

## What's Wrong With a Little Tort Reform?

by John Hasnas\*

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### I.

I come before you today to speak in opposition to tort reform.

The preceding sentence may be the most ambiguous one I have ever uttered. This is because its meaning depends entirely upon the particular type of reform to which one is referring. Although I do intend to argue against most variants of 'tort reform,' for my position to be intelligible, I must take a moment to distinguish among the different referents of that phrase.

Understood in its most general sense, tort law is always undergoing reform. As part of a common law legal system, the "rules" of tort law are continually being revised as precedents are distinguished or overruled in response to changing technological conditions and social mores. Because this type of adjustment is inherent in the legal system itself, it would be absurd to oppose tort reform in this sense. One might as well declare oneself opposed to the law of gravity. I am opposed to neither.

I do find myself opposed to most other types of tort reform, however. For example, 'tort reform' has recently come to be used to refer to the proposal to employ Federal legislation to alter

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various aspects of state tort law.<sup>1</sup> I am certainly opposed to tort reform in this sense, although perhaps not for the reasons that are most frequently adduced. Opponents of this type of tort reform often base their case on the standard “laboratory of the states” argument for federalism. This argument asserts that efforts at tort reform are more likely to be successful if each of the fifty states is allowed to address the problem in its own way. Although many states may institute reforms that will fail to accomplish their purpose, others will be more successful. By allowing fifty “experiments,” each state will be able to learn from both the mistakes and the successes of the others and this will provide the practical guidance necessary to produce effective long-term reform. This, it is claimed, is surely a superior strategy to the “all eggs in one basket” approach of allowing the Federal government, working in the abstract, to devise one rule for simultaneous application everywhere in the country.

In my opinion, this is a perfectly good argument, as far as it goes. If tort law must be reformed legislatively, then state legislation is assuredly preferable to Federal legislation. I do not employ this argument, however, because I do not share its underlying assumption; i.e., that tort law should be legislatively reformed. In fact, to the extent that ‘tort reform’ is used to refer to the effort to employ state legislation to alter the common law of tort, I am opposed to that as well.

I must point out, however, that legislative attempts to revise tort law do not exhaust the referents of the phrase ‘tort reform.’ There is another type of tort reform, which, in my opinion, is

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<sup>1</sup>For example, the House of Representatives is currently considering a bill that would, among other things, limit medical malpractice non-economic damages to \$250,000 and punitive damages to the greater of \$250,000 or treble economic damages, allow punitive damages only on clear and convincing evidence of conscious and flagrant indifference to safety, introduce a modified “loser pays” provision, and impose a 15 year statute of repose. *See* Harvey Berkman, *Back to the Start for Senate Tort Bill*, NAT'L L.J., May 22, 1995 at A16.

significantly more pernicious than those so far mentioned, and which is primarily responsible for the so-called “litigation explosion.” This is the tort reform that results from the efforts of legal academics and commentators to influence the judiciary to interpret the common law of tort so as to embody a particular conception of justice. I am emphatically opposed to this type of tort reform, but to explain why and to be able to even articulate an alternative, I must take you on a somewhat lengthy excursion into legal history. So I will beg your indulgence while I tell you a story about how our tort law was transformed from a peace system into a justice system; a tale of two tort systems, so to speak.

## II.

For most of its long history, what is now known as tort law functioned as what may be called a “peace system,” an alternative to violence that facilitated the peaceful coexistence of people in society. To explain precisely what I mean by this, let me ask you to cast your minds back to the dimmest recesses of the Dark Ages when Roman rule had faded not only from the British Isles but from most of Europe. The absence of centralized authority during these times did not, of course, imply an absence of society, and our ancestors lived together in the kinship and tribal groups that would eventually evolve into the hundreds<sup>2</sup> and shires of medieval England. Given human nature, the primary requirement for the survival of these social groupings was a deterrent against the use of violence. This was provided by the blood feud.

When someone was assaulted, killed, or otherwise wronged, the members of the aggrieved party’s household or clan were entitled to take direct and frequently violent action to extract

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<sup>2</sup>A hundred is a geographical unit smaller than a county containing ten tithings, i.e., ten groups of ten families of freeholders.

compensation from the wrongdoer. This “blood feud” was the expected, socially accepted response to aggression. Although it suffered from the obvious drawbacks of vigilantism, the blood feud constituted an admirable deterrent; the prospect of an immediate violent response from a victim’s entire family or support group was sufficient to give a potential offender pause.

