WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES?

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INTRODUCTION

The most fundamental question about America's liability, or tort law, today focuses on who should make it — legislatures or courts? The answer to this question has far more long-term significance than other disputes that fill press stories and discussions about the subject, such as whether there should be limits on punitive damages awards. If courts declare themselves the "exclusive oracle" of who can and should decide tort law, debate about whether there should be any limits on liability becomes academic, at best. Judges will simply answer all of the questions that surround the debate.

The question about who should make law is not academic; tort law affects people's lives, every day. Tort law can discourage conduct such as medical malpractice and help remove truly defective products from the marketplace. But, unchecked, unbalanced tort law can remove good products from the marketplace, discourage innovation, limit the supply of necessary medical services, and unduly raise costs for consumers.

In light of the profound impacts that tort law may have on society, it is important that state legislatures, as well as courts, have their voices heard. If legislatures have a rational basis for their proposals, they should not be silenced by judges who believe that "they know better."

As this monograph will demonstrate, that is precisely what is going on in some states today. In little over a decade, over *sixty* state court decisions have used provisions in *state* constitutions to nullify attempts by state legislatures to reform America's tort law.[1] The courts declared legislative efforts "unconstitutional" under a variety of provisions in *state* constitutions. Never before have *state* constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The pace is unparalleled in American history, without precedent, and simply wrong.

In addition, some judges have, on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy. The courts have, in some instances, acted as legislators.

This monograph will show that these decisions have ignored fundamentals of legal history and have unduly tipped the balance of power from legislatures toward courts, and will suggest how and why that balance should be restored.

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[1] *See* APPENDIX A ("Tort Reform Laws Held Unconstitutional By State Courts After January 1983"). *Compare* APPENDIX B ("Tort Reform Laws Upheld As Constitutional By State Courts After January 1983").

I.

A PAGE OF LEGAL HISTORY

A. The Reception Statutes — Legislative Power Delegated to Courts

In the battle between state courts and legislatures, a fundamental part of legal history has been ignored. Legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to "receive" the Common Law of England as of a certain date and have that provide a basis for a state's tort law. In the same piece of legislation, called a "reception statute," state legislators *delegated* to state courts the authority to develop the English Common Law in accordance with the "public policy" of the state.[2] These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.

Early state legislatures delegated the task of developing tort law to state judiciaries, because the legislatures did not have the time or perhaps the inclination to formulate an extensive "tort code." They faced more extensive and pressing tasks, such as the formulation of the very basics of a "new society." As some "reception statutes" made clear, however, what the legislature delegated, it could retrieve, at *any* time.

B. From Incrementalism to "Making" Tort Law

For over 200 years, the authority delegated to courts to "make" tort law continued and, in most instances, worked well.

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[2]*See* APPENDIX C (providing state reception statutes).

Courts developed the "common law" in a slow, incremental fashion in accordance with societal needs.

In the 1970's, however, some courts strayed from this incremental approach. Judicial "lawmaking" was no longer gradual or evolutionary, but bold-faced, new, and sometimes revolutionary in content.

For example, some courts extended the concept of punitive damages into new and unchartered territory. For over 200 years, punitive damages were reserved for a small class of torts involving intentional wrongs such as assault and battery,[3] libel and slander,[4] malicious prosecution,[5] false imprisonment,[6] and intentional interferences with property such as trespass and conversion or destruction of property.[7] The cases involved

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[3]*See, e.g., Corwin v. Watson*, 18 MO. 71 (1853); *Porter v. Seiler*, 23 PA. 424 (1854); *Lyon v. Hancock*, 35 CAL. 372 (1868); *Ward v. Blackwood*, 41 ARK. 295 (1883); *Trogden v. Terry*, 172 N.C. 540 (1916).

[4]*See, e.g., Sheik v. Hobson*, 64 IOWA 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 KY. 307 (1887); *Coffin v. Brown*, 50 A. 567 (Md. 1901); *Ellis v. Brockton Pub. Co.*, 84 N.E. 1018 (Mass. 1908).

[5]*See, e.g., Brown v. McBride*, 24 MISC. 235, 52 N.Y.S. 620 (1898); *Jackson v. American Tel. & Tel. Co.*, 51 S.E. 1015 (N.C. 1905).

