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How to Manufacture a Crisis: Evaluating Empirical Claims Behind “Tort Reform”

For several decades, tobacco companies, large corporations, and insurance companies have systematically attacked the civil justice system. Mounting a campaign of anecdotes purportedly representative of a complex system that adjudicates several million civil cases each year, political entities have proclaimed that changing the civil justice system is necessary to preserve American business competitiveness.

Republicans from Ronald Reagan to George W. Bush have made changing the civil justice system part of their platforms. Newt Gingrich’s “Contract with America,” a document that helped Republicans wrest leadership of the Congress from Democrats in 1994, argued that the civil justice system was out of control and that when victims recovered damages from wrongdoers, the aggregate of payments amounted to built-in headwinds and a tax on business.¹ Before his domestic agenda was sidelined by preoccupation with the Iraq war, George W. Bush regularly claimed that the tort system was rife with “frivolous” lawsuits.²

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¹ See NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 143–55 (Ed Gillespie & Bob Schellhas eds., 1994).

² A search for the word “frivolous” on the official White House website discloses 783 “hits,” including many speeches and official policy statements by President Bush. See Search www.whitehouse.gov by Keyword, <http://www.whitehouse.gov/query.html?col=colpics&qt=frivolous&submit.x=8&submit.y=16> (last visited Nov. 12, 2007).

The core claims of the movement are simple: litigation is “exploding,” damage awards are “skyrocketing,” juries are “out of control,” citizens file suits at the drop of a hat, and “frivolous” claims are expanding. These contentions are repeated fervently by many reputable persons and reported widely in the media.

Previous efforts to “reform” tort law worked by making claims through case-by-case litigation, and to a lesser extent in policy arguments made to legislatures. In contrast, the current “reform” movement, which I prefer to call a retrenchment movement, has its genesis in the 1970s as a reaction against liberalization of the substantive rules of tort law by thousands of courts around the nation. Instead of making its arguments to courts or legislators, the tort retrenchment movement chose to focus on the court of public opinion.³

The current tort retrenchment movement marries commercial and political advertising techniques to a very public attack upon the civil justice system. By inducing the public to question the validity of the entire system, any individual verdict, lawsuit, claim, etc., can be called into question. From the big picture (e.g., legislation in Congress or constitutional litigation in the Supreme Court attacking punitive damage awards as violating due process) to the mundane (e.g., picking a jury in a routine fender bender), the campaign has had enormous impact on how people think about civil litigation.

Leading newsmagazines such as *U.S. News & World Report* and *Newsweek* offer columns entitled *Sue City U.S.A.*⁴ or even *Civil Wars*,⁵ and announce a new “fear” of litigation that is stifling volunteer activities and causing doctors to resign their practices.⁶ CBS’s famed “60 Minutes” produces a story on a diet drug lawsuit filed in Fayette, Mississippi, the poster city for “jackpot justice.”⁷

³ See John Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005).

⁴ Mortimer B. Zuckerman, *Welcome to Sue City, U.S.A.*, U.S. NEWS & WORLD REP., June 16, 2003, at 64.

⁵ Stuart Taylor Jr. & Evan Thomas, *Civil Wars: Doctors. Teachers. Coaches. Ministers. They All Share a Common Fear: Being Sued on the Job. Our litigation Nation—and a Plan to Fix It*, NEWSWEEK, Dec. 15, 2003, at 43.

⁶ See Taylor & Thomas, *supra* note 5, at 44; Zuckerman, *supra* note 4, at 64.

⁷ Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America’s “Lawsuit Crisis,”* WASH. MONTHLY, Oct. 2004, at 18, 21.

In the middle of an article about the Vioxx litigation, the *Los Angeles Times* casually mentions without attribution that a Santa Monica courthouse is so well known for large plaintiff verdicts that lawyers "on both sides of the bar" refer to it as "the bank."⁸ The article, purportedly addressing the opening day of the first California trial involving Vioxx, refers repeatedly to certain catch phrases that have become the staple of the tort reform publications: the words "explosion in litigation," "litigation boom," "storm of litigation," "legal quagmire," and "jackpot jury awards" all appear in the story, each time without attribution.⁹ This was a reporter who had her thesaurus ready at hand.

The "litigation crisis" has become, in short, a matter of common knowledge. The rhetorical frame is so well established that it is no longer even necessary to cite authority for the propositions that litigation is skyrocketing or that people file frivolous lawsuits.

The political branches have responded to the rhetorical onslaught with scores of proposals designed to ameliorate these conditions. Before the Democratic Party took control of Congress in the 2006 elections, each house of Congress was actively considering major legislation that would nationalize key parts of civil litigation disputes involving class action suits, products liability, asbestos claims, and medical malpractice damage awards.¹⁰

State legislatures too, hearing complaints of "insurance crises," have rushed to respond. Governors and legislators insist the civil justice system needs to be reined in. Every state house in the country confronts proposal after proposal designed to correct the many asserted "abuses" of the civil justice system.¹¹

⁸ Lisa Girion, *State Vioxx Trial Is Set as Drug Litigation Suits Boom: An Explosion in Litigation Spurs Calls for Legal Reform and Regulatory Changes*, L.A. TIMES, June 27, 2006, at C1.

⁹ *Id.*

¹⁰ See, e.g., Michael S. Gerber, *Champions of Class Action Reform Seek Senate Supermajority for Bill*, THE HILL, Apr. 23, 2003, at 12.

¹¹ On its website, the American Tort Reform Association ("ATRA") lists hundreds of "reforms" proposed or enacted in every state. See ATRA, *State and Federal Civil Justice Reforms*, <http://www.atra.org/reforms/> (last visited Nov. 13, 2007); see also James Dao, *A Push in States to Curb Malpractice Costs*, N.Y. TIMES, Jan. 14, 2005, at A21.

For thirty years, “tort reform” has been the rallying cry of those who would radically transform the civil justice system.

In the face of proposals that would defang the civil justice system of every state, it would be wise to examine the empirical claims made by the “reformers.” Is there in fact a “crisis” of litigation? Are lawsuits “exploding”? Are damage awards “skyrocketing”? Do our fellow citizens sue each other “frivolously”?

This Article analyzes key empirical claims made by “tort reformers” concerning the operation and impact of the civil justice system. These claims have deep roots: most of the rhetorical frames described in the prior paragraph have been deployed for at least thirty years. There is a need for a systematic review of the literature that addresses the empirical assertions.

Scholars have not been silent in the face of the rhetorical onslaught. Indeed, many legal scholars and sociologists of law have addressed many of the empirical claims. This Article provides a methodical overview of the empirical evidence about the operation of the civil justice system.

In Part I, I examine retrenchment arguments that have a factual basis (e.g., litigation is increasing, damage awards are skyrocketing, juries are out of control, citizens are quick to sue, and frivolous claims are expanding). To the extent that data exists, I show that most of the credible evidence contradicts the contentions of the tort retrenchment movement.

Tort reformers often make normative assertions that are difficult to refute. For example, your “frivolous lawsuit” may be my core civil right. Before the late 1970s, workplace sex harassment was not understood as discriminatory and did not violate federal law. Today, thousands of lawsuits are filed every year challenging such behavior. In 1960, a claim of discriminatory “sex harassment” would have been widely regarded as frivolous. To a certain extent, therefore, one who believes that certain lawsuits are “frivolous” grounds that belief in a moral understanding that goes outside the bounds of this Article. Thus, while I address empirical claims, I do not consider whether certain types of tort claims should not be recognized at all.

Although tort retrenchment empirical claims can be refuted, that does not prevent their repetition. People continue to believe that litigation rates are “exploding,” even though the fact

that they have been declining for decades is well known. In the concluding section, I offer some preliminary thoughts as to why this may be so.

The “tort reform” movement is a very organized, long-term political campaign. Tort retrenchment challenges the underpinnings of a civil justice system that has evolved over several centuries. This Article aspires to shed light on some of the movement’s key empirical claims.

I

EMPIRICAL CLAIMS OF RETRENCHMENT

Much of what we think we know about the behavior of the tort litigation system is untrue, unknown, or unknowable. . . .

....

Data on the litigation system’s behavior are meager. Even the most complete data on federal and state court activity fall far short of answering the most pressing and fundamental questions about the performance of the litigation system. . . .

....

[As a result, much] discussion of the tort litigation system consists of conclusory assertions, unsupported by evidence.¹²

A. “Frivolous Litigation”

Common assertions regarding frivolous litigation include the claims that there has been an explosion of tort litigation in recent years, that frivolous lawsuits are clogging the courts, and that people sue for minor injuries with the primary goal of winning big money. Those seeking changes to the civil justice system conduct surveys seeking to reinforce these notions.¹³ Thus, reform advocates blame frivolous tort litigation for what they claim is an alarming increase in tort filings.¹⁴

¹² Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1149, 1154, 1156 (1992).

¹³ A group calling itself “Citizens Against Lawsuit Abuse,” for example, surveyed approximately 1800 teenagers regarding their beliefs about lawsuits. Press Release, Citizens Against Lawsuit Abuse, *Teens Troubled by Jackpot Justice* (Aug. 11, 2004), available at http://www.cala.com/docs/California_survey_release.pdf. The survey found that eight out of ten teenagers ages sixteen through eighteen “believe most people file lawsuits to win big money—not to bring justice to those who were wronged or harmed.” *Id.*

¹⁴ The Republican Party’s 1994 *Contract with America* proclaimed, “Almost everyone agrees America has become a litigious society: We sue each other too often and too easily.” GINGRICH ET AL., *supra* note 1, at 144. In the book outlining

1. *Volume of Litigation*

One of the challenges facing anyone who attempts to evaluate claims about alleged increased filings is that no data set contains all or even necessarily the type of information one desires. Some studies focus on particular states, while other studies look at filings in federal courts alone. Further, some state court administrators group different lawsuits in different ways: one may group trespass and nuisance lawsuits under a category such as “property,” while another may group them under “tort.”

Furthermore, the data in one study may not be comparable to data in another study. The first study may include “torts” such as employment discrimination or wrongful discharge, while the second may exclude such lawsuits from its study because they are “employment” actions. In addition, when businesses file lawsuits against other businesses, they may allege breaches of contracts as well as violations of tort law. Those suits may be classed as “contract” lawsuits, even though the primary purpose may be to seek tort damages.

Especially when advocates of one or another position are making their case in the political arena, where the “rules of evidence” and the “rules of argument” are less stringent than the courtroom, one must assess the arguments based upon limited empirical studies with care. Accordingly, I would emphasize caution when assessing claims about increased filings of “tort” suits.

Population growth must also be considered when evaluating claims about an increased volume of litigation. If a study does not control for population growth, asserting that a certain type of lawsuit “increased” 40% every year over a long period of time may prove very little.

Additionally, the *time frame* of a given study is very important. For example, if one reads that “tort filings in federal court doubled in a single year from the prior year,” that may

the contract, the chapter on legal reform begins by proclaiming, “Isn’t it time to clean up the court system? Frivolous lawsuits and outlandish damage rewards make a mockery of our civil justice system. Americans spend an estimated \$300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs.” *Id.* at 143; see Peter Baker, *Bush Campaigns to Curb Lawsuits: President Says ‘Junk’ Litigation Is Driving Small-Town Doctors out of Business*, WASH. POST, Jan. 6, 2005, at A6 (noting that at a campaign stop, George W. Bush urged that “[j]unk lawsuits change the way docs do their job. Instead of trying to heal the patients, doctors try not to get sued”).

sound like a huge increase. But one then needs to ask, *why* did the number increase in that particular year, and was it a pattern of increase or a spike? As it happens, the filing of mass tort claims—such as the asbestos claims—periodically spikes filings from one year to the next, but then the number of filings drop off.

Finally, it may make little sense to focus on overall claims filed without understanding *why* filings are increasing or decreasing. Do filings increase because scummy people persuade greedy lawyers to file frivolous cases? Or are businesses filing more cases against other businesses and against individuals? Or do products liability cases spike when more products prove defective (e.g., the DES, Bendectin, Dalkon Shield, and breast implant cases filed by hundreds of thousands of women)? And do products liability filings then decline when there are fewer mass-produced defective products?

In other words, if the sheer number of lawsuits is relevant to a discussion about the civil justice system, it is equally plausible to assert that lawsuits are being filed because defendants are careless or products are defective as it is to assert that there are more greedy plaintiffs.

Despite the above qualifications, several important generalizations can be rendered about the types and total number of tort filings during significant periods of time. For example, consider Table 1, showing civil lawsuit filings in state courts over a ten-year period of time. Civil lawsuits include contract disputes, property disputes, debt collection, and landlord-tenant disputes, as well as tort suits. Tort suits comprise approximately 10% of civil filings.

TABLE 1
CIVIL LAWSUITS FILED IN STATE COURTS¹⁵

Year	Civil Filings
1993	14,591,080

¹⁵ National Center for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/csp/2000_Total_Caseloads.html (last visited Nov. 14, 2007) (lawsuit statistics); U.S. Census Bureau, Population Change and Distribution 1990 to 2000, at 1 fig.1 (2001), *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf> (population statistics).

1994	14,446,805
1995	14,672,072
1996	15,008,380
1997	15,317,717
1998	15,331,616
1999	15,047,495
2000	15,139,995
2001	15,750,071
2002	16,335,207
Change in number of civil filings, 1993–2002	12%
Change in population 1990–2000	13%

Table 1 illustrates that *all* civil filings in state courts increased 12% during the ten-year period from 1993 to 2002. However, this rate of increased civil filings approximated the rate of population growth in the country.

Reform rhetoric often ignores other important data regarding tort suits. For example, most states report that between 200 and 500 tort cases per 100,000 persons are filed each year.¹⁶ Between 1975 and 2002, data from sixteen states show a 40% increase in tort filings.¹⁷ However, between 1970 and 2000, the U.S. population increased 38%.¹⁸

¹⁶ Neal Kauder, *Tort Filings in the Nation's State Courts*, CASELOAD HIGHLIGHTS (National Center for State Courts, Williamsburg, Va.), Aug. 1995, at 2, 2, available at http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf; see also Brian J. Ostrom, David B. Rottman & John A. Goerd, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 235 n.6 (1996) (“The [National Center for State Court’s] Court Statistics Project’s unpublished data on tort filings from 28 states (which account for 69 percent of the U.S. population) suggest that there were 320 tort cases per 100,000 population in 1992.”).

¹⁷ See Nat’l Ctr. for State Courts, *Examining the Work of State Courts*, 2003, at 23, available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SubCivil-TORTCON.pdf [hereinafter *Examining the Work of State Courts*, 2003].

¹⁸ 1970 U.S. Population: 203 million, U.S. Census Bureau, *Urban and Rural Population: 1900 to 1990*, <http://www.census.gov/population/censusdata/urpop0090.txt> (last visited Nov. 14, 2007); 2000 U.S. Population: 281 million, U.S. Census Bureau, *United States—Urban/Rural and Inside/Outside Metropolitan Area*, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-P1&-ds_name=DEC_2000_SF1_U&-format=US-1 (last visited Nov. 14, 2007).

The NCSC statistics project revealed that "[f]or states that reported tort filings from 1975 to 1993, caseloads remained relatively constant from the mid 1970s to the early 1980s."¹⁹ Note that caseloads remained constant despite population increases. Also, while significant numbers of mass tort cases were filed in the 1990s, tort filings *decreased* by 9% between 1992 and 2001 in thirty states.²⁰

If one looks merely to overall litigation trends in tort filings and if population growth is taken into account, tort filings likely changed very little between 1980 and 2000. Thus, as one article in the *Atlanta Constitution* put it, the so-called "litigation explosion" was merely "popular and political rhetoric."²¹

However, the fact that the total number of tort cases may be stable over time tells us very little about important matters involving the number and type of disputes being settled in court. For example, the rise of alternative dispute resolution services (mediation and arbitration) may be shifting certain types of cases into a different forum. Or, contrary to the arguments of some tort reformers, many people may in fact be reluctant to pursue even legitimate claims because of the hassle, a reluctance to engage in a confrontation, or for fear of being stigmatized.²² Again, these considerations emphasize caution in how one treats the overall volume numbers. Total filings also say nothing about whether the types of claims being made are changing from one

¹⁹ Kauder, *supra* note 16, at 2.

²⁰ See THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS 2001: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 7 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf> [hereinafter COHEN, SURVEY OF STATE COURTS 2001]; see also Mark Sauer, *Taming Trouble Torts: Some Wonder Whether Reports of Litigation Explosion Were Overblown*, SAN DIEGO UNION TRIB., Apr. 21, 2002, at H-1, (noting Judicial Council of California found a 50% drop in personal-injury suits over last fifteen years); Bloomberg News, *Personal-Injury Trials Down by 80% Since 1985, Report Says*, L.A. TIMES, Aug. 18, 2005, at C3 (discussing a Justice Department report finding that personal injury cases decided by trial in federal courts declined by almost 80% from 1985–2003).

²¹ Bill Rankin, *Litigation Data Disprove the Myth*, ATLANTA J.-CONST., Feb. 9, 2000, at C3 (quoting Thomas Eaton, Professor, University of Georgia) (reporting University of Georgia study); see also Myron Levin, *Legal Urban Legends Hold Sway: Tall Tales of Outrageous Jury Awards Have Helped Bolster Business-Led Campaigns to Overhaul the Civil Justice System*, L.A. TIMES, Aug. 14, 2005, at C1 [hereinafter Levin, *Legal Urban Legends*]; Sauer, *supra* note 20.

²² I develop this point more fully in the next section. See *infra* CONCLUSION.

period to the next. Automobile accident lawsuits may be declining while product suits are increasing.