Despite its effectiveness as a deterrent, the blood feud was not very convenient in practice. The victim’s supporters were usually not anxious to risk life and limb in its prosecution and the members of the larger community, who found themselves in the position of the proverbial innocent bystander, had reason to discourage it as well. Thus, its own violent nature provided strong personal and social incentives to find an alternate method of resolving disputes. As a result, the practice developed of holding the violence in abeyance while attempts were made to compose the dispute through negotiation.

The forum for these negotiations was the *moot*, a public assembly which served as the chief instrument of social administration. If both parties agreed, they could lay their dispute before the *moot*, whose members, much like present-day mediators, attempted to facilitate an accommodation that both parties found acceptable. If no accommodation could be reached, there was always the blood feud; however, if one could, violence had been avoided.

This method of composing disputes was extremely popular among both the community at large which thereby avoided strife, and (especially) among the parties’ family members or supporters who would otherwise have had to do the fighting. As a result, community pressure gradually transformed the effort to reach a negotiated settlement from an optional alternative to self-redress to a necessary prerequisite for receiving the help of one’s support group. In addition, the negotiations were usually successful, and typically resulted in some sort of compensatory

payment being made to the injured party or his representatives since the easiest way to avoid the violence of the blood feud was simply to purchase peace.

To illustrate this process, let me ask you to imagine two sturdy Anglo-Saxon yeomen; let's call them Alfred and Aethelred. I'll ask you to further imagine that Alfred and Aethelred reside in Essex and are farmers with adjoining lands separated by a row of hedges. One day, Alfred's cow breaks through the hedges and eats a great deal of Aethelred's vegetables. As a result, Alfred and Aethelred have a dispute; and, in these agrarian times, a fairly serious one since Alfred was counting on those vegetables to get his family through the coming winter. Alfred is entitled to take direct action against Aethelred to make good his loss; he could get out his sword and round up the members of his clan or support group to prosecute the blood feud. This response is both risky and costly, however; risky because Aethelred and his clan or support group might be superior swordsmen, costly because of both the time, effort, and potential for injury involved in the fighting and the ill will Alfred may engender among his supporters for getting them involved in the unpleasantness. Therefore, Alfred has fairly strong incentives to find an alternative means of resolving the dispute.

As a result, before prosecuting the blood feud, Alfred is likely to summon Aethelred to the *moot* and make an "appeal," a public statement of his grievance against Aethelred and a request for help from the members of the community in redressing it. Considerable bargaining and discussion will then take place with many members of the community offering advice about how best to compose the dispute. Perhaps someone will suggest that because Aethelred's cow ate Alfred's vegetables putting Alfred's family at risk during the coming winter months, Aethelred should provide Alfred's family with milk from the cow during those months. If both Alfred and

Aethelred agree to this, the dispute is resolved and no fighting need take place.

Of course, this proposal may or may not be a good way of resolving this dispute. If it is, peace will be restored between the neighbors and before long they will be inviting each other over to play cards as they did before the trouble started. If it is not, one of the neighbors is likely to be coming after the other with his sword before too long. One way or the other, there is fairly immediate feedback about whether the proposed solution was a good idea.

Conditions being fairly stable in those days, it was extremely likely a similar dispute would arise before too long. Assume that several years later, two other neighbors, Edward and Harold, appear before the *moot* because Edward's goat got loose and ate a large quantity of Harold's hay. If Alfred and Aethelred's dispute had been successfully resolved, someone is likely to point this out and suggest a similar solution; say, that Edward compensate Harold by supplying him with a three-month supply of goat cheese. On the other hand, if Alfred and Aethelred ended up at each other's throats, then the suggestion that Edward compensate Harold with goat cheese is likely to elicit a response such as: "Hey, we tried something like that with Alfred and Aethelred, and you know how that turned out."

As this process of copying successful methods of resolving disputes and discarding unsuccessful ones is repeated over time, rules of social behavior gradually develop. After enough disputes like Alfred and Aethelred's and Edward and Harold's have been brought before the *moot* and successfully resolved with the relevant compensatory payment, all future cases will quickly be dealt with the same way. Eventually, the community comes to accept and abide by a rule that requires the owner of livestock that damage another's property to compensate the injured party out of the products of the livestock.

This and the other rules that we anachronistically refer to as customary law were wonderful labor saving devices. They allowed people to avoid the extremely labor-intensive blood feud; they saved a great deal of bargaining time at the *moot*; and most importantly, they served as a guide for future behavior that enabled people to avoid disputes in the first place. Further, because they arose out of the repetition of successful dispute resolutions, i.e., those that were effective at restoring peace, they embodied the practices that tended to facilitate peaceful social interaction in the relevant community. Thus, our earliest law consisted in what were essentially “peace rules.”

