

## **Public Choice and Tort Reform**

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The American legal system and economy continues to sink ever-further into the morass of modern tort law. Tort lawyers greet the introduction of new products to the market by opening a new file for the inevitable lawsuits that will follow. Modern tort law strangles technological innovation in the cradle and costs American consumers billions of dollars a year in higher costs and goods and services. The American tort law system is an international embarrassment and a domestic scandal. Studies estimate that the American tort law system costs upwards of \$152 billion per year, or some 2.2% of American GNP (Tillinghast 1995, p. 16). This figure is roughly two-and-a-half times more expensive than the average of most major foreign industrialized nations.<sup>1</sup> The majority of these costs are for expenses to run the tort system itself, rather than compensation to injured parties.<sup>2</sup>

These direct costs only capture a small element of the harm caused by a runaway tort system. Tort liability has substantially raised the price of many products, from stepladders (30% of the cost of stepladders) to vaccines (90% of the cost of vaccines) (Huber 1988; Discussion 1989, p. 2237). Useful products have been driven from the market because of liability costs; other valuable products never even make it to the market because liability concerns makes the products economically infeasible (Priest 1991). Tort liability deters innovation and does little to improve safety (Huber & Litan 1991). Litigation diverts numerous non-legal personnel from productive work, costing businesses thousands of man-hours in foregone productive work (Silberman 1978, p. 21). Moreover, it is likely that the “tort tax” is regressive in nature overall, with its most negative impact falling on the poor (Priest 1987; Priest 1987a).

There are even more indirect costs that flow from the runaway liability system. The riches transferred through the tort system draws talented youth into law schools to become tort lawyers (both plaintiff and defense), thereby drawing them away from more highly-valued social uses. This “brain drain” is a substantial opportunity cost to society (Magee 1992; Murphy, Shleifer, & Vishney 1991; Laband & Sophocleus 1988; Silberman 1978).<sup>3</sup> In turn, as frivolous lawsuits drive companies into bankruptcy and innovative

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<sup>1</sup> Tillinghast 1995, p. 14, 16. Tillinghast studied Denmark, Japan, Australia, Canada, France United Kingdom, Switzerland, Spain, Germany, Italy, and Belgium. After the United States, the country in the survey with the highest percentage of GNP flowing to tort costs was Belgium, with 1.4%; the lowest two were Australia and Japan, at 0.4% and 0.5%, respectively.

<sup>2</sup> Tillinghast 1995, p. 8. Tillinghast estimates that 54% of total tort costs are expenses rather than transfers: 16% to claimants’ attorneys’ fees, 14% to defense costs, and 24% to defense administrative costs. Of the 46% of the funds that are actually compensation for injured parties, 24% is for awards for economic loss and 22% are for awards for pain and suffering.

<sup>3</sup> Derek Bok has put the point less empirically but more eloquently, arguing that the increasing number of lawyers is “a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit.” (Bok 1983, p. 573). Frank Cross has challenged these studies and questions the empirical support for the claim that excess lawyers and litigation have a negative effect on economic growth. Even if a slight negative effect exists, Cross argues that the link between lawyers and economic efficiency is myopic, as lawyers provide additional

products off the market, there is still greater social loss from the destruction of valuable companies, such as Dow Corning. Fears of malpractice litigation lead doctors to practice “defensive medicine,” making medical judgments on the basis of avoiding malpractice suits, rather than in the best medical interests of the patient. This wastes scarce medical resources by requiring doctors to conduct unnecessary tests and take unnecessary precautions, diverting real resources from more socially-valuable uses. Smaller CPA firms have begun turning down audits and cutting back on client services because of fear of liability suits (Olson 1994, p. 364). Finally, it is now well-understood that “wealth makes health,” i.e., that in general wealthier societies have a cleaner environment, better health care, safer products, better science, longer life-spans, and a more educated and knowledgeable population (Wildavsky 1987). By making us poorer than we would otherwise be, the tort law system truly is hazardous to our health.

Perhaps these expenditures would be justified if there was evidence that increased tort liability has actually resulted in greater safety in products and services. But the evidence suggests that the tort explosion has not in fact increased product safety; nor is there any reason to believe that the revolution in tort liability is well-conceived to actually accomplish the goals of safety and accident prevention (Priest 1988).<sup>4</sup> Indeed, market pressures and third-party evaluators such as *Consumer Reports* and Underwriters Laboratory do far more to ensure the safety of products than does the tort system (Klein 1997; Rubin & Bailey 1994, p. 810; Ippolito 1992; Discussion 1989, pp. 2242-43; Mitchell & Maloney 1989; Hoffer, Pruitt, & Reilly 1988; Viscusi & Hersch 1990; Mitchell 1989; Peltzman and Jarrell 1985). Today’s tort system thus appears to be dramatically inefficient, imposing substantial wealth losses on American society and the economy with little mitigating public benefit.

Despite the widespread recognition of the need for reform, the reform movement has met with little tangible success. The purpose of this article is to explain why a system so manifestly in need of reform has nevertheless prevented the enactment of much meaningful reform. This article will draw on the tools of public choice theory to provide an explanation for how the tort system has reached its current predicament and the difficulties of enacting reform.

This article will not specifically focus on any particular industry or detailed discussion of particular tort law doctrines. Instead, the approach will be conceptual, and will look for patterns across different industries that will serve to illustrate more general themes. By looking for patterns across different areas, rather than the specifics of particular industries, the article will strive to illuminate more general points about the political economy of tort law and tort reform. Thus, examples will be drawn from many different industries. Nonetheless, the law of liability for consumer products holds a particularly prominent place in the historical development of tort law and the current tort

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noneconomic values relating to the furtherance of a free society, constitutional government, and the rule of law (Cross 1992).

<sup>4</sup> In part, this is because manufacturer safety and consumer safety are substitutes at the margin. In other words, as manufacturers makes products safer, consumers will to some extent respond by taking less care. Thus, for instance, as cars become safer consumers will tend to drive less carefully, thereby tending to increase the number of car accidents and offsetting some of the benefits of increased safety (Viscusi 1984; Peltzman 1975)

law crisis. For similar reasons, much of the academic commentary on the tort law system has been concerned with the startling developments of products liability law over the past few decades. As a result, much of the discussion will focus on products liability law, although this focus is intended to be illustrative rather than exhaustive of developments in other areas of law.

This essay will examine the political and economic forces that have shaped modern tort law and evaluate the political feasibility of reform. I will argue that modern tort law has been shaped primarily by the self-interests of lawyers and judges, rather than by improvements in the law. Moreover, because of the influence and power of these groups in both the legal and political processes, prospects for fundamental reform are dim for the foreseeable future. Despite this pessimistic note, I will offer a model for how tort reform might come about despite these political obstacles.

## **A Public Choice Analysis of the Evolution of Tort Law**

### ***Role of Plaintiffs' Lawyers in Legal Change***

The driving force behind many of the innovations in tort law in recent decades has been the plaintiffs' bar, pushing for expansion of liability under the tort system as well as increasing complexity in the tort system. Lawyers, like all other people, are interested in increasing their personal wealth. There are two basic ways to accomplish this goal. The first is to reduce the supply of a valuable product. Lawyers reduce market supply of their services by erecting barriers to entry into the profession, including certain education requirements, bar admission, and restrictions on unauthorized practice of law. Although important, these supply-restricting factors are largely outside the scope of this essay.<sup>5</sup>

A second way to increase wealth is to increase demand for lawyers. Tort lawyers can do this in two different ways: first, by increasing the amount and value of tort litigation, or second, by increasing the cost of litigation. In practice, tort lawyers have done both.

### **Expansion of Tort Liability and Damages**

Lawyers have increased the value of lawyers' services by dramatically increasing the amount and value of tort litigation in the economy. As noted above, there has been a dramatic increase in the amount of social wealth allocated to the operation of the tort system, with a very large amount of that wealth being delivered directly to tort lawyers. Tort lawyers, unlike the dispersed public, are in a position to directly capture a large portion of the gains created by expansions in tort liability and damages. Increased tort liability and damages will lead people to bring more lawsuits and to seek (and win) more money. Thus, tort lawyers have consistently pressed for doctrinal changes in tort law that increase the liability for defendants, such as strict products liability and the replacement of contributory negligence with comparative negligence. Tort lawyers have also pressed for changes in damages rules, such as prejudgment interest and increased punitive damages. By expanding liability rules and increasing damage recoveries, tort lawyers increase the demand for litigation and, as a result, for lawyers' services. As a result, as a plaintiffs' lawyers as a group can be expected to benefit substantially from increases in tort liability.

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<sup>5</sup> Charles Epp has argued, for instance, that the primary mechanism by which lawyers have succeeded in transferring wealth to themselves has been through restrictions on supply, rather than expansions in demand (Epp 1992, p. 589).

One should also not overlook the impact of attorney advertising in expanding the demand for tort litigation. Attorney advertising dramatically expands the potential for litigation because it enables lawyers to take the initiative in recruiting legal claimants, especially for class actions. Advertising, therefore, enables plaintiffs' lawyers to act entrepreneurially in creating lawsuits. Rather than awaiting injured plaintiffs to come to them with actual claims, advertising allows lawyers to identify *potential claims* first, then recruit clients to bring these claims. When combined with the power of class action lawsuits, this allows lawyers to initiate suit with little in the way of real clients and then to recruit clients after devising novel claims to pursue. Thus, for instance, lawyers can identify a potential menace of which individuals may not be aware, such as lead paint, and then recruit clients to bring claims against landlords for exposure to lead paint (Kagan 1994, p. 41) or breast implants (Weinstein 1994). When combined with other developments, this ability to identify claims first and clients second opens a powerful window for expansion of liability and novel legal claims.

Given the opportunity to benefit from increased tort liability, it has been argued that plaintiffs' lawyers will be willing to invest in legal reforms designed to accomplish those goals (Bailey & Rubin 1994; Rubin & Bailey 1994). The ability of lawyers to manipulate the path of legal evolution to enrich themselves is heightened by the ability of trial lawyers to form an effective group for collective action. Some 33 states have an integrated bar, for instance. Thus, lawyers are compelled to be part of the lawyers' "union" if they want to practice law in the state. This power to compel membership to pursue the occupation provides state bars with a great deal of organizational ability (Olson 1993). Rubin and Bailey highlight the role of the Association of Trial Lawyers of America (ATLA) as "an interest group with exactly the sort of interests needed to move products liability law in the direction it has actually moved." (Rubin & Bailey 1994, p. 814). The development of groups with the ability and incentive to organize has combined with certain technological innovations that have tended to decrease the costs of collective organization (Kagan 1994, p. 33; Rubin 1982, p. 218). The existence of a well-organized interest group with an incentive to move the law in a particular direction undermines the conditions of symmetry and reciprocity necessary for the law to evolve in an efficient direction. If one group has a greater stake in the evolution of law than other groups, then the law will tend to evolve so as to favor those parties who have a future interest in the type of case under consideration, whether or not it is efficient for such parties to be victorious (Rubin 1982, p. 206).

### **Increased Complexity of Law and Cost of Litigation**

Lawyers also have an incentive to increase the complexity of the law (Zywicki 2000; Pritchard & Zywicki 1999; White 1992; Epstein 1988).<sup>6</sup> Increased legal complexity increases the demand for lawyers in society by making obligations less predictable. As a result, actual obligations will tend to diverge from expected obligations, causing individuals to increasingly run afoul of the law and necessitating lawyers for *ex ante* advice and *ex post* sorting out. Thus, even though the public benefits from fewer and simpler rules, lawyers benefit from an increase in the number and complexity of legal rules

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<sup>6</sup> Subject to the constraint that lawyers will not favor law so complex that no lawsuit will be brought at all (White 1992; Epstein 1988). Where this point will be reached is an empirical question, but it is doubtful that the American legal system has ever been so complex as to actually reduce the demand for lawyers.