Moreover, even if product liability lawsuits are increasing, that fact tells us nothing about the reason for the increase. For example, even if we assume filings in a certain class of tort suits are increasing, that tells us nothing about why more of such suits are being filed. One must ask: (1) is the pool of injured persons increasing because of fundamental changes in the social, economic, and technological environment,²³ (2) have rules of law changed to permit people who previously were barred from recovery to now seek relief for their injuries, or (3) have one or the other party to litigation become more greedy, so that plaintiffs are filing more suits or defendants are resisting paying legitimate claims?²⁴

Take, for example, the rise of industrialization in the nineteenth century. As a result of new technologies, machines, and economic development, the “pool” of injured persons dramatically increased. The legal system responded by enacting rules of law that prevented many injured persons from recovering.²⁵ Thus, a “litigation explosion” was averted, but

²³ One astute commentator puts it thus:

Any assessment of whether the propensity to sue is increasing, decreasing, or remaining the same can be made only in relation to the waxing or waning of the pool of injuries from which suits properly arise. Any inference about whether the average size of awards or settlements has gone up, down, or remained level, in real terms, depends upon knowing what the pool of injuries looks like. If the pool of injuries has increased and the inherent seriousness of the injuries or the cost of repairing them has increased, one should not be surprised to find a commensurate increase in cases or awards. If the pool has shrunk either in size or cost of injuries, even a seemingly level number of filings or payments should in real terms be regarded as an increase.

Saks, *supra* note 12, at 1173–74 (footnotes omitted).

²⁴ See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986). A lawsuit “represents not only a claim but a refusal by the defendant to satisfy it. Thus, we must be open to the notion that changes in the rate of filing may represent not only changes in plaintiff propensity to claim, but also changes in defendant propensity to resist.” *Id.*

²⁵ This story has been described comprehensively by a number of legal historians. See, for example, the extraordinary two volume study, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977) [hereinafter HORWITZ, *AMERICAN LAW 1780–1860*] (describing the totality of tort rules as resulting in a subsidy to business at the expense of victims, which had additional benefit of not requiring public agencies to finance the subsidy through the tax system), and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) (bringing the study into the twentieth

many scholars consider that result a crystalline example of injustice.²⁶

In our time, we too have experienced dramatic new technologies or products (e.g., asbestos or Dalkon Shield) that have created huge social losses.²⁷ The pool of injured persons eligible to recover for their injuries spiked sharply in the 1970s when evidence was uncovered that major asbestos manufacturers had known for decades of the risks their product posed to the health of citizens, and hundreds of thousands of new cases were filed over the next few decades.²⁸ It has been estimated that 700,000 cases of asbestos-related claims have been filed in the last thirty years.²⁹ Meanwhile, as black lung disease claimants wound their way through federal courts in the 1970s, the incidence of new black lung cases declined by 98%.³⁰

A favorite topic of "litigation explosion" commentators focused on a decade of civil filings in federal court between 1975 and 1984, the beginning of much reform hysteria. During that decade, the number of civil suits filed in federal court increased

century). See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 411–27 (2d ed. 1985) (1973); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328–31 (1998) [hereinafter Hans, *Illusions and Realities*] (maintaining that societal desires to stimulate the economy in the nineteenth and early twentieth centuries led to generous treatment of business corporations).

²⁶ See, e.g., FRIEDMAN, *supra* note 25, at 411–27.

²⁷ On the Dalkon Shield litigation, see MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (1985). According to one source, the total number of Dalkon Shield suits filed in both state and federal courts by early 1985 was over 8700. *Toxic Tort/Product Liability: Dalkon Shield*, LEGAL TIMES, Apr. 7, 1986, at 11, 11.

²⁸ The course of asbestos litigation was framed by a landmark decision in 1973, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), where the court found defendant manufacturers strictly liable to the decedent, an insulator of thirty-three years who died from asbestosis and mesothelioma. An estimated 600,000 asbestos-related lawsuits have been filed in state or federal court as of 2000. Nockleby & Curreri, *supra* note 3, at 1040; see also *id.* at 1039–42 (describing more fully the course of the litigation, as well as that of other major product liability suits); STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* xxiv (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf (finding that approximately 730,000 people had filed asbestos claims through 2002).

²⁹ See National Association of Mutual Insurance Companies, *Asbestos Litigation Reform*, <http://www.namic.org/fedkey/04Asbestos.asp> (last visited Nov. 14, 2007). See generally Nockleby & Curreri, *supra* note 3, at 1039–42.

³⁰ Galanter, *supra* note 24, at 20. In 1975, 2793 black lung cases were filed in federal court. *Id.* at 20 n.66. By 1985, the number had dropped to ninety-five. *Id.*

123%, from 117,320 to 261,485.³¹ Sounds like a litigation explosion, no? Indeed, many commentators, including the Reagan Justice Department, claimed that the increase was evidence of a tort litigation explosion.³²

However, Marc Galanter's study demonstrates that half of the total increase over that period of time involved litigation other than tort litigation and that those filings were provoked by the federal government itself.³³ Two classes of cases that saw dramatically increased filings included those involving (1) recovery of overpayments by federal agencies, and (2) social security cases, resulted from a deliberate and calculated official policy to recover overpayments of veterans' benefits by suing veterans and to curtail disability benefits by "summarily removing beneficiaries from the rolls."³⁴ Another *quarter* of the increase was attributed to four other types of claims: (1) prisoner petitions, which increased 61% (during a period in which the prison population had increased 74%); (2) civil rights cases (sex harassment claims were new and employment discrimination claims were on the rise); (3) contract suits (increased at a higher rate than torts) and (4) torts.³⁵

If we focus on the growth of federal tort suits alone, which rose 62% from 1975 to 1985, from 25,691 cases to 41,593, an increase of 15,902, it should be noted that the rate of increase was half that of other federal civil litigation.³⁶ For example, recovery of overpayment cases jumped from 681 to over 46,190; suits over social security benefits went from 5846 to 19,771, and as high as 29,985 in 1984³⁷; and contract cases, usually involving businesses suits against other businesses, increased from 12,391 to 26,849, an increase of 117%.³⁸ Interestingly, to my knowledge, none of the reform organizations contend that business litigation is spiraling out of control, or that businesses

³¹ *Id.* at 15, 16 tbl.2.

³² *See, e.g.*, RICHARD K. WILLARD ET AL., REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 45-52 (1986).

³³ *See Galanter, supra* note 24, at 17.

³⁴ *Id.*

³⁵ *Id.* at 15-28.

³⁶ *See id.* at 22.

³⁷ *Id.* at 16 tbl.16.

³⁸ Saks, *supra* note 12, at 1201.

should have their rights of recovery curtailed, or that the government should not be permitted to file suit claiming recovery of benefits.³⁹ However, it is certainly ironic that one agency of the Reagan administration could be heard solemnly complaining about "increased litigation," while another Reagan department was busy filing many of those same "excessive" claims.

We can now turn to the question of *why* tort filings in federal court increased 62% over that twelve-year period. First, an increase in population accounts for a portion of the growth in tort litigation. However, mass tort injuries caused by two products, asbestos and Dalkon Shield, probably account for most, if not all, of that increase. From 1974 to 1985 the products liability category of federal filings grew from 1579 cases to 13,554,⁴⁰ no doubt largely attributable to a single product: asbestos.⁴¹ Indeed, "[o]ne-third of all product liability cases in the [federal] system in the mid-1980s were attributable to . . . asbestos."⁴²

In sum, if a particular type of tort litigation has increased or decreased and we do not understand why the change has occurred, we do not know whether the change is a good or a bad thing. Making generalized claims of a "litigation explosion" suggests a rampant, system-wide development, not a change brought about by litigation involving a single product or two. Finally, references to increased litigation also tell us nothing

³⁹ A National Center for State Courts study that examined filings in general jurisdiction courts of seventeen states from 1987–2001 found that contract cases have equaled or exceeded tort filings in all but four of the years. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 30 (Brian J. Ostrom et al. eds., 2002), available at http://www.ncsconline.org/D_research/csp/2002_Files/2002_Tort_Contract.pdf [hereinafter EXAMINING THE WORK OF STATE COURTS, 2002].

⁴⁰ Galanter, *supra* note 24, at 22.

⁴¹ "It is estimated that [between 1974 and 1985] there were more than 16,000 asbestos cases were filed in the federal courts." *Id.* at 25. That figure would represent "more than a quarter of the cumulative total of 60,508 products liability filings counted from 1974 to 1985." *Id.*; see also DEBORAH R. HENSLER, WILLIAM L. F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 8 (1985).

⁴² Saks, *supra* note 12, at 1204 (citing AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 7–10 (1991); TERENCE DUNGWORTH, PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS 35–38 (1988); THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 117–19 (1987)).

about whether the claims are legitimate, but that is the topic of a later section.

2. *Types of Tort Cases Filed*

The literature of tort reform might give one the impression that most lawsuits are tort cases and that, of those, significant numbers are filed against doctors and products manufacturers. This is simply not true. Most civil litigation in the United States involves disputes over property, contracts, and domestic affairs.⁴³ Only a fraction of lawsuits involve torts. For example, the National Center for State Courts studied all civil cases filed in a single year, 1992, in forty-five of the seventy-five most populous counties in the United States.⁴⁴ First, it found that tort cases comprised approximately 10% of *civil litigation suits* filed in state courts in that year.⁴⁵ Within that 10%, the most common types of tort cases were automobile accident and premises liability.⁴⁶ Medical malpractice and products liability claims constitute a small percentage of state court tort litigation.⁴⁷

⁴³ The greatest single source of swelling *civil lawsuits*, not tort filings, during the 1970s was the increase in divorce and postdivorce proceedings. See COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 38, 166 (Jethro K. Lieberman ed., 1984). The authors of one study concluded that “domestic relations cases dominate state court dockets.” *Id.* at 38. This study was based on a survey of courts of general jurisdiction in eight states in 1976. See *id.* at 166 tbl.6. In all but one state domestic relations cases made up more than 50% of the total caseload. *Id.* In California the percentage was 38.5. *Id.* Of the eight common types of disputes studied in the Civil Litigation Research Project, postdivorce disputes were most likely to end up in court. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 537 tbl.2 (1981).

⁴⁴ STEVEN K. SMITH ET AL., CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 1 (1995).

⁴⁵ See *id.* at 2. This study of general civil cases, conducted by the National Center for State Courts (“NCSC”) and the Bureau of Justice Statistics (“BJS”), still provides the most accurate picture of tort caseload composition available. Because litigation trends have shifted in the last ten years as a result of dramatic increases in suits over contracts, it is likely that the 10% figure would be smaller today. On the explosion of contract litigation, see *Examining the Work of State Courts*, 2003, *supra* note 17, at 23. The report states that of seventeen states able to report comparable data, tort filings *declined* 5% between 1993 and 2002, while contract filings *jumped* 21%. *Id.*

⁴⁶ STEVEN K. SMITH ET AL., CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 2 (1995).

⁴⁷ *Id.*

Table 2 provides results from the National Center for State Courts study.⁴⁸

TABLE 2

NATIONAL CENTER FOR STATE COURTS STUDY, 1992⁴⁹

Type of Tort Case	Percent of Cases
Auto Accident	60%
Premises Liability	17
Medical Malpractice	5
Products Liability	3
Intentional Injury	3
Toxic Substance	2
Professional Malpractice	2
Other	8

As revealed in Table 2, medical malpractice and products liability cases together probably made up about 8% of tort litigation in state courts in 1992.⁵⁰ Such suits could nonetheless be very important, but the data suggests that most cases continue to be of the fender bender, slip-and-fall variety.

3. *Trigger-Happy Plaintiffs?*

Tort reform groups argue that many people are eager to file suit over nonsensical problems. Putting aside until the next section the empirical validity of anecdotal evidence to back up this claim, comprehensive research studies by social scientists do not support the claim. On the contrary, the social science literature shows that most people do not seek compensation for their injuries, much less even consult a lawyer.

According to Professor Michael Saks, who summarized a series of major studies on the question of why people don't sue:

By comparing the cases determined to be instances of negligent injury with insurance company records, the study of California medical malpractice found that at most only 10% of negligently injured patients sought compensation for their

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The qualifier is added because the study concerned forty-five of the seventy-five most populous counties. *See id.* The authors believed that these percentages probably reflect the filings in other states as well. *See id.*

injuries. Even for those who suffered major, permanent injuries (the group with the highest probability of seeking compensation) only one in six filed. The earlier Health, Education, and Welfare study found that only 6% of those negligently injured filed claims. The Harvard Medical Practice Study found that in New York State “eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system.”

Such findings are not unusual. A major study of a wide range of types of civil litigation (not just torts) found that of every one thousand grievances (events for which an injury was noticed), 718 became claims (the victim brought the problem to the alleged harmdoer’s attention), 449 became disputes (the complainant and the alleged harmdoer failed to reach an agreement on the matter), 103 were brought to the attention of a lawyer, and 50 became filed cases. Thus, only 10% of grievances came to the attention of lawyers, and only 5% became filed cases.⁵¹

More recent work confirms Michael Saks’s conclusion. For example, several studies conducted in the last decade suggest that injured persons are reluctant to bring suit for medical claims.⁵² Tom Baker’s excellent book, *The Medical Malpractice*

⁵¹ Saks, *supra* note 12, at 1183–84 (quoting HARVARD MEDICAL MALPRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK, THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK, at 7-1 (1990)) (citations omitted). Saks describes the result of a Rand Corporation study as follows:

The Rand Corporation’s study of people’s responses to disabling injury found that of every one hundred injured, eighty-one decided to take no action at all. Of the nineteen who considered making some sort of claim for compensation, two dealt directly with the injurer, four with the insurer, and seven consulted a lawyer (of whom four engaged the lawyer but only two filed suit); six did nothing. Thus, 87% are not heard from by the injurer or insurer, and only 2% become filed lawsuits.

Id. at 1184–85 (footnotes omitted).

⁵² See, e.g., TOM BAKER, THE MEDICAL MALPRACTICE MYTH 37 (2005) (citing studies showing more instances of medical malpractice than medical malpractice lawsuits); see also David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1089–92 (2006) (citing studies and noting significant underclaiming of medical malpractice); Douglas A. Kysar et al., *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785, 790–91 (2006) (citing studies and concluding that the tort system is underutilized); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence*

Myth, deconstructs several assumptions made about medical malpractice plaintiffs.⁵³ Baker estimates that, depending on the study, “there are between seven and twenty-five serious medical malpractice injuries for every one medical malpractice lawsuit.”⁵⁴

Some researchers have asserted that, contrary to the perception that litigation is rampant, the volume of tort litigation is actually too low.⁵⁵ For example, a Harvard-based study of medical injury and malpractice litigation found that only eight out of 306 patients who experienced adverse events as a result of medical negligence ultimately filed suit.⁵⁶ Many other studies have similarly concluded that Americans are not litigation happy, and indeed tend not to file suit when injured.⁵⁷

for *Malpractice Reform*, 80 TEX. L. REV. 1595, 1608 (1995) (“[O]nly a tiny fraction of patients injured due to negligence file a claim.”).

⁵³ BAKER, *supra* note 52, at 1–19.

⁵⁴ *Id.* at 23. The most recent survey of empirical evidence concerning the medical malpractice insurance market was performed by Douglas A. Kysar, Thomas O. McGarity, and Karen Sokol, *supra* note 52. *The Harvard Medical Practice Study*, the touchstone empirical study comparing the incidence of medical negligence against the rates of claims, concluded that only 1.5% of malpractice victims filed claims. See A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245 (1991). See generally PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 62 (1993) (“[T]he real tort crisis may consist in *too few* claims.”).

⁵⁵ See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 449 (1987). Abel refutes the common perception of Americans as overly litigious, by reviewing a study conducted in Great Britain which found that of 1202 individuals who had suffered at least two weeks of incapacity due to injury within the past year, 5.3% were injured in road accidents, 8.7% while at work, and the remaining 86% in “other” settings. *Id.* Claims arising from injuries in these “other” settings were often underreported and underfiled. *Id.* at 450.

⁵⁶ See Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 370–73 (1991) (attributing the low rate of filing “to the fact that the cost of bringing a suit is high, less than 40% of malpractice plaintiffs actually win their cases, and New York State has a \$250,000 limit on the amount that can be paid in a lump sum”); David M. Studdert, et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006), available at <http://www.hsph.harvard.edu/faculty/articles/litigation.pdf> (“[P]ortraits of a malpractice system that is stricken with frivolous litigation are overblown.”).

⁵⁷ Ted Rohrlich, *We Aren’t Seeing You in Court; Americans Aren’t Suing Each Other as Often as They Did a Decade Ago*, L.A. TIMES, Feb. 1, 2001, at A1 (reporting that legal scholars and a survey by the Rand Corporation’s “Institute for Civil Justice” suggest that only a small percentage of injured Americans litigate). Several studies by the highly respected Marc Galanter make the same claim. E.g., Marc Galanter, *Contemporary Legends About the Civil Justice System*, TRIAL, July

The fact that many people do not sue, even though they may have valid grievances, does not, of course, prove that the suits that are filed are necessarily meritorious. It is certainly possible that the frivolous suits are filed and the meritorious ones are not. However, when the data about reluctance to seek compensation for injury is stacked up against the data showing relatively stable tort-filing rates, except for the mass tort burps, the contention that Americans are a litigious lot and that litigation rates are skyrocketing is not supported by the evidence.

