOCIETY ON THESE ISSUES

As discussed above, much discussion of tort reform has become politicized. The debate is often not one of reasoned argumentation so much as a fight on the level of a political campaign. This campaign has been long on emotion and marketing but short on analysis and reflection. Interest groups dominate debate and attempt to manage the information flow – or anecdote flow – to legislators. James Madison's nightmare of "faction" unhealthy for the Republic appears to have become the reality surrounding tort reform.

A characteristic of the current tort reform movement that arguably distinguishes it from the first medical malpractice "crisis" of the 1970s, and the insurance/product liability crisis of the 1980s, is that this wave of tort reform is clearly a production of interest groups and is based on preferences more than a clear emergence of a large problem or a groundswell of public sentiment. In the 1970s, doctors were not merely facing large premium increases or the availability problems created by company decisions to change corporate strategy (e.g., St. Paul's withdrawal from Nevada). There were more refusals to underwrite, the unavailability of "tail" coverage for retiring physicians,⁶³ and allegations of coercive insurance company action to force changes in policy terms.

In the 1980s, many insurers refused to write for the sort of risks that got public notice, including parks, schools, child care centers, and other walks of

⁶² 531 U.S. 98 (2000).

⁶³ See Symposium, *supra* note 1, at 393 (remarks of Dean Hardy).

life that affected the populace at large. To be sure, a hardening of the product liability market also characterized the crisis. While there were efforts at product liability tort reform and construction of claimant rights, this ultimately proved not to be the primary means by which the 1980s crisis was “solved.” Instead, manufacturers and insurance brokers formed new entities for self-insurance, risk retention groups, captive insurers, or offshore insurers in insurance shrines such as Bermuda. One of today’s most successful insurers, ACE, was born out of this ferment and today has acquired or is larger than many of the insurers that spurned product liability risks during the 1980s.

Today’s early twenty-first century push for tort reform is bit different. Until organizations of contractors or doctors became energized (with insurers arguably playing puppeteer), it was far from obvious that there was a tort crisis. Despite the alleged burdens of Nevada Revised Statutes Chapter 40, homes were being built undeterred in southern Nevada (indeed, as Bill Robinson reminds us, that was part of the problem⁶⁴). There was no general stoppage of growth. Subdivisions were not being shut down because of a complete dearth of available insurance. Contrast this with the closings of public pools, parks, and day care centers during the 1980s.

Similarly, prior to the well-organized physician and insurer lobbying that produced the 2002 special session, there continued to be a net influx of doctors into Nevada and much medical activity, though one can of course point to isolated instances where the financial burden of a malpractice premium increase prompted a few doctors to relocate or make other career changes. Even giving credence to the most alarmist news accounts, it appears that only one medical specialty (obstetrics) was facing the problem of constriction in services due to high insurance costs. Even making the inferential leap that these insurance price rises were entirely the fault of defects in the legal system, this hardly justifies across-the-board tort reform. A more measured analysis would seemingly conclude that any reforms should be directed at availability of insurance or targeted at protecting obstetricians. Like most folks, I would like to live in a society where every mother has quality medical care during pregnancy and delivery (and childhood for that matter). But does this mean we need a damage cap when plastic surgeons, orthopedists, allergists, or dermatologists commit malpractice?

While I realize others will disagree, my view is that calling recent problems in construction and medicine a “crisis” is hyperbole. One can even argue that these two industries were simply faced with worse-than-usual economic pressures on their profitability and operation. While this may be regrettable, in a market-based economy the default rule is one of letting the chips fall where they may and minimizing government activity to aid any particular industry. Sure, we violate that default rule all the time: regulated industries, aid to distressed industries, legislation based on political favoritism, etc. But generally American government tries not to pick favorites in legislation affecting business operations, absent a compelling case. The case for medical malpractice reform, at least of the type sought by doctor interests (more on the Com-

⁶⁴ See Symposium, *supra* note 1, at 383 (remarks of William J. Robinson).

mon Good proposals in Part VI), was not convincingly made. I am even less convinced that there is any case for legislation to aid contractors.⁶⁵

But without doubt, the most organized business group in Nevada during the past eighteen months has been the medical lobby, although the always powerful casino interests cannot be too far behind, even if their influence is hard to detect. Although not as successful, construction contractors have also been organized and politically active. As evidenced by this Symposium, doctors and contractors have put "it's all about me" tort reform on the metaphorical front burner of Nevada politics. The current tort reform debate in Nevada, for the most part, has not been a comprehensive discussion about global change and improvement of the legal system.

Interest group activity, even when successful, has a politicizing and sometimes polarizing effect. As in Newtonian physics, political action appears to spur an equal and opposite reaction. Tort reform efforts engender opposition from plaintiff lawyers and consumer groups. Once started, the cycle is hard to stop, as evidenced by developments of the last thirty years.

To some extent, the tort reform debate is also a reflection of the sharp split in American society overall. Much has been written about "Red-State America" (the inland states where a majority of voters supported George Bush in the 2000 presidential election) and "Blue-State America" (the mostly coastal states, save for the South, that supported Al Gore in the 2000 election). To be sure, this sketch is a caricature. For example, in Nevada, a Bush Red State, nearly half of the voters chose Gore. But that division is arguably more problematic, at least for state policymaking, than is the Red State-Blue State division that obviously raises the distributional stakes of federal policy.