(Zywicki 1998).<sup>7</sup> In addition, lawyers and judges have a natural bias that the answer to any social problem is the articulation of new and more-detailed rules (Zywicki 1999). This too tends to expand the scope and complexity of law. Increased complexity also tends to maximize judicial discretion, thus this trend will generally be favored by judges. The demand for legal services is likely to be greatest when judges afford themselves the greatest discretion (Pritchard & Zywicki 1999; Ehrlich & Posner 1974).

It would be difficult to imagine a tort law system better-designed to increase the wealth of lawyers. The substantive rules are extraordinarily pro-plaintiff and the perils of massive damages (including, with increasing frequency, punitive damages (Rubin, Calfee, & Grady 1997)), thereby inducing plaintiffs to bring a lot of cases and for defendants to undertake the expenditures necessary to mount a spirited defense. Moreover, the current process provides seemingly maximum amounts of complexity and discretion, generating long and expensive litigation. The risk-utility test, for instance, requires the jury to engage in an open-ended inquiry to determine whether the overall social benefits of marketing or using a given product outweigh their overall costs. In turn, this requires a sifting of multiple different factors, such as the cost of using alternative designs, the plaintiff's knowledge of the risk, and the availability of insurance. How these factors will be weighed and which factors will predominate will vary from case to case and jury to jury, making it impossible to predict the outcome in any given case. Maximum complexity and discretion are assured – as are maximum fees for both plaintiff's and defense counsel.

### ***The Role of Defense Lawyers***

As predicted by this lawyer-driven model of legal change, this expansion of tort liability has been accompanied by increased litigation and increased lawyer incomes (Rosen 1992; Epstein 1989; Pashigian 1977). Of course, not all of this effect can be attributed only to increased tort litigiousness. Nonetheless, it is apparent that at least in part this increase in litigiousness has disproportionately increased the wealth of trial lawyers directly. Note, however, that lawyers are a scarce commodity, in that at any given time there is a relatively fixed number of them. By increasing demand for and the income of plaintiffs' lawyers, this has the indirect effect of increasing the incomes of defense lawyers and eventually all other lawyers. The market for lawyers, like any other market, responds to relative prices. Thus, as the price for plaintiffs' lawyers are bid up, defendants will have to pay more for their lawyers to keep resources from flowing to the plaintiffs' side. This increase in prices for litigation specialists will at the margin also increase the salaries of transactional lawyers to induce them to remain in transactional practice rather than switch to litigation. Therefore, an expansion in the earnings of some lawyers can be expected to be carried by general market processes to increase the wealth of all lawyers.

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<sup>7</sup> Justice Clarence Thomas, in a remark contrary to the standard mindset of the legal profession has stated, "Whenever possible, the Court and judges generally should adopt clear, bright-line rules that, as I like to say to my clerks, you can explain to the gas station attendant as easily as you can explain to a law professor." (Thomas 1996, p. 7). It is significant that Justice Thomas has been more-heavily criticized by lawyers, academics, the media, and even other federal judges than any Supreme Court Justice in recent memory.

This analysis suggests that defense lawyers will not be opposed to the changes advocated by plaintiffs' lawyers. Although their clients may favor more limited liability and damages, less litigation, and less legal complexity, *defense lawyers* will share with plaintiffs' lawyers an economic interest favoring increased liability, more litigation, and more complexity. Put simply, the more cases that can be brought, the more business for defense lawyers. The greater the risk of being tagged with a large judgment, the greater the demand for defense lawyers. More litigation, and more complex and expensive litigation, increase demand for the services of defense lawyers (Glendon 1994, p. 56). Moreover, unlike contingent-fee plaintiffs' lawyers, defense lawyers are generally paid whether they win or lose. Thus, at heart, the economic interests of plaintiffs' lawyers and defendants' lawyers are aligned (Winter 1997; Cross 1996; Brickman 1994; Epstein 1989; Epstein 1988). For instance, defense lawyers have generally not responded very favorably toward reforms designed to reduce the costs of discovery (Winter 1997). This is not to say that the plaintiffs' and defense bars are active co-conspirators; it does suggest, however, that any counter-efforts they exert will likely be somewhat half-hearted.<sup>8</sup> As Frank Cross sums up their position, "Perhaps the best world for both plaintiffs' and defendants' lawyers is a world of many cases that plaintiffs often win." (Cross 1996).<sup>9</sup>

#### ***Other Interests: Insurers, Manufacturers, and Consumers***

Plaintiffs' lawyers and defense lawyers share a common interest in increasing the quantity of tort litigation, the size of the damages available, and the complexity and expense of tort cases. Are there other interests who have much of an incentive to push against these tendencies, such as insurers, manufacturers, or consumers?

The answer appears to be "no." Insurance companies will be largely indifferent to these developments, and may even support many liability-expanding rules. Manufacturers will generally be hostile toward these developments, but their interests will be highly diverse. As a result, they will lack adequate incentives to oppose liability-expanding innovations and will have difficulty even agreeing on the reforms they desire. Consumers are the hurt the most on average, but they lack the incentives and ability to influence the

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<sup>8</sup> Judge Ralph Winter aptly puts the case: "Members of the defense bar may not always be vocal in opposing reform, but they are not likely to zealously support reform that may result in a reduced demand for their services." (Winter 1997). Richard Epstein echoes the point, noting that the position of the defense bar toward reform will be to attest to the basic soundness of the current regime, then "to not that no manufacturer need fear liability if well represented at trial, and then to plead faintly on behalf [of] some modest reform."

<sup>9</sup> Richard Epstein similarly observes, "Clear, decisive rules that demarcate some zone of conduct in which the manufacturer or seller is *not* liable generates no income to any member on either side of the bar.... It is therefore in the interest of defendant firms to have a pro-plaintiff set of rules, which makes their own defensive efforts worthwhile for the manufacturers that hire them." (Epstein 1998, p. 313). Others have questioned these results, arguing that the attempt by tort lawyers to change the law will be frustrated because of collective action problems (Cross 1996). But these criticisms of the model are probably overstated (Zywicki 1999, pp. 902-910). All that is really necessary is for any individual lawyer to anticipate a private windfall from a change in the law that will reap benefits for that lawyer in a stream of future cases. If there are such appropriable economic rents available from a change in the law, any given lawyer will press for those reforms. Moreover, it is not necessary for trial lawyers to be perfectly well-organized and solve all collective action problems to move the law in the desired direction. It is only necessary that trial lawyers be *relatively* more well-organized than others to do so (Zywicki 1999).

litigation process to their advantage. There thus appears to be few countervailing influences to offset the dominant influence of lawyers in pushing for liability-increasing rules.

### **Insurance Companies**

Insurance companies will be indifferent at best, and may actually share an economic interest in maximizing tort liability. To be sure, insurance companies may lose in the short-run from a more costly tort system, depending on the speed and predictability with which changes are phased in and the ability of the insurer to amend premiums and coverage. Also, the fact that new products will be deterred from going to the market or that a number of products may be removed from the market creates a prophylactic “self-insurance” regime for at least some products.<sup>10</sup> But in the long run insurance companies can expect to gain from a more expensive products liability system. Insurance companies earn a normal return on insuring an amortized amount of risk. Thus, as the amount of the total risk insured increases, the number and value of the policies written will also increase. Hence, and the return they will net, increases as well. Increased exposure to greater liability and higher damages, therefore, increase the amount of coverage the insurance company can write (Viscusi 1991). If insurance companies know the level of risk they need to insure, they can adjust their premiums *ex ante* to receive a normal return on covering the risk. Thus, they are less concerned about the amount and level of damages generated by the tort system than by the predictability of those damages. So long as liability and damages are predictable and low-variance, insurance companies will be indifferent or even favorable toward higher average liability levels and damage awards. To be sure, some insureds will exit the market in favor of self-insurance or no insurance at all (such as judgment-proofing the company). But, one suspects that the elasticity of substitution between outside and self-insurance is likely to be inelastic over a relatively large range. Although some self-insurance will replace some market insurance over some margin, there is reason to believe that this effect will be relatively minor and that over the relevant margin insurers will tend to benefit from the expansion of liability.

Even in a relatively high-variance insurance situation, insurers may be able to lay off any concern of extraordinary damages on reinsurers. Reinsurers may be able to form even larger pools of risk that allow them to amortize liability and damages that standard insurers may not be able to digest.

Thus, insurance companies will be at best indifferent to rules and reforms designed to limit tort liability. At the margin they may even support greater tort liability and damages. Because insurers simply amortize pools of risk and draw a normal return from them, as the overall size of the risk to be insured increases, insurers can correspondingly increase the premiums they charge.

### **Manufacturers**

Manufacturers will be opposed to the deadweight costs created by an inefficient tort liability regime. As noted, the costs imposed on manufacturers as a result of the tort

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<sup>10</sup> One survey found that in response to tort liability concerns, in 1986, 47 percent of manufacturers had withdrawn products, 25 percent had decided against introducing new products, and 25 percent had discontinued new product research (McGuire 1988).

system are staggering, regardless of whether the manufacturer is making modern products such as vaccines or ancient products such as ladders. By unnecessarily driving up the price of these products, or at the margin driving them off the market completely, the tort system eliminates transactions that would mutually beneficial to consumers and producers. These foregone mutually-beneficial transactions that would occur absent the impact of the tort system represent deadweight cost to the economy.

But manufacturers will generally not make a very effective force in counterbalancing the incentives of lawyers and judges to expand liability. In the litigation process, these difficulties will be especially pronounced as a result of the agency costs of monitoring one's lawyers (Rubin & Bailey 1994; Miller 1987). Manufacturers can only get a hearing in court through their lawyers; thus, to at least some extent they are dependent on their lawyers' advice and trial strategy.

Leaving aside agency problems, however, manufacturers may still face a comparative disadvantage in fighting for legal reform. Unlike plaintiffs' lawyers, for instance, any single manufacturer has little incentive to fight for a reformed liability regime, because most of the benefits will be shared with other manufacturers. Each manufacturer has an incentive to free ride off the efforts of other manufacturers in exerting energy to enact legal change (Rubin & Bailey 1994, p. 809). Lawyers, by contrast, can treat legal change as a sort of capital investment to be recouped in multiple future cases. Thus, while both lawyers and manufacturers will have some interest in shaping future precedent, this effect should be conceived of as a continuous variable, rather than a discrete variable. Conceived this way, it seems that an individual lawyer may have a greater ability to privately capitalize the value of a favorable precedent than any single manufacturer. As a result, business firms have little interest in precedent for a broad range of liability rules, at least when contrasted with the incentives of lawyers.

Even if manufacturers did have an interest in precedent, it would be very difficult for them to organize to fight for "reform." This is because "reform" means something different in almost every industry. "Tort reform" in the medical industry generally means greater reliance on medical custom or reforms to medical malpractice. This is very different from reform for consumer products and different still from those industries concerned primarily about the sufficiency of warning labels. And reform for vaccine manufacturers means something different than for ladder manufacturers. As Richard Epstein sums up the difficulties, "An apricot with a pit inside is a product, but so too is a complex nuclear reactor. The type of reforms that will benefit some product manufacturers and sellers are often of no concern, or less concern, for others." (Epstein 1988, p. 314). Thus, there are almost as many varieties of "reform" as there are industries. Thus, it will be very difficult to organize across industries to even come up with a viable concept of reform.