4. *Merits of Tort Lawsuits Being Filed*

A common persuasive device employed by tort reformers is to choose an “outrageous” case and then to frame a discussion of the entire tort system around purported and sensational “facts” of the case.⁵⁸ This style of “argument by anecdote” has proven extremely effective in persuading the public that the civil justice system has run amok.⁵⁹ The stories are picked up by media who may not investigate or report all the facts, and the stories become urban legends. Given such success, it is no wonder that argument by anecdote continues to be employed, as the overarching goal of tort reform is to transform public opinion.

Consider two recent examples drawn from the literature of tort reform. First, stories recount that a plaintiff in a medical malpractice lawsuit filed a claim for damages because she lost

1999, at 60; *see also* VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 55 (2000) (recounting a 1991 Rand Corporation study showing that the vast majority of potential plaintiffs did not resort to legal disputes) [hereinafter HANS, *BUSINESS ON TRIAL*]; Saks, *supra* note 12, at 1185 (“[V]ictims tend not to complain.”); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 86–87 (1983) (noting that only about 10% of sampled cases actually end up in court). An early empirical study commenting on the phenomenon of low-rate litigation filings was William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631, 636 (1980–81) (stating that “a small fraction of injurious experiences” mature into legal disputes).

⁵⁸ *See* Levin, *Legal Urban Legends*, *supra* note 21; Myron Levin, *Coverage of Big Awards for Plaintiffs Helps Distort View of Legal System*, *L.A. TIMES*, Aug. 15, 2005, at C1 [hereinafter Levin, *Coverage of Big Awards*].

⁵⁹ *See generally* Kenneth C. Chessick & Matthew D. Robinson, *Medical Negligence Litigation Is Not the Problem*, 26 *N. ILL. U. L. REV.* 563 (2006) (discussing many of the myths of the medical malpractice crisis); Edward J. Kionka, *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 *N. ILL. U. L. REV.* 469 (2006) (noting problems in passing reforms that only apply to medical malpractice torts).

her powers of extrasensory perception (“ESP”) on account of receiving negligent treatment with a CAT scan. According to the stories, she was awarded a million dollars.⁶⁰ Second, according to a *U.S. News & World Report* columnist,

A woman throws a soft drink at her boyfriend at a restaurant, then slips on the floor she wet and breaks her tailbone. She sues. Bingo—a jury says the restaurant owes her \$100,000! A woman tries to sneak through a restroom window at a nightclub to avoid paying the \$3.50 cover charge. She falls, knocks out two front teeth, and sues. A jury awards her \$12,000 for dental expenses.⁶¹

Careful research reveals that each anecdote is misleading or false. First, the woman in the CAT scan suit did not claim lost income as a result of an inability to perform psychic evaluations.⁶² Instead, she claimed she suffered permanent injuries as a result of a severe allergic reaction to a drug injected prior to the scan.⁶³ The trial judge *told the jury not to consider any claim for alleged loss of her psychic powers*.⁶⁴ Further, the court set aside the verdict and ordered a new trial.⁶⁵ Second, the *U.S. News & World Report* stories involving the women were not true. They were urban legends, circulating in spam email for two years, that made it into several mainstream news outlets.⁶⁶ The columnist did not bother to investigate their authenticity.⁶⁷

Despite the fact that many of the well-known anecdotes are misleading or are stated inaccurately, the real problem is the *use, at all*, of anecdotes that purport to describe a system that processes millions of cases a year. Even if one compiled a dozen or even a hundred anecdotes, it would prove nothing about the operation of the civil justice system or the fundamental fairness of the tort system. This does not, however, stop tort reformers from using anecdotes persuasively.

⁶⁰ The more complete version of this example is recounted in Saks, *supra* note 12, at 1160 n.34.

⁶¹ Zuckerman, *supra* note 4, at 64.

⁶² See Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39, 39 (summarizing *Haimes v. Hart*, No. 81-4408 (Phila. Court of Common Pleas)).

⁶³ Saks, *supra* note 12, at 1160 n.34.

⁶⁴ *Id.*

⁶⁵ See Strasser, *supra* note 62, at 39.

⁶⁶ See Mencimer, *supra* note 7, at 22.

⁶⁷ See *id.*; see also Levin, *Legal Urban Legends*, *supra* note 21.

B. *Runaway Juries*

Reformer assertions about the civil jury are just as broad, and just as unsupported, as assertions about litigation. Reformers say that juries cannot be trusted to consider the facts in an unbiased manner, that juries award far more than the facts warrant, and that plaintiffs' lawyers place undue influence on jury decision making. One of the most common assertions about juries and their function in the civil system is that damages are skyrocketing because of problems with civil juries. Just as with statements concerning the "litigation explosion," these assertions are not supported by the available, unbiased empirical evidence. This section examines some of modern discussion on the civil jury, especially the part used by the retrenchment movement.

The jury system was developed as a counterweight to overreaching executive authority. Trial by jury is part of our constitutional system of checks and balances, and is guaranteed by the Seventh Amendment to the United States Constitution in federal cases and by state constitutions for state lawsuits.⁶⁸ Many scholars and lawyers link the jury's role to a democratic system of government.⁶⁹ Viewed in this light, juries are the means by which the public imposes its values on the legal system and maintains at least some authority over the administration of justice.⁷⁰ Indeed, recognizing the central role juries play in a democratic state, the President of the American Bar Association proclaimed in August of 2004 that his major priority that year would be to focus on the importance of the jury system in a democratic society.⁷¹

That the jury system is part of our constitutional democratic tradition does not necessarily mean that tort reformer arguments that juries are "out of control" are invalid. Juries could be both constitutionally required and impossible to control. However, if

⁶⁸ See generally JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994) (discussing the role of the jury in the American legal system).

⁶⁹ See, e.g., *id.* at 1; VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 6 (1986); John T. Nockleby, *What's a Jury Good For?* VOIR DIRE, Summer 2005, at 6.

⁷⁰ John Edwards, *Juries: "Democracy in Action,"* NEWSWEEK, Dec. 15, 2003, at 53, 53.

⁷¹ See American Bar Association, Commission on the American Jury, <http://www.abanet.org/leadership/jury/commission.html> (last visited Nov. 17, 2007).

“runaway juries” are imposing unwarranted damage verdicts on defendants, there must be something wrong with the jury system—unless, that is, juries are not in fact imposing unwarranted damage verdicts.

1. *Biased Juries?*

Return for a moment to consider several features of the civil justice system. First, only a small percentage of civil cases, usually 5%, actually go to trial.⁷² The rest are usually either settled or dismissed before trial. Of those that are tried, the trial is not a forum in which persuasive plaintiffs’ lawyers are permitted to sequester themselves with jurors and browbeat them into awarding high damages. Indeed, our *adversarial* trial system protects defendants by providing them the opportunity to hire well-paid expert defense attorneys to cross-examine plaintiffs, to file motions for dismissal, and to argue their case effectively to the jury. It is not clear why legions of defense lawyers, many having substantial investigative resources at their disposal, might be systemically less adept at persuading jurors than plaintiffs’ lawyers.

Academic studies of jury verdicts, juror attitudes, and juror bias also support a conclusion that juries as a whole are fair, impartial, and not necessarily biased to rule for one party or the other.⁷³ For example, in a comprehensive study of tort case

⁷² See, e.g., Examining the Work of State Courts, 2003, *supra* note 17, at 27 (studying seven states’ disposition of tort cases in 2002 (representing 340,000 lawsuits), in which 5.2% of such cases went to trial); Paula Hannaford-Agor et al., *Trial Trends and Implications for the Civil Justice System*, CASELOAD HIGHLIGHTS (National Center for State Courts, Williamsburg, Va.), June 2005, available at http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No3.pdf. (finding that trial dispositions declined 49% from 1984–2002); COHEN, SURVEY OF STATE COURTS 2001, *supra* note 20, at 1–2 (noting that in the nation’s seventy-five largest counties in 2001, there was a 23% decline in tort trials from 1992–2001, and only 3% of tort filings were adjudicated by trial while 73% of cases were disposed of by settlement).

⁷³ See Hans, *Illusions and Realities*, *supra* note 25, at 352–53 (study of Arizona jury trials “failed to find any evidence that juries disproportionately reward plaintiffs who sue business defendants. . . . [W]e found that the rate of plaintiff verdicts was about the same for individual and business defendants.”); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 LAW & SOC’Y REV. 121, 125–43 (1996). A 2004 U.S. Department of Justice study found that plaintiffs prevailed to a greater extent in trials heard by judges than those heard by juries. See COHEN, SURVEY OF STATE COURTS 2001, *supra* note 20, at 4 tbl.3. In 2001, judges found for plaintiffs in nearly two-thirds of tort trials, while juries found in favor of

dispositions conducted in one year, 1992, half of the verdicts went to plaintiffs and half to defendants.⁷⁴ Other studies have tended to show similar results.⁷⁵ Of course, such gross figures do not show the number of trial verdicts for plaintiffs that were reversed on appeal.⁷⁶

Similarly, a fifty-fifty win rate for each side does not demonstrate that jurors on the whole are necessarily impartial toward the status of the parties. It is certainly possible that some of the victorious plaintiffs should not have won. It is equally possible that some of the victorious defendants should not have prevailed. However, since half of trial verdicts tend to go to defendants, it would seem difficult to maintain that juries are systematically biased against defendants or are systemically “out of control.”

Data from federal court litigation studies leads to similar conclusions. Professors Clermont and Eisenberg calculated plaintiff rates of success in federal courts between 1979 and 1989.⁷⁷ The so-called “win rate” differed depending on the type

plaintiffs around half of the time. *Id.* The study also found that median final awards did not significantly differ between judges and juries. *Id.* at 5.

⁷⁴ Kauder, *supra* note 16, at 2.

⁷⁵ Several studies argue that, because the “tort reform” movement has heaped such scorn on the civil jury system, jurors have become biased in favor of defendants. These studies are reviewed in Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 248 (Robert E. Litan ed., 1993) and Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in *supra*, at 282, 283. See also COHEN, *SURVEY OF STATE COURTS 2001*, *supra* note 20, at 1 (finding that plaintiffs won in 52% of tort trials in 2001, a rate that has stayed relatively the same since 1992).

⁷⁶ Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, Cornell Legal Studies Research Paper No. 07-006 at 2 (Sept. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988199 (“The reversal rate for trials appealed by plaintiffs is 21.5% compared to 41.5% for trial outcomes appealed by defendants. The reversal rate for jury trials is 33.7% compared to 27.5% for judge trials.”). As noted in the introduction, a verdict for the defendant is often impossible to appeal in the absence of legal error in the trial. On the other hand, defendants are often victorious in persuading appellate courts to set aside verdicts for plaintiffs.

⁷⁷ Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *CORNELL L. REV.* 1124, 1133 (1992). A more recent study examining data from 1992–2001 confirms that overall plaintiff win rates are relatively the same in both state and federal courts and that there is a trend of declining trials and stable plaintiff win rates in both systems. THOMAS H. COHEN, *DO FEDERAL AND STATE COURTS DIFFER IN HOW THEY HANDLE CIVIL TRIAL LITIGATION: A PORTRAIT OF CIVIL TRIALS IN STATE AND FEDERAL DISTRICT COURTS* (2006), available at <http://ssrn.com/abstract=912691>. The Clermont and

of case.⁷⁸ For example, plaintiffs won 30% of medical malpractice cases tried to juries,⁷⁹ roughly the same percentage as in state courts. Plaintiffs won 42% of asbestos cases tried to juries, but plaintiffs prevailed in only 26% of other product liability cases.⁸⁰ Thus, at least as the statistics bear out, there is no empirical evidence that juries are out of control.

Indeed, the claims by tort reformers that juries are mindlessly awarding excessive damages are supported, at most, by anecdotes. I am unaware of *any* studies by reputable scholars that support the assertions about out-of-control juries. Further, a few or even a hundred anecdotes—even if taken at face value—cannot establish the truth about the operation of a civil justice system managing fifteen million cases a year as they are not supported by empirical evidence and are thus faulty as a source of proof.⁸¹

Eisenberg study is described in Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 852 (1998) [hereinafter Vidmar, *Performance of the American Civil Jury*].

⁷⁸ Clermont & Eisenberg, *supra* note 77, at 1175 app. A.

⁷⁹ *Id.*; see also COHEN, SURVEY OF STATE COURTS 2001, *supra* note 20, at 4.

⁸⁰ Clermont & Eisenberg, *supra* note 77, at 1175 app. A. See generally THOMAS H. COHEN, DO FEDERAL AND STATE COURTS DIFFER IN HOW THEY HANDLE CIVIL TRIAL LITIGATION: A PORTRAIT OF CIVIL TRIALS IN STATE AND FEDERAL DISTRICT COURTS (2006), available at <http://ssrn.com/abstract=912691> (finding that overall plaintiff win rates are approximately the same in both federal and state courts between 1992–2001); Vidmar, *Performance of the American Civil Jury*, *supra* note 77.

⁸¹ Many reputable legal scholars have taken the tort reform movement to task for repeating unsubstantiated and oftentimes false claims about the civil justice system. See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 59–68 (1995) [hereinafter DANIELS & MARTIN, CIVIL JURIES]; NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS 11–22 (1995) [hereinafter VIDMAR, MEDICAL MALPRACTICE]; Chessick & Robinson, *supra* note 59, at 566–86; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 84–85 (1993) [hereinafter Galanter, *News from Nowhere*]; Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1113–15 (1996) [hereinafter Galanter, *Real World Torts*]; Kionka, *supra* note 59, at 472–74; Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267, 1270–71 (2005); Chris A. Messerly & Genevieve M. Warwick, *Nowhere to Turn: A Glance at the Facts Behind the Supposed Need for "Tort Reform,"* 28 HAMLINE L. REV. 489, 492–502 (2005); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 449–59 (2004); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1206–12 (1994) [hereinafter Vidmar, *Pap and Circumstance*] (critiquing anecdotes as a means of evaluating the operation of the civil justice system); Jaclyn Edgar,

Moreover, the academic studies that have been undertaken on juror bias tend not to support claims that jurors are oriented towards either plaintiffs or defendants.⁸² This does not mean that outlier juries do not exist. In a system that annually processes fifteen million civil cases each year, it would not be surprising if some juries were strongly biased against one or the other party based solely on that party's status.

Notably, in what is perhaps the least controversial tort, auto accidents, plaintiffs win 60% of the time in front of juries.⁸³ In contrast, in the controversial cases on which tort reform is focused, products liability and medical malpractice, plaintiffs win far less frequently.⁸⁴ Plaintiffs prevail in only 45% of jury trials in products cases and even less often—26% of the time—in medical malpractice trials.⁸⁵ This 26% plaintiff win rate for medical malpractice jury trials is consistent with the national average.

Numerous studies support the conclusion that juries find for plaintiffs in products cases far less frequently than for defendants. Professor Kip Viscusi examined 10,784 closed product liability files retained by the Insurance Services Offices, an insurance industry group.⁸⁶ The files represented lawsuits concluded from all geographic regions between mid-1976 and mid-1977 and included cases from all fifty states.⁸⁷ About 4% of

Comment, *Doctor v. Attorney: Why Are Attorneys and Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform Is a Better Solution*, 73 UMKC L. REV. 773, 786–90 (2005).

⁸² HANS, BUSINESS ON TRIAL, *supra* note 57, at 216–17 (stating that empirical studies do not support the myth of jurors as pro-plaintiff); *see also* Mark Mandell, *Overcoming Juror Bias: Is There an Answer?*, TRIAL, July 2000, at 28, 28 (noting that jurors judge plaintiffs harshly).

⁸³ COHEN, SURVEY OF STATE COURTS 2001, *supra* note 20, at 4.

⁸⁴ *Id.*

⁸⁵ *Id.* at 4 tbl.3; *see also* EXAMINING THE WORK OF STATE COURTS, 2002, *supra* note 39, at 30. In the 1996 NCSC / Bureau of Justice Statistics study of civil trials in the nation's seventy-five largest counties, plaintiff win rates were 57% in automobile trials, while plaintiffs only won in medical malpractice trials 23% of the time. MARIKA F. X. LITRAS ET AL., U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS 1996: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996, at 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvc96.pdf>.

⁸⁶ W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 43 (1991). A number of studies, including Viscusi's, are analyzed in Vidmar, *Performance of the American Civil Jury*, *supra* note 77, at 868–69.

⁸⁷ Viscusi, *supra* note 86, at 43.

the cases went to trial.⁸⁸ Of these, plaintiffs prevailed in 37% of the cases.⁸⁹ Other studies of juror attitudes have shown that, if anything, jurors are hostile to plaintiffs.⁹⁰

Yet even in cases in which one suspects one is dealing with an outlier jury, there are a number of corrective mechanisms in the system to regulate a supposed "out of control jury" in either a criminal or a civil case. Such procedural devices as voir dire, challenging jurors for cause, peremptory challenges to a particular juror, motions to dismiss, motions for new trials, motions to reduce damage awards, and appeals to higher courts are all mechanisms to check for and correct for potential bias in the jury pool.⁹¹

2. *Are Damage Awards Skyrocketing?*⁹²

Reformers criticize plaintiffs' attorneys for unduly influencing juries to award large damages. They also level significant criticism at state court judges, who are viewed as granting too much control to plaintiffs' attorneys and sympathetic juries.⁹³

One way to evaluate jury awards is to examine *median* awards. Looking at median jury verdicts tends to avoid the skewing that the occasional large verdict might have on small samples. The most thorough study of jury awards in tort cases was performed by the National Center for State Courts ("NCSC"), which evaluated jury verdicts in forty-five of the nation's seventy-five largest counties in 1992, as shown in Table

⁸⁸ *Id.* at 44.

⁸⁹ *See id.* at 51.

⁹⁰ *See* Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 243 (1996).