As reflected by the Bush-Gore division, we have an evenly but sharply divided polity in this country. Not only was the Bush-Gore election close (arguably decided by one vote),⁶⁶ but the candidates were comparatively far apart ideologically and philosophically.⁶⁷ Where the explicit partisan politics are so divided, it should come as no surprise that views on the legal system are

⁶⁵ At some point, even the most self-interested policymaker, who glories in obtaining the favor of the powerful, needs to ask whether legislation is fair. Thousands of businesses operate in Nevada subject to the general legal regime. Why should certain businesses, such as home construction or delivery of medical care, receive more favorable treatment than the bulk of businesses? Until there is a good answer to that question, governments should be very wary of changing the law in favor of select business groups.

⁶⁶ See *Bush v. Gore*, 531 U.S. 98 (2000) (the Supreme Court, in a contentious 5-4 decision, halts efforts to recount votes in Florida, effectively giving Florida's electoral votes to Bush [whose brother was noncoincidentally Governor of Florida] whose electoral process was presided over by Secretary of State Katherine Harris, an avowed Bush partisan and later Republican congresswoman from Florida; Bush won the electoral vote and became the 43rd President, but Gore received 500,000 more popular votes).

⁶⁷ I realize everything is relative. The differences between Bush and Gore were hardly as sharp as those frequently seen in Europe, where among a handful of serious candidates for office there may be a fascist, a Christian Democrat, a Socialist, a Communist, and someone from the Green Party. But the Bush-Gore difference seems relatively large in historical perspective. Most observers would agree, I think, that the conservative-liberal split found between Bush and Gore was considerably wider than that found regarding the Clinton-Dole, Bush-Dukakis, Carter-Ford, or Kennedy-Nixon contests. But neither is sharp division foreign to American presidential elections. Consider Johnson-Goldwater and Reagan versus Carter or Mondale.

also sharply divided.⁶⁸ Even for elections considered to be “landslides,” deep divisions remain. Although Ronald Reagan arguably rolled over Walter Mondale in 1984, the fact remains that tens of millions of Americans voted for Mondale and implicitly had strong disagreements with Reagan policies.

With political division comes cultural division. Arguably, Americans are in the midst of a modest (and thankfully largely nonviolent) culture war. Consider debates over abortion, bilingual education, immigration, prayer in schools, biblical monuments, the Clinton impeachment and trial, and gay rights (a topic made expressly political in its divisiveness because of efforts to amend the Nevada Constitution to outlaw gay marriage). A telling (and to me disturbing) political statistic is that regular churchgoers are more than twice as likely to vote Republican. Although I do not want to enter the fray as to whether Jesus would raise or lower taxes or what his position might have been on Iraq (much less his political affiliation), I cannot help but be a bit worried when politics and religion are closely aligned, even implicitly.

In short, despite its current functionality, America is a pretty divided place, at least in terms of attitude if not behavior. It should not, therefore, surprise us that some people think all plaintiffs are wimps or scam artists while others think all manufacturers are heartless cheats. Nor should we be surprised that some people like doctors and hate lawyers and a few even like lawyers and hate doctors. Some folks think homeowners’ associations are complaining about the real estate equivalent of a hangnail (e.g., displeasing landscaping) while others see contractors knowingly profiting from shoddy work, covering it up with sheetrock and stucco, and then waiting for the statute of limitations to run its course or daring the disgruntled homeowner to sue. In twenty-first century America, people just disagree, often intensely, and they are roughly evenly divided on many major questions.

Add to this professional misunderstanding and rivalry, such as the doctor-lawyer gulf. Also add the interest group activity and economic self-interest. Further, add efforts at media manipulation from all sides and news coverage that tends to operate at the sound bit level. This is a recipe for cold war on the tort reform front. Under the circumstances, why should we expect anything different?

VI. A PROBLEM OF FUNDAMENTAL IMPORTANCE; A PROBLEM OF FUNDAMENTAL CONTRADICTION

In addition to the political and sociological factors at work, legal reform is also pervaded by fundamental philosophical difficulty. Even assuming the most neutral and disinterested analysis, the proper course of legal reform is hard to determine. To a large degree, this is simply because a good legal system involves some intellectual trade-offs. We have juries but we give trial

⁶⁸ And politicians may stoke the fires where it is perceived as good electoral politics. See Dana Milbank, *The Political Mind Behind Tort Reform*, WASH. POST, Feb. 25, 2003, at A21 (noting the active role played by Karl Rove, President George Bush’s chief advisor, in promoting tort reform as part of the Bush Administration and Republican political agenda). See also Jeanne Cummings, *Doctors’ Activism Revives Malpractice Bill*, WALL ST. J., Jan. 13, 2003, at A4.

judges substantial power over them through pretrial motions that may narrow or even eliminate the case. Judges also control the evidence a jury may hear and have authority to overturn verdicts, force their modification, or order a new trial. Although trial judges have wide discretion, they are subject to appellate review, where reversal, modification, or remand can occur. Courts have great power over adjudication but can be legislatively overruled through passage of new or amended statutes. The executive, the organized bar, and the public also have considerable power over courts because of their role in judicial selection, especially in a state that directly elects its judges. Numerous other examples of tradeoffs and compromise in the legal architecture could be listed.⁶⁹

Further, law is pervaded by one hard core trade contradiction that seems fundamental to the enterprise: the conflict between rules and discretion. To some extent, preferences within the legal academy mirror this fundamental difference in orientation. Some professors are “rule” people. Others are “discretion” or “standards” people (favoring more relaxed and flexible versions of rules). These differences tend to get more explicitly identified and debated in the academy,⁷⁰ but they are clearly also part of the dialogue of judges and lawyers.⁷¹ Laypersons may not be as self-conscious about their stand on the rules-discretion debate, but most people implicitly have a position. For example, do you support “three-strikes-and-you’re-out” criminal sentencing or should judges have more discretion to shape a sentence to the individual defendant? Are you with or against John Ashcroft in his effort to prevent judges from making downward departures from the sentencing guidelines?⁷²

This sort of rules-versus-discretion division so permeates analysis of American law that arguable contradictions can pervade the analysis of a single person. Normally we at least like to think we are consistent, even if the organizations with which we interact are not. But consider the writings of Philip Howard, founder of Common Good, and arguably America’s most prominent

⁶⁹ See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY PRIMER chs. 3, 4 (1994).