It was from these prosaic beginnings that what we now call tort law evolved. Following the Norman Conquest, an ever increasing number of the disputes that had been heard in the local *moots* were brought in the King’s courts instead. These were presided over by royal “justices” who rode circuit (*eyre*) around the kingdom. When these justices, who were as interested in saving their labor as anyone, came to believe that the rule of a particular locality was effective in resolving disputes of a certain kind, they would apply it to similar disputes at other points along their ride. Thus, a royal justice who saw that the rule in Essex governing damage caused by a neighbor’s livestock was an effective way of settling agrarian disputes would apply it when a similar controversy came before him in Wessex. In this way, the royal justices carried the local rules that were successful in restoring and facilitating social peace with them throughout the kingdom. Eventually, these rules became common to the entire realm, giving birth to the “common” law of England, including the common law of tort.

I will spare you the story of the growth of the common law, of how the practice of repeating successful dispute resolutions evolved into the doctrine of *stare decisis*, of how this

doctrine gave the law the flexibility it needed to respond to changing conditions and mores, and of how this allowed for the development of new rules to provide for the peaceful redress of new grievances. I will point out, however, that until the mid-nineteenth century the development of these rules continued to be guided by the sensibilities of the ordinary citizen. This is because until that time cases were decided by juries which exercised both law and fact-finding functions.<sup>3</sup> Unlike their present counterparts that are empowered to decide only factual matters, early juries simply heard the case and decided whether relief should be granted. These decisions, which reflected the jury's opinion of what was fair to the parties rather than the demands of any abstract theory of justice, established the precedents out of which the rules of tort law evolved. As a result, by the middle of the nineteenth century, tort law consisted in an essentially uncoordinated set of rules which 1) had proven successful at resolving disputes and 2) corresponded to the common person's sense of what is fair in the circumstances.

Up until this time, it is fair to characterize Anglo-American tort law as a peace system, a set of rules which provides a nonviolent way of resolving serious interpersonal disputes. As a peace system, our early tort law was characterized by four features. First, its scope was limited to fairly serious controversies. Because the rules developed as a way of avoiding violence, the complaints they addressed were usually those that were likely to give rise to violence if they were not redressed. As a result, a lawsuit was generally viewed as a last resort, something to be pursued only when no other social mechanism provided an effective way to compose the dispute. Second, the jury was the ultimate decision-maker. This made perfect sense because the average juror would have as much insight into what would be fair to the parties to the immediate dispute

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<sup>3</sup>JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 102 (1988).

as any expert; more in fact, since highly educated experts were less likely to be in touch with the sentiments of the lay people who were the litigants in most tort cases. Third, the system was evolutionary in nature. Actually, it was a good example of what Friedrich Hayek referred to as “spontaneous order” in that there was no guiding intelligence behind it. Tort law did not embody any ideal of justice; it did not exemplify any rational conception of what the law should be. It was merely a collection of rules that facilitated the peaceful coexistence of human beings in society. Juries would respond to changing social conditions and the concomitant changes in human sensitivities and conflicts with new judgments of what was fair to the parties. These new precedents would expand, contract, or simply change the rules which constituted the tort system. As a result, tort law was constantly evolving to meet the changing needs of the citizenry for dispute settlement. Finally, the system was essentially “consumer driven.” For it was the consumers of legal services, the ordinary citizens, who decided what cases to bring; and it was the resolution of these cases that gave rise to the rules of tort law. Therefore, it was “consumer” choices as to what issues were serious enough to require redress through the courts that drove the development of the system.

### **III.**

In the years following the Civil War, the nature of our tort system began to change. The intellectual climate of the United States was undergoing a radical shift from traditional learning to what was regarded as more “scientific” modes of thought. To America’s postwar intellectuals, the lesson of the nineteenth century had been the efficacy of science. Scientific thinking had produced the industrial revolution with its massive technological and material progress and the theory of evolution with its new explanatory paradigm. Such an approach seemed to offer the only hope of

finding order in the chaos produced by the “industrialization, urbanization, increased ethnic heterogeneity, markedly increased technological and social mobility”<sup>4</sup> that characterized late nineteenth century life. Thus, the social sciences rushed to adopt the scientific approach that had shown so much success in the physical sciences.

This new scientific paradigm was embraced by the legal profession as well; most famously in the Harvard Law School of Christopher Columbus Langdell. Langdell introduced the case method in which appellate decisions constituted the raw data from which legal generalizations were to be drawn. Just as physical scientists discovered the laws of nature by abstracting from a mass of empirical observations, so the new legal scientists would discover the principles of the common law by abstracting from a mass of legal observations, i.e., from a close reading of all relevant cases. This process would enable legal theorists to bring order to the uncoordinated jumble of rules that constituted the various legal disciplines (contract, tort, property, etc.), and its adoption set off a frenzy of efforts to systematize the law.