⁹¹ *See generally* Marder, *supra* note 81, at 1283 (explaining the process of remittitur as a safeguard); Alec Shelby Bayer, Comment, *Looking Beyond the Easy Fix and Delving into the Roots of the Real Medical Malpractice Crisis*, 5 HOUSTON J. HEALTH L. & POL'Y 111, 131-33 (2005) (noting that there are safeguards already in place to guard against "frivolous" lawsuits).

⁹² The rhetoric of large damage awards is similarly "uninformed by empirical research." Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 107 (2002).

⁹³ *See, e.g.*, AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES, at ix (2003), available at <http://www.atra.org/reports/hellholes/2003/report.pdf> ("Any individual or employer has reason to fear a lack of due process if sued in a judicial hellhole.").

1.⁹⁴ The NCSC study showed that *only 2.7% of all tort filings actually went to jury trial.*⁹⁵ Of those cases for which juries entered verdicts, the median awards ranged from \$260,000 in products liability suits to \$29,000 in auto accident suits. The median jury verdict for all tort cases in these counties in 1992 was \$51,000.

Finally, in another table, not reproduced here, the authors report that punitive damages were awarded in only 2.5% of those cases in which plaintiffs prevailed in jury trials.⁹⁶ For medical malpractice jury awards, only 4% included awards for punitive damages.⁹⁷ These figures contrast with awards of punitive damages in 6% of contract-related cases.⁹⁸

⁹⁴ Kauder, *supra* note 16, at 2. Subsequently, the authors of the study reported more comprehensive results in Ostrom, Rottman & Goerd, *supra* note 16. *See also* Hannaford-Agor et al., *supra* note 72 (finding that damages awarded by juries are relatively modest and have declined over the past ten years). The study found that only in medical malpractice, defamation, and product liability, less than 16% of tort trials, had jury awards increased in that period. *Id.* The explanation offered for the increase in medical malpractice awards was health cost increases that outrun inflation. *Id.*; *see also* COHEN, SURVEY OF STATE COURTS 2001, *supra* note 20, at 1–2 (noting in a study of the nation's seventy-five largest counties in 2001 that in tort jury trials, the overall median damage awards have declined 56% from \$64,000 in 1992 to \$28,000 in 2001).

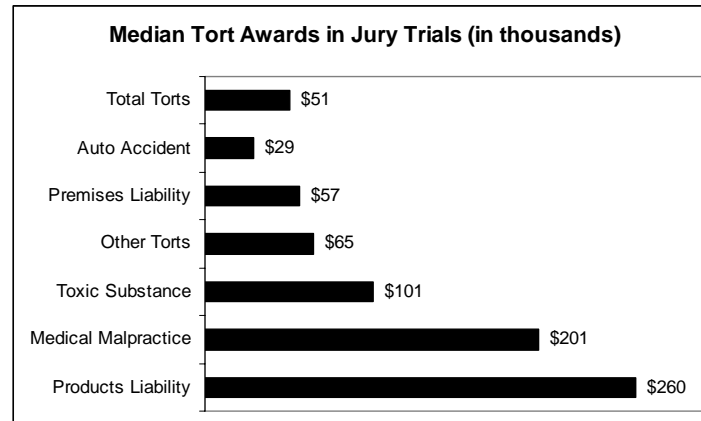
⁹⁵ Ostrom, Rottman & Goerd, *supra* note 16, at 234.

⁹⁶ NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT, 96 (Brian J. Ostrom et al. eds., 2001), *available at* http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Part_II_Section.pdf.

⁹⁷ Robert C. LaFountain & Neal B. Kauder, *An Empirical Overview of Civil Trial Litigation*, CASELOAD HIGHLIGHTS (National Center for State Courts, Williamsburg, Va.), Feb. 2005, at 4, *available at* http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No1.pdf.

⁹⁸ *Id.*

TABLE 3
 NCSC STUDY OF JURY AWARDS IN STATE COURTS⁹⁹



**Profiling Tort Cases in
 State Courts, 1992**

Type of Tort Case	Percent of Cases
Auto Accident	60%
Premises Liability	17
Medical Malpractice	5
Products Liability	3
Intentional Injury	3
Toxic Substances	2
Professional Malpractice	2
Other	8
<u>Manner of Disposition</u>	
Settlement	73%
Dismissed	10
Transfer	5
Arbitration	4
Default	3
Trial Verdict	3
Summary	2
Other	1
<u>Plaintiffs Winning at Jury Trial</u>	
Toxic Substance	74%
Auto Accident	60
Other Torts	47
Premises Liability	44
Products Liability	41
Medical Malpractice	30
Total Torts	50

⁹⁹ Neal Kauder, *Tort Filings in the Nation's State Courts*, CASELOAD HIGHLIGHTS (National Center for State Courts, Williamsburg, Va.), Aug. 1995, at 2, 2, available at http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf.

Of course, reporting the mean or median award for a single year does not answer the question of whether jury verdicts as a whole are trending upward, nor whether, if so, the trend is a function of inflation, a different mix of plaintiffs, a different kind of case that causes more serious injuries, or some other factor. To get at this question, we need to recall the basis on which tort damages are awarded.

3. *Empirical Studies of Damage Awards*

There are serious deficiencies inherent in any effort to answer questions about whether the amount of damage awards have changed over set periods of time. First, as noted above, only about 5% of cases go to trial.¹⁰⁰ Thus, any effort to draw attention to amounts of money awarded for certain classes of cases over time must take into account settlement awards. No such comprehensive studies exist, though some researchers are attempting to develop the appropriate tools.¹⁰¹

Second, a study of jury verdicts does not take into account what happens after trial. Both trial and appellate judges have the power to overturn a jury's finding of liability, or to order remittitur. In actuality, both of these devices, rarely reported in the popular media, are employed readily.¹⁰² Only a few

¹⁰⁰ See, e.g., Examining the Work of State Courts, 2003, *supra* note 17, at 27.

¹⁰¹ See, e.g., Stephen Zuckerman, Christopher F. Koller & Randall R. Borbjerg, *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 LAW & CONTEMP. PROBS. 85, 90 (1986); F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295 (1989).

¹⁰² See Marder, *supra* note 81, at 1283–85 (explaining the process of remittitur as a safeguard); Levin, *Coverage of Big Awards*, *supra* note 58; Joseph T. Hallinan, *Suit Wrinkle: In Malpractice Trials, Juries Rarely Have the Last Word*, WALL STREET J., Nov. 30, 2004, at A1. Professors Clemont and Eisenberg studied 21,415 trial judgments entered between 1988 and 1997 and compared the results on appeal. They concluded:

[J]ury wins by plaintiff[s] are relative to jury wins by defentants, heavily reversed, whereas jury wins by defendant[s] are relatively solid. The defendant and plaintiff reversal rates for jury trials are 31% and 13%, respectively. These results are highly significant. . . .

. . . . A defendant jury win is sacrosanct, but a plaintiff jury win is surprisingly fragile. . . .

Plaintiffs' jury wins meet much more suspicion [on appeal] than do defendants' jury wins.

empirical studies have addressed this phenomenon, but the ones that have done so are telling. One major study of posttrial practice found that jury awards were reduced in 15% of cases.¹⁰³ "Defendants paid an average of 71% of what the juries awarded."¹⁰⁴ In a more limited study of posttrial motions filed in twenty-seven courts, defendants filed motions contesting the verdict in nearly half of the cases, and less than 10% of motions for a new trial were successful.¹⁰⁵ In one study of medical malpractice verdicts in New York, Florida, and California, New York plaintiffs were successful in 52% of trials in the sample of trials that took place between 1985 and 1997, a win rate in medical malpractice cases that is significantly higher than the national average of around 30%.¹⁰⁶ After postverdict motions and appeals, however, the study found that the median payment to plaintiffs was 73% of the original jury verdict.¹⁰⁷ In another study sampling 198 jury awards of \$1 million or more given between 1984 and 1985, plaintiffs received the original jury verdict in about a quarter of the cases. Plaintiffs received payments averaging 57% lower than the original verdict.¹⁰⁸

Third, beyond the question of settlements and posttrial modifications of jury verdicts lies an even bigger problem for those who are attempting to discern a pattern of higher or lower jury verdicts over time: the data does not exist in a form that can be relied upon. As a highly regarded social scientist puts it, "[n]o one has the data necessary to draw intellectually defensible

Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 138-45 (2001) (footnotes omitted).

¹⁰³ MICHAEL G. SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS vii-viii (1987), *discussed in* Saks, *supra* note 12, at 1280.

¹⁰⁴ Saks, *supra* note 12, at 1280-81 (discussing SHANLEY & PETERSON, *supra* note 103, at iii).

¹⁰⁵ Brian Ostrom et al., *So the Verdict Is in?—What Happens Next? The Continuing Story of Tort Awards in the State Courts*, 16 JUST. SYS. J. (SPECIAL ISSUE) 97, 113 (1993).

¹⁰⁶ Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 282 (1998).

¹⁰⁷ *Id.* at 282.

¹⁰⁸ Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 353 (1986). The major points in this paragraph are based on the work of Vidmar, *Performance of the American Civil Jury*, *supra* note 77, at 893-95. Several of the major critiques in the section that follows stem from close analysis of the studies undertaken by Vidmar, Michael Saks, Marc Galanter, and the joint work of Stephen Daniels and Joanne Martin.

conclusions about patterns of change in awards or their causes.”¹⁰⁹ Only recently have efforts been made to systematically collect data about jury awards.¹¹⁰

The limited studies that do exist have flaws that make it impossible for a dispassionate observer to draw accurate conclusions.¹¹¹ Studies that purported to show that, over time, jury verdicts have tended to award higher levels of damages in constant dollars have since come under criticism for making assumptions and drawing conclusions that their data could not

¹⁰⁹ Saks, *supra* note 12, at 1242.

¹¹⁰ *See id.* at 1245 n.347. As will be covered later, this raises a question: if data concerning jury awards has not been collected or has only recently been given attention, how have tort reformers gotten their data on jury awards and how have the American people learned that jury awards are too high?

¹¹¹ Consider one example. Some researchers have relied on reports from organizations such as Verdict Research, Inc. of Solon, Ohio, (“VRI”) and Jury Verdict Research (“JVR”). Both employ methods of collection that are scientifically suspect. VRI compiles reports by searching newspapers and court records, and by receiving submissions by lawyers and others claiming knowledge of the cases. *See* Stephen Daniels & Joanne Martin, *Jury Verdicts and the “Crisis” in Civil Justice*, 11 JUST. SYS. J. 321, 326–328 (1986) (challenging scientific reliability and validity of JVR data). *See generally* Vidmar, *Pap and Circumstance*, *supra* note 81, at 1206–12. Like VRI reports, JVR reports are not comprehensive, do not purport or attempt to record all verdicts, are disproportionately taken from the high end of the verdict spectrum, and rely for the most part on plaintiffs’ attorneys to report verdicts. *See* Saks, *supra* note 12, at 1245–46. According to Professor Saks, “serious students of the litigation system” do not rely on JVR reports because they are so unrepresentative and anecdotal. *Id.* at 1158. A Congressional Committee study relied on JVR reports, claiming that JVR’s data shows that medical malpractice cases have jumped 176% from 1994 to 2001. JOINT ECON. COMM., 108TH CONG., LIABILITY FOR MEDICAL MALPRACTICE: ISSUES AND EVIDENCE 7 (2003), available at <http://www.house.gov/jec/tort/05-06-03.pdf> (Vice Chairman Jim Saxton). However, a National Center for State Courts study found that jury verdict reporters often overstate awards and omit verdicts for the defense and low plaintiff awards. Hannaford-Agor et al., *supra* note 72. The study compared the 2001 Civil Justice Survey of State Courts and jury verdict reporters in the same jurisdictions and found that jury verdict reporters only recorded half of the jury trials that had taken place within those jurisdictions and that plaintiff win rates were 9% higher in the jury verdict reporter data. *Id.*

JVR does not believe its data supports the assertion that damage awards have exploded: “JVR has neither asserted nor published any conclusions that the average size of jury verdicts has recently skyrocketed. . . . The apparent reason for this erroneous impression [of our data] is that a number of highly publicized news articles quoting our statistics have grossly misstated them.” *Product Liability Reform Act, 1986: Hearings on S. 2760 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d. Sess. 226–27 (1986) (statement of JVR); *see also* A. Russell Localio, *Variations on \$962,258: The Misuse of Data on Medical Malpractice*, 13 LAW MED. & HEALTH CARE 126, 126–27 (1985) (discussing the shortcomings of JVR’s data). *See generally* Saks, *supra* note 12, at 1158.

support. In the following pages, I address the common deficiencies of these time-series studies by focusing on a series of studies by the Institute for Civil Justice of the Rand Corporation that compared jury verdicts over time.¹¹² I focus on just one part of that study addressing medical malpractice cases in San Francisco (the "Rand study").¹¹³

a. The Defects of Time-Series Studies

The Rand study, authored by Mark A. Peterson, purported to illustrate that, even when controlled for inflation and converted into 1984 dollars, the median jury verdicts awarded in medical malpractice cases in San Francisco gradually increased from \$64,000 to \$156,000 during successive five-year time frames from the period 1960–64 to the period 1980–84.¹¹⁴ The mean jury verdict increased from \$125,000 to \$1,162,000.¹¹⁵

Given this evidence, one might be tempted to conclude that juries were bumping up their awards in similar cases over time. However, other scholars were quick to point out why drawing such an inference would be erroneous.¹¹⁶ There are at least two alternative explanations that "may account singly or in combination for the higher observed awards:" either the composition of the pool of tried cases might have changed, or the cost of compensating victims might have changed.¹¹⁷

First, the composition of the pool of tried cases might have changed.¹¹⁸ One flaw in the time studies is that they make the

¹¹² The studies are summarized in MARK A. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS (1987).

¹¹³ The Peterson study compared San Francisco to Cook County, Illinois. *Id.* For a detailed critique of the Peterson study, see Vidmar, *Pap and Circumstance*, *supra* note 81, at 1206–12.

¹¹⁴ PETERSON, *supra* note 112, at 22 tbl.3.3.

¹¹⁵ *Id.*

¹¹⁶ The improper methodological assumptions and unreliable inferences contained in the Rand study have been critiqued by a number of other scholars. See, e.g., DANIELS & MARTIN, CIVIL JURIES, *supra* note 81, at 53–54; VIDMAR, MEDICAL MALPRACTICE *supra* note 81, at 11–22; Galanter, *News from Nowhere*, *supra* note 81, at 84–85; Galanter, *Real World Torts*, *supra* note 81, at 1113–15; Saks, *supra* note 12, at 1214; Vidmar, *Pap and Circumstance*, *supra* note 81, at 1206–12.

¹¹⁷ Galanter, *Real World Torts*, *supra* note 81, at 1113.

¹¹⁸ Neil Vidmar's work has been central to understanding the defects in time-series studies. See, e.g., VIDMAR, MEDICAL MALPRACTICE, *supra* note 81, at 14–15; Vidmar, *Pap and Circumstance*, *supra* note 81, at 1209–12.

assumption that the type of medical malpractice case that was tried in an earlier time frame is the same type of case tried in a different time frame. The Rand study, for example, assumes that the types of medical malpractice claims tried in 1960–64 were the same types tried in 1980–84.

Respected scholars, including Michael Saks, Marc Galanter, Deborah Hensler, and Neil Vidmar, among others, have explained that many such time-series studies could not support the inferences their authors drew from them.¹¹⁹ Vidmar summarizes his critique as follows:

The conclusions that juries increased their awards over time *cannot* be made from the verdict report data absent some other information. It is not possible to conclude whether juries were deciding cases differently *or deciding different cases*. To the extent that changes in litigation patterns occur, different types of cases may go to juries over the time periods. Litigation patterns include the number and types of cases coming into the legal system, settlement rates, and a host of other factors. Moreover, there is substantial evidence to indicate that these patterns do frequently change. Even though the awards may increase with time, the different case mix may explain the changes in mean and median awards (or win rates). For instance, consider a hypothetical example. At “Time 1” the cases going before juries include a mix of low value cases and high value cases. The average jury award will be a sum of those two types of awards divided by the number of cases. Now consider that between “Time 1” and “Time 2” alternative dispute resolution is introduced and many of the low value cases settle rather than go to trial. At “Time 2” juries are only deciding high value cases. The average award at “Time 2” will naturally¹²⁰ be higher since juries are only deciding high value cases.

Vidmar points out in another study that in each of the earlier five-year periods under consideration in the San Francisco study, between eighty-one and ninety-eight malpractice cases were

¹¹⁹ See *supra* notes 23, 55 & 73.

¹²⁰ Vidmar, *Performance of the American Civil Jury*, *supra* note 77, at 877. Vidmar points out that, even under the faulty assumptions made by the authors of the earlier studies, recent empirical evidence demonstrates that verdict amounts are falling in those same jurisdictions. *Id.* at 878 (citing *The Civil Trial Court Network Project*, 19 ST. CT. J. 1 (1995); John Kirkton, CHI. DAILY L. BULL., Feb. 1, 1995, at 2; Russell Moran, *System Self-Corrects Tort “Flaws,”* N.J. LAW., Mar. 13, 1995, at 6). See generally Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What’s Going on in the Civil Liability System?*, 16 JUST. SYS. J. (SPECIAL ISSUE) 139, 150 (1993) (finding insufficient data to support analysis of trends in jury verdicts).

tried to a jury, while in the 1980–84 time frame, only fifty-five malpractice verdicts were rendered.¹²¹ Why the sudden drop? Meanwhile, malpractice cases as a percentage of the total docket *increased* from 7% to 9%.¹²² What happened to all the malpractice lawsuits in San Francisco in the 1980–84 timeframe? Vidmar speculates that the data is consistent with an inference that lower-value cases were no longer being tried to a jury.¹²³ If this occurred, the median as well as the mean value of the remaining awards would dramatically increase—without indicating anything about juror willingness to award higher damages.¹²⁴

Other more pragmatic factors might equally explain the difference in median jury verdicts between a 1960–64 timeframe

¹²¹ Vidmar, *Pap and Circumstance*, *supra* note 81, at 1214 tbl.1.