Even within a given industry, it may be difficult to organize for a common end of reform. The costs of litigation may not fall uniformly on all producers. To the extent that at least some of these costs are not correlated to output in a linear function (i.e., are "fixed costs" or the marginal costs of compliance fall as output increases) the costs of the system will differentially impact small producers in a negative way.<sup>11</sup> Larger producers may also

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<sup>11</sup> Zywicki (1999) discusses a similar argument in the context of compliance with environmental regulations.

be able to self-insure more readily than small producers. Smaller companies may have greater difficulty in getting insurance and bringing new products to market. Because smaller companies will have fewer transactions, smaller companies will also have less of an ability to “spread” adverse judgments across subsequent sales. Because certain aspects of the liability system may therefore harm smaller companies more than larger companies, those rules may provide larger companies with a comparative advantage in the market (Pashigian 1982). To the extent that such intraindustry competitive advantage is available, this would further undermine unified support for tort reform.

### **Consumers**

Much of the cost imposed on manufacturers is eventually passed on to consumers.<sup>12</sup> When products are removed from the market or new products do not make it to the market, consumers are hurt the most. As noted above, increased liability levels lead to increased insurance costs. Higher insurance costs in turn are reflected in the final price of the product. Consumers are forced to buy mandatory insurance bundled with the product that they actually want. As noted earlier, this insurance is generally unnecessary because the consumer already has adequate insurance. The insurance provided by the tort system is vastly inferior in quality to the insurance provided in private markets. Many of the harms covered by the tort liability system are not covered in private insurance markets, suggesting that consumers are unwilling to pay for this unnecessary insurance (Rubin 1999, p. 125; Priest 1987a; Priest 1981). Thus, the product price is increased because of the requirement that the consumer also purchase the mandatory insurance option. Because this insurance is both unnecessary and of low quality, however, it is evident that overall consumer welfare suffers as a result of being forced to make this purchase.

It is plausible that some lucky consumers may hit the tort lottery jackpot and thereby be made better off, perhaps even resulting in a regressive wealth transfer from low-income to high-income consumers (Priest 1987; Priest 1987a). But most consumers will almost certainly be made worse off and most low-income consumers unambiguously so (Epstein 1989; Priest 1987). Widespread and unpredictable tort liability increases the cost of insurance and interferes with efficient risk-pooling practices in insurance markets, thereby increasing the price and decreasing the availability of insurance generally (Priest 1987). By trying to use the tort system to help the poor, expansive tort liability tends to unravel insurance markets, hurting those it purports to help. As Mancur Olson has stated the tension, “[L]egal innovations that increase the exposure of deep pockets, even if they should happen to be egalitarian on average, are no more rational for purposes of social insurance than a distribution of lottery tickets to the poor would be. They nonetheless greatly damage economic performance.” (Olson 1992).

Although consumers as a whole will be made worse off because of an expansive tort system, each individual consumer will bear only a small portion of that cost. This is not to imply that the costs are trivial – one recent study estimated that tort reform in Texas saved consumers a total \$2.542 billion, or roughly \$1,078 per family, per year (Perryman

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<sup>12</sup> The proportions to which consumers and manufacturers share the losses imposed by the tort system will be determined by the relevant cross-elasticities of demand for the products in question.

2000).<sup>13</sup> Nonetheless, this amount is modest compared to the overall scope of taxation and regulation that any individual consumer pays every year. Moreover, organizing consumers to argue for reform poses virtually insurmountable collective action and free rider problems, especially compared to the ease with which lawyers can organize to prevent reform. Indeed, consumers are generally considered to be the exemplary case of a group that is virtually impossible to organize into a coherent group to pursue collective action (Olson 1965).

The problems for consumers are heightened in the litigation context. There would also seem to be little opportunity for consumers to try to participate in the litigation process in order to argue for more efficient tort laws. The only consumer who will be heard from in the typical case is the plaintiff, who obviously will not argue for limitations on liability. Other consumers will be excluded completely as lacking standing, or at best, can participate by *amicus*. I am aware of no evidence to suggest that consumers have effectively organized to intervene as an *amicus*, nor is there reason to believe that they would be any more effective than the typical *amicus* if they did in fact intervene. Thus, it simply is not plausible to consider consumer groups to be an effective lobbying group in favor of tort reform, especially in the court system.

### ***Role of Judges***

The desire of lawyers to make work for themselves is long-standing; Charles Dickens observed that “the one great principle of the English law is to make business for itself.” (Dickens 1971, p. 58). In the past this self-interested tendency had been resisted by judges and society. But in recent decades, the power of the bar in building the current edifice of tort law has been matched by a greater receptivity of judges toward the pressures of lawyers to increase complexity and liability. There seems to have been a fundamental change in the role that judges and lawyers see for themselves in society. Traditionally, common law judges and lawyers saw themselves as playing the modest role of maintaining the rules of an ongoing spontaneous order framework of law, society, and the market (Hayek 1973). In this regime, the role of judges and lawyers was to clarify the law, vindicate reasonable expectations, and preserve a system of private ordering. Change was slow, gradual and at the margin. It is this bias in favor of private ordering, stability, and gradualism that led Tocqueville to remark on the conservative bias of lawyers in a common law system.

The demise of this traditional view of judging has left judges largely unconstrained in their willingness to use the bench as a vehicle for pursuing their self-interest. What this means is unclear, as it is not obvious how a judge will tend to effectuate his self-interest. Because judges have few direct ways of increasing their income through judging, it is generally supposed that judges are motivated by other goals. What these exact goals are is open to debate. It has been suggested by at least one notable judge, however, that among these are the desire for power and status (Posner 1998).

In major part judges are attracted to the bench because of the power that it gives them to impose their ideological worldview on society (Hasen 1997). Thus, it is unlikely

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<sup>13</sup> This amount may also be somewhat unrepresentative of the “tort tax” generally imposed on consumers, as prior to reform the Texas system was generally understood to be at the extreme end of the liability scale.

that they will be attracted to a philosophy of judging or a set of rules that reduce their power and reduce their discretion to pursue the ideological goals that they desire. Moreover, as noted above, much of the redistribution of the tort law system is driven by two factors: redistribution of wealth from out-of-state corporations to in-state plaintiffs and redistribution to individuals in poorer communities. A judge whose ideological world view (or electoral prospects) favors such redistributive patterns despite the losses in social wealth and deadweight costs that result, will be reluctant to admit that there is even a problem requiring correction. A substantial body of literature concludes that judges do in fact make decisions in furtherance of their ideological leanings (Revesz 1997; Cross 1996, p. 569).<sup>14</sup>

As described earlier, better collective organization by lawyers has led to greater effective demand for expansive tort law. Historically, lawyers may have preferred a more expansive liability regime, but were frustrated in enacting legal change by the individual-based nature of traditional common law litigation. Thus, although lawyers had a preference for more expansive liability rules, this demand was latent and poorly-expressed because of the nature of the litigation process. Better lawyer organization, however, converted this latent demand into effective demand by making lawyers a force to express their demands through the litigation process. Thus, although preferences remained constant, greater organization enabled lawyers to increase their effective demand for more expansive tort liability.

This change in judicial philosophy has resulted in a change in the supply curve for expansion of tort liability that complements the change in the demand curve described above. It has thus been observed that this combination of factors creates a “symbiotic relationship” between “policy-oriented jurists seeking social change” and lawyers seeking a more expansive tort law system (Brickman 1994, p. 1793; *see also* Kagan 1994, p. 29).<sup>15</sup> This partnership between lawyers and judges is necessary for both parties to accomplish their goals. Judges can only make policy if lawyers bring cutting-edge cases before them. Lawyers can only expand the reach of the tort system if judges are willing to make law that does so. It is necessary both for lawyers to demand more expansive law and for judges to supply more expansive law for a systematic expansion in the reach of the law to occur. For instance, the great asbestos litigation became possible only through “imaginative lawyers” pressing asbestos claims and “innovative judges” who allowed workers to circumvent the workers compensation system so as to file tort suits against the asbestos manufacturers (Kagan 1994, p. 58). In turn, once filed, the suits required numerous

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<sup>14</sup> The tendency for judges to indulge their ideological preferences where possible suggests that appointment of judges will not necessarily be a panacea to correct all ills of elected judges. Insulated from electoral monitoring, appointed judges can be predicted to be even more indulgent of their ideological preferences. The problem, of course, is intractable and ancient: how to give decision-makers adequate independence from interest-groups while not giving the decision-maker so much independence that he furthers his own ends (Pritchard & Zywicki 1998; *The Federalist* No. 10).

<sup>15</sup> Bailey and Rubin comment, “Changes in modern tort law may not have been possible until the ideology of judges changed to allow the law to follow. In this view, litigants would have been agents of judges’ preferences, not the other way around.” (Bailey & Rubin 1994, p. 476). The argument that I have presented suggests that lawyers’ economic interests and judicial ideology may have evolved together at approximately the same time. In some sense, both were necessary for tort law to expand so rapidly and in one direction in such a relatively short amount of time.

innovations in standards of proof for liability and damages that required still further partnerships between judges and lawyers, as well as friendly legislators. Overall, it is estimated that close to 75% of the money expended by insurance companies have gone to lawyers and experts, rather than asbestos victims and their families (Kagan 1994, p. 58).

Lawyers and judges will share a mutual interest in the expansion of tort liability, as it increases their wealth, status, and power in society. Lawyers and judges will also favor increased complexity and discretion in the legal system, as this too increases their power in given cases. By contrast, rule-based decision-making ties judicial hands more closely, thereby decreasing discretion and complexity (Zywicki 2000; Scalia 1989). Judges and lawyers may also sincerely believe that increased complexity and discretion will make it more likely that they will make the correct decision in a given case (Epstein 1995). Thus, Judge Jack Weinstein has been quoted as saying, “There is always justice done in my court because I’m here. I can run these multi-factor balancing tests.” (quoted in Discussion 1989, p. 2255). Even if true of Judge Weinstein, is this plausibly true of even a majority of the nation’s judges and juries applying the risk-utility test, for instance?

Any interest group seeking legal change will have to decide whether to pursue its goals through the legislative process or through litigation, or both. The decision whether to allocate resources to one path or the other will be a function of the comparative advantage that a group has in one arena rather than the other. There are several reasons why trial lawyers have chosen to pursue their goals through litigation rather than legislation (Pritchard & Zywicki 1999, pp. 494-501).

Judges will likely be motivated by the desire for power, and in particular the power to impose their personal ideological preferences on society to the extent that it does not interfere with their offsetting desires for status, leisure, and other goals.<sup>16</sup> Judges will tend to be naturally predisposed to receive the message of lawyers advocating greater judicial control over society and the economy. Judges will be interested in increasing their power in two ways: (1) relative to the power of the legislative and executive branches, and (2) over society as a whole (Pritchard & Zywicki 1999, p. 498). In this sense, the invitation by lawyers that greater judicial activity will also further the public good is one that judges would be expected to receive favorably. Expanding the reach of tort liability, expanding the discretion of judges to redistribute wealth according to their preferences, and giving judges the power to remake tort law so as to accomplish desired ideological and policy goals are consistent with judges’ desires to increase their power.