Led predominantly by Oliver Wendell Holmes, the “scientific” tort scholars set out to find the common principles that would explain the variegated set of rules that specified when individuals were legally entitled to compensation for their harms, i.e., to produce a theory of torts. In what appeared to be a circumscribed set of essentially unrelated specific duties, these scholars discovered a general duty of care, i.e., the negligence principle, bounded by several liability-limiting doctrines such as assumption of risk, contributory negligence, last clear chance, and proximate cause. Thus, out of the “raw data” of the particular rules of tort law, Holmes and his

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<sup>4</sup>G. EDWARD WHITE, *TORT LAW IN AMERICA* 25-26 (1985).

compatriots constructed the fault theory of tort.<sup>5</sup>

As good “scientists,” these scholars conceived of themselves as making objective observations from which they could construct a more orderly and useful representation of the way the law really was. But, as we all know, it is a very short step from systematizing to structuring, and scientific observation almost always leads to scientific engineering. And so, in an entirely natural fashion, legal scholars soon turned their attention from providing accounts of what the law was to making recommendations as to what it should be.

This transition was spurred by the revolution in thinking about social problems that took place in the early twentieth century. No longer were poverty and social disadvantage viewed as indicative of defects in the character of the afflicted individuals. Rather, these conditions were seen as inherent problems of social life that affected the well-being of the entire society. Of course, once these conditions were seen as societal rather than individual problems, they seemed to demand societal solutions. This view of things gave rise to an increasing demand for affirmative governmental intervention to cure these ills and thus, to increasing calls for activist government.

Just as the nineteenth century’s faith in “scientific thinking” had penetrated the legal academy, so too did the twentieth century’s faith in the need for centrally planned solutions to the problems of social living. As legal realists began to replace the legal scientists, tort scholars were no longer content merely to catalogue the law of tort, they wanted to reform it as well. Thus, they turned their attention from the effort to extract the rules of law from decided cases to the effects the application of these rules had on the public good. From this perspective, “[i]ndividual cases should be studied not merely as particular private disputes, but as instances of larger social

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<sup>5</sup>For an excellent account of this process, see WHITE *supra* note 4 at 31-62.

problems.”<sup>6</sup> To the realists, it seemed clear that the rules of tort law should produce results that were “not merely fair between the parties, but socially advantageous.”<sup>7</sup> Thus, they began to focus on “the potentialities of tort liability as a means of distributing losses,”<sup>8</sup> or, more concisely, as a means of “social engineering.”<sup>9</sup>

Under the influence of the realists, tort law came to be viewed not merely as a means for peacefully resolving interpersonal disputes, but as a mechanism for producing a more just society. Among these social reformers, the preferred conception of justice was one that required compensation for injured individuals. To them, it seemed patently unfair to simply let losses “lie where they fell.” Justice required that losses be distributed across society generally on a fair and equitable basis. But this, in turn, required the rejection of the fault theory of tort. For, as G. Edward White has described it, under the realists’ conception, tort law was “a compensation system designed to distribute the costs of injuries throughout society efficiently and fairly; it should no longer be regarded principally as a system designed to deter and punish blameworthy conduct.”<sup>10</sup> In other words, tort law should no longer be viewed as a peace system; rather, it was “public law in disguise”<sup>11</sup> whose essential purpose was to provide “a remedy for the everyday

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<sup>6</sup>Harry Shulman, *Book Review*, 48 HARV. L. REV. 1444, 1445 (1932).

<sup>7</sup>Henry W. Edgerton, *Book Review*, 29 COLUM. L. REV. 229, 230 (1929).

<sup>8</sup>HARRY SHULMAN & FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS* viii (1942).

<sup>9</sup>*Id.*

<sup>10</sup>WHITE *supra* note 4 at 150.

<sup>11</sup>Leon Green, *Tort Law: Public Law in Disguise*, 38 TEX. L. REV. 257, 269 (1959-60).

hurts inflicted by the multitudinous activities of our society.”<sup>12</sup>

Let us examine some of the elements of the transformation of tort law from a peace system to a justice system. With regard to substantive doctrine, consider the effect of William Prosser, clearly the twentieth century’s most influential tort scholar. Prosser firmly believed that the purpose of tort law was not merely to provide a peaceful forum for resolving intractable disputes, but to do justice. In his opinion, it was “the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied.”<sup>13</sup> This led him to argue (effectively) that recovery should be allowed for the intentional or negligent infliction of emotional distress. Since, as he saw it, mental suffering was “no less a real injury than physical pain,”<sup>14</sup> and since in a just tort system there should be a remedy for every wrong, it followed that one who wrongfully suffers emotional distress should be compensated. It is worth noting that while mental suffering is indeed as real an injury as physical pain, it is one that is considerably less likely to elicit a violent response. Hence, it is considerably less likely to be redressed when tort law functions as a peace system. It is also worth noting the subtle shift in Prosser’s argument from the general *ethical* proposition that for every wrong there should be a remedy to considerably different claim that for every wrong there should be a *legal* remedy.