¹²² *Id.*

¹²³ *Id.* at 1214–16. Indeed, this is almost certainly the case. In 1975, the California Legislature enacted damage caps of \$250,000 on a key type of damages available to medical malpractice plaintiffs: noneconomic damages. CAL. CIV. CODE § 3333.2 (West 2005). Recall that malpractice plaintiffs typically seek counsel willing to work for a contingency fee—usually 30 or 40%. Malpractice cases are notoriously expensive for plaintiffs to litigate because of the necessity of complex investigations and hiring experts. For a contingency lawyer considering accepting a malpractice case, these factors necessitate both a high probability of success and a predicted large overall damage award. Unfortunately, by capping noneconomic damages, the legislature limited the number of almost-certainly wronged claimants who would no longer be able to obtain lawyers. Thus, malpractice cases in which the injured person (a) suffered little economic losses; or (b) was unemployed—such as a child, older person, housewife/husband, or housebound person, would not be economic to file. *See infra* notes 124–26 and accompanying text. *See generally* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004) (arguing that because women receive more in noneconomic damages, tort caps have a disproportionate impact on women); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001) (advocating the availability of insurance for domestic violence torts to allow more recovery for domestic violence torts);

¹²⁴ Vidmar, *Pap and Circumstance*, *supra* note 81, at 1212–17. The same phenomenon appears to be operating in more recent time frames as well. Marc Galanter notes that the earlier Rand study of malpractice verdicts was updated to include the period from 1985 through 1994. Galanter, *Real World Torts*, *supra* note 81, at 1114. In the updated report by the Institute for Civil Justice through 1994, “the number of jury trials fell in eleven of the fifteen sites—in many cases substantially.” *Id.* From 1985 to 1994, malpractice jury verdicts in Los Angeles fell from 459 to 292; in San Francisco from 115 to 57; and in Cook County from 699 to 468. ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 45–46 tbl.A.5 (1996). As fewer cases are tried, the size of verdicts has increased. Once again, the explanation for higher *average* verdicts could be that lower-value cases are being settled, rather than juries generally awarding higher damages.

and the 1980–84 period. For example, before a medical malpractice victim can have his day in court, he must first persuade a trial lawyer to take his case, usually on a contingency basis. Unless we know the basis on which San Francisco plaintiff trial lawyers were making case selections across the various time frames, it is not possible to conclude that the cases that were *actually tried* were worth the same *economic value* across the five-year periods of time from 1960 to 1984. Recall that only a small percentage of cases are actually tried by a jury; as a result, meritorious cases with good prospects but predicted low damage awards are very unlikely to reach the trial stage. Both parties have very high incentive to settle such cases. The victim of such a situation may even find it difficult to retain a lawyer since the expense involved in litigating a medical malpractice case is so great.¹²⁵ Such low-value cases being settled or disposed of before trial would both explain the lower number of cases tried and the correspondingly increased median and mean damage awards.

Moreover, because of the growing cost and expense of retaining experts and litigating medical malpractice claims, beginning between 1980 and 1984 plaintiffs' lawyers might have determined to reject out of hand any malpractice claims that did not have a much higher economic value than in prior years.¹²⁶ It is also possible that they might have been responding to the enactment of damage caps of \$250,000 for pain and suffering in California five years earlier, in 1975.¹²⁷ Any of these factors may have made plaintiffs' attorneys more willing than before to settle low-value claims. Such behavior alone might explain the 42% drop in cases tried to a jury between the 1960–64 period and the 1980–84 period.¹²⁸ It would also explain why the median as well as the average verdicts increased.

¹²⁵ See Dan Margolies, *The Jury's Out: Missouri Tort Reforms Change How Lawyers Pursue Cases? But Is This a Good Thing?*, KAN. CITY STAR, Feb. 7, 2006, at D1; Rachel Zimmerman & Joseph T. Hallinan, *Life Values: As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, WALL STREET J., Oct. 8, 2004, at A1.

¹²⁶ See DANIELS & MARTIN, CIVIL JURIES, *supra* note 81, at 58–59 (noting problem of basing policies on anecdotal evidence); Saks, *supra* note 12, at 1189 (noting difference between injuries and litigated cases as the “tip of the injury iceberg”).

¹²⁷ Medical Injury Compensation Reform Act (MICRA) of 1975, CAL. BUS. & PROF. CODE § 6146 (West 2005).

¹²⁸ VIDMAR, MEDICAL MALPRACTICE, *supra*, note 81, at 16–18.

Finally, consider the behavior of malpractice insurers during the different time frames. It is no secret that insurance companies, and their physician clients, oscillate between a desire to settle cases and a desire to fight malpractice cases to the bitter end. What was the practice of malpractice insurers in the 1980–84 period compared to earlier periods? Did insurers make a judgment in the 1980–84 period that low-cost malpractice claims should be settled rather than litigated, and thereby remove the lower-value malpractice cases from the trial docket? Did the cost of defense increase, so that insurers became more willing to settle low-value cases? If so, that practice could also explain the 42% drop in malpractice trials.

Finally, as any lawyer can explain, no two medical malpractice cases are ever alike. Medical malpractice comes in a wide variety of forms and affects patients in widely different ways. For example, failure to diagnose and properly treat medical emergencies; misdiagnoses or failure to diagnose (e.g., cancer); surgical mistakes, such as leaving a sponge in a patient or amputating the wrong limb; wrongful birth; medication errors, such as the wrong medicine or improper dosage; lack of informed consent; and abandonment of a patient are all types of medical malpractice that might cause widely varying losses, depending on how soon the negligence was discovered and whether the harms caused by the negligence could be mitigated. Without more data, it is impossible to tell if the changing character of the awards results from a change in the character of the type of medical malpractice case brought to trial.

A second possible explanation for the higher observed awards is that the cost of compensating victims might have changed.¹²⁹ Even if the authors had attempted to compare verdicts between classes of similar medical errors (e.g., failure to diagnose cancer), any imagined comparison of damages is fraught with error. For example, in a negligent failure to diagnose lawsuit, the damages that could be awarded could vary widely *even if the two victims suffered from precisely the same medical error*. This is so because once a jury finds liability, it is instructed to “make whole” the *actual victim* in front of it and not some abstract other person.

Thus, the actual damages awarded in a malpractice case will vary with the victim’s age at the time of misdiagnosis (e.g.,

¹²⁹ Galanter, *Real World Torts*, *supra* note 81, at 1113.

twenty-one or eighty-one); the number of years that he or she might have lived but for the failure (e.g., two years or sixty years); her lost income as a result of the failure (i.e., was the plaintiff unemployed or making \$100,000 a year?); and the amount of money in medical treatments the plaintiff will now be required to expend as a result of the defendant's failure. Indeed, if in general the cost of medical treatment increased much more than the rate of inflation between the two time periods 1960–64 and 1980–84, that fact too could explain why plaintiffs in the latter timeframe were receiving higher awards, since malpractice victims are entitled to be awarded payments for future medical bills.

As Marc Galanter points out, significant differences in the victim population might also account for different levels of awards between two very different time frames:

[I]f people live longer or have higher incomes, it will take more money to compensate them for lost wages. Again, the range of medical and rehabilitative services has grown dramatically and their costs have outpaced general inflation. In a richer world, as incomes go up and people live longer and consume more costly medical care, similar injuries may involve larger losses. A jury seeking to make whole the victim of a given kind of injury might need to award more dollars to provide a remedy “equivalent” to that conferred by earlier juries.¹³⁰

To test Galanter's hypotheses, let us examine several possible differences in the victim population between 1960–64 and 1980–84:

- (1) *Longer anticipated life spans.* According to the National Center for Health Statistics, the average life expectancy between 1959–61 was 69.89.¹³¹ From 1979–81 it was 73.88.¹³² Since a “make whole” award takes into account the amount of additional necessary medical care required over the victim's lifespan, as people live longer similar injuries may involve larger losses.
- (2) *Higher incomes.* Since “make whole” awards must take into account future wage losses caused by a defendant's negligence, increased jury awards may simply have reflected

¹³⁰ *Id.* at 1114.

¹³¹ ELIZABETH ARIAS, DEP'T OF HEALTH & HUMAN SERVICES, UNITED STATES LIFE TABLES, 2000, at 29 tbl.11 (2002), available at http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_03.pdf.

¹³² *Id.*

the fact that by 1980 malpractice victims were earning proportionately higher incomes.¹³³

(3) *Inflation in medical care outstripping general inflation.* In their studies, the researchers controlled for general inflation, holding their numbers to constant 1984 dollars. However, between 1960 and 1984, inflation in medical services dramatically outstripped inflation represented in the Consumer Price Index. Even after controlling for inflation in ordinary goods and services, in other words, to receive exactly the same medical services in 1984 as in 1960 would likely have required at least an increase of 137% of the medical treatment portion of any damage award.¹³⁴

(4) *Growth of rehabilitation and medical services.* In the 1960–64 timeframe, certain types of medical and rehabilitative services were simply unknown, not yet developed, or unavailable. Thus, it might have been impossible for malpractice victims to receive the type of rehabilitation services to which they would have been entitled if they were available. By 1980, progress in medical treatment made it more likely that victims would be able to receive better services.

(5) *Higher employment rates in high-income groups by women.* In 1960, just over 35% of women were employed outside the home.¹³⁵ By the end of 1984, over half the working age population of women were employed outside the home.¹³⁶ Many more women entered professions after 1960, so it would be important to know if the 1960–64 plaintiff class contained homemakers, for whom damage awards would be small, while the 1980–84 female plaintiffs were professionals, for whom damage awards would be substantially higher. Since a

¹³³ See generally U.S. Census Bureau, The 2008 Statistical Abstract: Compensation, Wages and Earnings, http://www.census.gov/compendia/statab/cats/labor_force_employment_earnings/compensation_wages_and_earnings.html (last visited Feb. 18, 2008) (containing several reports on income rates in the United States).

¹³⁴ According to the Bureau of Labor Statistics, inflation as measured by the CPI increased 351% between 1960 and 1984. See Bureau of Labor Statistics Data, CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Mar. 3, 2008). Meanwhile, inflation in medical services increased 488%. See Bureau of Labor Statistics Data, <http://www.bls.gov/data/home.htm> (last visited Mar. 3, 2008).

¹³⁵ KRISTIN SMITH ET AL., U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961–1995, at 4 n.11 (2001).

¹³⁶ See *id.*

significant portion of damage awards reflects lost income, this factor may very well help to explain why damage awards increased over that more than twenty-year period.

The purpose of this list is not to demonstrate that, in fact, these factors explain why jury verdicts may have increased between the 1960–64 period and the 1980–84 period. Instead, the purpose is simply to suggest that *even if* the injuries in the earlier time period were similar to those of the later period, to “make whole” a victim might have entailed larger awards for economic losses.

In sum, the data in the time-series studies may reflect underlying changes in the pool of persons or in the cost of compensating victims. Because the studies as developed do not allow us to draw appropriate conclusions about the behavior of juries, we cannot conclude that juries were “out of control” or rendering verdicts not supported by the evidence. As Neil Vidmar explains:

To say, as Peterson does, that the data may reflect either changes in the cases tried or changes in jury behavior does not mean that each is equally probable nor does it allow us to conclude that both changes have probably occurred. Scientifically, the verdict data do not allow us to draw any conclusions. Without controlling for outside events or changes in the cases that work their way to the tip of the litigation iceberg, it is not possible to draw conclusions about trends or lack of trends in jury behavior. In other words, absent additional data, we simply cannot determine whether juries are deciding cases differently or whether they are deciding different cases.¹³⁷

b. Of Apples and Oranges: Are Fender-Bender Plaintiffs Equivalent to Medical Malpractice Plaintiffs?

Another type of study, often undertaken or cited by the medical establishment, purports to show that juries tend to award higher damages against “deep pocket” defendants such as doctors. These studies usually take as their baseline comparison damages awarded in automobile accident cases and then attempt

¹³⁷ Vidmar, *Pap and Circumstance*, *supra* note 81, at 1216. *See generally* Hensler, *supra* note 120, at 150 (finding insufficient data to support analysis of trends in jury verdicts); Marder, *supra* note 81, at 1269 (noting that there is no support for the contention that juries have gone awry in their damage awards and that jury awards are consistent, judges and juries usually agree on the awards, and if the jury award is excessive, the judge can always reduce the award through remittitur).

to show that damages awarded against doctors or product manufacturers are higher than damages awarded in automobile accidents.¹³⁸

The difficulty with comparing across categories of tort injuries such as auto accidents and medical malpractice cases is that these are two very different types of suits. Not only do studies that purport to compare the two share many of the same problems as the time-series studies, they raise a whole host of other reliability problems as well. Chief among the additional confounding variables is the nature of the two very different types of litigation involved. Juries hear very different cases in medical and automobile negligence trials, and it should not be surprising that the awards differ from one class to another.¹³⁹ Indeed, even within the class of automobile liability cases, awards differ dramatically depending on the same factors that affect the amount of damages in any other case (e.g., age and income of plaintiff, expected life span, anticipated medical expenses, degree and severity of injury, likelihood of successful rehabilitation, capacity to ameliorate the injury, etc.).

¹³⁸ See Vidmar, *Pap and Circumstance*, *supra* note 81, at 1221–22; see also PETERSON, *supra* note 112, at 21 tbl.3.2; Physician Payment Review Comm'n, Annual Report (1991); PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 48–49 (1991); Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1369–70 (1989).

¹³⁹ Some of the differences that Vidmar notes include:

Automobile cases often involve multiple plaintiffs, the driver and passengers of the second car, but usually a single defendant, the allegedly negligent driver of the first car. Malpractice cases, however, typically involve a single plaintiff, the injured patient, and multiple defendants (such as doctors working as a team to provide different aspects of the health care). Automobile cases often involve strangers, whereas malpractice cases involve a professional relationship between patient and physician. Automobile cases usually involve a single theory of liability, whereas malpractice cases frequently involve multiple theories. Automobile cases may involve contributory negligence, which is not claimed as often in malpractice cases. Medical malpractice lawyers tend to be specialists who carefully screen cases and invest heavily in experts, whereas generalist lawyers who often call few or no experts litigate automobile cases. Automobile cases frequently concern disputes about damages, whereas malpractice defendants mostly dispute liability. Finally, rather than the "reasonable man" standard used in automobile and most other negligence cases, malpractice juries determine negligence according to whether the physician violated accepted standards of practice.

Vidmar, *Pap and Circumstance*, *supra* note 81, at 1221–22.

c. Estimating Pain and Suffering Awards

A third type of study attempts to calculate the amount of pain and suffering damages typically awarded to malpractice, automobile accident, or products liability plaintiffs. Using closed claim data from products liability files of insurers or verdict reporters, the researchers attempt to estimate the “economic losses” suffered by the successful plaintiff and then calculate the amount a jury likely awarded for pain and suffering.¹⁴⁰ In several studies, these researchers have concluded—in various forms—that pain and suffering damages comprise at least half of the total damages awarded plaintiffs in certain closed-file cases involving certain torts.¹⁴¹ They also conclude that the amount of such damages varies widely across claims of similar severity.¹⁴²

Although not infected with the same problems as the time-series studies or the cross-tort category studies, the credibility of this third type of inquiry depends entirely on overlooking the fact that no data supports the researchers’ conclusions about pain and suffering.¹⁴³ To see why this is true, it will be helpful to focus attention on certain features of jury trials.

Jury trials of tort claims combine two separate inquiries: whether the defendant committed a tortious act that caused the plaintiff’s injury and, if so, the amount of damages that will make the plaintiff whole. The damages phase of a trial is often highly contested, and experienced lawyers, both plaintiff and defense, will offer substantial evidence on the question of what the plaintiff lost and what is required to make the plaintiff whole. Since the liability question is tried at the same time as the damages question, both parties have enormous incentive to

¹⁴⁰ See, e.g., *Report on Awards for Noneconomic Losses*, in FLORIDA MEDICAL MALPRACTICE POLICY GUIDEBOOK 132, 132 (Henry G. Manne ed., 1985). See generally Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC’Y. REV. 997 (1990) (noting in study that compensation is generally vertically equitable but horizontal inequities exist); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT’L REV. L. & ECON. 203 (1988) (finding in study that pain and suffering awards are not completely random or capricious).

¹⁴¹ For a discussion of several of the studies, see, for example, Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 222 (1993).

¹⁴² See *id.*

¹⁴³ The validity of JVR reports has been seriously questioned on grounds that the data is unreliable, not systematically collected, and relies on anecdotal reporting. See *supra* note 111.

bracket the appropriate amount of money that will make the plaintiff whole.

When a jury issues a verdict on damages, it is ordinarily asked to award a single sum. This figure encompasses both "economic" and "noneconomic" damages. Economic losses include back wages, lost future wages, payments for past or future medical care, and past and future payments for rehabilitation services or nursing care. Noneconomic losses include payments for past or anticipated future pain and suffering, loss of enjoyment of life, and perhaps other related losses. The fact that juries award a single figure encompassing both economic and noneconomic damages (the "make whole" rule) means that in contested cases, unless a jury blithely adopts one party or the other's damages calculation, after a damages verdict is entered, even the participants cannot be certain which elements of damages the jury recognized and which it rejected.