Lawyers and judges are drawn from the same social, economic, and educational background, whereas legislators are likely to be drawn from a more diverse professional and educational background. Judges, like all other people, will be to some extent motivated to seek status and prestige within their community, in this case lawyers and academics, and perhaps the media. Judge Laurence Silberman has observed that “the fortunes of lawyers as a class, and particularly litigating lawyers, tend to wax at a time of rising, not declining, judicial power . . . .” (Silberman 1991). Judges, therefore, cannot help but be moved in a direction to gain status by issuing opinions pleasing to the bar. It

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<sup>16</sup> For instance, it appears that an appellate judge is less willing to follow her personal preferences rather than precedent where there is a “whistleblower” dissenting judge on the panel who will expose that the majority is judging ideologically (Cross & Tiller 1998).

is now evident that to a large extent the American Bar Association's ratings of an individual's qualifications to be a judge are driven largely by political ideology and the receptivity of that individual to the peculiar mindset of the organized bar (Hatch 1997; Silberman 1991). As Gordon Crovitz has observed, judges do not gain esteem according to "the simplicity of the law, the reliability of the law, or the prosperity of the citizenry. Not at all. We measure judges by how much social good they do or claim to do." (Discussion 1989, p. 2253).<sup>17</sup> The modern lawyer or judge aspires not to preserve individual expectations, but to use the law as an instrument for legal change and to right injustice (Silberman 1998; Thomas 1996). A judge seeking notoriety and respect in the bar, media, and academia, would do well to pattern herself after activists such as William Brennan or Roger Traynor than those with a more restrained view of the role of the judiciary, such as Antonin Scalia or Clarence Thomas (Thomas 1999; Pritchard & Zywicki 1999; Glendon 1994; Kagan 1994, p. 31).

Given this shared sociological background, judges have likely internalized many of these ideological values. In the past, common law judges tended to be drawn from a commercial class which made them highly conscious of the importance of economic efficiency and freedom of contract (Discussion 1989). In recent decades, however, the dominant social values of the American elite have become more intellectual and less commercial in nature (Pritchard & Zywicki 1999). One study estimates that only ten percent of law professors consider themselves to be conservative to some degree and more than eighty percent are registered Democrats (Devins, p. 171). Because judges are drawn from this social class, they too have come to express a heightened concern for social justice and redistributive policies and less of a concern for economic efficiency and freedom of contract.

Justice Scalia has observed of his Supreme Court colleagues, "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins – and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn." (*Romer v. Evans*, Scalia, J., dissenting, p. 652). Thomas Baker similarly observes, "The Justices have been shaped by our culture. They are creatures of their caste. These are people of above-average intelligence, narrowed by education, and isolated by their professional experience, ruling based on their fuzzy notions of the moral zeitgeist." (Baker 1997, p. 1199). Because of their independence from popular opinion, judges have far greater opportunity to indulge their ideological preferences than do legislators, as even elected judges have substantially greater independence to pursue their ideological predilections than legislators (Hasen 1997).<sup>18</sup>

### **The Problem of Elected Judiciaries**

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<sup>17</sup> See also Kagan (1994), p. 31: "The judges who issued these decisions often were responding to deep social concerns, widely expressed in the media or by prominent politicians. . . . Lawyers and judges, therefore, did not act alone, without encouragement from the wider society."

<sup>18</sup> Hasen concludes that "most judges can vote their values, that is, act independently, most of the time, whether they are elected or appointed," and that they will tend to follow the wishes of the general public or appointing authorities only in extremely high-salience cases (Hasen 1997, p. 1335).

Tort law remains predominantly state law made by state judges. Roughly half of the states have an elected judiciary of one type or another (Helland & Tabarrok 2000, Table 1). In states where judges are elected, the primary source of campaign fund-raising are lawyers. Thus, the lawyers who write the checks to elect judges are the very same lawyers who later appear in front of those judges. A study by the Florida Bar Association estimated that at least 80 percent of all campaign contributions to Florida judges are made by lawyers (Helland & Tabarrok 2000, p. 22). Looking solely at the candidates for the Texas Supreme Court in 1994 and 1996, more than 40% of the funds raised for their campaigns (approximately \$3.7 million out of a total of \$9.2 million) came from parties and lawyers with cases before the state Supreme Court or from those closely linked to those parties (Presser 2000). The pattern has been observed in other states, including Alabama, Ohio, Illinois, and Pennsylvania (Presser 2000). Judge Posner similarly observes that “the local trial bar is invariably the major source of campaign contributions to judicial candidates.” (Posner 1996, p. 39).

Contrary to appointed judges, these judges are not expected to recuse themselves when a donor appears before them. In the *Texaco v. Pennzoil* case, for instance, the lead counsel for Pennzoil donated \$10,000 to the campaign of the trial judge hearing the case two before filing an answer in the case and also served on the judge’s campaign steering committee. Pennzoil donated more than \$315,000 to Texas Supreme Court justices and Texaco donated \$72,700 (Presser 2000). Three of the recipients were not even up for reelection. Texaco brought a motion challenging the practice of allowing judges to hear cases brought by their donors. The motion was rejected. As the Texas Court of Appeals wrote: “It is not surprising that attorneys are the principal source of contributions in a judicial election. . . . A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.” (*Texaco v. Pennzoil*). Thus, judges in elected systems are fully permitted to sit in judgment of the cases brought by the lawyers who are also their financial supporters.

### **Elected Judges Have Incentives to Redistribute Wealth from Out-of-State Corporations**

A fundamental dynamic driving the tort law crisis is the fact that the tort law system creates a dynamic where parties seek to transfer wealth from underrepresented out-of-state corporations to in-state plaintiff-voters and lawyer-donors. In fact, this ability to transfer vast amounts of wealth from out-of-state corporations may be the crucial factor driving the tort law crisis. (Helland & Tabarrok 2000; Helland & Tabarrok 1999; Tabarrok & Helland 1999; Tabarrok & Helland 1999a). In a series of papers, economists Eric Helland and Alexander Tabarrok concluded that much of the tort explosion can be attributed to the desire of elected judges to transfer wealth from out-of-state corporations to in-state plaintiffs. In general, plaintiffs in states with elected judges tend to receive larger awards against out-of-state defendants than where judges are appointed. Although this effect exists for judges elected in both partisan and nonpartisan elections, the negative treatment accorded out-of-state defendants is most pronounced in states with partisan elections. The logic is straightforward – out-of-state corporations do not vote and rarely contribute money

to state judicial campaigns. By contrast, in-state plaintiffs vote and in-state lawyers contribute large amounts of money to judicial campaigns. It is not surprising, therefore, that the in-state interests receive better treatment. As retired West Virginia Supreme Court Justice Richard Neely wrote, “As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.” (Neely 1988, p. 4). Justice Neely further observes, “it should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can’t even be relied upon to send a campaign donation.” (Neely 1988, p. 62). “Redistributing wealth from out-of-state defendants to in-state plaintiffs is a judge’s way of providing constituency service.” (Neely 1988).

Despite the obvious incentive problems occasioned by judicial election, the degree to which out-of-state defendants are abused is still striking. Helland and Tabarrok find, for instance, that in states with nonpartisan judicial elections, the average tort award against an out-of-state defendant is \$384,540, whereas the average award against an in-state defendant is \$207,957 (Helland & Tabarrok 2000, Table 2). The disparity is even more striking for judges elected in partisan balloting: the average award against out-of-state defendants is a whopping \$652,720, as compared to a measly \$276,320 for in-state defendants. Helland and Tabarrok also observe that this disparity disappears when cases are removed to federal court (Helland & Tabarrok 1999). Thus, even though the federal court is applying the same substantive state law under the *Erie* doctrine, the fate of an out-of-state defendant is much better under an appointed rather than elected judge. This suggests that it is in fact the method of choosing judges through elections that create the discrimination against out-of-state defendants, not differences in substantive state law between states.

The perverse incentives created for judges under the current electoral regime are especially troubling in that judges may be the most crucial actors in the tort system to ensure fair and efficient administration of justice (RAND 2000).<sup>19</sup> This ability to punish out-of-state defendants is especially troubling when punitive damages are awarded to punish conduct that is perfectly legal in other states (Becker, Olson, & Corboy 1997, pp. 447-448).

### **The Problems with Appointing Judges**

The personal desire of judges to pursue status and ideological goals also makes it evident that appointing judges is not necessarily a panacea for the problems raised by electing judges. Independence relieves judges of electoral pressures. On the other hand, by eliminating any popular check on judges, independence increases the opportunity for judicial arrogance and the pursuit of self-interest and ideological goals (Williams 1998). Thus, the decision between electing and appointing judges really amounts to a choice between whether we are more fearful of the overreaching of democratic politics or the overreaching of independent judges (Williams 1998; *Federalist* No. 10). Recall, however, that the Founders’ argument for judicial independence was premised on the

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<sup>19</sup> As discussed below, elected judges have also been more willing than appointed judges to strike down state tort-reform legislation as unconstitutional under state constitutions.

belief that the judiciary would comprise the least dangerous branch. Given that judicial regulation in the tort context far exceeds that contemplated by the Founders, and indeed rivals that of the democratic branches, there is reason to wonder whether the dangers of an arrogant judiciary have in fact come to exceed the dangers of democratic politics. Indeed, although only roughly half of the states elect their judges, all of the states have followed the same path of tort law development. Thus, in the larger picture, it may make little difference in practice whether judges are elected or appointed.

Moreover, the bar invariably plays an important role in the appointment and confirmation process of judges. Politics is not eliminated. Rather, appointment politics simply replaces electoral politics. Appointment politics may actually heighten the control of well-organized interest groups such as lawyers when compared to electoral politics. At the federal level, the influence of ideological politics on the appointment and confirmation of judges is manifest (Bork 1990, pp. 271-349). But politics matters in state judicial appointments as well. The so-called “Missouri Plan” is representative of state “Merit Selection” appointment regimes.<sup>20</sup> The Missouri Plan and similar plans operate more or less as follows (Presser 2000). A panel is selected, composed of lawyers selected by the bar, lay persons selected by the governor, and a sitting judge who served as chair. In practice, lawyers dominate the panel decision-making (Presser 2000). This is largely by design, as it believed that lawyers are impartial experts who will be in the best position to assess the relative merits of the judicial candidates. Once appointed, most systems provide that at some point in the future the judge will have to stand for a retention election, but these elections are marked by even greater public ignorance and lower voter turnout than traditional judicial elections (DeBow 2000). To the extent that judges fear retention elections, of course, this tends to undermine their independence in the same way (although probably to a lesser degree) than for traditional judicial elections (Presser 2000). Indeed, it appears that the threat of a retention election primarily undermines judicial independence in the situations where independence is most valued, i.e., where the judge needs to make a countermajoritarian and controversial election to follow the law (Presser 2000; Hasen 1997). Ironically then, judicial election compromises judicial independence most in the controversial cases where it is most needed.

Historical evidence suggests that the Missouri Plan has not eliminated politics from the judicial selection process. Lawyers of opposing views attempt to appoint judges favorable to their respective views (Watson & Downing 1969). Thus, it has simply supplanted popular politics with “bar and bench politics, in which there is little control.” (DeBow 2000). It may be that in the short run the appointment process avoids some of the more egregious problems associated with an electoral system, such as blatant incentives to disfavor out of state corporations. But by making it more difficult to remove judges once they are in office, judicial appointment increases the stakes for interest-groups in insuring the appointment of favorable judges on the front end. Appointed politics may thereby increase the importance of ideology in the selection decision, because ideology may be the most reliable indicator of how the judge will vote in the future, given the curtailment of

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<sup>20</sup> Interestingly, apparently no state uses the “strong-executive” model used by the federal government, i.e., sole discretion in the governor to nominate judges (DeBow 2000). California uses a system that reverses the Missouri Plan. In California, the Governor recommends names to an appointed commission who then reviews the names the Governor provides (Presser 2000).

other incentives (Pritchard & Zywicki 1999; Posner 1995). As tenure and independence increase, ideology becomes increasingly important as a precommitment device (Dougan & Munger 1989). The importance of ideology as a signaling and precommitment device explains the contentiousness of judicial confirmation struggles at the federal level in recent years. As the Supreme Court has become an alternative avenue for interest groups, the stakes of ensuring a steady supply of a particular ideological brand of opinions has steadily increased. Thus, it is to be expected that interest groups would place heightened scrutiny on a nominee's ideological leanings. Judicial appointment under the Missouri Plan has evidenced a similar tendency; it has been observed that "[l]awyer-representatives on nominating commissions are pre-occupied with the decisional propensities of potential judges." (Presser 2000).