⁷⁰ To illustrate, I invoke a conversation I still remember after fifteen years. When I was on the Brooklyn Law School faculty, then-Dean David Trager (now a federal district judge) was debating a point with Professor Aaron Twerski concerning their mutual field of expertise, conflict of laws. After some discussion, they were at loggerheads, whereupon Trager (a former U.S. Attorney and Republican) commented: “You know, Aaron, this is what always happens with us on these topics. You like rules; I like standards and discretion. You want more certainty and predictability; I’m more concerned that the result make sense in the case at hand. You have your perspective, I have mine. We’re just never going to agree on some of these things.” In a nutshell, this exchange explains a lot about divisions within the bench and the legal profession. Although one, of course, needs to be careful that discretion does not become arbitrariness, my own preference is for bounded discretion rather than rigid rules.

⁷¹ Compare Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (lionizing rules) with Kathleen Sullivan, *Foreword: The Justices of Rules and the Justices of Standards*, 106 HARV. L. REV. 24 (1992) (supporting standards and discretion).

⁷² For the record, in what should come as no surprise, I am against the Ashcroft initiative and against overly restrictive sentencing guidelines generally. I am more comfortable with judges, who are far more familiar with the defendant and the case than Congress, the Attorney General, or a Sentencing Commission exercising their discretion when determining sentencing. I also am very uncomfortable with the Attorney General’s efforts because they tend to give the erroneous impression that judges are standardless scofflaws.

proponent of legal reform.⁷³ Notwithstanding efforts to avoid labels, Howard has been referred to as the new “star” of the tort reform world by some observers. Another contender for that position, but one who has been on the tort reform scene considerably longer, is former University of Cincinnati Dean Victor Schwartz, general counsel to the American Tort Reform Association and a partner in the Shook, Hardy & Bacon law firm in Washington, D.C.⁷⁴ Howard’s two books, *The Death of Common Sense* and *The Collapse of the Common Good*,⁷⁵ are the rough equivalent of a manifesto for tort reformers, even if Howard prefers to call himself a legal reformer.

Both books are entertaining, well-written, provocative, and make many cogent points. But both books are very different in terms of orientation and framing of the legal reform problem despite the similarities of their titles and the perhaps marketing-driven tendency to be more shrill than necessary (e.g., law “suffocating” America or lawsuits “undermining our freedom”; many in other countries of the world would gladly suffer some of this suffocation or impingement of freedom in order to enjoy access to American courts and the protections of American law). *Common Sense* is a book advocating greater discretion in the application of law to the world, while *Common Good* advocates more rules. Although both can be seen as “anti-law” books on the surface, both in fact advocate more law – but quite different kinds of law. *Common Sense* wants decisionmakers to make discretionary rulings that have legal precedence over rigid and bureaucratic legal rules. *Common Good* wants to have more legal rules designed to limit lawsuits, claims, and damages.

Unsurprisingly, I found myself in agreement with *Common Sense* more than *Common Good*, in large part because the book was more anti-bureaucracy and less anti-lawyer than *Common Sense*, which at times veered toward being a lawyer bashing diatribe (a bit jarring coming from an author who is a partner at Covington & Burling, a large national firm). *Common Sense* is chock-full of similar such accounts where blind adherence to rules and regulations produces stupid, wasteful, inefficient outcomes. Perhaps most frequently cited is the “Mother Theresa story.” A Catholic charity group affiliated with the famous saint sought to build a homeless shelter in the Bronx. The ever-watchful regulators of New York City thwarted the effort by insisting upon adherence to technical building regulations (requiring an elevator, which the old renovated building did not have) that made the cost of the project prohibitive. The regulators were unwilling (they might say unable) to grant a variance, even for

⁷³ Howard, Common Good counsel Nancy Udell (see Symposium, *supra* note 1, at 407 (remarks of Nancy Udell)), and the Common Good organization all take pains to point out that they are seeking more comprehensive changes in the legal system and American disputing culture and they are not a “tort reform” group as such. But much of the Common Good agenda overlaps or abuts portions of the tort reform agenda and debate. See, e.g., COMMON GOOD, ELEMENTS OF A SYSTEM OF MEDICAL JUSTICE (2003) (white paper advocating significant changes in handling of medical malpractice claims).

⁷⁴ See, e.g., Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”* 54 S.C. L. REV. 47 (2002).

⁷⁵ See PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) [hereinafter COMMON SENSE]; PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA’S LAWSUIT CULTURE UNDERMINES OUR FREEDOM (2001) [hereinafter COMMON GOOD].

Mother Theresa. As a result, the project was abandoned and New York was denied the benefits of this social welfare effort.⁷⁶ These and other stories from *Common Sense* leave the reader shaking his or her head at the wooden, uninspired thinking (or lack of thinking) found in so many rulemakers and petty regulators.⁷⁷

Common Sense is a searing critique of this corner of the status quo, but is not really a critique of law per se. Rather, it skewers a particular sort of government regulation that is arguably law but which many law teachers would look down upon as primitive or infantile law.⁷⁸ In many of Howard's anecdotes, the villain is not even a lawyer but instead a nonlawyer bureaucrat with just enough knowledge of law and rules to be dangerous.⁷⁹ Or the villain is the text of a law that is applied too literally and inflexibly.⁸⁰ One cannot help but read *Common Sense* without concluding that inflexible application of rules in violation of common sense is a major cause of arteriosclerosis of government and other organizations.

