BACKLASH: AFTER 40 YEARS OF TORT REFORM NOISE, LET'S CHANGE THE TONE, UNDO THE HARM, AND CORRECT THE BIG LIE

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INTRODUCTION

From the earliest days of this Republic, civil justice has been a source of great pride.[1] Civil justice is and should be that one level playing field, a domain conceptualized in Magna Carta and brought forward through the next millennium.[2] The

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1. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (declaring the importance of Article III courts and civil justice, announcing the power of the U.S. Supreme Court to review governmental actions, serve as the guardian of our system of laws, interpret the constitution, and serve as the clarifying and authoritative voice of legal rules and standards); *see also* Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 749 (2018) ("The aspirational ideas underlying the American civil justice system are to promote the resolution of disputes on their merits after an adversarial contest on a level litigation playing field . . . ."); Bernard W. Bell, Marbury v. Madison *and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 239 (2003) (discussing the occasionally unfulfilled role of state and federal courts and agencies in implementing the Constitution's promise of justice).

2. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22

venue for civil justice, the American courtroom, is and should be the one place where ordinary citizens determine truth and hold accountable those responsible for harm to others.[3] From the founding of the Republic and for the next two centuries, the courts were the centerpiece of civil justice, the dignified and accepted domain to pursue claims of those suffering harm and defend the rights of those accused of causing that harm.[4]

In the early 1980s, those on the defense side of the aisle unified in criticism of this model of civil justice—of the fundamental tenets of tort law—and labeled their discontent *tort reform*.[5]

This Article celebrates the attributes of civil justice and takes aim at those who claim that mode of justice is broken and in need of repair. Those repairs, civil-justice critics claim, can be accomplished by implementing the tort reform agenda. In fact, that agenda has not and does not help injured consumers. It has degraded civil justice rather than fixed it.

Reforms do not make access to justice more difficult or limit accountability for those who cause harm, yet the tort reform initiatives did and do just that. Slapping the word "reform" on a movement that lessens consumer rights and limits access to justice is not merely fake news; it is the big lie at the core of this Article.

Those who revere the fairness, balance, and values of civil justice and respect the fundamental rights embodied in tort law have a responsibility and an opportunity to turn the tide and work to restore those rights. With no control over the accuracy of information, the public has been exposed to endless, relentless messaging that vilifies the tort system.

Turning around public opinion will require an investment of time and resources and a deep and abiding commitment to civil justice. If a concerted effort is not made to fight back, civil justice will be lost. The virtue in this fight is that those who support civil justice, the right to a jury trial, and accountability, have no need to deceive, fabricate statistics, or lie.

HOFSTRA L. REV. 1, 13 (1993) ("[T]he . . . right to a jury trial was guaranteed by the Magna Charta, signed . . . on June 15, 1215. The Magna Charta provided that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers . . . ."). As noted later in this Article, that right has been called into question by tort reformers who seem to see no harm in substituting arbitration for jury trials. *See infra* notes 127–33 and accompanying text.

3. Clauses in at least thirty-nine state constitutions that guarantee legal remedies for cognizable injuries are traceable to Edward Coke's gloss on Chapter 29 of Magna Carta. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 240–42 (Or. 2001), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998 (Or. 2016); *see also* 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND *45–46.

4. *See* Colleen F. Shanahan et al., *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469 (2016) (examining the essential role of lawyers in civil justice).

5. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 4–6 (2002).

I. TORTS AND CIVIL JUSTICE: IF IT AIN'T BROKE . . . .[6]

By intention and design, civil justice should instill confidence in the American public that those suffering harms will find a just and neutral setting to pursue their claims. Similarly, those who produce goods and services should experience a fair setting to explain or defend their actions in our civil justice arena. Our courts are "[t]he only place[s] in America, [in] the only country in the world, where people just like you and I can go to court on a level playing field with the largest corporations that are the defendants."[7] That confidence and faith in our courts are predicated on a stable, robust, and balanced implementation of tort law, the backbone of civil justice. This Article takes the position that tort reform initiatives have damaged the entire domain of civil justice and continue to pose real and severe threats to it.

To begin, the term "reform" has a fairly clear meaning: to make things better. One need not conduct in-depth legal research to conclude that the point or goal of reform is to improve the human condition—one needs only common sense. Reforms do not lessen or eliminate consumer rights, make access to justice more difficult, or limit accountability for those who cause harm. And yet, somehow, the movement that is the target of this Article, tort reform, does all of those things.

Tort law is "a complex system all its own" that "combines a dispute resolution system, a lawmaking system, and the social system at large. . . . As the law evolves, its functionality never falters, keeping the system plural, unified, *and* complementary *all at the same time*."[8] The antecedents of modern tort law predate the Code of Hammurabi, and despite endless fits and starts (as would accompany any system of this import and magnitude), tort law has acquitted itself remarkably well.[9] From personal safety and security to the food we eat and the air we breathe, the means by which we travel to the workplace, the role of government to standards of economic freedom and fairness, and product safety to our very reputation, our civil justice model has functioned well. And yet, it is under attack. Though the given name suggests otherwise, tort reform threatens civil justice and potentially undermines some of the most

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6. This Article asks whether our form of civil justice is broken, in need of repair, and argues that repairs known as tort reform do not help injured consumers and degrade the system rather than fix it. On the expression noted in the section heading above, see Grant Freeland, *Preemptive Transformations: Even If It Ain't Broke, You Still Oughta Fix It*, FORBES (July 22, 2019, 7:24 AM), https://www.forbes.com/sites/grantfreeland/2019/07/22/preemptive-transformations-even-if-it-aint-broke-you-still-oughta-fix-it/?sh=acbf59063135 [https://per ma.cc/6A6W-XRJB] ("Nobody knows the origins of the saying, 'If it ain't broke, don't fix it.' . . . [The phrase] seems like common sense. . . . [But] in the world of business, it's wrong.").