It is not obvious that in the long run, however, the legal system will generally be improved by making judges more reliant on the insular interests of the bar and less reliant on the public. For instance, there is some evidence that compared to other judicial selection systems, merit selection systems tend to favor Protestants relative to Catholics and Jews (Presser 2000). To counterbalance the provincialism of the bar, many states have responded by mandating quotas and imposing other similar regulations on the composition of the nominating committees (Presser 2000). In turn this quota practice raises additional problems of its own. Merit selection committees have also exhibited a strong tendency to be captured by ideological activists, who seek to advance their agenda through the nominating commission (Presser 2000).<sup>21</sup> Despite (or perhaps, because of) the influence of lawyers on the nominating committees, there also is no reliable evidence to suggest that appointment of state judges brings more-qualified individuals to the bench than elections (DeBow 2000; Presser 2000).

This is not to say that an appointments system is on net necessarily better or worse than an elective system. As noted, empirical evidence suggests that some forms of abuse are unique to a system of partisan elections, most notably a systematic discrimination against out-of-state corporate defendants. On the other hand, appointed systems raise their own political concerns, as well as the traditional concern about the excesses of judicial independence, concerns that have increased in recent decades as appointed judges have become increasingly arrogant and activist. More important than this abstract debate is the implications for the current project. Regardless of whether judges are elected or appointed, both systems have embedded within them inherent biases toward greater expansion of tort law liability and damages. At the margin, electoral regimes may be driven more by the financial interests of lawyers; appointed regimes may be marginally more motivated by the ideological predilections of judges and those making the appointments. The relative weight of these interests may differ, but both economic and ideological factors seem to be at play to some degree in both contexts. Thus, although the limit cases may differ in states with different regimes, it is not surprising that the same basic trajectory has been evidenced in all states regardless of the mechanism of judicial selection.

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<sup>21</sup> Professor Presser describes in detail the case of Janice Brown, appointed to the California Supreme Court by Governor Pete Wilson. Brown, a black female conservative, apparently drew the wrath of the state merit selection committee because of her conservative ideology and her support for tort reform (Presser 2000).

## **Ideology and Rent-Seeking Through the Judiciary**

Leaving aside expenditures on judicial elections, money generally will be less important in the process of changing the law through litigation than through legislation (Pritchard & Zywicki 1999; Erlanger & Merrill 1997; Merrill 1997; Friedman 1993).<sup>22</sup> After hiring the lawyers and writing the briefs, there are rapidly diminishing marginal returns to investing further resources. By contrast, in seeking legislative change, it seems that more money always generates a better likelihood of either enacting or blocking change (whichever is preferred). Thus, groups with modest financing, but high intellectual and ideological influence, will tend to have a comparative advantage in seeking reform via litigation rather than legislation. “Interest groups with substantial financial resources will be better served by focusing on the legislature; congressmen always need more money for re-election. Groups that lack money, but which can offer judges opportunities for ideological voting, status enhancement, and increased judicial power, will tend to seek rents through the judiciary.” (Pritchard & Zywicki 1999, p. 500).

It follows that groups that are relatively low on financial resources, but score relatively highly on judicial preferences for status and ideological appeal will tend to seek their goals through the judicial rather than legislative process. Thus on major public issues from abortion to capital punishment left-wing intellectual groups have generally succeeded in the courts and failed in the legislatures. So too with the expansion of tort law.

If judges on average have greater ability to indulge their ideological predilections than do legislators, and if judges on average are more intellectual and redistributionist than the public at large, this also helps to explain why the innovations in tort law have tended to be generated by the courts rather than legislatures. Given the comparative advantages of lawyers in effectuating legal change by litigation rather than legislation, it is instructive that in general tort reforms that enlarge liability and increase damages generally have been brought about by judicial action (Campbell, Kessler, & Shepherd 1995).<sup>23</sup> Campbell, Kessler, and Shepherd also found that liability and damage-decreasing reforms were almost always brought about by legislative activity. This tends to suggest that the directional evolution of tort doctrine in the courts is in one direction and that the development of tort law is not likely to be self-correcting.

### ***Legal Academics***

The ideal of a lawyer as a facilitator of private ordering arrangements seems archaic today.<sup>24</sup> Indeed, it is likely that many legal academics find an emphasis on private ordering among autonomous individuals to be morally questionable. Law is not viewed as an instrument to allow individuals to pursue their independent and diverse ends peacefully and effectively. Instead, law is seen as an instrument of judges and legislators to pursue specific aggregate social purposes, whether efficiency or distributive justice. As Judge

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<sup>22</sup> Frank Cross, however, has argued that this distinction is overstated and that financial resources are at least as important in litigation as in legislation (Cross 1999, pp. 360-364).

<sup>23</sup> See also Curran (1992) (arguing that lawyers’ interests explain the elimination of contributory negligence as a defense in tort).

<sup>24</sup> Even Dean Anthony Kronman, a contracts scholar and supposedly an advocate of an “old-fashioned” role for lawyers, still emphasizes the role of “lawyer-statesmen” in the public arena, rather than extolling the virtues of the lawyer who serves the private-ordering process (Kronman 1993).

Laurence Silberman observed several years ago, “Now it seems that law schools are centers of distrust for capitalism (and contempt for businessmen) as well as impatience with democratic institutions.” (Silberman 1978, p. 19).<sup>25</sup>

This change in outlook is dramatic: whereas the traditional view saw law as an instrument of individual purposes, the modern view sees the *individual* as the instrument of *the law’s* purposes. As Hayek states the issue, “Already the lawyers in many fields have, as the instrument of a general conception which they have not made, become the tools, not of principles of justice, but of an apparatus in which the individual is made to serve the ends of his rulers.” (Hayek 1973, p. 67).

The corrosive influence of this change in judicial outlook runs deep, all the way to the heart of modern law schools (Glendon 1994). This outlook which flowered in the era of the Warren Court has become institutionalized through two generations of law professors who see their roles as critics and reformers of the legal system and legal practice (Kagan 1994, p. 25). In turn, these professors have passed on this adversarial relationship with the common law tradition to their students, who are the lawyers, judges, and professors of the future. One study reported that in 1960 law review articles defending the legal status quo slightly outnumbered those criticizing the status quo. By 1985, however, there were two and half as many articles criticizing the status quo as defending it (Kagan 1994, p. 26).

In the modern academy, law and judicial action is viewed primarily as a vehicle for circumventing unenlightened political processes that fail to regularly accomplish the ideological goals favored by legal academics. Indeed, it is often suggested that if the democratic branches fail to act to rectify social injustice then a judge has a moral duty to act aggressively to rectify societal power imbalances and to redistribute wealth to the poor. Students vie to get jobs with public interest law groups that are perceived as being on the “cutting edge” of legal reform, by which is also meant, the cutting edge of economic and social reform. Because of their prestige and importance in social litigation, many of these groups, such as the NAACP Legal Defense Fund, ACLU and National Resources Defense Council, have also traditionally served to groom future law professors who carry on the cause in the law school setting.

This mindset is seen in the shrinking role accorded to the traditional first-year courses of torts, property, and contracts at most elite law schools. Once viewed as the foundation of the common law system – and the hence the foundation of freedom and private ordering – today these courses are seen as but applications of the public law courses that dominate the upper-class curriculum. Thus, the public law mindset of enacting legislation to accomplish specific social goals has come to corrupt the private law system of private ordering and individual choice. Hayek identified this trend in law schools almost thirty years ago, “But the leadership in jurisprudence, in the course of the process we have described, has shifted from the practitioners of private law to the public lawyer, with the result that today the philosophical preconceptions which govern the development

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<sup>25</sup> See also Silberman (1978, p. 20): “Disdain for capitalism and capitalists, elitism couched in Naderite concern for consumers and the poor, impatience with the democratic process as an inadequate engine for social change – all follow from the power afforded those who join the ministers of the legal process. They respond to the prospect not of the rule of law, but of the rule of lawyers.”

of all law, including the private law, are almost entirely fashioned by men who main concern is the public law or the rules of organization of government.” (Hayek 1973, p. 67).

The modern tort law system is reflective of the harm that can be wreaked a handful of influential academics and judges (Priest 1985). Beginning at the turn of the century and accelerating under the influence of legal realism, “legal scholars and policymakers began to consider tort law more seriously as an affirmative public policy tool.” (Priest 1991, p. 33). It has been observed that “almost the whole of the modern law of strict products liability in tort has originated in academic writings.” (Kagan 1994, p. 29 (quoting P.S. Atiyah and R. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* pp. 401-402 (Oxford: Clarendon Press, 1987)). This professorial influence was solidified through the prominent role played by reformist academics in the American Law Institute’s Restatement and model law projects (Kagan 1994, p. 28). These same academics also powerfully affected the subsequent course of judicial interpretation of the ALI’s work (Priest 1985, pp. 514-518). Academics crafted law review articles endorsing the changes being brought about in the courts and calling for still further expansions of doctrine (Kagan 1994, p. 32).

Over time this yielded a departure from the traditional understanding of tort law as a check on aberrant or unreasonable behavior, as “the basis of tort law analysis began to shift generally to an openly functional approach, especially by younger scholars who viewed themselves as social reformers.” (Priest 1991, p. 34). This revolution in outlook is striking in two ways.

First, it illustrates the astonishing degree of hubris exhibited by modern lawyers, academics, and judges. Rather than seeing themselves as providing a limited role of maintaining the legal underpinnings of a larger spontaneous order of law, society, and the market, these developments turned judges into social engineers and economic planners.<sup>26</sup> Robert Kagan observes, “[I]n the last two generations the center of gravity of elite (or lawyers’) legal culture has shifted. It became more supportive of an instrumental, ‘social engineering,’ or even political vision of law and the judicial role.” (Kagan 1994, p. 61). It was only a matter of time that judges – working in tandem with juries, of all things – felt themselves competent to redesign ladders and airplanes, and to freely second-guess the judgments made by surgeons in the operating room. Today, the power of courts to regulate society far exceed that of any regulatory agency (Priest 1991, p. 39). As George Priest has observed, the modern civil justice system aspires to regulate “all activities in the society, made within every industry, indeed, by every citizen. Through the daily aggregation of civil damage judgments in the thousands of state courts around the country, our courts aspire to provide fine-tuned control of all injury-causing behavior. Our civil courts have become the most powerful regulatory institution of the modern state.” (Priest 1991, p. 39). This free-ranging regulatory authority has turned judges into “an agent of the modern state” deputized to correct social injustice and achieve economic efficiency by forcing manufacturers to internalize the costs of risky products (Priest 1985, p. 519).

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<sup>26</sup> Kagan notes that “the judicial rulings extending liability law were explicitly justified in social engineering terms.” (Kagan 1994, p. 31). The lawyers’ briefs and judicial opinions justifying tort expansion explicitly argue that expansive tort regulation would increase safety by forcing internalization of the costs of risks by manufacturers, hospitals, and municipalities. (Kagan 1994, p. 31).