But does Howard's critique in *Common Sense* make a case for discarding or drastically limiting law, legal rights, and legal relief? I think not. Rather, *Common Sense* makes a convincing brief for taming and controlling bureaucracy, an enterprise involving law but one that is not law itself. To the extent that the bad bureaucracy identified by Howard is law, it is highly formalistic,

⁷⁶ See COMMON SENSE, *supra* note 75, at 3-5.

⁷⁷ See *id.* at 30 (noting the requirement of a food inspector on site that leaves the inspector killing time at the post); *id.* at 34 (noting an EPA requirement to use expensive pollution scrubbers for smokestacks when use of low sulphur western coal would have been cheaper and more effective); *id.* at 35 (criticizing the rigidity of the Judicial Sentencing Commission); *id.* at 49 (noting that tax law treating child care workers as subject to social security withholding is widely ignored); *id.* at 60 (relating how the Chicago maintenance department insisted on following a competitive bid process rather than moving swiftly to fix a problem that resulted in a massive, destructive flood of the Chicago River); *id.* at 102-03 (describing how civil service job protections lead to abuse by a bellicose employee, who was rewarded for misbehavior with nine-months of paid leave). See also *id.* at 10-22 (noting the importance of discretion and judgment in preference to rigid rules. To be fair, COMMON GOOD also has its share of good stories and does not ignore bureaucratic foibles. In one scene related in COMMON GOOD, Howard illustrates the inefficiency and cost of stupid or lazy adherence to rigid rules and formal logic. Nancy Udell, then a teacher in the New York City school system prior to becoming a lawyer, noticed some rather disgusting matter on a window of her classroom. She asked a janitor to clean up the matter and was pointedly told by the janitor that his union contract required only that he clean windows on a set schedule. One cannot help but read this account and conclude that (a) sharply defined rules for division of labor are the ticket to organizational inefficiency; and (b) formalistic adherence to rules, like patriotism, can be the last refuge of the scoundrel, or at least a lazy janitor.

⁷⁸ Most law professors I know find that much of the challenge of educating law students comes not from getting them to absorb substantive rules but in getting them to think critically about the rules and their application, and to reason in ways that are more flexible than those of the bureaucrats profiled in COMMON SENSE. Although it is perhaps an elitist conceit of the academy, most every law professor I know looks down upon hyper-formal, rigidly rule-based bureaucratic thinking as something infantile and primitive, much like the view toward rules held by a child or martinet elementary school teacher. Real "law," or at least the higher forms of law, involves more subtle, nuanced thinking that endeavors to keep sight of the underlying objectives of the law while applying the groundrules (or standards) for decision.

⁷⁹ See COMMON SENSE, *supra* note 75, illustrations discussed at n.77.

⁸⁰ *Id.* at 62-103.

stiff law that has become laughable because its sole objective has become adherence to formal rules rather than attainment of the goals that begat the rules in question. One obvious solution to much of the foolishness chronicled in *Common Sense* is more judicious use of discretion (a/k/a common sense) by the actors involved (and rules that permit actors to use their common sense and discretion). Howard advocates this specifically and he is right. But he arguably fails to recognize that the sort of improvement he advocates does not require a “turn against law.”

In contrast to *Common Sense*, *Common Good* is a book suggesting that litigants have abused their legal rights and freedom of court access. The solution in *Common Good* is use of more rigid rules to impose limits in order to rein in allegedly problematic or erroneous exercises of discretion and baseless claims not clearly foreclosed by the current system of legal rules (which Howard implicitly suggests is inadequate, a sharp contrast with his view in *Common Sense*). Thus, while *Common Sense* is a plea for standards and discretion, *Common Good* is a plea for rules and contraction of law and legal prerogatives.

In my view, *Common Good* is far less effective and convincing than *Common Sense*. Part of this is because I am more attracted to standards, discretion, and instrumentalism than to rules and formalism. But in addition, the anecdotes strung together in *Common Good* are not, for me, as compelling as those in *Common Sense*. *Common Sense* contains many stories where most reasonable observers would come to a shared view as to the foolishness of the conduct in question. Although *Common Good* also has some of this, many of the stories in *Common Good* are like the dueling anecdotes of the tort reform debate. They can certainly be seen by one faction as evidence of a “broken” system, but they can be seen equally well as legitimate claims or minor irritants that should be permitted as a price paid for a legal system able to vindicate more valid claims. *Common Good* also replaces the bureaucrat-bashing of *Common Sense* with lawyer and plaintiff bashing. But while bureaucrat-bashing seems justified (based both on the content of *Common Sense* and my own experience with real world bureaucracy), the lawyer and plaintiff bashing of *Common Good* is based on much less convincing evidence and seems less balanced in its appraisal and advocacy. Notwithstanding what I regard as the comparative deficiencies of *Common Good*, it does provide some law reform suggestions worth considering, which have now become part of the organizational agenda of Common Good.

What is perhaps most interesting about *Common Sense* and *Common Good* is not their relative merits or that I liked one more than the other. Rather, it is their divergence from one another and their reflection of the differences and arguable contradictions in Howard’s own thinking about law reform – and the thought processes of all of us. In a sense, juxtaposing the two books is a microcosm of the inherent tensions involved when constructing legal and regulatory systems. Because these tensions are so pervasive, designing and implementing effective law reform is difficult, even without interest groups, politics, or social conflicts.