[6]*See, e.g., Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Schenckler v. Risley*, 4 ILL. 483 (1842); *Taber v. Hutson*, 5 IND. 322 (1854); *Parsons v. Harper*, 57 VA. 64 (1860); *Hamlin v. Spaulding*, 27 WIS. 360 (1869); *Green v. Southern Express Co.*, 41 GA. 515 (1871); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 KAN. 350 (1887).

[7]*See, e.g., Taylor v. Giger*, 3 KY. 586 (1803); *North v. Cates*, 5 KY. 591 (1812); *Treat v. Barber*, 7 CONN. 274 (1828); *Huntley v. Bacon*, 15 CONN. 267 (1842); *Clark v. Bales*, 15 ARK. 452 (1855); *Schindel v. Schindel*, 12 MD. 108 (1858); *Dorsey v. Manlove*, 14 CAL.

basically one or perhaps a few injured plaintiffs and one defendant who had engaged in intentional wrongdoing. Then, some courts applied the punitive damages concept to product liability without careful consideration of the fact that suddenly there was one defendant with many potential plaintiffs who could seek to punish the defendant again for essentially the same conduct. One of the most perceptive and learned judges of this century recognized the problem and warned against it.[8]

In addition, some state courts retroactively changed the standard for when punitive damages could be imposed. They began to use vague phrases such as "gross negligence" as the standard for imposing punishment.[9] These looser standards could lead to severe economic punishment; they gave potential

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553 (1860); *Lynd v. Picket*, 7 MINN. 184 (1862); *Brown v. Allen*, 35 IOWA 306 (1872); *Singer Mfg. Co. v. Holdfodt*, 86 ILL. 455 (1877); *Bradshaw v. Buchanan*, 50 TEX. 492 (1878); *Huling v. Henderson*, 161 PA. 553 (1894).

[8]In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), Judge Henry Friendly noted the court's "gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Judges in more recent times, even some who are perceived to be quite sensitive to plaintiffs, have recognized the same problem, but have suggested that individual judges cannot solve the problem, only the United States Supreme Court or Congress can. *See Juzwin v. Amtorg Trading Co.*, 718 F. SUPP. 1233 (D.N.J. 1989) (Sarokin, J.), *rev'd on other grounds sub nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990). *See generally* Victor Schwartz, Mark Behrens and Lori Bean, *Multiple Imposition Of Punitive Damages: The Case For Reform*, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

[9]*See, e.g., Wisker v. Hart*, 766 P.2d 168 (Kan. 1988); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991); *Universal Servs. Co. v. Ung*, 904 S.W.2d 638 (Tex. 1995) (noting that, in 1995, the Texas legislature eliminated gross negligence as a ground for punitive damages in all but wrongful death claims).

defendants little "notice" of what was expected of them in terms of behavioral norms.[10]

In another example of judicial lawmaking, some courts went beyond imposing so-called "strict liability" against product manufacturers and, without careful consideration for public policy implications, created absolute liability — manufacturers would be liable for their failure to warn even when it had been impossible to discover a risk or for a design when there was no feasible alternative way for the product to be made.[11] The implications of these decisions on our society as a whole (*e.g.*, their effect on product innovation or insurability) were ignored.

C. Legislatures Retrieve Their Power

In response to these cases, some state legislatures in the 1970s began to "retrieve" their clear historical right to decide tort law. Most state courts respected what their legislature had done — these were appropriate legislative prerogatives and policy choices.[12]

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[10]In *BMW of North America, Inc. v. Gore*, 116 S. CT. 1589, 1598 (1996), the United States Supreme Court said: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

[11]*See, e.g., Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318 (Ma. 1992); *Ayers v. Johnson & Johnson Baby Products Co.*, 818 P.2d 1337 (Wash. 1991).

[12]*See generally* JOHN W. WADE *et al.*, PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 807-09 (9th ed. 1994).

In the 1980's, the involvement of state legislatures in deciding tort law increased.[13] Unfortunately, at the same time, the issues involved became politicized. Target defendant groups, such as physicians, engineers and architects, and product manufacturers and sellers, lined up on one side. Organized plaintiffs' lawyer groups and sometimes state and national bar associations, as well as professional "consumer" groups, lined up on the other. When legislatures determined that some modification of their state's tort law should occur, plaintiffs' bar groups challenged these reforms under provisions of state constitutions.

II.

LEGISLATURES VERSUS COURTS: WHO SETS PUBLIC POLICY?