Second, this hubris is striking in that it is matched by an almost perfectly proportional degree of ignorance on the actual economic and technological consequences of this actions. There is little reason to believe that the courts are a particularly well-suited institution for collecting and analyzing the economic and social data necessary to engage in the bold policy-making involved in creating and administering the modern tort system. In this sense, the common law judge as social planner is plagued by the same problems of knowledge and incentives that generally undermine attempts to plan the economy or elements of it (Hayek 1945). It is simply impossible for even the smartest and most well-intentioned judge to collect the amount of data and knowledge necessary to engage in the wholesale social and economic planning implicit in the building of the tort system. The problem is exacerbated by the cavalier attitude of judges toward even thinking about collecting the information necessary to make rational policy. Although concerned about injuries to uninsured consumers, it appears that judges made no effort to determine how many people actually lacked adequate insurance. Judges also had no knowledge of how insurance markets would react to their policy-making strokes. Other complexities abound. The modern risk-utility test, for instance, requires judges and juries to determine whether the risk of product injuries given current product design exceeds the product's utility. Is there really any reason to believe that judges or juries are competent to make these types of marginal appraisals of the relative tradeoffs of risk and utility exhibited by millions of consumers voluntarily trading in markets every day?

It is doubtful whether the academic architects of the modern tort system understood economics at all (Priest 1991, p. 34). Even if they understood basic economics, it is apparent that they were utterly ignorant of such issues as reciprocal externalities in the Coasian sense (Coase 1960) or the economics of insurance markets (Priest 1987). To the extent that the tort scholars of the 1930s and 1940s were in fact aware of the economics of their era, they likely would have been exposed to the Keynesian and populist economics that dominated the academy during the Great Depression and New Deal. The Keynesians of the era were suspicious of corporations and hostile toward free markets and freedom of contract (Muris 1999; Epstein 1989; Hayek 1973, pp. 67-69). Thus, to the extent that economics played a role building the foundation of modern tort law, it would have been likely been the perverse role played by the Keynesian economics of the Depression era. Although Keynesianism is now largely dead, its ideology and hostility to freedom of contract lives on in modern tort law. As Hayek remarks, "To the economist, reading the account by which the lawyers explain that transformation of the law, is a somewhat melancholy experience: he finds all the sins of his predecessors visited upon him." (Hayek 1973, p. 68).

### **Legislative Tort Reform?**

It thus appears that there is little reason to believe that the common law process with respect to tort law will be self-correcting. Plaintiffs' lawyers, defense lawyers, and judges all share an interest in the current system. The current tort law system seems almost designed to maximize liability, damages, and the complexity of the tort system. All of this increases demand for lawyers on both sides of the tort law system. Moreover, it increases judicial power and discretion, and thereby increases the opportunity for judges to indulge their ideological and personal preferences in implementing the tort law system. Elected judges hold a special incentive to redistribute wealth from out-of-state corporations to in-

state plaintiffs and the lawyers who represent them, and empirical evidence tends to show that they do in fact act consistent with this predicted incentive. State Supreme Courts have even invalidated legislative efforts at tort reform as unconstitutional. In short, there is little reason to believe that in the long run much progress will be had by trying to induce state common law judges to reverse the path they have pursued in recent decades.

This means that if tort reform is likely to occur, it will more likely result from legislative efforts rather than through judicial self-correction. But legislative efforts at tort reform will run up against many of the same problems that explain the current state of tort law in the courts. In particular, lawyers will still possess a substantial comparative advantage in organizing to oppose tort reform relative to those lobbying for tort reform. And even though judges and their incentives to expand tort liability and damages are removed from the picture, there are many aspects of the legislative process that suggest that lawyers will still be a very powerful constituency in preventing legislative tort reform. Finally, it should be observed that tort lawyers are not merely playing defense in fending off tort reform. They are also acting offensively to create new opportunities, such as legislative changes to permit participants in health plans to sue their health maintenance organizations (Jacobson 2000).

The fundamental dynamic of collective decision-making was described by Mancur Olson (Olson 1965). All else being equal, Olson observed, groups with a comparatively-better ability to organize themselves for collective action will generally have a greater ability to influence the legislative process relative to less-organized groups. It was observed earlier that a similar dynamic lay behind the expansion of tort law through litigation (Rubin 1982; Tullock 1980). Lawyers have a comparative advantage in influencing the litigation process because they are relatively easy to organize and have a relatively large individual stake in increasing the size and expense of the legal system. Modern judges will also tend to be favorably predisposed to treat the claims of lawyers for a more expansive and discretionary tort system. By contrast, manufacturers are relatively unorganized and may have differing or even inconsistent incentives. Moreover, they can pass much of their cost onto consumers, who are even less organized and aware of the costs imposed on them by the litigation system. Given this set of dynamics, it is predictable that the tort system would evolve over time to favor the interests of lawyers and judges, rather than the dispersed interests of manufacturers and consumers.

Although the legislative process will reflect many of these same pressures, there is reason to believe that the legislative process may be more receptive to the tort reform agenda than the judicial process. Nonetheless, comprehensive tort reform is likely to remain elusive.

### ***Lawyers***

Lawyers hold a number of advantages in the political process. First, lawyers are the dominant profession represented in the political branches, both at the state and federal levels (Silberman 1978). Lawyers supply a larger number of state legislators than any other single occupation (McCormick & Tollison 1981). On the federal level, in the 1980s approximately 60% of U.S. Senators and 44% of House members were lawyers (Kagan 1994, p. 7 n.19). In the 1980s, more than half of all state governors are lawyers and more than half of all U.S. presidents have been lawyers (Kagan 1994, p.6 n.18). Moreover, most

lawyer-legislators continue to practice law while in the legislature; at a minimum, many of them return to the practice of law after service in the legislature. Because they can directly benefit from their legislative actions, they are unusually well-positioned to capture the gains of any laws that they enact, or to prevent legal reforms that would reduce their income from practicing law. McCormick and Tollison surmise that it is this ability to directly enrich oneself while serving as a state legislature that helps to explain the prevalence of lawyers in legislatures.

### **Tort Lawyers as Political Candidates**

Tort lawyers have been especially effective at getting themselves or their representatives elected to high office. On the national stage, trial lawyer John Edwards from North Carolina was elected United States Senator from North Carolina. It is reported that Edwards plowed some \$6 million of his personal fortune earned from the practice of law into his election campaign (Morgan 2000). News accounts identified Edwards – after only two years in the Senate – as one of the finalists to serve as Al Gore’s running mate in the 2000 presidential election. But Edwards was just one of several trial lawyers who recently have used their personal fortunes to mount a campaign for office.<sup>27</sup> Indeed, America’s most famous tort lawyer – Ralph Nader – used the wealth and notoriety generated by decades of participation in the tort system to launch a plausible race for President on the Green Party ticket.

Democratic leaders have increasingly recruited trial lawyers as candidates for office “because their riches from the tobacco, asbestos and other mass-injury lawsuits enable them to be largely self-funded.” (Morgan 2000). These individuals have reached office because of the riches bestowed by the tort system. There is little reason to believe that they will support efforts to reduce the excesses of the tort system.

### **Tort Lawyers as Political Contributors**

Trial lawyers have also become increasingly aggressive in lobbying Congress and state legislatures to oppose tort reform efforts. In 1999, trial lawyers contributed \$2.7 million to the national Democratic Party (Cohen 2000) and since January 1999 plaintiffs’ attorneys have contributed more than \$4 million to the Democratic Party, with millions more contributed to various candidates for federal office. As of August 2000, for instance, Al Gore’s campaign has directly received \$767,850, according to FollowTheMoney.org. Amazingly, lawyers and lobbyists have even surpassed labor unions and are now the biggest single industry supporter of Democratic Party committees, having shelled out \$11.6 million for 2000, exceeding the \$11.3 million donated by labor unions (Broder & Oppel 2000). When tort reform legislation went to the floor of the United States Senate in spring 2000, trial lawyers rallied \$508,000 to contribute to Democratic Senate campaigns (<http://www.overlawyered.com/archives/00jun2.html>). In recognition of the financial contributions of trial lawyers, last year Bill Clinton became the first sitting President ever to address ATLA (*See* <http://www.overlawyered.com/archives/00aug1.html>).

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<sup>27</sup> In Charleston, West Virginia, Jim Humphries won the Democratic nomination for the Second Congressional District after investing \$3 million of the fortune he made in asbestos litigation (Kabler 2000). Several others have used the money and publicity from products liability suits as a springboard to run for federal office (Morgan 2000).

Even more money went to Democratic candidates for state and local office (Cherry 2000). For instance, trial lawyers have contributed well over \$2 million to candidates for state offices in California (Cherry 2000). During the 1998 gubernatorial race, trial lawyers donated \$3.4 million to Democrat Gray Davis (compared to \$200,000 to Republican opponent Dan Lungren) (Reader's Digest 2000). In addition, trial lawyers across the have established separate funds specifically to coordinate resistance to tort reform efforts (Morgan 2000) or to run independent ads attacking political opponents (Wall Street Journal 2000). Given the amount of money contributed by trial lawyers, there is little doubt that they are a cohesive and well-funded lobbying group that prove a formidable opponent for tort reform advocates.

The multibillion dollar state lawsuits against the tobacco companies have solidified the relationships between trial lawyers and politicians. Indeed, in some states it appears that the relationships formed by the tobacco litigation have become *too* close, as the relationships have raised ethical and political eyebrows. Some states have raised specific allegations of kickback arrangements, where specific trial lawyers were given the valuable right to sue on behalf of the state in exchange for large campaign donations. Trial lawyers who earn millions from litigation such as the tobacco lawsuits then turn around and plow some of that money back into politics to influence future legislation favorable to subsequent suits. In Texas, for instance, former Democratic Attorney General Dan Morales awarded contracts to prosecute the state's tobacco suits to five law firms. Those five firms had donated more than one-third of the money raised by Texas Democrats during the 1998 election and from 1990 to 1995 they contributed nearly \$150,000 to Morales's campaigns (Cherry 2000). That same year the five firms won \$3.3 billion in legal fees from the tobacco lawsuit and another \$40 million in expense reimbursements. A separate contract for \$520 million in fees allegedly signed by Morales with a lawyer from his former law firm was found by the current Attorney General to have been "procured by fraud" due to back-dating and fraudulent signatures (Wall Street Journal 2000a). Morales was voted out of office soon thereafter, and his successor as Attorney General has appointed a grand jury to investigate the affair (Cherry 2000).

In Mississippi, Richard Scruggs was appointed to sue cigarette companies after contributing more than \$20,000 to the reelection campaign of Mississippi Attorney General Mike Moore. Kansas's Attorney General Carla Stovall signed her former law firm Entz & Chanay to represent the state in their tobacco lawsuit, which netted the firm \$27 million. Entz & Chanay provided Stovall with an office and campaign contributions during her reelection campaign. The state of Washington's antitrust chief Jon Ferguson left his post to join the law firm of Chandler, Franklin & O'Bryan following their recovery of \$50 million from the tobacco suits. Ferguson worked with the firm's Steve Berman during the suit. Ferguson explained that the tobacco suit was a proximate cause for his departure: "Steve Berman got \$50 million and I got a plaque," he said (Cherry 2000).