For the moment, both Howard and the body politic appear to have pivoted toward a more formal, rule-bound system as the preferred solution to the perceived serious social and economic problems of law. Consider many of the

modern solutions to the alleged “tort crisis”: damage caps, elimination of joint liability, restrictions on punitive damages, restrictions on noneconomic damages, restrictions on counsel fees, increased procedural and evidentiary barriers, and so on. The United States Supreme Court’s *State Farm Mutual Automobile Insurance Co. v. Campbell*⁸¹ decision provides a baleful example in which the Court attempts to control a perceived punitive damage problem by imposing broad and rather draconian (at least by historical standards) restrictions on such awards.

Although the problem of tort liability amounts and consistency among them is serious and deserves attention, was the formalist condemnation of *State Farm v. Campbell* the right solution? Obviously, I think not, as do others.⁸² In general, a mixture of rules and discretion best serves an adjudicatory system.⁸³ Litigation and business conduct can be shaped for the better without inflexible imposition of paint-by-numbers standards.

VII. THE ROAD TO WELLVILLE: SUGGESTIONS FOR EVALUATING TORT REFORM PROPOSALS

Evaluating tort reform initiatives requires carving a path that acknowledges the long-standing and ongoing tension rules and standards, rigidity and discretion, formalism and functionalism. Embracing formalism may seem like a quick fix, but it is not good policy. In the long run, it may also lead to backlash against the proponents of formalist, self-interested fixes as well as producing unanticipated pathologies stemming from new changes. To begin to address tort reform proposals rationally, decisionmakers need to acknowledge these chronic tensions in the law rather than pretending that elevating formalism above functionalism will solve all of our tort and litigation problems. In addition, a number of other considerations should be addressed during the course of evaluating any tort reform proposal.

A. Consider Objectives Rather than Rules; Count the Gains and Costs of Agency

Related to the problem of form versus function and rules versus discretion is the issue of agent constraint and agent discretion. On the one hand, constraining an agent reduces the risk of loss due to unfaithful or incompetent agents. For example, if you don’t give your agent the key to the car, he can’t steal your car. But on the other hand, the agent is also unable to use the car to respond to an emergency or seize a business opportunity.

⁸¹ 538 U.S. 408 (2003); see *supra* note 9, summarizing the *State Farm* case.

⁸² See Symposium, *supra* note 1, at 432 (remarks of former Arizona Supreme Court Justice Stanley Feldman) (labeling *State Farm* the “worst” U.S. Supreme Court decision he ever read).

⁸³ It appears I have the support of at least one area newspaper on this point. See, e.g., Editorial, *Scales of Justice Tip Wrong Way*, LAS VEGAS SUN, Apr. 23, 2003, at 14A (in criticizing the medical malpractice proposal of damage caps, the editorial states that by further limiting the discretion of judges and juries, the Nevada Senate action supporting the cap legislation could prevent many victims of medical malpractice from receiving just compensation).

If one thinks of judges and juries as agents of society, we can see the potential dilemma presented by many rule-based tort reform proposals. Such proposals may be effective in preventing a “runaway jury” or an addled or corrupt judge from going too far astray. But in addition to being imperfect (really dumb or corrupt agents will impose costs no matter what the rules), such rules impose the cost of preventing the agent from exercising discretion in ways that are beneficial to society. After *State Farm*, juries are less likely to render an unfoundedly high punitive damages award, but they are also less likely to be able to render an award that will change bad corporate behavior or eliminate a destructive company. Capping noneconomic damages in medical malpractice cases prevents absurdly high pain and suffering verdicts. But, it also prevents neutral parties from awarding a fair market valuation of the loss and providing an incentive for medical providers to treat children and the less affluent with the same care afforded to high income patients.

B. Identify the Type of Tort Reform Argument at Issue to Sharpen Analysis

Tort reform lobbying has essentially made four categories of claims: (a) many claims against _____ (fill in the blank with the name of the interest group making the argument) are frivolous and should be prohibited or more frequently truncated during the early stages of a dispute; (b) tort claims for _____ (fill in the blank again) systematically overcompensate plaintiffs; (c) adjudication, juries in particular, do not understand complex issues like _____ (e.g., home construction or medical malpractice); and (d) even if many individual claims have merit, society simply cannot afford to make many large or erratically-sized awards to these claimants without incurring aggregate and collateral costs that are worse than undercompensation of individual victims.

The first argument recalls the discussion in Part I of the different factual worlds of tort reform proponents and opponents. As discussed in Part I, knowledge in this area is largely insufficient to support sweeping tort reform proposals. On the whole, however, it appears that complaints of this type are greatly exaggerated and that most claims have merit. Those claims that do not have merit appear not to be moving very far into the system.⁸⁴ To the extent there is some merit in this allegation, however, the means of addressing the problem appear to be case-specific through adjudication rather than through sweeping systemic reforms.

The second argument also appears to be incorrect, at least for compensatory damages. Whether pre-*State Farm* punitive damages are too high or too frequent returns us to the legal/political divide where personal preferences predominate over empirical fact.

The third argument, that the dispute resolution system is incompetent or too costly in dealing with certain claims, may have merit and may justify targeted efforts to improve expertise and lower costs, as discussed in Part VII.F below.

⁸⁴ See Symposium, *supra* note 1, at 388 (remarks of Scott Canepa) (nearly all construction defect claims tried to verdict in Nevada have been successful).

The fourth argument, that tort reform is necessary to avoid bogging down the economy, is addressed in Part VII.C below.