7. Brian Panish, *Torts: Past, Present and Future—Presentation of Brian Parish*, 49 SW. L. REV. 478, 479 (2021).

8. Alan Calnan, *Torts as Systems*, 28 S. CAL. INTERDISC. L.J. 301, 304–05 (2019).

9. *See* Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 248–49 (1986) ("The tort rules found in the Code of Hammurabi are most easily described by reference to our own. . . . [That system was] negligence-based, . . . [with] areas . . . carved out for the application of a strict liability rule.").

vital components of the rule of law if it is not stopped in its tracks.

Across multiple decades, the tort reform campaign has successfully advocated for change. But the changes the movement has secured are antithetical to the interests of consumers. Initially, it seemed like the courts would undo the changes wrought by tort reform.[10] However, in the last couple of decades, it has become clear that courts alone cannot be relied upon to undo the damage. Though parts of the tort reform fight are about legal niceties suited for judicial action, the core problem is far broader—it is a struggle for the hearts and minds of the American public. There has been sufficient support for those changes to give many (but not all) politicians room and incentives to implement tort reform, notwithstanding the fact that the support was and is based on misinformation, an unstable foundation labeled herein as fake news or the big lie.[11]

The lie? Tort reform initiatives are good for consumers when, in fact, they are uniformly antithetical to the rights and well-being of consumers. At some point, a public backlash to those changes became not just possible but likely.[12] Those who revere civil justice and respect the fundamental rights embodied in tort law have a responsibility and an opportunity to turn the tide and work to restore those rights.[13]

Over the centuries, tort law has proved effective in avoiding violence between those who cause harm and victims of such wrongdoing. Tort law has been balanced and rebalanced, recalibrated and rethought, with the hope that the confidence placed in civil justice is deserved. What, then, would incentivize people to gut this system? Quite simply, it is an economic interest, defunding accountability for all who might cause harm. There is no other credible rationale.

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10. *See, e.g.*, State *ex rel.* Ohio Acad. of Trial Laws. v. Sheward, 715 N.E.2d 1062 (Ohio 1999).

11. Although there has been considerable political support for a number of tort reform initiatives amply evidenced by state tort reform laws adopted in recent years, *see infra* notes 82–85 and accompanying text, political opposition to tort reform is growing, *see* Daniel Fisher, *Meet The Conservative Republican Who's Trying To Torpedo Tort Reform*, FORBES (Apr. 27, 2017, 9:16 AM), https://www.forbes.com/sites/danielfisher/2017/04/27/meet-the-conservative-republican-whos-trying-to-torpedo-tort-reform/?sh=57f22faa636d [https://perma.cc/DR5F-PTCG] (lashing out against state tort reform as a violation of the rights of the states to govern their citizens); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647 (2008) (tracking increasing political support for undoing the harms of tort reform and characterizing such reforms as inconsistent with consumer rights).

12. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 528 (2003).

13. *See* Beason v. I. E. Miller Servs., Inc., 441 P.3d 1107, 1112 (Okla. 2019). In *Beason*, the Oklahoma Supreme Court found that caps on noneconomic damages, one of the more common "reforms," was unconstitutional:

> [T]he people have vested the jury with constitutional responsibility to determine the amount of recovery for pain and suffering from an injury resulting in death, [so] this Court must presume a jury would be equally competent to make the same determination in a case where the injury does not result in death. This faith and confidence of the people in the jury system are enshrined within our sacrosanct Bill of Rights, expressed through the command that "[t]he right of trial by jury shall be and remain inviolate."

Id. (third alteration in original) (quoting OKLA. CONST. art. 2, § 19).

Through the end of the twentieth century, our model of civil justice was rightly perceived as balanced and earned respect, unlike any other model in the world.[14] Unfortunately, a system designed to hold people accountable is bound to have detractors and generate anger among those who believe they have done nothing to justify sanctions. A seller of a product designed by others who is held accountable when that product proves defective is bound to be resentful and feel *they* have been wronged. Anger and resentment are some of the forces that drive tort reform. But more often than not, a desire to diminish accountability underlies these initiatives.

Stunningly, though these changes redound to the detriment of consumers, tort reform appears to have garnered the support of millions of voters who have become convinced that our form of civil justice is unfair and unjust. The pitch—that tort reform was in the best interests of consumers—worked, even though no reliable empirical data supported it.[15]

Dr. Tim Kaye captured in a few sentences the dissonant and unsettled nature of the tort reform pitch:

> It is often said that the law of torts is in crisis. Indeed, it has become somewhat common to observe that it is currently going through its third crisis . . . . Whether this crisis is real or manufactured is . . . a matter of some debate. Yet within academic—and perhaps also some appellate court—circles, it certainly appears that there is significant disquiet about the current state of tort law theory.[16]

In the last forty years, there have been competing narratives about the varying component parts of civil justice with little agreement regarding the health and utility of our legal order. In fact, after decades of arguments regarding the state of tort law and civil justice, we are left with those competing narratives and this question: what story to tell?

Does this system favor unduly virtually anyone who complains of injury? Or does it favor those who are accused of causing harm? Neither narrative is uniformly true. A coordinated campaign to de-legitimate tort law—what tort reform campaigners have sought to do—has attracted supporters and been quite successful. After all, the entire U.S. gross national product, the economic output of all producers of goods and services, is on the campaigners' side. Campaigners have effectively used the

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14. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802 (1997) (arguing that tort law can be understood by its seemingly contradictory goals of deterring misconduct and providing a just and fair resolution to those harmed by wrongdoing).

15. Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 589 (2014) (stating that the benefits of tort reform were at best oversold).

16. Tim Kaye, *Rights Gone Wrong: The Failure of Fundamentalist Tort Theory*, 79 MISS. L.J. 931, 931 (2010) (footnotes omitted).

limitless resources at their disposal to convince many that tort law is wildly out of balance, favors plaintiffs unfairly, and takes a terrible toll on the American economy. Despite the lack of evidence to support those contentions, tort reformers have garnered support—and lots of it—which leads to the obvious question: how did they do that? How did tort reformers convince much of the public, as well as a variety of judges and politicians, that a system so vital to civil justice and effective for so long was suddenly hopelessly flawed?

We live in a time when information can be conveyed to the entire planet with just a keystroke or two. Conveying a message regarding the meaning of tort law, legislation, or, for that matter, the nature of civil justice no longer requires coveted placement in newspapers, expensive blocks of time on television, or advertisements in social media, although all these have occurred. Now, information can be conveyed with instant messages that catch the eye.

Perceptions of civil justice matter have been part of every presidential platform for the last four decades. Essential planks of presidential platforms invariably involve tort law, more often than not under the banner tort reform. Presidential candidates have many options regarding the planks in their platform, so why have they chosen the tort reform agenda?

The answer is not difficult: a negative or attacking stand on tort law, injured plaintiffs, and particularly plaintiffs' lawyers, produces votes, regardless of whether meaningful evidence supporting the tort reform agenda exists.[17] "[T]he the more pervasive tort reform becomes, the easier it is for the public to accept it . . . ."[18] That these claims about civil justice are without a credible foundation does not matter. Repeat a lie over and over, and after a time, it will be believed.[19]

II. THE TWO SIDES OF TORT REFORM: THE BIG LIE AND THE SMALL PRINT

In the tort reform wars, there are two sides: those pursuing tort reform and those opposed. This does not always make for the most enlightened or objective discussion, particularly given the politics supporting the tort reform perspective:

> For the past four decades, pro-business interests have spent tens of millions of dollars in an effort to reshape the civil justice system. Under

17. Joseph Pierre, *Illusory Truth, Lies, and Political Propaganda: Part 1*, PSYCH. TODAY (Jan. 22, 2020), https://www.psychologytoday.com/us/blog/psych-unseen/202001/illusory-truth-lies-and-political-propaganda-part-1 [https://perma.cc/W9NP-3W38] ("Repeat a lie often enough and people will come to believe it.").

18. Roland Christensen, Note, *Behind the Curtain of Tort Reform*, 2016 BYU L. REV. 261, 273–74; *see also id.* (concluding that limited awareness of the actual effect of tort reform, the limitation or elimination of accountability for those who cause harm, must be addressed).

19. Pierre, *supra* note 17; Craig C. Reilly, *The Truth About Lying*, 29 LITIGATION, Summer 2003, at 40, 40 ("[O]ne would think the 'big lie' would no longer work. But the listener's self-deception will sustain the big lie, even when no proof could convince the rational mind.").

> the banner of "tort reform," the insurance, manufacturing, pharmaceutical, and medical industries have vilified the civil jury . . . . They claim that jurors . . . [are] overly influenced by their emotions and biases, resulting in a world of "jackpot justice" that deters innovation, prompts defensive medicine, and hamstrings economic growth . . . . [L]egislators, often recipients of largess from deep pocket industries, have succeeded in passing a wide range of laws that curtail plaintiffs' rights.[20]

When it comes to something this fundamental and complex, it is hard to be opposed to those who favor the improvement of civil justice, and the shorthand for improvement in the language of politics is "reform." Reforming civil justice is the promise—the large print, so to speak. Reform must be a social good, right? Or is this an instance where "the large print giveth , [and] the small print taketh away"?[21]

Under the large-print banner of tort reform, an act of public relations genius that labels the avoidance or limitation of civil liability for wrongdoing of one type or another an act of virtue, of reform, the reality lies in the small print. "The tort reform movement is often portrayed as a grass roots movement by ordinary Americans calling for changes in the tort system. In reality, tort reform is an astro-turf movement by public relations professionals representing America's most powerful corporations and insurance companies."[22] In the underlying substance of the changes proposed and adopted, the small print, so to speak, is a pattern of change that has produced absolutely nothing to help consumers.[23] Under the banner of reform, the last forty years have been a disaster for any and all injured consumers.[24]

The small print under that grand banner has done nothing to improve the accountability of those who produce harm.[25] The small print has made it more difficult,

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20. David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 903–04 (2015) (footnotes omitted); *see also id.* (arguing convincingly that judges, not politicians, are in the best position to assess successes and failures in the tort system); Schwartz, *supra* note 14 (establishing a path that would allow a fair assessment of tort law notwithstanding the seeing conflict between corrective justice and deterrence).

21. While Forbes Magazine declared this quote to be anonymous in 2015, *see Forbes Quotes: Thoughts on the Business of Life*, FORBES, https://www.forbes.com/quotes/552 [https://perma.cc/FR8B-JBJ9], singer/songwriter Tom Waits made it famous in his 1976 ballad, "Step Right Up," TOM WAITS, *Step Right Up*, *in* SMALL CHANGE (Asylum Records 1976).