In other states, the relationship between trial lawyers and politicians appear to be functionally equivalent to a kick-back arrangement. Perhaps most notorious is Peter Angelos of Baltimore. Angelos represented the state of Maryland in its suit against the tobacco companies. When the state's case appeared to be in trouble, Angelos actually induced the state to rewrite its tort laws in the middle of the lawsuit so as to retroactively strip the tobacco companies of traditional common law defenses such as assumption of

risk. Angelos has requested fees of \$1.1 billion for his work on the case. This year alone, Angelos and his law firm have donated \$700,000 to the Democratic Party (Broder & Opper). One member of the Maryland House of Delegates observes that Angelos “spreads money around like mulch.” (Schulz 2000). Angelos even has a several members of the Maryland state legislature on his firm’s payroll who regularly sponsor and shepherd legislation for Angelos’s benefit. Others who sponsor favorable legislation have been subsequently added to the Angelos stable of legislators (Schulz 2000). Owner of the Baltimore Orioles as well, on one occasion Angelos brought baseball star Cal Ripken, Jr., with him to lobby the state legislature for legislation favorable to his asbestos suit that was pending at the time (Schulz 2000).

### **Tort Lawyers as Legislators**

Lawyers also hold a further political advantage in that tort reform legislation usually must originate in the judiciary committees of the relevant legislatures (Epstein 1988). On the federal level, the House and Senate Judiciary Committees tend to be more responsive to the interests of lawyers than most other committees (Zywicki 2000). The Judiciary Committee in each house works very closely with the bar and bench, and in fact, the committees themselves are typically dominated by lawyers. This provides lawyers with a degree of agenda control over the origination of tort reform legislation, giving them an opportunity to water-down or otherwise control the content of tort reform legislation. Moreover, it is generally easier for an interest-group to block legislation than to accomplish its enactment (Zywicki 2000; Cross 1999). This is because of the numerous legislative “checkpoints” that a bill must go through in order to be enacted. Thus, the application of influence or pressure at one strategic point in the legislative process will generally be sufficient to kill legislation. Often the strategic legislative checkpoint is the legislative judiciary committee. For instance, in the 1970s the Senate Judiciary Committee repeatedly voted to pass a federal no-fault auto insurance bill, but were repeatedly frustrated by ATLA's ability to get the bill referred to the Judiciary Committee. Once in the Judiciary Committee, the bill was prevented from ever even coming to a vote (Kagan 1994, p. 58). Legislative judiciary committees on the state level have similarly served to bottle-up many reform initiatives (Kagan 1994, p. 56).

But even where a bill gets through the judiciary committee it has to then be voted on the floor. In a bicameral legislature this process must be accomplished in both houses. Then the bill must be presented to the executive (either governor or president) for signature. Thus, even if tort reform passes both houses of Congress, reformers must contend with the ever-present threat of a veto by the President. In fact, when Congress passed the Private Securities Litigation Act in 1996, President Clinton vetoed the legislation (Becker, Olson, & Corboy 1997, p. 434). The bill was eventually enacted over the President’s veto (Becker, Olson, & Corboy 1997, p. 435). President Clinton also vetoed a product liability bill during the same congressional session and Congress did not override that veto (Becker, Olson, & Corboy 1997, p. 435). The President’s vetoes of both of these bills illustrate the difficulties inherent in enacting meaningful products liability reform, especially when the President is tied closely to leading opponents of reform.

How this relationship between tort lawyers and their political allies operates became concrete through news reports suggesting a “cash for veto” swap between leading tort lawyers and President Clinton’s veto of the 1995 tort reform bill (Seper 2000; Seper

and Sammon 2000).<sup>28</sup> According to newspaper accounts, national Democratic Party leaders, perhaps including Vice-President Al Gore, contacted several Texas trial lawyers requesting substantial political donations, using President Clinton's promise to veto the tort reform bill as the basis for their solicitation. In all, six lawyers were contacted within a few weeks of Clinton's veto, and \$100,000 was requested from each of them. In the case of lawyer Walter Umphrey, it appears that the Chairman of the Democratic National Committee at the time may have personally contacted him to solicit money. Soon after the bill was vetoed, Umphrey contributed \$40,000 to the Democratic National Committee. Since that time Umphrey and his firm have contributed nearly \$800,000 to Democrats on the national level (Schmidt 2000). Another of the six, John Eddy Williams, has given \$550,000 to Democrats since 1995 (Seper 2000). This saga illustrates the difficulty of enacting tort-reform legislation when it is necessary for the legislation to pass through numerous "check points" before being enacted. Even if legislation passes both houses of the bicameral legislature, it must still survive the executive's review.

### **Tort Lawyers and Judges**

Finally, the bill must survive any post-enactment challenges in court. Thus, as noted, where tort reform has been enacted into law at the state level, many of these reforms have been later been invalidated in the courts as unconstitutional. Well-organized and wealthy lobbyists such as ATLA will thus have multiple opportunities to block legislation detrimental to their interests by applying opposing pressure at the most critical points of the law-making process. Because it is necessary to win only at one of these check points, this also allows trial lawyers to identify the specific points in the process where they have the greatest comparative advantage, thereby allowing them to "pick their fights" and to use their resources where they will have the largest effect.<sup>29</sup>

Trial lawyers will also be more unified and present a more homogeneous front than reform advocates. Trial lawyers have one simple goal – prevent all reform at all costs. As noted earlier, however, manufacturers have a diverse array of goals that differ from industry to industry, and perhaps even firm to firm within an industry. Thus, the chemical industry may be interested in duty to warn issues, the consumer products industry may be concerned about damages or liability issues, and physicians may be most concerned about the scope of custom. Unlike the trial lawyers, these groups will have difficulty agreeing on a single set of reforms. This failure to be able to join forces and speak with a single coherent voice significantly undermines the clout these various groups will have in the legislative process. As Epstein observes, "The dilemma is complete. Coordinated action across industry groups is not feasible. But individual groups acting alone lack sufficient clout." (Epstein 1988, p. 315). Again, it is not necessary for lawyers to be perfectly well organized to accomplish their goals, it is only necessary for them to be comparatively well-organized when compared to their rivals (Zywicki 1999).

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<sup>28</sup> Some public choice theorists have argued that the executive's veto power is used primarily to protect interest-group beneficiaries by blocking the removal of existing interest-group benefits rather than to prevent the creation of special-interest legislation (Crain & Tollison 1979).

<sup>29</sup> It has been argued that interest groups are most effective when attempting to block rather than create action, when the issues had relatively low visibility, and when the group is able to select a favorable forum. (Schlozman & Tierney 1986, pp. 395-397). All three characteristics seem to be present in the tort reform process.

### *Implications for Legislative Reform*

This also tends to explain why much of the tort legislation that has been enacted has tended to be on a more piecemeal basis, rather than some sort of comprehensive tort reform (Jacobson 2000).<sup>30</sup> Often the beneficiaries of these bills have been unusually sympathetic sets of defendants, such as non-profit groups, government entities, or dramshops (Priest 1987, p. 1589-1590).<sup>31</sup> The overall trend of tort reform legislation, however, has generally been to nibble at the edges and not to do anything about the core problems in the tort system. In part, this is likely to the influence of lawyers of all type, who do not want a radical retrenchment of the tort regime. But it may also reflect the reality that cross-industry lobbying efforts will only be able to agree upon the blandest and simplest forms of reform, such as limits on punitive damages and changes in statutes of limitations.<sup>32</sup> This is not to say that these reforms are wholly without merit. Many of these reforms, such as caps on punitive damages and limitations on joint and several liability, have the salutary effect of reducing the variance of predicted liability. By at least making liability exposure more predictable (even if only marginally more efficient overall), these reforms reduce the variance of expected liability. By reducing variance, these reforms make it possible for insurance markets to function. Thus, there is some benefit to these reforms, even if the benefit is minor.

But these particular reforms do little to address the underlying problems with the tort system. They may help insurance markets to function, but do little to increase the overall economic efficiency of the tort law system. Thus, George Priest has dismissed these reforms as “partial” and “mere tinkering,” in that they treat the symptoms of the tort system but do nothing about the underlying problems (Priest 1991, p. 48). Richard Epstein observes, “What is characteristic about the full range of reforms is that none of them tries to undo any of the major structural reforms that are found in product liability law. No one is willing to pass legislation that would allow disclaimers of liability, or even limitations upon liability subject to some legislative minimums. Contractual freedom is dead in this area, as is too often the case elsewhere. There is no effort to return to a theory of implied misrepresentations as the sole definition of product defect. There is no effort to undo the risk/utility analysis but only to constrain it, perhaps by a negligence instead of a strict liability standard, or by insistence that plaintiffs demonstrate with some particularity the technical and economic efficacy of alternative designs. . . . [T]he range of proposals is quite remarkable, because even if they were all instantly enacted, the scope of tort liability

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<sup>30</sup> In recent years, only narrowly focused liability bills have succeeded in Washington. Successful bills have included protections for those giving food to the needy, protection for unpaid volunteers, limiting liability for suppliers of materials need to make medical implants, and protections for small-airplane manufacturers, homeless shelters, Amtrak, cruise-ship owners, and the computer industry from Y2K problems (Jacobson 2000).

<sup>31</sup> Given the political cache of the high-tech industry, limitations on securities litigation and protection from Y2K litigation might also be consistent with the model of protecting “unusually sympathetic” defendants.

<sup>32</sup> As one tort reform advocate has stated the issue, “The more cooks there are in the kitchen, the more people you have at the end of the day extolling the virtues of the soup. . . . But the more cooks you have, the more difficult it is sometimes to come up with a stew that is acceptable to everyone.” (Jacobson 2000).

still would be far greater today than it was at the publication of the Restatement (Second) of Torts in 1965.” (Epstein 1989, pp. 2220-2221).

### *A Model for Reform?*

Legislative action may nevertheless hold out greater hope for reform than courts. Unlike courts, legislative action does in fact hold out the possibility that dispersed consumers and manufacturers may in fact be organized well enough to advocate reform. This strategy may be even more plausible if a political entrepreneur picks up the opportunity to organize broad-based public support for reform. A political entrepreneur can be understood as a politician who, rather than passively responding to the lobbying efforts of particular interest groups, instead acts as an “entrepreneur” to galvanize political support for a given issue and organizes a coalition to enact reform into place (Zywicki 1999). Moreover, it may be that the deadweight costs from inefficient policies may become so large that it may be viable to crack prevailing special interest coalitions and to make efficiency-enhancing policy changes, either by mobilizing offsetting interest groups or in some rare cases, the public at large (Zywicki 1999; Becker 1985; Becker 1983; Peltzman 1976). Thus, there may be a combination of offsetting interest groups, political entrepreneurship, and massive deadweight costs from the status quo that can overwhelm the specific beneficiaries of a program and thereby galvanize reform.

Tort reform appears to be an issue where dispersed public opinion may be relevant to the legislative process. Thus, one empirical study concluded that states with a more conservative political climate tend to be more likely to enact tort reform than other states (Campbell, Kessler, & Shepherd 1995). Although instructive, the conclusion of this one study is not conclusive, as the variable used to test the ideological climate was Republican control of political branches. As noted, trial lawyers overwhelmingly support Democratic candidates, thus the model may be merely reflecting different winning interest-group coalitions rather than ideological characteristics of the electorate. Nonetheless, the findings that public opinion may influence tort reform are suggestive and warrant further exploration. One source concludes that some 75%-85% of the people in a national poll support some form of tort reform (Becker, Olson, & Corboy 1997, p. 438 (statement of Theodore Olson)). To the extent that this number is accurate and this diffuse public support can be made effective by a political entrepreneur, this suggests that tort reform could potentially be viable on the national political level.

The most successful tort reform effort appears to be that enacted by George W. Bush when he was Governor of Texas.<sup>33</sup> Bush’s approach appears to be consistent with the model suggested: a strong political entrepreneur and high levels of deadweight costs that made it possible to galvanize the dispersed public in favor of the reform message. Bush aggressively promoted tort reform in his campaign and as a centerpiece of his legislative agenda. In so doing, he was assisted by a manufacturer-backed push for reform. Finally, the sheer excesses of the Texas tort system seems to have caused the otherwise low-salience issue to motivate voters who might otherwise be indifferent to the issue.