C. Consider the Tradeoff: Individual Fairness vs. Aggregate Efficiency

Arguing against individual compensation because of its aggregate economic drain is a utilitarian position, one generally identified with John Stuart Mill and teleologic philosophy rather than the ethical imperatives of Immanuel Kant and deontology.⁸⁵ The slogan of utilitarians might be termed “the greatest good for society” or the “greatest good for the greatest number.” The rallying cry of Kantians might be described as “treat each individual fairly and ethically” (although this arguably begs the question, as utilitarians think they are being perfectly ethical).

In order to reach a position on this sort of argument, one needs to have at least a rough position on the underlying philosophical debate, or at least a reasonably principled and coherent means of determining the circumstances under which one finds the utilitarian perspective more persuasive than the Kantian approach (or vice versa). For example, if you are strongly and uniformly utilitarian, the issue seems like a no-brainer: limit individual claimant relief in order to lower medical or construction costs across the board (including presumably lower costs for the individual). Heck, why not bar individual claims altogether. On the other hand, if you are resolutely Kantian, the easy answer is to do whatever is necessary in the individual case in order to ensure that the victim is adequately compensated, no matter how much this costs society as a whole.

If you are like most people who favor some fusion of these potentially extreme positions, deciding where you stand is more difficult and probably turns on facts we do not yet know. If we limit claims in X manner, how many claimants will be undercompensated? By how much? What will the rest of society save by this? How much does that translate into for my housing, medical, or insurance costs? In addition, what is it worth to me to pay X dollars more for housing or medical care in order to have greater assurance if my home collapses or my medical care providers cause me serious, permanent injury? When people ask these questions, most of the time they prefer reasonably broad individual protections or rights to compensation (in order to protect them from mishap), but with sufficient controls so that the basic things one buys, which generally work ninety-odd percent of the time, will not be prohibitively expensive.

The utilitarian argument can be very persuasive: nothing is free; everything has tradeoffs. Large damage awards and counsel fees can produce poorer housing or health care for the many. As Judge Guido Calabresi once observed, “treating justice as a pearl beyond price carries a price of its own.”⁸⁶

But this does not mean that every utilitarian gain (or prospect of gain) is one society would embrace. Let’s use damage caps as an example. Imagine a

⁸⁵ Mill is one of the most widely known teleological or utilitarian philosophers, advocating the aggregate net good of society as the highest value in ethics. Deontological philosophers like Immanuel Kant advocate comportment with moral rules irrespective of the overall effect of adherence to these rules. See KUKLIN & STEMPEL, *supra* note 69, at 6-10.

⁸⁶ Guido Calabresi, *quoted in* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986).

twenty-five year-old victim of medical malpractice rendered quadriplegic during surgery or an athlete who becomes blind during what should have been a routine wisdom tooth extraction. I have seen a real person who suffered this latter fate, regularly attending the games of the University of Iowa basketball team on which he used to play. Although he was obviously getting around, had friends, and seemed healthy, his life was clearly altered for the worse by what certainly appeared to my untrained mind as dental malpractice.

Even after crunching the numbers of economic loss (which may have been low; I have no idea how blindness did or did not change this person's economic future), what is the fair valuation to place on losing one's sight at age twenty and going from star athlete to aural spectator? Is it more than \$350,000? I think so. I am also pretty sure most juries and judges would think so. But under current Nevada medical malpractice law, \$350,000 would be the maximum award for this sort of noneconomic loss. That situation can not pass the Kantian test of fairness, although it might satisfy a utilitarian test if the damage cap sufficiently reduced the costs of health insurance, dental malpractice insurance, or the ordinary price of a wisdom tooth extraction. If one is neither pure Kantian or pure utilitarian, what is the right position? For me it would depend on the aggregate cost of full compensation. If permitting full compensation to this sort of victim increases the cost of tooth extraction by a modest amount (say up to \$100 for the sake of argument, although I would probably go higher), I am willing to pay it. I may be more out-of-pocket for my next tooth extraction, but I would rather (a) feel like I live in a society where victims are not short-changed (which gives me more than \$100 of satisfaction), and (b) know that if something similar happens to me, I will be fairly compensated. As to (b), this just means I am willing to pay a real or de facto insurance premium of at least \$100 in return for being free of a noneconomic damages cap if something bad happens to me or a loved one.

Of course, this kind of analysis is a lot messier and harder to apply in real life. What about other goods and services? What time frames are we talking about? How are these extra costs imposed and administered? And don't forget the obvious tort reform rejoinder: there is no guarantee that the legal system will correctly adjudicate this type of dispute. I may be zeroed-out because the jury likes Dentist X or her lawyer better than me or my lawyer. Or the injury may not have been any fault of Dentist X, but she will be saddled with an adverse judgment nonetheless. These are good arguments for considering reforms in the methods of adjudication in order to seek more accuracy and reliability, but they are not very good arguments for damage caps. Whether the fact-finding adjudicative system is good or bad, I am still happier without caps.

Of course, others may disagree and my own views may change depending on the facts. According to behavioral scientists, they will change according to the way the question is framed. But my point is not to definitively resolve the Kantian vs. utilitarian debate. Rather, my point is that the debate must be had, substantively and rationally, if society is to make good decisions about various tort reform proposals.

D. Economic Analysis vs. Social Analysis

A variant of the Mill vs. Kant – individual vs. aggregate – argument is one framing the question as one of wealth maximization vs. individual justice. To follow through on the last example, a damage cap may, in the aggregate, lower the social costs of a good or service previously subject to engendering litigation and tort liability. If this aggregate savings exceeds the undercompensation of victims, there has been a net gain in society's wealth (at least as measured in dollars) but at the cost of some amount of individual injustice due to undercompensation.