Most people think of "the law" in terms of legislation, a prospective rule enacted by the legislature that they can read and understand. They appreciate that, however imperfect, the development of "law" by legislatures is a public event with hearings, debates, and compromise. The public also knows that they have the *final* say about the wisdom of what legislators may do or may not do — if the majority of the public believes that legislation is not in accord with the public interest, they can "retire" the legislator who supported it. This is particularly true of so-called "tort reform," which is very public in its making.

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[13]For example, *Beshada, supra* note 11, and *Halphen, supra* note 11, were overruled by legislation so as to require proof of defect. *See* N.J. REV. STAT. § 2A:58C-3(3) (1987); LA. REV. STAT. ANN. § 2800.56(1) (1991). A Maryland case which held a handgun manufacturer strictly liable for personal injuries resulting from a properly functioning "Saturday Night Special," *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985), was similarly overruled by legislation. *See* MD. ANN. CODE art. 27, § 36-I(h) (West Supp. 1990).

By way of contrast, the development of the "common law" by judges is not made in the public light, is retroactive, and often is not understood by the public. In addition, judges in many states are appointed, not elected, so the public often lacks an effective check on judicial decision-making.

Yet, most of America's tort law has been "common law." What judges say they are doing is not "making law," but "discovering" the law from past precedents. They look to past cases to "discover" what the law is and should be today. Lawyers know, however, that sometimes there really is *nothing* to discover in the past. In such a case, judges can sometimes measure the norms of society and "fill in the gaps" of the common law. But, when judges go beyond this and decide to create a new duty that was not recognized previously in the law and award damages for its breach, they have entered into a legislative role.[14]

It may be argued that the creation of a "new cause of action" is simply a traditional gradual development of the common law. It is not. Judicial creation of new legal duties is different in both form and substance from traditional common law developments in the law of torts. They have generally been incremental in nature.

For example, in the 19th Century in every state, a person's right to recover for an injury was barred if he or she was in any way at fault.[15] In 1854, a Pennsylvania judge called the defense "a rule from time immemorial" and ventured to guess that it was

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[14]*See generally Harrison v. Montgomery Co. Bd. of Educ.*, 456 A.2d 894, 904 (Md. 1983) (stating that the judiciary should defer "to the legislature where change is sought in a long-established and well-settled common law principle").

[15]*See* WILLIAM PROSSER and PAGE KEETON, THE LAW OF TORTS § 65 at 451-52 (5th ed. 1984). The doctrine of contributory negligence had its origin in the English case of *Butterfield v. Forrester*, 103 ENG. REP. 926 (K.B. 1809).

"not likely to be changed for all time to come."[16] The judge who wrote the opinion was a poor prognosticator of history, but he must be given some credit as the rule took more than 150 years to change in common law development. Gradually, state courts narrowed this so-called "contributory negligence defense" and developed exceptions to it, such as not applying it when the defendant had a "last clear chance" to avoid an accident or where the defendant engaged in "reckless" behavior.[17] But, it was not until 1973 that the first common law decision permitted comparative fault as a general rule, and that was in a state that had already used comparative fault in a wide matrix of specific statutes.[18] This was not the creation of an entirely new duty or obligation, only the gradual modification of a defense.

When other changes have developed in the common law, such as the recognition of strict products liability, they have also occurred gradually. For example, it took almost *fifty* years from the time of then-Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*,[19] removing the privity barrier in product liability negligence cases, before the New Jersey Supreme Court decided *Henningsen v. Bloomfield Motor Co.*,[20] removing the privity barrier in implied warranty actions involving personal injury. Three additional years passed before Justice Traynor, writing for the California Supreme Court, recognized privity-free strict liability in tort in *Greenman v. Yuba Power*

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[16]*Pennsylvania R.R. Co. v. Aspell*, 23 PA. 147, 149 (1854).

[17]*See* WILLIAM PROSSER and PAGE KEETON, *supra* note 15 at 462-464.

[18]*See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). *See generally* VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE (3rd ed. 1994).

[19]111 N.E. 1050 (1916).

[20]161 A.2d 69 (N.J. 1960).

Products, Inc.[21] Several more years passed before the rule of strict product liability became the common law of most states.[22] Even when this expansion occurred, a fault base remained in the key areas of product design and warnings.[23]

The same slow, meticulous, evolvement of the common law has been true with other tort law developments, such as the modification of traditional immunities, permitting recovery for a prenatal injury, or modification or abolition of the assumption of risk defense. Even when duties were created in the distant past they were minor in scope. Today, the retroactive creation of duties is basically unfair and can have major economic and social impacts.