As a second example, consider Prosser’s position on products liability. Prosser was the leading advocate of assigning strict liability to the manufacturers of defective products as a means of “allocating a more or less inevitable loss to be charged against a complex and dangerous

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<sup>12</sup>*Id.*

<sup>13</sup>WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 202 (1941).

<sup>14</sup>*Id.*

civilization, and [placing] liability upon the party best able to shoulder it.”<sup>15</sup> Strict liability, of course, flew in the face of the fault theory of tort, but this was of no consequence since the conduct of the manufacturer of defective products should be “regarded as tortious not because it was socially or morally wrong, but because as a matter of social engineering the responsibility must be his.”<sup>16</sup>

To give you some idea of how influential Prosser was in effecting legal change, consider the following series of occurrences. In his 1941 treatise, Prosser predicted that, due in part to the public interest in providing the maximum protection for consumers,<sup>17</sup> strict liability would “be the law of the future in defective products cases.”<sup>18</sup> When this change had failed to materialize by 1960, Prosser published *The Assault on the Citadel* in which he claimed to find a “trend” toward strict liability for defective products.<sup>19</sup> In 1965, § 402A of the Second Restatement of Torts explicitly applied strict liability to defective products.<sup>20</sup> Interestingly enough, Prosser was himself the draftsman of that section. Then, in 1966, Prosser published *The Fall of the Citadel* in which he announced the victory of the theory of strict liability for defective products.<sup>21</sup>

As a final illustration of the substantive transformation of tort law to a justice system,

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<sup>15</sup>*Id.* at 430.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 689.

<sup>18</sup>*Id.* at 692.

<sup>19</sup>William Prosser, *The Assault on the Citadel*, 69 *Yale L.J.* 1099 (1960).

<sup>20</sup>RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>21</sup>William Prosser, *The Fall of the Citadel*, 50 *MINN. L. REV.* 791 (1966).

consider the doctrine of comparative negligence. Under the assumption that the purpose of tort law is to provide “a remedy for the everyday hurts inflicted by the multitudinous activities of our society,” there would be no reason to totally bar recovery to injured parties who were not totally to blame for their injuries. It would be unfair to force them to bear the entire cost of an injury for which they were only partially responsible. Thus, the shift from the barrier of contributory negligence to the gateway of comparative negligence is a logical consequence of a perspective that sees tort law as designed to effectuate a scheme of socially just compensation.

A good summary of the effect the conception of tort law as a justice system had on the substance of the law has been provided by White. As he expresses it,

To conceive of tort law as ‘public law in disguise’ . . . suggested that tort doctrines were, and perhaps always had been, exercises in public policy. That being so, there seemed nothing wrong with legislative invasions of common law areas, such as comparative negligence, with sweeping doctrinal change if public sentiment demanded it, or with the transformation of Torts into a subject, like administrative law, that used private disputes as a basis for making public rules.<sup>22</sup>

The transformation to a justice system affected not only the substance of tort law, but its procedures as well. Rather than go into detail, let me merely highlight some of the procedural implications of the new conception of tort. 1) If the purpose of tort law is to ensure that injured parties receive compensation as a matter of social justice, injured parties should not be barred from recovery due to arcane pleading requirements. This provided the rationale for abandoning code pleading in favor of more liberalized notice pleading. 2) If the purpose of tort law is to ensure that injured parties receive compensation as a matter of social justice, then injured parties should not be barred from recovery because the tortfeasors have fled the jurisdiction. This

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<sup>22</sup>WHITE, *supra* note 4 at 178.

provided the rationale for the adoption and continual expansion of the reach of long arm statutes.

3) If the purpose of tort law is to ensure that injured parties receive compensation as a matter of social justice, then injured parties should not be barred from recovery due to lack of access to information in the possession of the tortfeasor. This provided the rationale for expanding the scope of discovery. 4) Finally, if the purpose of tort law is to ensure that injured parties receive compensation as a matter of social justice, then injured parties should not be barred from recovery due to the lack of privity of contract with the tortfeasor. This provided the rationale underlying the early development of the law of products liability.