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<sup>33</sup> In part this tort reform effort is more famous than in other states because of Bush’s later candidacy for President of the United States. Nonetheless, it appears to have been one of the more successful tort reform agendas, and Bush succeeded in a state with an unusually problematic tort law system and an unusually well-organized, wealthy, powerful, and politically-influential plaintiffs’ bar.

Subsequent news reports suggest that a pivotal moment in the Texas tort reform battle was a segment on the popular television show “60 Minutes” that ridiculed the Texas tort law system by asking “Is Justice for Sale in Texas?” (DeBow 2000). The attention generated in the national press seems to have resonated with voters who were then willing to endorse reform. The Texas experience tends to suggest that although reform is difficult, it is possible, given a coalescence of countervailing interest groups, political entrepreneurship, and sufficient popular outrage at the status quo.

### **The Need for Federal Action**

Tort reform on the state level has been somewhat successful, as some 45 states have enacted some form of tort reform in recent years (Cohen 2000). Nonetheless, it is doubtful that tort reform on the state level can provide an effective vehicle for comprehensive tort reform. State legislators face the same incentives as state judges. As discussed earlier, elected state judges face strong incentives to redistribute wealth from deep-pocket out-of-state corporations to in-state plaintiffs. State legislators face identical incentives. Thus, state legislators will tend to favor policies that redistribute wealth from out-of-state interests to in-state voters. This behavior of discriminating in favor of in-state interests and against out-of-state interests, or imposing costs on out-of-state interests for the benefit of in-state, has been manifested in a variety of contexts, including taxation, antitrust, and utility rate regulation (Helland & Tabarock 2000; McConnell 1988, pp. 92-93; Maloney, McCormick, and Tollison 1984).

Usually the efforts to redistribute wealth from out-of-state to in-state interests will fail because out-of-state interests can adjust their behavior in response to the appropriation incentives of in-state interests. For instance, exemption law in bankruptcy is generally governed by state law. States have a wide variety of exemption regimes, from highly generous to very strict. The variance is greatest for homestead exemptions, as some states such as Texas and Florida, have unlimited homestead exemptions. This variance in homestead regimes potentially raises the possibility of opportunism against out-of-state lenders. But because homesteads generally cannot be moved, out-of-state lenders can adjust their behavior *ex ante* to offset the possibility of opportunistic behavior *ex post* by borrowers living in high-exemption states, such as by reducing the supply of credit or by raising interest rates. Empirical evidence suggests that lenders do in fact respond to borrowers living in high-exemption states by constricting credit and raising interest rates (Gropp, Scholz, & White 1997). There is a deadweight cost that still results from overly-generous homestead exemption laws, as all consumers bear the cost of the higher *ex post* contractual opportunism that higher exemption limits encourage. Nonetheless, most of the costs of the homestead regime are internalized by those living within the state, thus there are minimal opportunities for individuals to appropriate the wealth of out-of-state lenders. As a result, this is arguably a matter that falls within traditional state powers.

In theory, tort law is susceptible to the same analysis. An excessively-generous products liability regime, it may be argued, will be detrimental primarily to those within the state. Merchants and manufacturers could raise their prices to offset the risk of selling goods in high-liability states or refuse to sell to those who live in the state. Thus, it might be argued, an equilibrium will re-establish itself in a manner comparable to that of the homestead exemption, where in-state residents bear the cost of excessive tort liability through higher prices in goods and services.

But that is not the case with respect to products that move in interstate commerce. Goods are manufactured in one place but sold all over the country. Thus, a good may be manufactured in New York, but sold in Georgia to a tourist from Alabama who later moves to Oklahoma where the product malfunctions. Choice-of-law rules permit a plaintiff to sue wherever a state has an interest, thus the manufacturer can be liable even if it didn't know that the plaintiff was from out-of-state or subsequently moved to another state. Thus, where goods move in interstate commerce, it becomes impossible to respond to the risks of doing business in a particular state. Because manufacturers cannot tailor their prices to local circumstances, states have an incentive to increase liability and to externalize the resulting expenses on residents of other states. "It follows from these factors that the cost of a given state's liability laws, as they apply to mass-market products, is borne by consumers nationwide. In effect, consumers in states with less generous products-liability laws pay a portion of the more generous recoveries won by plaintiffs in other states. This imbalance introduces an incentive for strategic behavior that would not be present if states made rules for themselves alone. Each state can profit at the expense of the others by expanding its scope of liability, at least until the others catch up." (McConnell 1988, p. 92). As a result, the behavior of state legislators will mirror those judges who seek to redistribute wealth from out-of-state to in-state interests. "A state's decision makers will therefore observe that nearly all the consumers injured in the state are local residents and constituents, while most of those who can be sued for making the products are residents of other states." (McConnell 1988, p. 92). Because goods can move in interstate commerce, the effects of an excessive tort regime will be borne by the residents of other states, creating a "race to the bottom" in tort law.

Indeed, current tort law provides incentives for plaintiffs to forum shop for law conducive to their claims. Because of the combination of expansive choice-of-law rules and state long-arm statutes, plaintiffs have wide discretion to bootstrap a claim under almost any state's law. The ability to forum shop for favorable law is exacerbated in the context of a class action that can be brought almost anywhere in the country (RAND 2000). As a result of these factors, plaintiffs have opportunity to "shop" for state court judges who are more favorable to class actions. Thus, consumer class actions are unusually common in Alabama and mass tort actions appears to be attracted to Louisiana (RAND 2000), p. 7).<sup>34</sup>

Given these political dynamics, it should not be surprising that tort reform has been most successful when all of the relevant parties live within the state, such as limits on medical malpractice claims, municipal liability, or liability of taverns or social hosts for accidents caused by persons to whom they serve liquor (McConnell 1988). Many Where the plaintiff and defendant are both in-state interests, then the seller can raise its prices or exit the market to adjust for the increased liability. Limitations on liability for enterprises servicing tourists are also common, such as for ski-resorts or beach resorts. High-tourism states will also tend to impose higher taxes on hotel and restaurant taxes, for similar reasons. The reason is evident in these cases as well, as the businesses are in-state and the tourists are from out-of-state. If fully disclosed, however, these liability limitations should

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<sup>34</sup> Thus, for instance, the *BMW v. Gore* case could have been brought in any number of states, but the plaintiff chose Alabama as the place to bring the suit, presumably because of the propensity of Alabama courts to award punitive judgments (Becker, Olson, & Corboy 1997, p. 450).

be incorporated into the price of the product and thus should cause minimal deadweight loss. Reforms that aid manufacturers in the national market have tended to be less successful. This political dynamic suggests that there may necessarily be some role for federal action in the tort reform area.

This is not to say that the federal government must intervene to establish a comprehensive tort reform agenda. The role of the federal government should be to limit discrimination against out-of-state interests, and intervention that can take several forms. The federal government could act to try to reinstate principles of freedom of contract (Rubin 1999; Rubin 1993; Krauss 1991; Schwartz 1988) or stronger choice of law rules (Niskanen 1995; McConnell 1988). The United States Supreme Court appears to be at least somewhat aware of this temptation and has used the due process clause to limit blatant forms of discrimination against out-of-state corporations (Rubin, Calfee, & Grady 1997). These interventions at the federal level to police economic discrimination against out-of-staters is appropriate and consistent with the traditional exercise of power by the federal government.

Federal tort reform may be necessary for another reason. Although many states have enacted legislative tort reform, a number of those statutes have been invalidated under state constitutions. Indeed, ATLA has announced a concerted effort to attack these state tort reform initiatives under state constitutions. By using their financial clout to elect judges favorable to their positions, state trial lawyers have managed to recapture the initiative by having reforms barred by state constitutions. In recent years, state supreme courts have struck down tort reform laws in Illinois, Indiana, Ohio, and Oregon, and West Virginia's cap on damages in medical malpractice cases was invalidated this summer by a state district judge (Federal & State Insurance Week 2000; *see also* Presser 2000). One scholar reported that as of 1994 plaintiffs' lawyers had been successful in 17 states in having tort reform legislation declared unconstitutional in whole or in part (Kagan 1994, p. 56). This flurry of activity in state supreme courts attacking legislative tort reform has been the result of a concerted litigation strategy masterminded by ATLA to challenge tort reform on state constitutional grounds (Federal & State Insurance Week 2000). Given the unwillingness to defer to the state legislatures of these states, federal intervention under the Supremacy Clause may be necessary to impose tort reform in these states.

States with elected judiciaries are more likely to declare legislative tort reform enactments unconstitutional than are appointed judges (Presser 2000). Elected judges in Ohio and Illinois declared the tort reform legislation enacted there invalid *in toto* (Presser 2000), other state judiciaries have invalidated only parts of the tort reform regime. By contrast, states with appointed judges have tended to be more deferential toward legislative tort reform enactments.

Of course, there is little reason to believe that tort reform efforts on the national front will be any more successful than at the state level. As noted, President Clinton has close ties to ATLA and the trial lawyers and even vetoed a tort reform bill in 1996. Al Gore has been similarly friendly with the trial lawyer industry, although his running-mate Joe Lieberman has not. George W. Bush, of course, is an ardent foe of the trial lawyers, helping to explain the strength of their support for Al Gore. So it is at least conceivable that if Governor Bush were elected president that tort reform could be viable. Nonetheless, many of the same collective action problems that have undermined tort reform

efforts at the state level become even more difficult when the debate moves to the federal level. By contrast, trial lawyers seem as well-organized on the federal level as on the state level. This suggests that even if federal action is appropriate, it will not be very viable for enacting fundamental change.

## **Conclusion**

This essay has identified the political and economic forces that have shaped the development of the American tort law system in recent years. Trial lawyers have become increasingly aware of the riches available through the tort law system and have become increasingly adept at organizing for change. Their pursuit of these goals has been relatively unobstructed by other interests such as defense lawyers, insurance companies, manufacturers or consumers. At the same time, their desire for a more expansive and complex tort system has met a receptive audience in judges seeking to expand their status and power in society. The incentives to distort the path of the law for private gain has been especially pronounced in states with elected judiciaries. Electoral pressures put into motion incentives to raise money and exploit out-of-state corporations that further corrupt the development of sensible and predictable law.

Although the causes of the problems in the tort law system are economic and political, their antidotes are cultural. Traditionally, common law judges and lawyers believed that the purpose of the legal system was to advance the goals of private ordering and freedom of contract. Through respect for private ordering and personal autonomy, it was believed that the public welfare would be served and that economic prosperity would result. As a result, judges and lawyers concerned themselves with developing a reasonable, intuitive, and predictable legal system. Trained by law professors to respect the wisdom and majesty of the common law, judges and lawyers were acculturated in this ethic of private ordering and liberty. This tradition restrained radical change and the frowned upon social engineering by judges and lawyers.

Today, however, the legal system is seen as a tool for self-styled “progressives” to advance causes and interests that they are unable to advance in the legislative process. This has led to an aggrandizement of power in the judicial system that has turned the legal system into a target for special interests. A combination of forces has crippled the traditional tort system and fatally corrupted the self-correcting virtues of the common law.

Thus it has become that the battle for sensible tort law has shifted to the legislative branch. The struggle for reform faces an uphill fight, but the experience in Texas suggests a model for reform: a combination of a political entrepreneur, large dead-weight losses from a system out-of-control, and a degree of widespread public disaffection that can be galvanized for reform. This suggests that it will become increasingly urgent to educate the public about the costs of the current tort reform system and the benefits of reform. Even then, truly comprehensive reform may prove elusive.



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