A. Judicial Lawmaking Adversely Affecting Plaintiffs

This monograph has shown some examples from the 1980's where judges abandoned the "incremental" approach that is appropriate for the judicial system. Plain and simple, the courts acted as legislators.

Unfortunately, in the 1990's, in some situations, this trend has accelerated. In general, this activity has assisted plaintiffs and the plaintiffs' bar, but not always. When judges act like

[21]59 Cal. 2d 57, 62, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[22]*See* JOHN W. WADE *ET AL.*, supra note 12 at 717.

[23]*See* RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft (Preliminary Version) Oct. 18, 1996).

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legislators, they can adversely affect plaintiffs as well as defendants.[24]

For example, in *Life Insurance Co. of Georgia v. Johnson*, the Supreme Court of Alabama recently decided that *half* of all punitive damages awarded in Alabama should go to a "state general fund."[25] When the court created this rule, it cited *no* precedent from judicial decisions of Alabama or any other state. Of course, the court conducted no hearings on the subject. In fact, the issue of whether punitive damages should go to a state general fund was not even argued before the court.

Whether any percentage of an individual's punitive damage award should go to a state fund is a decision for a state legislature. A legislature can consider key public policy issues that the Supreme Court of Alabama ignored, such as the issue of whether allocating a portion of a punitive damages award to the

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[24]For example, some state courts have abolished joint and several liability. *See Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503 (Ky. 1985); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Some courts have also raised the burden of proof needed to impose liability for punitive damages. *See Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980); *Rodriguez v. Suzuki Motor Corp.*, 1996 WL 726788 (Mo. Dec. 17, 1996) (*en banc*).

[25]1996 WL 202543 (Ala. April 26, 1996), *vacated and remanded for further consideration*, 117 S. CT. 288 (1996).

state may create a conflict of interest between a plaintiff's attorney and his or her client.[26]

Conflict of interest problems are not the only legislative issue involved in the question of whether it is sound public policy to have a portion of a plaintiff's punitive damage award go to the state. There also is the question of whether such funds should go to a general fund or some specialized fund. The legislature also could look to the experience of other states that have enacted legislation directing a portion of a plaintiff's punitive damage award to the state.

If the Alabama legislature held hearings on the issue of whether all or a portion of punitive damage awards should go to the state, it well might decide that the idea is unsound. In any case, it would be acting on more complete information and would be more aware of the issues that need to be addressed in evaluating the idea.

B. Judicial Lawmaking Adversely Affecting Defendants

A basic fundamental principle of tort law for over 200 years is that liability should only be imposed when a person has suffered an injury. There are reasons for this basic rule. In order

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[26]In the *Johnson* case, the court stated that plaintiff attorneys are to receive their "contingency" fees out of the *entire* punitive damages award, not simply the portion of the award that flows to the client. Thus, the attorney has a strong motive to pursue punitive damages even though his or her client may not. First, the client has to pay federal income tax on the punitive damages portion of any award received, but not on the portion of a settlement or award deemed to be "compensatory." Second, when cases go to trial, plaintiff attorney contingency fees are usually more (35-50%) than when cases are settled (33%). Although the choice of whether or not to accept or reject a settlement is up to the client, in practical terms, the client usually follows the lawyer's advice.

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to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective manifestation that an individual has been harmed.

Nevertheless, a few courts have determined that it is appropriate to award damages to a plaintiff for so-called "medical monitoring," even though the individual currently suffers no harm and no symptoms of harm.[27] Whether individuals should receive payment from private parties for medical monitoring is a question for legislatures to answer. There are several reasons why this is true.

First, courts cannot assure that awards for medical monitoring will actually be used for that purpose — tort awards are made in lump sums. The lump sum award could be used for purposes having *nothing* to do with medical monitoring. Legislation could address this problem. Second, courts that have decided to create this "new tort" have given no consideration to the fact that the plaintiff already may have opportunities for medical monitoring under workers' compensation or a health insurance plan. A legislature could consider whether the "new tort" should be limited to people who do not have existing resources that provide for medical monitoring. Third, courts do not have the scientific knowledge to determine when and if medical monitoring is appropriate. Legislators are in a better position to obtain such information.