Under such circumstances, is the effect of the damage cap good or bad? An economist using wealth maximization as his yardstick for social well-being would approve. But others might consider the cost of substantial individual undercompensation too great to justify the cap, even if there is a net savings for the populace as a whole. Policymakers and voters facing tort reform initiatives need to determine their position on issues of this type if they are to make rational decisions to embrace or reject tort reform proposals.

E. Try to Count All the Costs and Benefits

To perhaps state the obvious, making the types of balanced assessments discussed in the preceding subsections requires decisionmakers to be well-informed as to the real, total, nonspeculative costs and benefits of various tort reform proposals. Only a pure Kantian would be uninterested in netting out costs and benefits with at least some confidence. This, of course, requires examination of tort reform to move beyond anecdote or case study (although these can be instructive as well as rhetorically persuasive) and assemble some reasonably reliable cost-benefit data.

Gaining this sort of information takes both time and effort. Unfortunately, the current political climate of tort reform provides little opportunity for such fact-gathering and thorough analysis. Instead, legislators and voters are treated to full-court press by interest groups that are long on marketing and short on analysis. One can only hope that more reflective sentiments will prevail over ideology, economic interest, mindless professional allegiances and phobias, and sloganeering.

F. Start from the Original Position and Gain Insight Through a Veil of Ignorance

As in so many areas of law, a more modern philosopher than Kant or Mill has valuable insights that can help clarify the way tort reform proposals are evaluated. The late John Rawls, most famously in his celebrated book *A Theory of Justice*,⁸⁷ introduced the concept of the "original position" and the "veil of ignorance" as means of evaluating public policy. Simply put, the Rawls approach asks the person evaluating the policy, proposal, or prospective law to assume he or she has no idea whether he or she will be a lawyer, a doctor, a plaintiff, a defendant, an insurer, or a person who is rich, poor, politically-

⁸⁷ See JOHN RAWLS, *A THEORY OF JUSTICE* (1970). On the influence of Rawls on legal thought, see Anthony Simon Laden, *The House that Jack Built: Thirty Years of Reading Rawls*, 113 *ETHICS* 367 (2003).

connected, politically powerless, socially elite, socially ostracized, or anything else. Given that the person operating behind this veil of ignorance can be any member of society, the evaluator's task is to decide whether the policy proposal is one to enact irrespective of one's position in society. The Rawls approach asks that policymakers decide on the shape of the legal system (and everything else for that matter) without regard to their potential gain or loss as participants.

What does this suggest for the current tort reform debate? Despite its imperfections, a system much like American litigation has considerable appeal for those operating in the original position behind a veil of ignorance. If you are a patient or a homeowner, you would have certain legal rights: a neutral, relatively corruption-free and independent forum to hear the case; a chance to gather information (with the help of the court where necessary to overcome the recalcitrance of opponents); and you could obtain substantial monetary or equitable relief. If you are a builder or physician, you would have a system that provides similar access to information, a neutral forum, due process of law protections, and a right of appellate review.

While it would be nice to have a system that is faster and cheaper, would you make these concessions without knowing whether you are going to be the home buyer or the home builder involved in disputes under this system? Once you get out from behind Rawls's veil of ignorance, self-interest would kick in and distort judgment.

For example, if you know that you are a builder or insurer, you know that you are likely to be the defendant (or representing the defendant) most of the time in litigation and that you will be a so-called "repeat player" involved in a significant number of cases. As a result, your self-interest may prompt you to prefer a system that errs more often but is faster or cheaper in bulk, based on the assumption that the law of averages will even things out and you will be money ahead overall. As a builder or insurer, you will certainly be a fan of anything that reduces, delays, or discourages recovery by homeowners. A litigation penny saved is a profitable dollar earned.

Those who know they will participate in the system as homeowners will, of course, feel differently. They know (or at least expect and hope) that they may be in a construction defect lawsuit only once (and in a matter that involves their most valuable possession). Rational homeowners would rather incur some additional disputing costs to have a system that places a premium on accuracy and full relief.

As the old adage cautions: where you stand depends on where you sit. One promising way to try to wring some self-interest out of the system is to adopt the Rawls approach. Although critics argue that this approach is slanted toward liberalism and more government,⁸⁸ I see it as a simple thought experiment that can bring policy analysis closer to neutrality, something that could be useful in the tort reform debate.

Some tort reform proposals might perform quite well under the Rawls test. Consider abolition of the collateral source rule, so that the jury knows whether a tort claimant has insurance or other sources of compensation for the injury that is the subject of the lawsuit. Typically, defendants love the collateral

⁸⁸ See, e.g., ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

source rule and plaintiffs hate it, for obvious but self-interested reasons. But even for a badly injured plaintiff it is hard to advocate double recovery. In many cases, the law prohibits or inhibits double recovery outright by allowing collateral providers of compensation (e.g., workers compensation insurers) to obtain reimbursement from a successful plaintiff.

Expert juries or specialized courts are another law reform notion that appears to do well under the Rawls construct. Although there is the possibility that experts could be "captured" by an interest group, prejudiced by socialization within their field of expertise, or jaded to the complaint of laypersons, it is probably more likely that they would better understand complex issues and be able to adjudicate them faster and cheaper than lay judges, juries, or arbitrators.⁸⁹

Alternative dispute resolution (ADR) of almost any mainstream kind, so long as conducted fairly and with sufficient data, also appears to score well in a Rawls regime. Medical malpractice screening panels, once the norm in Nevada, appears not to have many fans but would hold some attraction when viewed from the original position. There is always a risk, however, that adding layers of ADR will really only add additional procedural hurdles, a development that would hinder claimants and help defendants.