22. Michael L. Rustad, *The Endless Campaign: How the Tort Reformers Successfully and Incessantly Market Their Groupthink to Rest of Us* (Suffolk Univ. L. Sch., Rsch. Paper No. 10-32, 2010) (available at https://perma.cc/JJZ4-445W).

23. F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 524–25 (2006).

24. Jason C. Sheffield, Note, *Congress Prescribes Preemption of State Tort-Reform Laws to Remedy Healthcare "Crisis": An Improper Prognosis?*, 32 J.L. & HEALTH 27, 30 (2019) ("Terms like 'litigation crisis,' 'insurance crisis,['] and 'medical malpractice crisis,' refer to the modern public perception that frivolous litigation is rampant in the United States and substantially burdens our society.").

25. Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U.L. REV. 431, 458–59 (2008). Professor Sandra Gavin detailed that "[t]he 'original tort reform' . . . evolved primarily to protect consumers from injuries caused by

substantively and procedurally, for injured consumers to bring legitimate claims.[26] The small print under the banner of tort reform has limited or eliminated the possibility of liability in area after area.[27]

In the midst of the COVID-19 pandemic, states enacted limitations on businesses' liability for COVID-19 infections that occurred on their premises,[28] and every other aspect one can imagine to reduce liability related to the pandemic was proposed.[29]

The small print under the banner of tort reform has limited liability for egregious environmental catastrophes from Prince William Sound to the Gulf of Mexico.[30] The small print has limited or eliminated liability in cases involving undeniably deadly products that found their way into public use.[31] The small print created a structure for imposing liability on the federal government but limited that liability from the outset with the discretionary function exception as well as a growing list of exceptions that, from the outset, limited and then eliminated opportunities for members of our Armed Forces to pursue legitimate claims in the very courts those service members risked their lives to defend.[32]

The small print, instead of facilitating action against those in the medical community who have caused harm, has made it more difficult to secure liability. Even

unsafe products." *Id.* at 459. In contrast, the modern pro-defendant tort reform movement "is a product of political manipulation" whose purported justifications are "response[s] to a semantically created political crisis." *Id.* Professor Gavin concluded that this manufactured crisis stemmed from "a war of words taking place in the media rather than the courts" which involves "impassioned rhetoric, often funded by the very constituents seeking to profit from its agenda." *Id.*

26. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).

27. Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 277 (2013) (detailing Congress's enactment of reforms that shielded manufacturers and merchants in the aviation, biomaterial, vaccine, antiterrorism technology, firearm, and ammunition industries from products liability).

28. *See, e.g.*, Act of Feb. 10, 2021, § 9, 2021 Mont. Laws 1, 4–6 (codified at MONT. CODE ANN. § 27-1-719 (West 2021)); H.B. 606, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020) (uncodified); *see also* Arren Kimbel-Sannit, *Liability Shield Bill a Priority for Gianforte*, DAILY MONTANAN (Jan. 7, 2021, 5:02 PM), https://dailymontanan.com/2021/01/07/liability-shield-bill-a-priority-for-gianforte/ [https://perma.cc/7K6W-DEE4]; Justin Dennis, *Ohio Grants Businesses, Schools, Others Immunity from COVID-19 Lawsuits*, MAHONING MATTERS (Sep. 15, 2020, 10:08 AM), https://www.mahoningmatters.com/news/local/article262617757.html. Concerning the Montana legislation, Governor Greg Gianforte said, "There will be very clear rules of the road—if you follow those, you'll be immune from lawsuits related to COVID." Kimbel-Sannit, *supra*.

29. Betsy J. Grey & Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 IND. L.J. SUPP. 1, 4–6 (2020).

30. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 489–515 (2008) (expounding on the policy rationale and justification for limiting punitive damages); *In re* Deepwater Horizon, 745 F.3d 157, 174 (5th Cir. 2014) (upholding removal to federal court).

31. The most obvious example of this is the limitation on liability for firearms found in the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2018).

32. *See, e.g.*, Feres v. United States, 340 U.S. 135, 144 (1950) (exempting the U.S. government from liability to servicemembers under the Federal Tort Claims Act for injuries that are "incident to military service").

when a claim succeeds, the small print has limited plaintiffs' abilities to secure proper compensation. As if this was not enough, this same small print has forced many claims out of the civil justice arena altogether and into forced arbitration.[33]

The small print under the banner of tort reform has limited or eliminated the ability to hold accountable those with the great and unchecked power to communicate with every person on this planet: internet service providers.[34] The small print has limited or eliminated punitive damages, which has undermined the essential deterrent function of tort law.[35]

The small print has also limited or eliminated joint and several liability, which has made it far more difficult for those injured by multiple parties to secure justice.[36] The small print has nearly eliminated the ability to pursue a class action at the state level and has forced those claims either out of existence or into less friendly federal courts.[37]

And, stunningly, each of the above examples of the evisceration of legal rights and entitlements is called reform, as if using the word "reform" changes the character of the actions.

Tort reform lessens the rights of consumers. It is hard to imagine the public would buy into such a complete contradiction in terms. But in fact, tort reform may be the best example, at least in the legal system, of how the repetition of false information, carefully packaged and carefully sold, is perceived as truth. Tell the same perverse story, flush with misstatements and false claims, every time you have access to the public's ear, and sooner or later, the story is seen as truth.[38] Tort reform has hurt consumers, yet the message is that it has been a positive force in their lives. That is the big lie. And in the last five years or so, any deviation from the false message of tort reform is met with the characterization "fake news."[39] It is a remarkable accomplishment of public deception when those who cause harm are seen as those who

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33. JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 7–11 (2017) (detailing federal preemption of state limits on arbitration agreements).