Broad and complex tort policy issues, such as medical monitoring, are more appropriately left to legislatures, because of their ability to hear from a wide array of witnesses and create prospective rules of law. Courts are not as well-equipped to resolve such issues, principally because their perspective is

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[27] *See Ayers v. Township of Jackson,* 525 A.2d 287 (N.J. 1987); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) ("*Paoli II*"), *cert sub nom. General Elec. Co. v. Ingram*, 499 U.S. 961 (1991); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Buckley v. Metro-North Commuter R.R. Co.*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

generally limited to arguments from opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively, denying "fair notice" to the public about rights and responsibilities that may result from significant new changes in the law. Legislative questions deserve legislative answers — they are not questions that can or should be addressed by courts.

III.

STATE "CONSTITUTIONALISM" RUN WILD

As the introduction indicated, in slightly over a decade, courts have nullified state tort law legislation over *sixty* times.[28] In each of these cases, state courts have turned to a state's constitution rather than the federal constitution.

By utilizing a state's constitution, state courts, as a practical matter, have precluded defendants from raising federal constitutional questions that could be appealed to the United States Supreme Court. The Supreme Court has tried to distinguish situations in which a legislature violated a person's constitutional rights from situations in which legislatures have made a public policy decision with which Justices of the Supreme Court might not have personally agreed. Apart from a very bleak and highly discredited period in the Court's history which began around the turn of the century and ended in the mid-1930s (known as "the *Lochner* era"), the Court has shown deference to legislative policy judgments.[29] Most of the decisions nullifying state tort reforms

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[28]*See* APPENDIX A.

[29]*See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (1978).

have *not* given state legislative policy judgments the same level of respect. As a result, state court judicial decisions have had an unprecedented, crushing effect on the prerogative of state legislatures in the area of liability law.

Perceptive plaintiffs' bar scholars have hailed this development as one of the most important and significant occurrences in the development of tort law in the past fifty years.[30] Many of these decisions, however, were premised on the assumption that courts had a "fundamental and exclusive right" to make state tort law. The decisions ignored basic legal history — the "reception" statutes. They also betray a solipsistic view of the formulation of public policy — the formulation of tort law has never been an exclusive province of *any* one branch of government. In addition, the cases often show judges substituting their own views of what tort law "ought to be" for that of the legislature; they do not represent sound constitutional law decisions. More importantly, like the United States Supreme Court's *Lochner* era cases, the decisions create precedents so that courts in the future can nullify a wide array of state legislation, whether "conservative" or "liberal," in support of tort reform or not.

We will explore three examples: modifications to the collateral source rule, statutes of repose, and punitive damages limitations.

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[30]*See* Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1996, at 51 (hailing the "revival of state constitutionalism" as one of the greatest developments to help plaintiffs' lawyers over the past 50 years). The problem with this statement, in part, is that there has been no "*revival*" — there is *no* historical evidence that state courts have *ever* used state constitutions in the manner that they are currently being used to nullify state tort reforms.

A. Modifications to the Collateral Source Rule

The collateral source rule, which developed in common law decisions, says that a plaintiff can be paid even though he or she already has received compensation for a specific harm if that compensation came from a source that is not connected with (*i.e.*, is "collateral" to) the defendant. The common law rule is based on the assumption that the defendant is a "wrongdoer," the plaintiff has been "provident" in buying insurance, and the defendant should not benefit from the plaintiff's providence.

In modern times, however, plaintiffs may benefit from the "collateral source rule" even though the sources of payment for their injuries do not stem from their own "providence." A plaintiff may have received workers' compensation benefits or state health benefits or other funds that he did not create, or insurance benefits that he did not purchase. With these facts in mind, plus a fiscal resources policy judgment that a "double recovery" is inappropriate, a legislative public policy determination can be made that the old common law collateral source rule should be modified or abolished. A number of state courts have agreed that legislative action in this area is appropriate.[31] Other courts, however, have used a variety of state constitutional provisions to sweep away legislative changes to the

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[31]*See Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); *Blue Cross and Blue Shield of Fla., Inc. v. Matthews*, 498 So. 2d 421 (Fla. 1986); *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985); *Heinz v. Chicago Rd. Inv. Co.*, 549 N.W.2d 47 (Mich. App. 1996) ; *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990); *Johnson v. Farmers Union Cent. Ex., Inc.*, 414 N.W.2d 425 (Minn. App. 1987); *Buchman v. Wayne Trace Local School Dist. Bd. of Educ.*, 652 N.E.2d 952 (Ohio), *reconsideration denied*, 655 N.E.2d 188 (Ohio 1995); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991).

collateral source rule.[32] When these decisions are carefully examined, regardless of the state constitutional provision chosen to strike down the legislative action — "open courts" or "equal protection" or "right to jury trial" — they often appear to be little more than "we know better than you how to make tort law" decisions.