Every single element of economic damages, ranging from back wages to future wages, necessity of and amount of nursing or rehabilitative services, necessity of and amount of future medical expenses (including whether future surgeries might be necessary, and if so, the cost), as well as other economic losses, are all often hotly contested. All the elements identified so far fall under the rubric of "economic damages." The defendant, of course, will attempt to justify a smaller sum; the plaintiff will attempt to justify a larger sum. Both will attempt to explain the utter rationality of their respective positions. In many cases, the parties' evidence as to the appropriate amount of economic damages could vary by a factor of two or three, or by as much as ten or twenty, depending on the level of complexity of the damages phase.

To illustrate why the parties could *reasonably* differ so greatly on these measures of economic losses, consider a single aspect of measurement of lost future wages for a thirty-year-old woman who has been rendered paraplegic by the defendant's negligence. Suppose she was a homemaker at the time, waiting for her kids to enter school so she could resume her previous position as an accountant. What is the measure of her lost future wages? To get at this question, a jury would have to decide multiple subissues, each one of which would affect the amount of money to which the plaintiff would be entitled on this one issue of economic damages alone. Both parties would typically call experts to establish the validity of their assumptions.

The plaintiff and the defendant would each offer evidence and expert testimony on each of the following issues:

- (1) How likely is it that the plaintiff would, in fact, have reentered the workforce?
- (2) When would she have entered the workforce (i.e., how many years down the road)?
- (3) Given the paucity of openings in her field, will she likely be able to return to the same type of work as before?
- (4) Given that her family circumstances have changed, would she now be more likely to seek a less ambitious career, or at least a position that was less demanding (and therefore less remunerative)?
- (5) At what salary would she be able to reenter the workforce (i.e., at entry level, at the level at which she left, somewhere in between, or in a different position altogether)?
- (6) If the plaintiff would likely have sought work and obtained it, for how long would she have likely worked?
- (7) Would the plaintiff likely have had other responsibilities or demands on her (e.g., another child) that would cause her to work part time or to resign after a year or two?
- (8) During her work life, would the plaintiff likely receive salary increases or promotions?
- (9) Would the plaintiff have likely worked until age fifty, fifty-five, sixty, sixty-two, sixty-five, or seventy?
- (10) What other benefits (e.g., health care, retirement, etc.) would the plaintiff have likely received during her work life?

Furthermore, even if a jury can answer the above questions (which it must in order to arrive at a reasonable damage award that “makes whole” the plaintiff), it must “discount” dollars that would not be earned for some years to present value. Doing so entails calculating another contested variable: the inflation rate and the reasonable rate of return to assign to dollars invested now for future losses.

For these reasons, the belief that measuring economic damages can be “easily ascertained” and are “usually . . . documented by routine business records” is almost certainly wrong.¹⁴⁴ “When estimates of economic damages are obtained

¹⁴⁴ MARK A. PETERSON, COMPENSATION OF INJURIES: CIVIL JURY VERDICT IN COOK COUNTY 9 (1984); *see also Report on Awards for Noneconomic Losses, supra* note 140, at 137–39.

from insurers’ closed-claim files or defense attorneys, the amount of estimated damages will be on the conservative side.”¹⁴⁵ Thus, researchers may be systematically underestimating the actual “economic losses” suffered. If this is the case, their conclusion that pain and suffering awards are increasing rests on conjecture. While their conclusion may, in fact, be correct, their data does not support their conclusion.

C. Are Plaintiffs’ Personal Injury Lawyers Greedy or Aggressive? Does It Matter?

We have seen how the retrenchment movement has attacked the court systems. Similarly, some tort reform groups target the attorneys who represent victims of alleged tortious behavior: the plaintiffs’ trial bar.¹⁴⁶ For now we should put aside the high-pitched claims that plaintiffs’ lawyers are “greedy,” by which it is meant, presumably, that by vigorously asserting the interests of their clients, “trial lawyers” are behaving in a fashion more morally repugnant than either defendants or defendants’ lawyers—or business litigants—who are vigorously defending their own interests. Part of the pseudo-populist attack upon plaintiff lawyers reflects the centuries-old distrust of lawyers as hired guns and evil but necessary accouterments of civil society.¹⁴⁷ Therefore, one might assume that recent ad hominem attacks are merely antilawyer sentiment finding a new outlet.

¹⁴⁵ Vidmar, *Pap and Circumstance*, *supra* note 81, at 1230. Vidmar himself has conducted research using closed insurance case files and is therefore well aware of the paucity of accurate data about economic loss. *See id.* at 1225.

¹⁴⁶ *See, e.g.*, Judge Andrew Napolitano, How Texas Tackled Tort Reform: Taking on Trial Lawyers, Inc. (Oct. 8, 2003), <http://www.manhattan-institute.org/html/clp10-8-03.htm> (“[W]e are visited by runaway juries and gutless judges and greedy trial lawyers who would cause a ring of credibility to sound in each of these ridiculous tales.”).

¹⁴⁷ Recall Shakespeare’s Dick the Butcher’s famous line in Shakespeare’s Henry VI, “The first thing we do, let’s kill all the lawyers.” WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2 (Wells et al. eds., 2d ed. 2005). Whether Shakespeare meant the line ironically (the words were spoken by someone plotting to overthrow the government), or intended to reflect criticism of corrupt lawyers who advanced the interests of the rich by suing the poor, the phrase sticks in the American consciousness as a critique of lawyers generally. A 2002 study prepared on behalf of the American Bar Association surveyed public attitudes towards lawyers and found that the American public in general had a negative perception of lawyers. *See* LEO J. SHAPIRO & ASSOCIATES, *PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 4* (2002), available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>.

However, part of the critique of tort reformers addresses what has for generations been an uncomfortable truth about how most people in this country obtain legal representation for injuries: the contingency fee. In contrast to plaintiffs' lawyers, most defense lawyers are paid by the hour. Some are paid handsomely while others may be paid less well. But defense lawyers tend to be paid whether they win or not, while plaintiffs' lawyers are paid only if they win.

The two main assertions in this area focus on this relationship between plaintiffs' lawyers and plaintiffs. First, would-be-reformers assert that high contingency fees lower the awards that injured plaintiffs receive. They also insist that contingency fee arrangements benefit trial lawyers, but not the public.

The contingency fee arrangement has a number of characteristics, some of which are salutary, others problematic. The virtues are well understood: victims without resources can get representation, and the lawyer's personal interests are inextricably linked to those of her client's—the lawyer does not get paid unless she wins—so delays and mindless running of the hourly meter tend not to characterize the plaintiffs' bar, and plaintiffs' lawyers have an additional incentive to obtain the highest possible result for their individual clients. Finally, the contingency fee relationship also increases the likelihood that only meritorious cases will be brought, since the lawyer will not be paid unless she prevails.

On the other hand, the contingency fee relationship also means that promising but low-value claims are not likely to be accepted. Many plaintiffs' law firms reject claims unless the total recovery is likely to exceed \$50,000.¹⁴⁸ This means, in turn, that it is likely to become increasingly difficult for most people with valid claims to obtain representation unless they are able to finance the claim on an hourly basis. This is an unacceptable result for a system that prides itself on "access to justice."¹⁴⁹

Additionally, there is some fear that because plaintiffs themselves do not risk anything by handing their case to an

¹⁴⁸ See Margolies, *supra* note 125; Zimmerman & Hallinan, *supra* note 125.

¹⁴⁹ Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 270–75 (1996) (asserting that the ABA Model Rules of Professional Conduct and Code of Judicial Conduct endorses contingency fees on the ground that they may be the only means of permitting clients to obtain counsel of their choice).

attorney, they are less careful about the types of claims they advance. Proposals to remedy such fears include adopting the “loser pays” rule, whereby the losing party pays the other’s attorney fees.¹⁵⁰

In addition, because the incentive fee structure permits a great deal of discretion in what types of cases might be litigated, another fear is that the lawyer may be induced to seek out clients who might need representation. This risk is especially pronounced in class actions, or so it is believed.

Some tort reform groups also critique plaintiff lawyers for taking too large a piece of the damage award. Most contingency arrangements run from 20 to 40% of the recovery, with the standard figure at about one third. The “reformer” argument is that the plaintiffs’ bar is taking advantage of the victims—that when they win the lawyers are way overpaid. Some of these groups have attempted to raise the issue of the contingency fee to the level of a consumer protection issue.

There are obvious problems with the latter line of reasoning. First, the groups critiquing the contingency fee tend to array themselves on the opposite side of victims’ interests on every other issue (e.g., damage caps, abolition of joint and several liability, etc.). Thus, the motivations of tort reform groups who question the contingency fee may be suspect. For example, it is not clear exactly why tort reform groups are so exercised about a business and professional relationship between a plaintiff and her lawyer. Why do they care?

It is difficult to put aside the feeling that those who are most critical of the contingency fee arrangement between plaintiffs and their attorneys have another, not-so-subtle agenda: *to make it even less economical for plaintiffs’ lawyers to accept cases under \$50,000*. If contingency fees were regulated, as proposed by some of these groups, so that plaintiffs’ lawyers received a much smaller percentage of the overall recovery, the only cases that would attract members of the bar would be those with the probability of high damage awards.

It should also be noted that the plaintiffs’ tort bar is increasingly becoming stratified. One group of plaintiffs’ lawyers plays at the margins of the trial system, representing

¹⁵⁰ CATHERINE CRIER, THE CASE AGAINST LAWYERS 211 (2002) (arguing a rule that the “loser pays all costs would be the biggest single change to improve our civil court system today”).

routine volume tort claimants such as those involving auto accidents. These lawyers act more like settlement agents, perhaps trying the rare high-value accident case against an obdurate insurance company.

A second group are those who accept fewer cases but spend a great deal of time preparing the case for trial. These are the medical malpractice lawyers and the slip-and-fall lawyers—the ones most of us would call if ever we needed a trial lawyer.

A third group are the class action lawyers, who represent a class of victims, some of whom may be unaware or have only a vague awareness of the pending lawsuit. Historically, plaintiffs' firms were viewed as underdogs without the resources to defeat the well-funded and well-staffed defense firms in tort litigation.¹⁵¹ Over time, however, in certain segments of the bar, well-organized plaintiffs' firms have utilized capital obtained in victories to mount successful attacks against large corporate figures in asbestos, tobacco, and other cases. Plaintiffs' attorneys act as "gatekeepers" to the civil litigation system for many injured parties who otherwise would not seek redress for their harms.¹⁵² This group of lawyers is increasingly coming under attack. However, I see these attacks as directly related to the procedural device of the class action, so I will defer further discussion.

A number of states have initiatives to limit contingent fees.¹⁵³ In response, the Tort Trial and Insurance Practice Section of the American Bar Association ("ABA") formed a taskforce to report on whether limiting attorney fees is a beneficial policy option.¹⁵⁴ Proponents of reform, such as Common Good, advocate a 10% limit on the first \$100,000 of a settlement and 5% of the remaining amount.¹⁵⁵ For years, contingent fees

¹⁵¹ See Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 232 (2001).

¹⁵² See DANIELS & MARTIN, CIVIL JURIES, *supra* note 81, at 249.

¹⁵³ See, e.g., Terry Carter, *Sizing Up Attorney Fees: TIPS Taskforce Responds to Calls for Regulation of Contingent Fees*, A.B.A. J., Mar. 2004, at 67; see also Adam Liptak, *Ethical Questions Raised on Legal Fee from Widow*, N.Y. TIMES, Aug. 28, 2004, at A8, available at <http://www.nytimes.com/2004/08/28/politics/28law.html>.

¹⁵⁴ See Carter, *supra* note 153, at 67.

¹⁵⁵ See Steven T. Densley, *Contingency Fees: Should They Be Limited in Personal Injury Cases That Settle Early?*, UTAH B.J., Jan.–Feb. 2004, at 6, 7. However, another study evaluated six types of tort reform, including limited contingency fee agreements between lawyers and their clients, and found that only

ranging from 33 to 40% of awards or settlements have been accepted as “reasonable” according to Rule 1.5 of the ABA Model Rules of Professional Conduct.¹⁵⁶

D. “Fear of Litigation”

Tort reformers and other commentators often point to an asserted “culture of fear” that has pervaded our society and that allegedly contributes to a reduction in beneficial activities.¹⁵⁷ Critics of the tort system cite instances in which playgrounds have been closed or other worthwhile activities curtailed because the operators fear being sued.¹⁵⁸

Like many other arguments pointing to problems with the civil justice system, the “fear of litigation” argument is backed up by anecdotal evidence. In addition, however, the “fear” movement has begun taking polls to gauge whether people are fearful of being sued and whether or not they have taken steps to avoid suits.¹⁵⁹

caps on pain and suffering damages reduced the number of annual payments. See Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments* 29 (Northwestern Univ. School of Law & Econ. Research Paper No. 06-07, 2006), available at <http://ssrn.com/abstract=912922>. The study found other reforms, including the limited contingency fee agreements, to have no statistically significant effect on total annual payments. See *id.*

¹⁵⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002, as amended, 2003). Numerous court decisions have upheld this rate of contingency fee. See, e.g., *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 201 (D.D.C. 2006).

¹⁵⁷ See, e.g., *Taylor Jr. & Thomas*, supra note 5; *Talk of the Nation: How Fear of Litigation Has Changed the Way People Work and Live* (National Public Radio Broadcast, Dec. 18, 2003); see also LAWRENCE J. MCQUILLAN ET AL., *JACKPOT JUSTICE: THE TRUE COST OF AMERICA'S TORT SYSTEM* 28–29 (2007) (estimating the cost of the U.S. tort system), available at http://www.legalreforminthenews.com/2007PDFS/PRI_2007JackpotJusticeFinal.pdf.

¹⁵⁸ See, e.g., Philip K. Howard, *Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse: Hearing Before H. Comm. on the Judiciary*, 108th Cong. 5–8, (2004) [hereinafter *Safeguarding Americans*] (testimony and statement of Philip K. Howard, Chair, Common Good). The relatively new civil justice reform group Common Good, founded by noted defense lawyer and author Philip Howard, claims that “fear of litigation” has led to many socially harmful results. See Common Good, Learn More, <http://commongood.org/learn.html> (last visited Feb. 20, 2008).

¹⁵⁹ See Common Good, Polls, <http://cgood.org/learn-reading-cgpubs-polls.html> (last visited Jan. 7, 2008) (reporting the results of several polls commissioned by the group common good).

Before evaluating the claim that American society has become a “fear of litigation” society,¹⁶⁰ two observations are in order. The first is that many reform groups, as well as the media, have undoubtedly contributed to such “fear” through hyperbolic and extreme claims about the operation of the civil justice system.¹⁶¹ Because “fear” is a function of anticipation of danger, and the rhetoric of tort reform trumpets danger, frivolous claims, excessive litigation, and out-of-control juries from every outpost, such groups may very well have created an image that so grossly distorts the actual operation of the tort system that reasonable people may legitimately fear any contact whatsoever with a system so demonized.¹⁶²

If the civil justice system is indeed out of control—though I do not think it is—then people are right to be afraid and worry that a frivolous lawsuit brought by a “greedy trial lawyer” on behalf of a grasping plaintiff, tried in a “judicial hellhole”¹⁶³ in front of an “out-of-control jury,” would surely impoverish them. The problem, in this event, is not the “fear” but the civil justice system itself.

On the other hand, if the rhetoric of fear that has been unleashed by tort reform groups and which shows no sign of abating is itself a gross distortion of reality, should we then worry about the “fear”? Or, rather, should we worry that the groups who are mongering fear are undermining the cultural underpinnings of the legal system?

The second observation concerns a different type of “fear,” one that we should not worry about and should actually encourage. Consider an earlier exemplar of tort law, one that held sway in the mind of the public before the infamous

¹⁶⁰ See MCQUILLAN ET AL., *supra* note 157, at 22.

¹⁶¹ A book by William Haltom and Michael McCann evaluating the extreme and frequently inaccurate claims made about the civil justice system by many tort reform groups makes this point as well. See WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 33–72 (2004).

¹⁶² Common sense notions of persuasion as well as sophisticated social sciences lend support to the idea that the American people have been persuaded to be afraid of the tort system by the reformers themselves, not through actual experience with the law. See, e.g., Perry A. Zirkel, *Paralyzing Fear? Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J.L. & EDUC. 461, 494 (2006).

¹⁶³ See American Tort Reform Association, <http://www.atra.org/> (last visited Jan. 7, 2008).

McDonald's coffee cup¹⁶⁴ spilled into public consciousness. In the earlier but equally famous Pinto case, *Grimshaw v. Ford Motor Co.*,¹⁶⁵ a 1972 Ford Pinto hatchback automobile unexpectedly stalled on a freeway and erupted into flames when it was rear-ended by a car proceeding in the same direction.¹⁶⁶ The driver of the Pinto died from burns suffered in the collision, and her passenger received severe and permanently disfiguring burns on his face and entire body.¹⁶⁷ At trial, the evidence showed that Ford had hurriedly designed the vehicle and knew of the Pinto's propensity to burst into flames if rear-ended, but Ford nonetheless rejected its own engineers' recommendations that it install inexpensive devices that would have corrected the problem so that it could rush the car to market.¹⁶⁸ One engineer testified that the decision not to install the safety devices was made by management to save the company money, although management knew its customers would face a blistering death.¹⁶⁹

One purpose of lawsuits like *Grimshaw* is to put manufacturing companies on notice that they need to carefully consider the safety of their products and to install appropriate devices that ensure a reasonable degree of safe operation. The "incentives" provided by the tort system are designed to encourage actors to take those precautions that reasonable people would take under the circumstances, the result being litigation and payment of damages if they fail to do so.