Consider also that if tort law really is “public law in disguise,” then liberalizing the conditions under which punitive damages may be awarded makes perfect sense. Although they may not be necessary to resolve the dispute between the parties, they are extremely effective at discouraging socially disadvantageous behavior.

A final implication of this view of tort concerns the role of the jury. For if the purpose of tort law is not merely to fairly resolve particular disputes, but to realize an abstract conception of justice, then complete control of the outcome of cases cannot be left in the hands of the jury.

Although the ordinary people who make up the jury may be well equipped to decide what is fair to the parties before them, they are certainly not qualified to consider how their decision promotes or retards the realization of the goals of social justice. For this reason, the jury must be restricted to deciding the facts of the case only. Questions of law must remain in the hands of legal professionals who understand the larger purpose of the law and can ensure that that purpose is served.

In sum, the result of the past century and a quarter of tort scholarship has been the

transformation of American tort law from a peace system into a justice system, a set of rules designed to provide compensation to injured parties in accordance with the demands of social justice. As a justice system, our contemporary tort law is characterized by four features. First, because the goal of the system is socially just compensation rather than merely the preservation of peace, the tort system is not reserved only for serious controversies that cannot be effectively resolved in any other way. There is no reason to view a lawsuit as a last resort; it is simply a means of claiming one's entitlements. Therefore, any unjust injury can give rise to a lawsuit. Second, as mentioned above, it really does not make sense to have the jury deciding the cases. Because ordinary people do not have the education and insight necessary to appreciate the larger social purpose the system serves, they cannot be trusted to reach proper decisions. Thus, they are restricted to making findings of fact and assigning damages, while judges make the decisions of law. (Actually, it is not really clear why the jury should have even this limited role. Recognition of this may well be behind many of current tort reform proposals that would further curtail the power of the jury.) Third, the system is no longer truly evolutionary in nature. Although as part of the common law there is a sense in which the system continues to evolve, the rules no longer grow purely in response to the need to resolve new types of disputes. Rather, as new rules arise in response to changing conditions, they must be shaped (by the judges who rule upon the law and the academics who comment on these rulings) to fit the conception of justice the system embodies. Since the system grows according to a rationally constructed ideal of justice (what Robert Nozick has called a patterned conception of justice<sup>23</sup>), it exemplifies a centrally planned, rather than spontaneous, order. Finally, the system is not what I have previously characterized as

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<sup>23</sup>See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 155-60 (1974).

“consumer driven.” The consumers of legal services do not utilize the system merely to resolve intractable interpersonal disputes, but to vindicate their entitlement to have wrongs they have suffered legally redressed. The rules of the system do not develop in response to lawsuits brought to satisfy an urgent consumer demand; rather, lawsuits arise in response to rules of entitlement which embody a particular conception of social justice. Thus, it is the judges, legislators, and academics who produce these rules that ultimately determine the nature of the lawsuits that will be brought. Accordingly, it might not be inaccurate to describe the system as “producer driven.”

#### IV.

I have taken up a great deal of your time this morning telling you the story of how our tort system was transformed from a peace system to a justice system. I'd like to take a bit more to ask you to consider the consequences of this transformation. Let's begin with the intended consequences; for like all social engineers, the theorists who helped transform tort law from an unorganized jumble of rules designed to preserve social peace to a rationally integrated body of rules designed establish social justice had only the best of intentions. There were, of course, several intended ends. At a general level, the reformers hoped to create a tort system in which there was a remedy for every wrong. At a more specific level, in the case of products liability for example, the reforms were designed to provide increased protection against injury for consumers. But in the main, the purpose of the reformers was to create a form of social insurance that would equitably spread the cost of injuries across the entire society. Since it was unfair to simply “let losses lie where they fell,” the reformed tort system was intended to relieve unfortunate victims from having to bear the entire cost of their injuries themselves. Tort law was to be a mechanism for shifting the burden of the inevitable injuries that resulted from the conditions of modern life

onto shoulders of those who were best able to bear it.

There seems little doubt that the reformed system has done a good job of realizing these ends. Consumers of commercial products do, in fact, have more protection against injury than formerly, and it is clear that many more wrongs are subject to legal redress. And if the complaints of the business community are to be believed, tort law has obviously become an extremely effective cost-shifting mechanism.

This, of course, brings us to the unintended consequences of the transformation. They're called the litigation explosion.