B. Statutes of Repose

Statutes of repose bar liability claims a certain number of years after a product is sold or an activity is engaged in by an engineer or architect or physician or some other professional. They represent a legislative policy judgment that after a certain number of years it is inappropriate to allow a lawsuit regarding a product that is very old and may have been altered, modified, or not repaired, or an activity that is long since over. Most state courts have recognized that statutes of repose represent a public policy "judgment call" and have upheld them,[33] but some courts have treated statutes of repose as if they were limits on a person's *fundamental* civil rights or liberties.[34] They are not. They

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[32]*See American Legion Post No. 57 v. Leahey*, — So. 2d —, 1996 WL 390622 (Ala. July 12, 1996); *Whitely v. Sebas*, 1991 WL 32038 (Conn. Super. Feb. 27, 1991); *Denton v. Con-Way Southern Express, Inc.*, 402 S.E.2d 269 (Ga. 1991); *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987); *Wentling v. Medical Anesthesia Servs., P.A.*, 701 P.2d 939 (Kan. 1985); *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995); *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994).

[33]*See* Appendix B.

[34]*See Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983); *Turner Const. Co., Inc. v. Scales*, 752 P.2d 467 (Alaska 1988); *Hazine v. Montgomery Elev. Co.*, 861 P.2d 625 (Ariz. 1993); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *McKinzie v. AC&S*, No. 96-L-126 (Ill. Cir. Ct., Madison Cty. June 29, 1996); *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991); *Tabler*

represent a public policy decision and one that can be reversed by the electorate.

C. Punitive Damage Limitations

People accused of crimes are given at least three fundamental rights: notice of the wrong that is to be punished; a firm burden of proof (*i.e.*, "beyond a reasonable doubt"); and notice of the "sentence" that may be imposed upon them. Punitive damages "reform" laws generally contain one or more of these three basic elements: a definition of when punitive damages are to be awarded; a burden of proof standard that reflects the quasi-criminal nature of punitive damages; and an outer limit on the amount of punitive damages which can be awarded.[35] These efforts are directed at providing defendants in punitive damages cases with rights that approximate those that are inherent in our criminal justice system. The legislatures are also making a policy judgment that weighs the need for punishment against the need to protect potential defendants against overkill in our judicial system.

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v. Wallace, 704 S.W.2d 179 (Ky. 1985), *cert. denied*, 479 U.S. 822 (1986); *State Farm Fire and Casualty Co. v. All Elec., Inc.*, 660 P.2d 995 (Nev. 1983); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983); *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986); *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987); *Kennedy v. Cumberland Eng'g Co., Inc.*, 471 A.2d 195 (R.I. 1984); *Daugaard v. Baltic Coop. Building Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985); *Hales v. Industrial Comm'n of Utah*, 854 P.2d 537 (Utah App. 1993); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188 (Utah 1989); *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989); *Funk v. Wollin Silo & Equip., Inc.*, 435 N.W.2d 244 (Wis. 1989).

[35]*See* Victor Schwartz and Mark Behrens, *Punitive Damages Reform — State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U.L. REV. 1365 (1993).

Nevertheless, a number of state courts have nullified these basic legislative policy judgments about punitive damage awards.[36] The Supreme Court of Alabama, in the *Johnson* case discussed earlier, was candid in its assessment of its role in formulating public policy regarding punitive damage limits. The court said:

> Under our system of government, with its guarantee of separation of powers between the executive, legislative, and judicial branches of government, *it is peculiarly and exclusively the function of the judiciary to determine whether a jury award in a civil case exceeds the amount that the State and Federal Constitutions will allow* without violating the due process rights of this State and this country.[37]

The Supreme Court of Alabama did not acknowledge the state's reception statute or the basic power of legislators to protect defendants from excessive civil punishment.

D. "All" Tort Reforms

In one recent case, an Illinois trial court used its state constitution to strike down *all* of the civil justice reform laws passed by the Illinois legislature in 1995 in their *entirety*. In *Best v. Taylor Machine Works, Inc.*, the court said that it was "the express intent of the Legislature . . . to usurp the powers of the

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[36]*See Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994), *reconsideration denied*, 644 N.E.2d 1389 (Ohio), *cert. denied*, 116 S. Ct. 56 (1995).

[37]*Johnson, supra* note 18, at *15.