Is it because of rules such as that reflected in *Grimshaw* that American society is unquestionably a much safer one than two generations or even one generation ago?

The number of workplace deaths and injuries are down in both absolute terms and as a population-adjusted rate. How much of this decline can be attributed to the deterrent effects of the tort system, how much to government regulation, how much to the regime of worker's compensation, and how much to changes in managerial or technological culture and practices is interesting and important to know. Something is causing it.¹⁷⁰

¹⁶⁴ See *Liebeck v. McDonalds Rest.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

¹⁶⁵ 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

¹⁶⁶ *Id.* at 359.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 359–62.

¹⁶⁹ *Id.* at 361.

¹⁷⁰ Saks, *supra* note 12, at 1178 (footnote omitted).

If the society is, in fact, a safer place, perhaps at least some of the reason could fairly be attributed to a tort system that incentivizes manufacturers not to distribute defective products for fear of being sued and paying damages. Yes, to the extent it is successful in encouraging socially responsible behavior, the tort system relies on incentives in the form of requiring tortfeasors to pay awards of compensatory damages to the victims of tortious behavior and occasionally, if the behavior is egregious, to pay them punitive damages.

Is it possible that the tort system overincentivizes actors, creating such fear of being held liable that reasonable people fear to act at all? Indeed, it is possible, though not likely if the rules are understood and properly applied. For example, Ford was not sued, and did not lose, merely because someone suffered a horrifying death. Ford was sued, and lost, because it knew before it marketed the Pinto that the car had serious safety hazards of the very sort that manifested themselves. In other words, Ford had *notice* of the hazard and could *foresee* the very harmful result for which it was sued. Ford's rush to push the Pinto onto the market without fixing the known hazard violated its duty to the plaintiffs. For that failure, it was held liable.

Phil Howard, chair of Common Good, cites a situation in which the town fathers of Greenwich, Connecticut, are considering banishing winter sports on public property after one resident broke his leg sledding.¹⁷¹ In that case, according to Howard, a father took one last run with his son down a sledding hill and broke his leg “when he hit a shallow drainage ditch at the end of the run.”¹⁷² The father sued the town, claiming that it should have taken better care of the hill.¹⁷³ The jury ruled in his favor and gave him a verdict of \$6.3 million, including \$1.5 million for pain and suffering.¹⁷⁴ Howard cites the town's response—shutting down the sledding run—as illustrating the phenomenon he describes as fear of litigation.¹⁷⁵ His prescription? The judge should have booted the suit out of court.¹⁷⁶

¹⁷¹ *Safeguarding Americans*, *supra* note 158, at 6–7.

¹⁷² *Id.* at 6.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* at 6–7.

¹⁷⁶ *See id.* at 7.

Now, we have no information whatsoever about the actual facts underlying the evidence before the jury. However, the case is based upon negligence, and in order to prevail in a negligence lawsuit the plaintiff must demonstrate that the defendant *was able to foresee an important precaution that a reasonable person would have seen* and repaired or fixed, and that the defendant’s failure to do so in a timely fashion led to the plaintiff’s injury. We are not told in Howard’s statement what the town actually knew about the hazard. For example, was the father the third person that winter to have broken a limb at that very spot? Was the hazard truly as minimal as suggested (a “shallow drainage ditch”),¹⁷⁷ or was it deep enough to be an obvious hazard? Was the hazard a “natural” depression in the land or had the city itself constructed the hazard? We do not know what the evidence shows because Howard does not tell us. Therefore, we are left to assume that this lawsuit is equivalent to a lightning bolt from the sky: how in the world did the City suddenly become liable for an unforeseeable wreck?

The missing facts are crucial. Negligence is the failure to act as a reasonable person would act under the circumstances. Negligence is not some abstract concept “in the air.” It is a function of particularities, one of specific facts about a person’s behavior in relation to what a reasonable person would do. It is also a function of the defendant’s foresight: *what* did you know, and *when* did you know it? Did you know, or should you have known, enough about the hazard to do something about it? Could a remedy be accomplished relatively inexpensively and would such a remedy be one that a reasonable person under the circumstances would have discovered and employed?

Howard does not tell us these crucial underlying facts—the very circumstances upon which a determination of negligence necessarily hinges. Nor does he tell us anything about the facts critical to establishing the City’s foresight—a necessary ingredient in any negligence lawsuit. Without information about what the City knew or reasonably should have known, what the City did or did not do, we simply do not have the type of information necessary to make the judgment that Howard asks us to make. He is asking us to take on the role of the judge without giving us the information a judge would have in front of her. So, if we credit Howard’s set of facts, we can only conclude,

¹⁷⁷ *Id.* at 6.

as he does, that the judge should have dismissed the case and not allowed a jury even to hear the facts (i.e., the ones Howard does not share with us).

But the City's reaction to the lawsuit is what really galls Howard—and it should: the City has been adjudicated negligent and is threatening to shut down access to all public land to winter activities by its citizens. However, if the City does this, it is not because of the lawsuit, so far as we know, the lawsuit only requires the City to pay damages, not to shut down access. But, as Howard notes, the City is considering shutting down public access because it is afraid of the next lawsuit. What it must, in fact, be announcing is this: “We, the City Fathers, cannot anticipate how the next injury might occur and we are unable to act as a reasonably prudent city, so in order to prevent an unanticipated injury we will close hills in the winter because we cannot be responsible for making sure hazards are removed.” The real question Howard should be asking is why the City does not respect the message given it by the jury: *stop acting negligently*. Indeed, the City need not fear “the next case” if it takes appropriate precautions for the safety of its citizens.

If we consider Howard's proposed remedy—dismissal of the lawsuit—we have no basis on which to judge whether this is an appropriate response or not. Unless we are told what the facts are that underlie the claim of negligence on the part of the City, we cannot make a judgment whether dismissal is appropriate—for example, whether the accident could not have been foreseen, whether the City was unaware of the hazard or could not have been aware of the hazard, whether the City had nothing to do with the creation of the hazard, or whether the case was properly sent to the jury because the City participated in creating a hazard or failed to correct a hazard once it was brought to its attention.

In short, unless we know all the facts that explain whether the City had reason to know of the problem yet failed to correct it, we cannot act as Howard asks us to act. We cannot play-act as though we were the judge without having the facts presented to us. Thus, based on the facts Howard gives us, neither he, nor we, can make any sort of judgment whatsoever about whether the City should or should not have been held liable.

E. Are Insurance Premiums Rising and Policies Being Canceled Because of the Tort System? The Special Case of Medical

Malpractice Insurance

Advocates of the retrenchment movement make the following assertions.

First, the system negatively affects the health care system and contributes to rising health care costs.

The traditional system no longer works. These non-notorious inequities and inefficiencies of the medical liability system negatively affect the cost and quality of health care as well as access to adequate health care. More important, the practice of "defensive medicine" as a means of reducing or avoiding tort liability is a major contributor to health care cost.¹⁷⁸

Second, medical malpractice lawsuits are curtailing the availability of medical care. "Skyrocketing medical liability premiums—\$200,000 a year or more in some high-risk specialties—are forcing physicians to limit services, retire early, or move to a state with reforms."¹⁷⁹ "[E]mergency departments are losing staff and scaling back critical services such as trauma units. Many more ob-gyns and family physicians have stopped delivering babies and some high-risk procedures are being postponed or now require patients to travel long distances to receive them."¹⁸⁰

Third, juries are out of control. "The primary cause of the emerging medical liability crisis is the unrestrained escalation in jury awards that are part of a legal system that is simply out of control in many states."¹⁸¹

Many analysts of the current state of medical malpractice insurance assert that doctors are encouraged to avoid "high risk" specialties and instead opt for practices with lower medical

¹⁷⁸ American Tort Reform Association, ATRA Issues: Medical Liability Reform, <http://www.atra.org/show/7338> (last visited Jan. 7, 2008).

¹⁷⁹ *House Passes Medical Liability Reform Bill*, AMA VOICE (American Medical Association, Chi, Ill.), Sept. 2005, at 6, available at <http://www.ama-assn.org/ama1/pub/upload/mm/453/2005sept.pdf> (quoting William G. Plested III, President-elect, American Medical Association).

¹⁸⁰ Letter from Michael D. Maves, Executive Vice President, CEO, American Medical Association, to the Honorable J. Dennis Hastert, Speaker of the House, U.S. House of Representatives (May 10, 2004), available at <http://www.ama-assn.org/ama/pub/category/13172.html>.

¹⁸¹ Minnesota Medical Association, *A Cap on Non-Economic Damages*, <http://www.mmaonline.net/KeyIssues/MedicalLiability/Acaponnoneconomicdamages/tabid/1523/Default.aspx> (last visited Jan. 7, 2008).

malpractice premiums. There are claims that doctors are avoiding certain specialties, or are quitting practice altogether:

OB/GYNs are among the specialists that have been most seriously affected by rate increases due to their vulnerability to lawsuits. Medical Liability Monitor newsletter reports that OB/GYNs' rate increases averaged 19.6 percent in 2002. General surgeons also saw their rates increase by 25 percent on average, while for internists the average cost of coverage rose 24.7 percent. A recent nationwide survey from the Council of State Neurosurgical Societies showed that neurosurgeons, another high-risk group, were hit with an average premium increase of 63 percent from 2000 to 2002. As a result, as many as 43 percent plan to, or are considering, restricting their practice.¹⁸²

Harris Interactive conducted a comprehensive study in 2002 for the tort reform support group Common Good.¹⁸³ Over 300 physicians, 100 hospital-based nurses and 100 administrators from around the country were interviewed in conjunction with the study.¹⁸⁴ Among physicians, 87% said that their concern or awareness regarding medical malpractice had increased during their careers.¹⁸⁵ Twenty-nine percent of physicians reported that during their careers they had avoided pursuing a specialty that they were interested in due to concerns over malpractice liability.¹⁸⁶ Forty-three percent of physicians stated that they had considered leaving the medical profession due to changes that have come about as a result of fear of malpractice liability.¹⁸⁷ Additionally, 79% of physicians reported that they have ordered

¹⁸² ROBERT P. HARTWIG & CLAIRE WILKINSON, INSURANCE INFORMATION INSTITUTE, *MEDICAL MALPRACTICE INSURANCE* 3–4 (2003). Figures put out by self-interested insurers have been challenged. *See generally* Kysar et al., *supra* note 52, at 810 (“As an empirical matter, there simply has not been a mass exodus of doctors from the medical profession.”) (citing U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-04-124, *PHYSICIAN WORKFORCE: PHYSICIAN SUPPLY INCREASED IN METROPOLITAN AND NONMETROPOLITAN AREAS BUT GEOGRAPHIC DISPARITIES PERSISTED* (2003), *available at* <http://www.gao.gov/new.items/d04124.pdf> [hereinafter *PHYSICIAN WORKFORCE*]).

¹⁸³ HARRIS INTERACTIVE, *COMMON GOOD FEAR OF LITIGATION STUDY: THE IMPACT ON MEDICINE* 6 (2002), *available at* <http://cgood.org/assets/attachments/57.pdf> [hereinafter *FEAR OF LITIGATION STUDY*].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 16 tbl.3. Among nurses, 64% indicate an increased awareness or concern regarding medical malpractice, and among administrators the figure is 77%. *Id.*

¹⁸⁶ *Id.* at 17 tbl.4.

¹⁸⁷ *Id.* at 49 tbl.33.

more tests than were medically required based on their professional judgment out of fear of malpractice liability.¹⁸⁸

However, despite the rhetoric, Professors Douglas Kysar, Thomas O. McGarity, and Karen Sokol have established that the claim of physician flight is baseless.¹⁸⁹ For example, a study conducted by the General Accounting Office (“GAO”) concluded that “[t]he number of physicians in the United States increased about 26% from 1991 to 2001, [approximately] twice as much as the nation’s population.”¹⁹⁰ The GAO further concluded that claims of physician flight are not substantiated.¹⁹¹ Although “extensive media coverage” that “some physicians in each of five states [experiencing insurance ‘crises’] are moving, retiring, or closing practices in response to malpractice pressures,” those reports proved to be either “inaccurate or involved relatively few physicians.”¹⁹²

Some proponents of tort reform believe that if their reforms are implemented there will be a significant reduction in medical liability insurance premiums. As evidence of this, the American Medical Association (“AMA”) looked to California insurance premiums following the implementation of the Medical Injury Compensation Reform Act (“MICRA”) in 1975.¹⁹³ At the time MICRA was enacted, “California was facing a medical liability crisis—much like the one facing America today—that was

¹⁸⁸ *Id.* at 20 tbl.7. Due to fear of malpractice liability, 41% of physicians indicated that they had prescribed more medications than their professional judgment required, 74% reported referring patients to specialists more than their professional judgment required, and 51% responded that they have suggested invasive procedures more than their professional judgment required. *Id.* The survey also asked physicians to rate how often they saw their colleagues engage in these behaviors. *Id.* Ninety-one percent reported seeing other physicians order additional tests, 73% reported seeing other physicians order additional medications, 85% reported seeing other physicians refer patients to specialists, and 73% reported seeing other physicians suggest invasive procedures. *Id.*

¹⁸⁹ Kysar et al., *supra* note 52, at 810.

¹⁹⁰ *Id.* at 811 (alterations in original) (quoting PHYSICIAN WORKFORCE, *supra* note 182, at 2).

¹⁹¹ See PHYSICIAN WORKFORCE, *supra* note 182, at 2.

¹⁹² U.S. GEN. ACCOUNTING OFFICE REP. NO. GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 17 (2003), available at <http://www.gao.gov/new.items/d03836.pdf> [hereinafter MEDICAL MALPRACTICE: IMPLICATIONS].

¹⁹³ American Medical Association, *MICRA vs. Prop. 103: Why Are Medical Liability Premiums Stable and Competitive in California?*, <http://www.ama-assn.org/ama1/pub/upload/mm/399/micraprop.pdf> (last visited Jan. 7, 2008) [hereinafter *MICRA vs. Prop. 103*].

caused by, in Governor [Jerry] Brown's words, 'the inability of doctors to obtain insurance at reasonable rates.'"¹⁹⁴ The AMA states that medical liability premiums in California have increased only 167% since MICRA was enacted in 1975, as opposed to a 505% increase across the rest of the country.¹⁹⁵

The current state of medical malpractice insurance is often referred to as the third "crisis" period in that industry. The first of these crises occurred in the mid-1970s, followed by a second "crisis" in the 1980s, and the current "crisis" which began in the early 2000s.¹⁹⁶ While there has been an increase in malpractice insurance premium rates over the last few years, just as there was during the mid-1970s and during the 1980s, an analysis of the cause of those increases is not necessarily as simple as blaming a "litigation explosion" within the tort system.¹⁹⁷

Trends do indicate that malpractice insurance rates have increased in recent years, averaging a 15% increase for

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* But see FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, HOW INSURANCE REFORM LOWERED DOCTORS' MEDICAL MALPRACTICE RATES IN CALIFORNIA: AND HOW MALPRACTICE CAPS FAILED (2003), <http://www.consumerwatchdog.org/malpractice/rp/1008.pdf> [hereinafter HOW MALPRACTICE CAPS FAILED] (finding that a 1988 California Insurance reform initiative, Proposition 103, caused medical malpractice premiums to drop, whereas the 1975 MICRA law that caps noneconomic damages failed). The Foundation for Taxpayer and Consumer Rights study found that thirteen years after the MICRA law, doctors' premiums increased by 450%. *Id.* at 1. After Prop. 103 was enacted, doctors' premiums were reduced by 30.7% within three years, after adjusting for inflation. *Id.* at 3.

¹⁹⁶ See generally, Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Jan. 21, 2004, at W4-20, available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1> (discussing the current increase in insurance rates and comparing it to previous insurance crises).

¹⁹⁷ See Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 207–10 (2005), available at <http://ssrn.com/abstract=770844>; Ceci Connolly, *Malpractice Situation Not Dire, Study Finds: Analysis of Texas Claims Finds 'Sea of Calm,' Overall Stability in Tort System*, WASH. POST, Mar. 10, 2005, at A8. A study of closed medical malpractice claims from 1988–2002 found that the number of large paid claims stayed constant from 1990–2002, after controlling for population growth. Black et al., *supra*, at 207–10. The study found that when controlling for inflation, the payout per large paid claim increased 0.1 to 0.5% per year from 1988–2002. *Id.* The researchers found that this data of claim outcomes did not show any evidence of a medical malpractice crisis and concluded that the large rise of insurance premiums in Texas may be from insurance market dynamics rather than changes in claim outcomes. *Id.*

physicians between the years 2000 and 2002.¹⁹⁸ Particular specialties, such as ob-gyns and internists/general surgeons, saw particularly high increases of 22% and 33% respectively.¹⁹⁹ A report from the Congressional Budget Office suggests three major causes of the current premium increases: increased costs (payments on claims and legal-defense costs); reduced investment income; and short-term factors such as major insurers withdrawing from particular markets and adjustments in reserves (excess reserves and strong investment income in the 1990s led some insurance companies not to increase premiums during those years).²⁰⁰

Major fluctuations in the bond market have occurred three times in the last thirty years, during the mid-1970s, the mid-1980s, and early 2000, mirroring closely the times at which there have been increases in medical malpractice liability insurance premiums.²⁰¹ The Physician Insurers Association of America requires that members put 80% of their investments in high-grade bonds.²⁰² Consequently, when the bond market is strong insurers can keep premium rates low, but the flip side is that when there is a drastic decline in the bond market, insurance premiums must be increased to cover that loss.²⁰³

¹⁹⁸ CONG. BUDGET OFFICE, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 1 (2004), available at <http://www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf> [hereinafter LIMITING TORT LIABILITY].