In retrospect, there should be nothing surprising about the litigation explosion. A moment's reflection will show that this must be the inevitable consequence of the proper functioning of the reformed tort system. If we intentionally create a tort system in which, to use Prosser's words, "the business of the courts is to make precedent where a wrong calls for redress even if lawsuits must be multiplied,"<sup>24</sup> then, pretty clearly, lawsuits will be multiplied. If the purpose of the system is to vindicate the entitlements of all citizens arising from the demands of social justice, then 1) as the demands of social justice expand, new causes of action must constantly arise to address newly recognized wrongs and forms of harm, 2) the system's procedures must facilitate plaintiffs' attempts to get their cases before the courts, and 3) the system must include a punitive element to discourage socially harmful behavior on the part of defendants. Given these goals, it should be clear that the litigation explosion is not some unfortunate glitch in the system. The system *is designed* to produce a litigation explosion.

Hindsight is, of course, 20/20. At the time, however, nothing of the kind was anticipated.

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<sup>24</sup>PROSSER, *supra* note 13.

The thinking seems to have been that compensating injured parties at the expense of deep pockets who could afford it was not only fair, but would provide an incentive to avoid the dangerous practices likely to cause injury. This would reduce the number of future injuries, which, in turn, would mean fewer compensatory payments, and eventually we would all live happily (or at least safely) ever after. The flaw in this reasoning is that it fails to consider the effect the system's incentives have on plaintiffs as well as defendants. It turns out that if you make it easier and more rewarding for people to bring lawsuits, they will bring more of them whether warranted or not. By overlooking this consideration, the social planners greatly underestimated the material costs of the reformed system. They had no idea that the litigation explosion would be the price society had to pay for their idea of social justice.

## V.

Toward the end of his life, Friedrich Hayek wrote a book entitled *THE FATAL CONCEIT*.<sup>25</sup> The title refers to the belief among intellectuals that they can gather enough knowledge and have sufficient powers of reason to improve society by making it conform to a rational plan. Hayek contends that the belief that evolution can be improved upon by rational, scientific central planning causes intellectuals to disregard the wisdom contained in the way dynamic social systems traditionally develop. According to Hayek, the intellectuals' "conceit" that they are wise enough to engineer a better society is a fatal one because in any sufficiently complex system of social interaction, it is impossible to gather the knowledge of local conditions and predict human reaction to the extent necessary to the success of any centrally controlled plan.

Hayek's observations suggest that when it comes to matters of legal reform, we usually

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<sup>25</sup>FRIEDRICH A. HAYEK, *THE FATAL CONCEIT* (1988).

ask the wrong questions. Because we are ourselves guilty of Hayek's conceit, we tend to begin our considerations with the question of what *we* can do to reform the legal system and then set off on a search for the *plan* that will produce a more just society. Were we a bit more modest, we might see that the proper question is actually a comparative one: Which is likely to produce better results in the long term, an unplanned system that evolves through a process of trial and error or a system that is centrally planned and consciously directed? In the context of the tort reform debate, this means that the essential (and entirely overlooked) question is whether we would be better off with a true common law tort system that evolves without a guiding intelligence or with a "reformed" tort system in which some human agency (whether legislators, judges, or academic theorists) consciously directs the law toward a desired end.

The essential characteristic of a true common law system is that it is never correct, but always self-correcting. A common law system is continually changing in response to problem situations that are not adequately addressed by the system as it stands. As technology, economic conditions, and accepted ethical beliefs change over time, conflicts arise that the rules of the system cannot effectively resolve. Thus, at any particular point in time, there will be identifiable defects in any common law system, and hence, *at any particular point in time*, legislators, judges, and academic commentators will be able to articulate legitimate criticisms of the state of the law. However, if left alone, the common law will evolve solutions to these problems. For, it is precisely the dissatisfaction felt over the way the current rules of the system deal with new and problematic cases that provides the impetus to try something new and results in decisions that go beyond the current state of the law. Decisions that do not effectively address the problem are not repeated; those that do become incorporated into the body of the law. Thus, a true common law system is

both a dynamic system, one which is constantly changing over time, never perfectly adapted to conditions but always in the process of adapting, and a learning system, one which employs the method of trial and error to solve present problems even as future ones are developing.

On the other hand, a centrally planned, consciously directed legal system is seldom correct, and even when it is, it does not long remain so. Centrally planned legal reforms, whether instituted by legislators, judges, or academic theorists, are usually attempts to perfect the system by correcting the identifiable defects in the present state of the law. If the reformers were omniscient, this might work. For then they would be able to precisely gauge the effect of their reforms on all of the various parties affected and accurately predict how each of these parties would adapt their behavior to the changed circumstances. Unfortunately, legislators, judges, and academic theorists are all human beings. Therefore, they have a tendency to get things wrong. Furthermore, even if they do hit upon the correct solution to the law's present problems, the gains are usually transitory. For once again, the reformers' lack of omniscience makes it unlikely that they will correctly anticipate and correct for the future technological, economic, and social developments that can skew or defeat the reforms or create entirely new problems. On this score, I might point out that the complaints giving rise to the present-day tort reform movement are the direct result of past reforms intended to correct what was then regarded as the tort system's chief defect, the failure to adequately compensate injury victims.