Many other potential law reform/tort reform initiatives would seemingly get serious attention when viewed through the Rawls prism, even though they are not being aggressively pushed by tort reformers. Examples are: more government oversight of professionals and businesses; a more comprehensive, professional, and government-operated system of ADR, including short trials or mini-trials; use of a broader social welfare system of compensating injury, funded by taxation of the industry causing injury. Yes, I know businesses would yelp, but if the litigation system is as bad as asserted by some businesses, one would think this change would be less expensive for business and industry as a whole. Perhaps a larger social welfare safety net along the European or Canadian models is the most direct way to address certain social problems. In addition, government-supported insurance or government support for the formation of captive insurance companies by professionals also seems to offer hope. At least we could determine how much of the tort reform problem is an insurance problem as opposed to a liability or litigation problem.

In making these suggestions, I am not only endorsing some incorporation of Rawls concepts in tort reform analysis, but am also suggesting a generally more reflective and analytical approach to tort reform and law reform. Much of the current tort reform discussion is extremely light on comprehensive analysis. Rather, interest groups stake out their positions and politicians engineer whatever compromise can be achieved. Failing that, the better organized and more powerful interest groups forge ahead, usually obtaining at least partial success.

⁸⁹ See Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995) (generally endorsing further experimentation with specialized courts in certain areas, but cautioning that appellate courts should remain generalist as a check on the danger of insularity). See also Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995).

Notwithstanding the generally grim tort reform scene, some groups have made suggestions well worth considering. Although I have been critical of "Keep Our Doctors in Nevada" and some of its agenda of greater immunity for doctors, portions of the doctors' political agenda deserve support, including: "any willing provider" laws; mandated occurrence-based insurance, which generally provides more protection to policyholders than the claims-made policies historically used in medical malpractice and also eliminates the doctor's need to purchase "tail" coverage after the expiration of the claims-made policy; Department of Insurance penalties for malpractice insurers who continue to insure problem physicians; state requirements for fair rates of insurer reimbursement to physicians and limitations on an insurer's ability to approve payment, reverse field, and then set this amount off against other funds owed to the doctor.⁹⁰

Similarly, many of the Common Good proposals outlined by Nancy Udell⁹¹ deserve serious consideration, including: replacement of litigation with a more administrative approach; increased expertise of decisionmakers; greater impartiality of expert witnesses; use of standard of care and risk management protocols as an affirmative defense by doctors; organization incentives for quality improvement; reduced adversarialism and more ADR.⁹² Although I am opposed to rigid caps on noneconomic damages (or any type of damage for that matter), Common Good's suggestion of damage schedules to set damage parameters for the exercise of judicial discretion has promise.

Similarly, although contingent fee regulation should not reduce patient access to justice or strangle the plaintiff's bar necessary for effective enforcement of the law, some limitations on contingent fees may be in order (a move supported both by Common Good and "Keep Our Doctors in Nevada"). A fifty percent contingency fee makes sense as to the first dollars of a recovery in light of the risks and expenses incurred by plaintiff's counsel, who may well invest thousands of hours in a case and come up empty. But where plaintiff obtains a large award (which also, of course, implies serious injury), should the lawyer continue to get a fifty percent cut on the second million? The third million? The fourth million?

⁹⁰ See Irwin Simon, *Medical Malpractice Legislation*, COMMUNIQUE, Aug. 2003, at 30, 32 (describing these doctor objectives). In addition Simon notes that "one popular physician alternative" is to allow doctors to "go bare" and refuse to purchase malpractice insurance, notifying patients that they are uninsured. I have reservations about this item of the doctor agenda, although it at least bears examination. Lawyers should be hesitant to criticize this approach because legal malpractice insurance is not required in Nevada. As between these professions, one can make a good case that sauce for the goose should be sauce for the gander. But if doctors, like lawyers, are permitted to go bare, they should be prohibited from taking certain actions to make themselves "judgment proof." With professional status and professional financial reward come professional responsibility. Although reasonable asset protection (e.g., owning one's homestead outright) should not be forbidden, many of the more exotic means of shielding assets are inconsistent with professional responsibility and should be forbidden for uninsured doctors and lawyers.

⁹¹ See Symposium, *supra* note 1, at 409-411 (remarks of Nancy Udell).

⁹² See generally COMMON GOOD, ELEMENTS OF A SYSTEM OF MEDICAL JUSTICE (2003) (outlining suggestions and collecting sources). Materials are available on the Common Good website at <http://cgood.org>.

A seemingly radical proposal made at the Symposium is also worth pursuing: eliminate individual physician liability and instead impose liability on hospitals, clinics, or HMOs. This type of respondeat superior mechanism should increase quality control efforts of medical providers and provide a boost toward weeding out problematic physicians or staff, as well as holding some hope for leveling the bargaining field between medical providers and insurers.⁹³

VIII. CONCLUSION

With perhaps some rhetorical excess, I have analogized the current tort reform situation to the Cold War and the adaptation of peaceful coexistence that, despite being the butt of humor, served to keep the war “cold” rather than “hot.” Of course the analogy is imperfect. Fortunately, the tort reform mess need not be as adversarial and polarized as international political conflict. And even the real Cold War came to an end (although international conflict remains). But advancement on this domestic front will require more sustained cerebral efforts by professionals and policymakers and less opportunistic electioneering.

⁹³ See Symposium, *supra* note 1, at 413 (remarks of Professor Ann McGinley).