34. The Communications Decency Act of 1996 provides immunity to the major platforms on the internet, for example, Facebook and Twitter. The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (available in scattered sections of 22 U.S.C.).

35. *See* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347 (2003); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005).

36. Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 440, 484–85 (2007).

37. Moore, *supra* note 26, at 1086–87.

38. Orwell knew from whence he spoke: "The past was alterable. The past never had been altered. Oceania was at war with Eastasia. Oceania had always been at war with Eastasia." GEORGE ORWELL, 1984, at 280 (1949).

39. Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337, 337 (2017).

are treated unfairly.

Tort reform, by its very name, is fake news and the big lie[40] that produced an upside-down universe where limiting consumer rights, closing the courthouse doors, and placing roadblocks in civil justice in any way possible[41] have become patriotic acts.[42]

The strategy of announcing and repeating misstatements about civil justice and the need for reform is not just an argument; it is what has taken place. For example, consider the oft-repeated message that punitive damages are a "monster" devouring civil justice—when they are not.[43] They are awarded, at most, in five or six percent of cases, which is far less than the language in the tort reform campaign leads one to believe.[44]

Beyond the overarching big lie, this campaign includes lesser fabrications concerning "the amount of and the effect of frivolous lawsuits, the impact of regulations on property rights, as well as the impact of liberal adjudication on the sanctity of contract."[45] These lesser lies "feed into the big lie that the common law has been hijacked by greedy plaintiffs and lawyers, as well as by liberal activist judges."[46]

Communicating untruths, large and small, has been the strategy of interests large enough to afford any and all types of mass media coverage. "The tort reform campaign has been principally advanced by large corporate interests, who . . . have the means necessary to make their voices heard. They often use mass media as a

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40. Reilly, *supra* note 19, at 40.

41. Just to be absolutely clear, the characterization of tort reform as the "big lie" is about tort reform and nothing else. Two things need to be said regarding the use of the term the "big lie." First, it is in no way intended to suggest other uses of that term or to draw parallels between my use of the term in this article and other uses, particularly as it is identified with one of the most horrifying and brutal propaganda campaigns in history. That is obviously not my intention. *See Joseph Goebbels: On the "Big Lie,"* JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/joseph-goebbels-on-the-quot-big-lie-quot [https://perma.cc/V6DN-AT94]. Nor is the use of "big lie" here in any way a reference to terminology invoked to describe claims that the 2020 presidential election was stolen. *See* Melissa Block, *The Clear and Present Danger of Trump's Enduring "Big Lie,"* NPR (Dec. 23, 2021, 5:00 AM), https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election [https://perma.cc/72KQ-ZVD4].

Second, and importantly, in no way do I mean to imply that in the legal arguments regarding tort reform, somehow the lawyers have become their clients. They are not. Zealous and effective representation of client interests does not mean that lawyers are doing anything other than providing quality legal service. This is true on both sides of the tort reform debate and in any other area of practice. *See also* John Lande, *Lessons from Mediators' Stories*, 34 CARDOZO L. REV. 2423, 2429 (2013) (discussing the risk that lawyers will over-identify with their clients and the importance of lawyers maintaining an identity separate from their clients).

42. *See generally* Cass R. Sunstein & Adrian Vermeule, *Symposium on Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202 (2009).

43. Rustad & Koenig, *supra* note 5, at 1–3.

44. Sebok, *supra* note 35, at 962–65 & n.19 (tort reform perpetuates a mythology on the frequency and size of punitive damages awards—they are neither as frequent nor as large as the tort reforms depict).

45. Roederer, *supra* note 11, at 679.

46. *Id.*

vehicle for spreading their ideas."[47]

Parts of these statements are not just false; they are insulting. Those who have been harmed and their lawyers are characterized in ways that are unrecognizable to anyone familiar with the practice of law in this field. "Corporations have portrayed themselves as blameless victims, . . . individuals (and their lawyers) as aggressors," and "plaintiffs [as] blameworthy . . . and always greedy."[48] This narrative is part of a script of "pervasive disinformation that accompanies [the tort reform] movement" that has caused a "jaundiced view of the legal system [to] flourish."[49]

One term that must be addressed in understanding the backlash is *frivolous lawsuit*—one of the primary suggestive phrases of the tort reform campaign. After looking through a few of the hundreds of thousands of times this term appears on social media, in the press (very broadly defined), and on the internet, the conclusion is inescapable. Everyone, it would seem, knows this particular civil justice "monster," everyone is sure this is a common and horrifying phenomenon, and everyone, or almost everyone, is wrong.[50]

The frequency of filing a frivolous lawsuit is small for several reasons.[51] First, any lawyer knows that if they initiate such a claim, they run the very real risk of being sanctioned under Federal Rule of Civil Procedure 11—and the sanctions are real, onerous, and may include payments of the legal fees of the defendants.[52] Second, that lawyer runs the risk of censure by the Bar in the state where they practice. Third, that lawyer runs the risk of a malpractice action. Fourth, and it almost goes without saying, those who violate this rule will take a direct hit on their professional standing and reputation. It is thus no wonder the actual number of such filings is minuscule.

In tort reform speak, frivolous lawsuits are every-day, every-hour, every-minute

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47. *Id.* (footnote omitted).

48. *Id.* at 679–80.

49. *Id.* at 680; *see also* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 721–22 (1998).

50. Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 69–70 (2015); Larry Lyon et al., *Straight from the Horse's Mouth: Judicial Observation of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 432–33 (2007) (concluding that the actual number of frivolous lawsuits may be as low as one percent). *See generally* Michael Darling, *The Frivolous Litigation Narrative: Web of Deception or Cautionary Tale?*, 36 REV. LITIG. 711 (2018).

51. Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580 (2011) ("In sum, the claim that the federal courts are inundated with 'frivolous' lawsuits is unsubstantiated by the available empirical evidence.").

52. FED. R. CIV. P. 11. Federal Rule of Civil Procedure 11 states that an attorney or person proceeding pro se will be in violation of the rule if the suit filed is "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." *Id.* r. 11(b)(1). If so—if the suit is frivolous and "Rule 11(b) has been violated, the court may impose an appropriate sanction," which "may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* r. 11(c)(1), (4).

events that drain resources at a level that approximates the national debt. Yet long before tort reform took hold, the legal system was designed to screen frivolous claims and allow legitimate claims to go forward. "When one separates fiction from fact, the tort landscape takes on a much different hue. Listeners to popular media might be convinced that too many people are suing and recovering too much money in America. The facts show otherwise."[53] Even for legitimate claims, the tort reform attack squad is poised to turn a just and proper claim into an embarrassing miscarriage of justice, demeaning and insulting the lawyer and client.[54]

III. BACKLASH TO THE BIG LIE: UNDOING THE WRONGS AND RIGHTING THE SHIP: AN HONEST ASSESSMENT OF WHAT COMES NEXT

Notwithstanding the collective negative effect of the many measures erroneously referred to as reform, all is not lost. The backbone of civil justice, tort law, is not dead. Change is possible. One caveat about the impact of four decades of reducing the rights of injured consumers: the actual numbers, case by case and claim by claim, are difficult to find and impossible to compile.

When so many claims are resolved by forced arbitration and when that forced arbitration is sealed, or when claims are resolved by settlement and those amounts are sealed or the parties gagged as a condition of settlement, or claims are not brought at all because claimants (and their lawyers) realize the system has been turned against them, a statistically accurate picture cannot and does not exist. Data projections are, at best, guesses. However, one thing is certain: tort reform has meant that injured plaintiffs, harmed by a wrongdoer, have a far more difficult time pursuing legitimate claims and receiving the resources to which they are entitled than they once did.

The difficulties plaintiffs face in securing justice are the result of tort reform and nothing else. A partial list of the end product of tort reform tells the tale: strict liability has been lost in many states and given way to the *Third Restatement*'s defense-oriented negligence system in product liability cases,[55] joint and several liability has (nearly) been abolished,[56] noneconomic damages have been capped,[57] punitive

53. Lyon et al., *supra* note 50, at 433.

54. Alex Mayyasi, *How a Lawsuit Over Hot Coffee Helped Erode the 7th Amendment*, PRICEONOMICS (Nov. 18, 2016), https://priceonomics.com/how-a-lawsuit-over-hot-coffee-helped-erode-the-7th/ [https://perma.cc/S3GD-5BCY].

55. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (AM. L. INST. 2000); Robert D. Klein, *A Comparison of the* Restatement (Third) of Torts: Products Liability *and the Maryland Law of Products Liability*, 30 BALT. L. REV. 273, 280 (2001).

56. The *Third Restatement of Torts: Apportionment of Liability* noted that, in 1999, only the following states retaining the doctrine: Alabama, Arkansas, Delaware, D.C., Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporters' note, cmt. a, at 151 (AM. L. INST. 1999); *see also* Marcus, *supra* note 36, at 442.

57. DeVito & Jurs, *supra* note 15, at 549–50.

damages have been either eliminated or made far more difficult to secure,[58] class actions have become extraordinarily difficult in state courts,[59] pleading requirements have been modified,[60] parties are forced into arbitration where claims are resolved without access to a court or jury,[61] and rules regarding the admissibility of evidence have made it more difficult for plaintiffs to present evidence in complex cases.[62]

The list above is by no means exclusive, but it does have this symmetry: (a) each factor mentioned benefits defendants whether they are service providers, those who manufacture and sell goods, or professionals in any field, and (b) not one of those factors benefits those who have been harmed, injured, or lost their lives due to the misconduct of another. In fact, in four decades, under the banner of tort reform, it is hard to find a single change in the legal system that facilitates the task of an injured plaintiff seeking to secure civil justice after suffering from the misconduct of a defendant of any type. One need not labor over the question of who benefits from this reform. Obviously and unequivocally, it is those who have caused harm and are seeking to limit or avoid accountability.

Labels like "reform" carry a potent message, usually meaning change for the good. Still, the good has nothing to do with injured consumers, yet support for tort reform is strong. Hence the question: How can it be that members of the public support changes to civil justice that lessen their rights?

Political choice cannot be explained by masochism. Entire populations do not willingly seek to have fewer rights or blindly hurtle forward, seeking less and less. Instead, it is a fair assumption that people gravitate to goals and changes when they believe those changes will advance their rights and interests—and if the public believes that the label tort reform must lead to a greater good for them, they buy in. They elect those who espouse the rhetoric of tort reform and, in so doing, empower those seeking to lessen their options and limit the accountability of those who cause harm. That is one heck of a grand public relations miracle—except in this instance, the miracle is dark, destructive, and at odds with the fundamental promise of the legal system.

This problem is not just a matter of enumerating the component parts of the tort

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58. James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1138 (1992) ("If some plaintiffs are undercompensated by the tort system, that problem should be addressed directly, not through the indirect, arbitrary method of punitive damages."); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1164–66 (1984).

59. David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1805–06 (2018).

60. Moore, *supra* note 26, at 1091.

61. *See generally* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371.