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 3–5; see also MEDICAL MALPRACTICE: IMPLICATIONS, *supra* note 192, at 7, 9–11 (finding that it could not be determined the extent tort reform laws actually influenced premiums and that multiple factors were responsible for the increase in medical malpractice premiums, including increased losses for insurers on paid medical malpractice claims, decreases in investment income, competition, and that reinsurance rates increased more rapidly than they had in the past); Joseph B. Treaster & Joel Brinkley, *Behind Those Medical Malpractice Rates*, N.Y. TIMES, Feb. 22, 2005, at C1. The most recent comprehensive and authoritative study of medical malpractice insurance rates was conducted by Professor Tom Baker. See BAKER, *supra* note 52, at 37.

²⁰¹ Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1082–83 (2004).

²⁰² *Id.* at 1082.

²⁰³ *Id.* at 1082–83; see also THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, FALSE ACCOUNTING: HOW MEDICAL MALPRACTICE INSURANCE COMPANIES INFLATE LOSSES TO JUSTIFY SUDDEN SURGES IN RATES AND TORT REFORM 13, 15–17 (2005), available at <http://www.consumerwatchdog.org/malpractice/rp/5714.pdf> (reviewing loss projections of insurance companies from 1986–1994 and finding that the incurred losses that insurers initially reported, and which medical malpractice premiums are based on, were 46% higher than the

Since 1975, the data show that in constant dollars, per doctor written premiums—the amount of premiums that doctors have paid to insurers—have gyrated almost precisely with the insurer's economic cycle, which is driven by such factors as insurer mismanagement and changing interest rates, not by lawsuits, jury awards, the tort system or other causes.²⁰⁴

Another problem contributing to higher medical malpractice premiums is the fact that many insurers have either limited or abandoned the medical malpractice market due to low profitability.²⁰⁵ After an insurer leaves a particular market,

amount the insurers eventually paid out on those claims and concluding that incurred loss data does not approximate the actual losses an insurance company will sustain); JAY ANGOFF, CENTER FOR JUSTICE AND DEMOCRACY, *FALLING CLAIMS AND RISING PREMIUMS IN THE MEDICAL MALPRACTICE INSURANCE INDUSTRY* i (2005), available at <http://www.centerjd.org/ANGOFFReport.pdf> (analyzing 2000–04 performance of the fifteen largest medical malpractice insurance companies in the United States rated by A.M. Best and finding, based on the 2004 annual statements filed with state insurance departments, that the examined malpractice carriers increased their net premiums by 120.2% during that period, while net claims payments only increased 5.7%); Dean Starkman, *Calculating Malpractice Claims: Study by Consumers Group Suggests Insurers Set Premiums Based on Market, Not Their Losses*, WASH. POST, Dec. 29, 2005, at D1.

²⁰⁴ AMERICANS FOR INSURANCE REFORM, *MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 2003*, at 5 (2003), <http://www.insurance-reform.org/StableLosses2003F.pdf> [hereinafter *STABLE LOSSES/UNSTABLE RATES*]. See generally Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393 (2005) (discussing the impact of the insurance underwriting cycle); Chessick & Robinson, *supra* note 59 (discussing common misconceptions about medical malpractice rates and analyzing other causes of the high prices); Kelly Kotur, Student Work, *An Extreme Response or a Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 W. VA. L. REV. 873 (2006) (discussing West Virginia's caps on noneconomic damages); Cathleen B. Tumulty, Note, *Capping Non-Economic Damages: Is It Really What the Doctor Ordered? Predicting the Effect of Federal Tort Reform by Examining the Impact of Tort Reform at the State Level*, 39 SUFFOLK U. L. REV. 817 (2006) (concluding that data does not support efforts toward noneconomic awards in medical malpractice cases and offering other methods of insurance reform to respond to rising premiums); Carrie Lynn Vine, Comment, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413 (2006) (discussing California's cap reforms and various other tort reform options); Edgar, *supra* note 81 (arguing for medical reform over tort reform).

²⁰⁵ U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-03-702, *MEDICAL MALPRACTICE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES* 31 (2003) [hereinafter *MEDICAL MALPRACTICE: MULTIPLE FACTORS*] (noting that St. Paul Companies, one of the largest medical malpractice insurers abandoned med-mal altogether in 2002; PHICO Insurance Company, MIIX Insurance Company, and Reciprocal of America all stopped providing medical malpractice insurance; and SCPIE Indemnity Company and First

remaining insurers have less incentive to maintain competitive prices. Additionally, pursuant to state insurance regulations, companies often have to increase their surplus, the amount that their assets exceed their liabilities, before they can insure additional policyholders.²⁰⁶ It is noteworthy, however, that medical malpractice insurer profits are not increasing, indicating that insurers are not simply profiting from excessively high premiums.²⁰⁷ Moreover, state insurance regulators generally require insurers to justify their reasons for rate increases.²⁰⁸

Also, it has been suggested that the increase in medical malpractice liability insurance premiums hinges on an increase in the *number* of civil suits filed against physicians. While the number of medical malpractice lawsuits filed in state courts has fluctuated, statistics released by the Administrative Office of the U.S. District Courts found that there were 1,346 medical malpractice suits filed in federal District Courts in 1990 and 1,221 filed in 2006—a decrease of 125 suits.²⁰⁹

However, since malpractice liability claims are based on state tort law, a majority of medical malpractice suits are filed in state courts. A survey by the National Center for State Courts examined medical malpractice filings in nine states between the years 1992 and 2001 and found an increase from 8500 suits filed to 10,500 suits filed.²¹⁰ Nevertheless, when those statistics were adjusted for changes in population over that period of time, the number of filings per capita actually decreased by 1% during the

Professionals Insurance Company both limited the number of states where they sell medical malpractice insurance).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 32.

²⁰⁸ *Id.*

²⁰⁹ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.2 (2006), available at <http://www.uscourts.gov/judicialfactsfigures/2006/alljudicialfactsfigures.pdf> [hereinafter JUDICIAL FACTS AND FIGURES]. The number of suits filed in federal court by year was: 1990 (1346); 1995 (1328); 2000 (1526); 2002 (1436); 2003 (1607); 2004 (1313); 2005 (1221); 2006 (1221). *Id.*

²¹⁰ EXAMINING THE WORK OF STATE COURTS, 2002, *supra* note 39, at 27. The nine states examined in the survey were Arizona, Connecticut, Florida, Minnesota, Missouri, Nevada, New York, North Dakota, and Oregon. *Id.* Only nine states were surveyed for the entire ten-year period, and seventeen states were surveyed between 1997 and 2001. *See id.* That data is not included here because of the short time frame surveyed. The remaining states are not included in the report because they do not report medical malpractice suit data to the National Center for State Courts.

decade studied.²¹¹ Furthermore, when allegations are measured in terms of malpractice suits alone, some studies contend that the number of malpractice suits has actually declined more than 25% since 1994.²¹²

Also noteworthy is the fact that *losses paid per doctor*, when adjusted for inflation, have remained steady over the last several years and actually *decreased* between 2000 and 2001, the years when the third malpractice premium “crisis” was emerging. A study by Americans for Insurance Reform examined the actual losses (as opposed to incurred losses, which include reserves for possible future claims) paid per doctor for each year between 1975 and 2002 and compared that with the premium charged per doctor during those same years.²¹³ The premium charged mirrored economic cycles and the losses paid per doctor closely paralleled medical inflation during those years.²¹⁴ According to the *Wall Street Journal*:

Following a cycle that recurs in many parts of the business, a price war [among insurance companies] that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims.

Some of these carriers had rushed into malpractice coverage, because an accounting practice widely used in the industry made the area seem more profitable in the early 1990s than it really was. A decade of short-sighted price slashing led to industry losses of nearly \$3 billion last year.

“I don’t like to hear insurance-company executives say it’s the tort [injury-law] system—it’s self-inflicted,” says Donald J. Zuk, chief executive of SCPIE Holdings Inc., a leading malpractice insurer in California.

What’s more, the litigation statistics most insurers trumpet are incomplete. The statistics come from Jury Verdict Research, a Horsham, Pa., information service

But Jury Verdict Research says its 2,951-case malpractice database has large gaps. . . . It collects award information unsystematically, and it can’t say how many cases it misses.

²¹¹ *Id.* at 28.

²¹² See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 66–67 (2001) (using statistics of states to dispute claim that medical malpractice suits are increasing).

²¹³ See STABLE LOSSES/UNSTABLE RATES, *supra* note 204, at 6 n.3.

²¹⁴ *Id.* at 5.

Most important, the database excludes trial victories by doctors and hospitals—verdicts that are worth zero dollars.²¹⁵

One threshold question to address, therefore, is whether tort reform, if enacted, would necessarily lead to a decrease in medical malpractice insurance rates. Statistics appear to indicate that the imposition of tort reforms, such as punitive damage caps and modifications to the collateral source rule, have not necessarily yielded that result.²¹⁶ A survey conducted by the Center for Justice and Democracy analyzed insurance “loss cost,” the portion of the insurance premium that the insurance company uses “to pay for claims and for the adjustment of claims,”²¹⁷ between the years 1985 and 1998 in states that were categorized as having implemented low, mid-range, or severe tort law changes between the years 1985 and 1997.²¹⁸

²¹⁵ Rachel Zimmerman & Christopher Oster, *Assigning Liability: Insurers’ Missteps Helped Provoke Malpractice ‘Crisis,’* WALL STREET J., June 24, 2002, at A1 (second alteration in original).

²¹⁶ See J. ROBERT HUNTER & JOANNE DOROSHOW, PREMIUM DECEIT: THE FAILURE OF “TORT REFORM” TO CUT INSURANCE PRICES 19 (2002); see also Avraham, *supra* note 155, at 29 (finding that between 1991–98, only one out of six types of tort reforms, caps on pain and suffering damages, reduced the number of annual payments, and two reforms, caps on pain and suffering damages and limitation on the collateral source rule, reduced average awards, with the other reforms having no significant effect on total annual payments in medical malpractice cases); MARTIN D. WEISS ET AL., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE 3–4 (2003), available at <http://www.weissratings.com/MedicalMalpractice.pdf> (finding that between 1991 and 2002, in states with caps on noneconomic damages, the annual premium went up by 48.2%, whereas in states without noneconomic damage caps the annual premium increased by only 35.9%). The Weiss study also found that of the states with caps on noneconomic damages, only 10.5% experienced flat or declining medical malpractice premiums, whereas in states without caps, 18.7% had flat or declining premiums. *Id.* Factors found to contribute to the rise in medical malpractice premiums were the medical inflation rate, the insurance business cycle, the need to shore up reserves, a decline in investment income, financial safety, and supply and demand. *Id.*

²¹⁷ HUNTER & DOROSHOW, *supra* note 216, at 10 n.34.

²¹⁸ *Id.* at 11–12. The study analyzed “major tort law limits” (i.e. “tort reform”) that had been enacted in each state based on American Tort Reform Association and Association of Trial Lawyers of America criteria. *Id.* “Major tort law limits” were defined as provisions enacted by the state legislature, including damage caps, “modifications to joint and several liability, modifications to the collateral source rule, structured settlements . . . , limits on prejudgment interest, limits on contingency fees for plaintiffs’ attorneys, new product liability defenses . . . , and statutes of repose for products.” *Id.* at 11. Each “reform” was weighted based on the number of years it had been in effect (no weight was given to reforms instituted prior to 1985), and the states (fifty states plus the District of Columbia) were then

The results of the study, as it related to medical malpractice insurance, were somewhat counterintuitive and largely inconclusive. The study found that in “Category 1” states, those with the least severe tort law changes, the annualized loss cost change was +8.2%.²¹⁹ In “Category 3” states, those with the most severe tort law changes, the annualized loss cost change was +6.3%.²²⁰ While those findings seem to suggest that implementation of tort law changes lead to a minimized loss cost increase, the states in “Category 2,” those with midrange tort law changes, preclude that finding because their annualized loss cost change was +9.2%, the highest of any group.²²¹ The report concluded by stating, “the data do not support any conclusion that enactment of tort law limits since the liability insurance crisis of the mid-1980s has succeeded in reducing insurance costs to insurance consumers.”²²²

A decrease in insurance rates, however, is not necessarily a first priority of tort reformers. Both the American Tort Reform Association (“ATRA”) and the American Insurance Association (“AIA”) have made statements indicating that even if tort reform is instituted, medical practitioners should not anticipate a decrease in their insurance premiums. An AIA press release stated, “[T]he insurance industry never promised that tort reform would achieve specific premium savings.”²²³ When discussing the proposition that tort reform would decrease medical malpractice insurance premiums, Victor Schwartz, a prominent tort reform advocate, stated, “I’ve never said that in 30 years.”²²⁴ Additionally, Sherman Joyce, president of the

divided into three equal groups of seventeen states. *Id.* at 12. These groups were then given the numbers 1 (low tort law changes), 2 (midrange tort law changes) or 3 (severe tort law changes) based on their ranking. *Id.* It was these three categories (1, 2, and 3) that the survey was based on. *See id.*

²¹⁹ *Id.* at 16.

²²⁰ *Id.*

²²¹ *Id.* While the study looked at three distinct tort reform categories (“general” tort reforms, products liability tort reforms, and medical malpractice tort reforms) the data cited above reflects only the results of the medical malpractice tort reform study. *See id.*

²²² *Id.* at 19.

²²³ Americans for Insurance Reform, Fact Sheet, <http://www.insurance-reform.org/issues/aiaatra.html> (last visited Jan. 8, 2008) [hereinafter Fact Sheet] (quoting Press Release, American Insurance Association (Mar. 13, 2002)) (alteration in original).

²²⁴ Michael Prince, *Tort Reforms Don’t Cut Liability Rates, Study Says*, BUS. INS., July 19, 1999, at 73, 73; *see also* HOW MALPRACTICE CAPS FAILED, *supra* note 195,

ATRA, stated, "We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates."²²⁵ In 2002, when Nevada imposed a cap on noneconomic damages in medical malpractice suits, two major insurers in that area stated that they would not decrease insurance rates.²²⁶

Thus, while it is clear that the goal of the medical profession is to reduce insurance premium rates and that the profession believes that the civil justice system is directly to blame for its high premiums, it is not at all clear that enacting tort reform proposals will do anything to reduce malpractice premiums. The evidence thus far seems to indicate that tort reform has not reduced premium rates. Further, the fact that major insurance industry groups like AIA have explicitly disclaimed any linkage between enactment of tort reform and reduction of premiums would suggest that other factors dominate in rate setting.

CONCLUSION

The empirical case for retrenchment of the civil justice system is based on tilted evidence. Litigation generally is declining, and tort suits in particular have declined even more. Rates of filings per capita have been dropping for years. Meanwhile, the available evidence does not support the claim that damage awards are increasing. Taking inflation into account, particularly inflation in medical procedures for which damages are often awarded, median jury awards are declining.

The available evidence also demonstrates that, at least with respect to medical malpractice insurance premiums, premiums are not increasing because of allegedly higher payouts to claimants. Further, despite public relations campaign advertisements by the American Medical Association, doctors are not abandoning their practices because of increasing malpractice premiums.

at 1 (quoting Victor Schwartz); HARVEY ROSENFELD, REGULATING DAMAGES VS. REGULATING INSURANCE RATES: THE CALIFORNIA EXPERIENCE 29 (2004), available at <http://www.consumerwatchdog.org/malpractice/rp/4719.pdf> (presented as testimony to the Oklahoma Legislature on April 22, 2004) (asserting that regulating insurance rates is the only way to lower insurance premiums).

²²⁵ Fact Sheet, *supra* note 223 (quoting Sherman Joyce, *Study Finds No Link Between Tort Reforms and Insurance Rates*, LIABILITY WEEK, July 19, 1999).

²²⁶ Nathanson, *supra* note 201, at 1083.

The empirical evidence also refutes the view that juries generally are less sympathetic to business defendants than other litigants. Indeed, surveys of the plaintiffs' trial bar suggests just the opposite: that juries have become systematically more skeptical of any person who dares to file a suit.²²⁷

In this last thought lies a possible explanation for the continuing political efforts by some business groups and insurers to stigmatize the entire civil justice system: if insurers and large enterprises can convince the public that the entire civil system is corrupt, when citizens are called as jurors they will be less likely to enter a verdict for plaintiffs and far less likely to award significant damages even if they do find liability. In this respect, then, there is every reason for "tort reformers" to continue to repeat false assertions about the civil justice system and to continue to enlist high-ranking officials, leading politicians, and journalists to endorse their view that the system permits much "frivolous" litigation to survive. By systematically putting out misleading data, and deploying false or mischaracterized anecdotes, the tort reform movement may have already achieved a major political goal even without succeeding in enacting any further legislative limits on litigation: contaminating the jury pool.

If this assessment is correct, an important piece of scholarship remains to be written: how have the American people been convinced that the civil justice system needs reform? And, given the empirical evidence that refutes many of the empirical claims, why is it so difficult to dislodge the falsehoods? The answer to this question no doubt lies in the mechanisms of persuasion that have been employed for many years. Such an inquiry awaits another day.

²²⁷ See, e.g., HANS, BUSINESS ON TRIAL, *supra* note 57, at 23 (jurors are "often suspicious and ambivalent toward people who bring lawsuits against business corporations"); Hans, *Illusions and Realities*, *supra* note 25, at 333–35; David A. Wenner & Gregory S. Cusimano, *A Brief Look at Overcoming Jury Bias*, <http://www.snyderwenner.com/overcomingjurybias.html> (last visited Mar. 21, 2008) (describing plaintiffs' lawyers convening of dozens of focus groups which expressed remarkably consistent antiplaintiff sentiments).