Centrally planned legal reforms are inherently static in nature. The reform is designed to perfect the system once and for all. But for it to accomplish this end, individual rulings must conform to the plan. Therefore, the evolutionary growth of the system through trial and error is cut off. This means that the planners have to get things right the first time. Unfortunately, the

inherent limitations on human beings' insight into the functioning of dynamic social systems usually guarantee that this will not be the case. Because central planning is not self-correcting, centrally planned legal reforms are virtually certain to fail over time.

These considerations explain my opposition to tort reform. I am opposed to the present proposals for tort reform for the same reasons I am opposed to the past reforms that created the present situation. If the real question of the tort reform debate is not how we can perfect the system, but whether we are better off with an imperfect, but self-correcting system or with the inherently static result of what our best minds blessed with all available information can come up with, I am suggesting that we might do better with the former. To put the matter concisely, sometimes the right thing to do is simply to butt out.

In the preface to his review of the history of tort law over the last 150 years, G. Edward White stated:

I would take some comfort in the thought that this study was written as an intended antidote to the growing confidence among many of my peers in legal education that a combination of "influence," analytical skill, global reach, and arrogance can enable one to make over the world in one's theoretical image.<sup>26</sup>

In my opinion, just such an antidote is still needed.

Let me hasten to add that this is not the counsel of despair, merely of moderation, or perhaps more accurately, of patience. An interesting fact about juries is that they learn, something that cannot always be said for our legislators and leading intellectuals. For the past several years,

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<sup>26</sup>WHITE *supra* note 4 at xii.

the public has been bombarded with news magazine and television news reports on the costs of the litigation explosion, as well as political posturing from our public officials about how paying millions of dollars to little old ladies who spill coffee on themselves is causing girl scout troops and little leagues to close down. As a result, the ordinary people who serve on juries have been learning that corporate America is not a cornucopia supplying cash that can be distributed to the unfortunate without cost to the greater society. The diffusion of this knowledge may now be beginning to be felt. The National Law Journal reports that the overall number of “massive verdicts” declined last year, as did the level of ordinary awards in personal injury cases that involved neither medical malpractice nor products liability.<sup>27</sup> Furthermore, the ordinary people who comprise juries are often directly aware of the effects of the expansion of tort liability. It has been suggested that the lack of inflated awards in automobile accident litigation is due to jurors’ appreciation of the effect this has on their automobile insurance premiums.<sup>28</sup> It may just be that if our politicians and intellectuals could summon the patience to allow the common sense of the ordinary citizen to surface, we might find that even in its present corrupted form, the tort system is still adequately self-correcting. Of course, since in the current political climate it is unlikely that we will see such forbearance, I expected to be invited back here in about fifteen years to speak on the proposed reforms to redress the ills produced by the legislative reforms of the law professors’ reforms of the common law tort system.

This last point brings me to the only type of tort reform I am willing to advocate, the liberation of the jury. Right now, the jury is limited to finding the facts and assessing damages

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<sup>27</sup>*Verdict Trends in 1995 Disregard the Clamor*, NAT’L L.J. February 5, 1996, at C2.

<sup>28</sup>See FLEMING, *supra* note 3 at 169.

within the confines of the judge's instructions as to what constitutes a proper cause of action. I would support freeing the jury to fully decide cases according to the conscience of its members. Juries do indeed tend to find in favor of the plaintiff and issue large awards when given instructions derived from a theory of tort that regards placing the cost burden of injuries on the parties best able to bear it as a requirement of social justice. I suspect, however, that if juries were instructed simply to hear both sides of the dispute and render a fair decision, this would occur less often.

Solon of Athens, one of the ancient world's seven wise men, was the author of the Athenian constitution. He presented it to the Athenians on the condition that they make no alterations to it for a period of ten years without discussing the matter with him first. He then left Greece for ten years. I think it is a shame that we do not possess this kind of wisdom today. For if we returned to jurors the power to decide cases according to their conscience and then simply left things alone for ten years, I believe we would have effectively reformed the American tort system. I would be willing to offer some direct arguments for this conclusion, but I'm afraid that would require more time than we have this morning. Perhaps I'll save it for when I am invited back in fifteen years.