62. *See generally* Andrew W. Jurs & Scott DeVito, *A Tale of Two* Dauberts*: Discriminatory Effects of Scientific Reliability Screening*, 79 OHIO ST. L.J. 1107 (2018).

reform agenda. It is a broader question of a violation of trust. Where there should be an outcry about the public being misled, there is instead mistrust for academia, those arguing for consumer rights, plaintiff's lawyers who try to set the record straight, and politicians who stand for a stronger tort system. All that is replaced by faith in sound bites in social media and conventional media designed to convince people that plaintiffs are treasure hunters, undeserving scammers, and defendants are heroes, laboring to make the world a better place. Sadly, many people were convinced by untrue tort reform sound bites and spilled coffee lies,[63] convinced that there would be a terrible cost to all that we hold dear if plaintiffs get their way.[64] With that success, why not spend hundreds of millions of dollars—or billions to convince anyone left who doubts the big lie?[65]

Various academics, policy centers, and even the Congressional Research Service[66] produce contradictory data or engage in the condemnable act of drawing grand conclusions from small bits of information, extrapolating those conclusions broadly. Argument by anecdote has become characterized, by default, as an acceptable statistical construct.[67]

On a more positive note, a simple observation of our legal environment yields this result: If the last two decades have taught us anything, it is that the courts, Congress, and even public opinion are capable of dramatic shifts, embracing revisions small and large and new approaches. The tort-reformed corner of the civil justice field is not a permanent state.

It is time to stop wringing hands and declaring that all is lost, that civil justice is damaged beyond repair. It is not. It will take time and resources to undo the harm of the big lie, the fakest of all news, regarding civil justice.[68] Still, every area of tort, from punitive damages to joint and several liability to procedural changes that closed

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63. Mayyasi, *supra* note 54.

64. Georgene Vairo, *The Role of Influence in the Arc of Tort "Reform,"* 65 EMORY L. J. 1741, 1751 (2016) ("[T]here is a doubling down effect of the tort reform effort. Even in states that have not enacted tort reform, the public relations campaigns have led to a diminution in claiming. Tort reform efforts have had a tremendous influence on jurors. Even though plaintiffs prevail in 48% of the cases in which there is a jury trial, most of the big verdicts are in business-to-business cases." (footnote omitted)).

65. *Id.* at 1743 ("How was [the tort reform] public relations war waged? . . . [The] budget was humongous. Billions of dollars have been spent on this public relations war with major companies around the country contributing at least a million dollars to the cause per year.").

66. HENRY COHEN, CONG. RSCH. SERV., RL32560, SELECTED PRODUCTS LIABILITY ISSUES: A 50-STATE SURVEY 8–23 (2005).

67. Jeffrey W. Stemple, *Tort Reform Symposium Comment—Not-So-Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform*, 4 NEV. L.J. 337, 340–49 (2003).

68. Daniel J. Capra, *'An Accident and a Dream:' Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339, 408 (2000) ("In sum, tort reform is simply not worth it. [The Public Policy Institute]'s case for tort reform is not based on fact. It is simply another part of the onslaught on public opinion, generated by tort reformers, to create a mindset that the tort system is out of control. The attack looks at the costs of the tort system, but not its benefits. It is a carefully crafted attack . . . .").

down civil litigation options, can be repaired.[69] Anything is possible—and nothing in this area is easy. But change can come, and change is needed. Untangling the series of state and federal cases and statutes that have produced this big lie is no small task—and some areas are not likely to change, no matter what is done. Take, for example, the federal government.

A. The Federal Government

In 1946, Congress passed the Federal Tort Claims Act ("FTCA"),[70] which changed two centuries of American jurisprudence by declaring the federal government, the sovereign, no longer completely immune from tort liability. That is the large print. The small print, however, created a breathtakingly vast set of exceptions to liability, beginning with the discretionary function exception. Accountability pursuant to this seemingly dramatic change in liability was limited from the outset and did not apply to a range of actions and behaviors.[71] As a model of changing consumer rights, the FTCA is a very limited example of expanding consumer rights and, in the same breath, limiting those rights. The FTCA exceptions protect the federal government from liability in many areas, including intentional torts and, perhaps more importantly, from liability involving the exercise of discretion.[72]

Consider cases involving members of the Armed Forces harmed by negligence or worse (outside of harms incurred in combat or armed conflict). Such cases, blocked for seven decades by the "incident to service" rule in *Feres v. United States* seem ripe for change.[73] With public awareness that sexual assault and rape are at

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69. Gavin, *supra* note 25.

70. Federal Tort Claims Act, ch. 73, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 2671–2680 (2018)).

71. 28 U.S.C. § 2674 (2018) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual . . . .").

The most expansive exceptions include claims (1) "based upon an act or omission of an employee of the Government, exercising due care . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused;" (2) "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property;" (3) "for which a remedy is provided . . . in admiralty against the United States;" (4) "for damages caused by the imposition or establishment of a quarantine by the United States;" (5) "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;" (6) "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war;" and (7) "arising in a foreign country." Id. § 2680(a), (c), (d), (f), (h), (j), (k) (emphasis added).

72. John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 252 n.125 (1992); Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91, 112–17 (2015).

73. 340 U.S. 135 (1950).

epidemic levels in our Armed Forces,[74] change is at least possible in that area.

Other parts of federal liability limitation provide an example of the first signs of change and restoration of rights. For example, notwithstanding seven decades of barred claims in the military medical malpractice area, legislation passed in the National Defense Authorization Act for Fiscal Year 2020 opened the door to a limited form of victim compensation.[75] Granted, it is a very small step since it is, at best, an administrative compensation system and does not provide access to Article III courts, but it is a movement in a field where none seemed possible.

Whether other forms of federal liability limitation (clearly part of tort reform) can be undone remains to be seen. But as the military medical malpractice example demonstrates, it is at least possible. The list of federal legislation limiting or eliminating tort liability is well-known and does not need to be repeated. Blood shield laws,[76] the National Childhood Vaccine Injury Act of 1986,[77] the Protection of Lawful Commerce in Arms Act protecting firearms manufacturers,[78] and the Public Readiness and Emergency Preparedness Act providing immunity from tort liability in public health emergencies[79] are part of an unrelenting stream of liability limitations that have eviscerated the very right to pursue a legitimate cause of action in multiple fields.[80] Can they be undone? Can rights be restored? No, if the exaggerations of tort reform (for example, without immunity) are the sole source of public perception, vaccines will never be produced. Given a more accurate statement of reality and a fair and balanced presentation of information to the public, change, and a restoration of rights can happen.

Beyond protecting those who produce goods and services, the impulse to limit liability has extended to telecommunications providers, including all the major internet platforms that have access to the entire population of the planet. Through section

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74. Melinda Wenner Moyer, *'A Poison in the System:' The Epidemic of Military Sexual Assault*, N.Y. TIMES MAG. (Oct. 11, 2021), https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html [https://web.archive.org/web/20221215201508/https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html] ("Nearly one in four U.S. servicewomen reports being sexually assaulted in the military. Why has it been so difficult to change the culture?").

75. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-283, § 731(a)(1), 133 Stat. 1198, 1457–59 (codified at 10 U.S.C. § 2733a (2018 Supp. I)); *see also* 32 C.F.R. §§ 45.1–45.15 (2021); (explaining section 731(a)(1) of the Act and the process the Department of Defense will follow for medical malpractice claims).

76. James M. Wood et al., *Product Liability Protection for Stem Cell Research and Therapies—A Proposal*, 18 HEALTH LAW., Oct. 2005, at 1, 11.

77. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-2 to 300aa-33 (2018). *See generally* Joanna B. Apolinsky & Jeffrey A. Van Detta, *Rethinking Liability for Vaccine Injury*, 19 CORNELL J.L. & PUB. POL'Y 537 (2010).

78. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2018).

79. Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d, 247d-6e (2018 & Supp. III).

80. Michael L. Rustad, *Your Right to Sue, Goodnight!*, NW. U. L. REV.: NULR OF NOTE (June 15, 2020), https://blog.northwesternlaw.review/?p=1487 [https://perma.cc/2C4H-BWT9].

509 of the Communications Decency Act of 1996, codified at 47 U.S.C. § 230, telecommunications providers are given tort immunity by federal law.[81] Section 230 declares telecommunications providers to simply be a pipeline of information for others, not publishers.[82] To be clear, one who publishes information bears liability when that information is false, defamatory, or otherwise causes actionable harm.[83] Platforms for potentially actionable information in the online universe (like Facebook and Twitter) are magically not publishers. Similar treatment has been given by the courts to entities like Amazon, which courts hold are transportation providers instead of product sellers.[84]

B. In the States

Federally-generated limitations on liability, including ongoing efforts in Congress, are complimented by state limitations on civil tort liability.[85] Among the most common state-law "reforms" are caps on noneconomic loss and other damages limitations enacted in response to the questionable claim that too much money is awarded for damages in medical malpractice cases. At least half the states currently have caps on noneconomic damages, including Alaska,[86] California,[87] Colorado,[88] Hawaii,[89] Idaho,[90] Iowa,[91] Kansas,[92] Maryland,[93] Massachusetts,[94] Michigan,[95] Mississippi,[96]

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81. Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 133, 137–39 (codified as amended at 47 U.S.C. § 230 (2018)).

82. *See* Heather Saint, Note, *Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation*, 36 LOY. L.A. ENT. L. REV. 39 (2015) (noting that First Amendment rights are not transgressed when an individual or entity responsible for publishing defamatory speech is found liable for the tort of defamation).

83. For example, intentional infliction of emotional distress.

84. *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019).

85. *See* H.R. 1704, 115th Cong. § 4(b) (2017); H.R. 1215, 115th Cong. § 3(b) (2017); S. 3291, 114th Cong. § 403(b) (2016); H.R. 4771, 114th Cong. § 4(b) (2016); H.R. 4589, 114th Cong. § 204(b) (2016); H.R. 3682, 114th Cong. § 713(b) (2015).

86. ALASKA STAT. § 09.17.010 (2021).

87. CAL. CIV. CODE § 3333.2 (West 2016).

88. COLO. REV. STAT. § 13-64-302 (2021).

89. HAW. REV. STAT. ANN. § 663-8.7 (West 2021).

90. IDAHO CODE § 6-1603 (2021).

91. IOWA CODE ANN. § 147.136A (West 2022).

92. KAN. STAT. ANN. § 60-19a02 (West 2021).

93. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2021).

94. MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2022).

95. MICH. COMP. LAWS ANN. § 600.1483 (West 2022).

96. MISS. CODE ANN. § 11-1-60 (2021).

Missouri,[97] Montana,[98] Nevada,[99] North Carolina,[100] Ohio,[101] Oklahoma,[102] Oregon,[103] South Carolina,[104] South Dakota,[105] Tennessee,[106] Texas,[107] Utah,[108] and West Virginia.[109] A number of states impose caps on *all* damages in medical malpractice cases, including Colorado,[110] Indiana,[111] Louisiana,[112] Nebraska,[113] New Mexico,[114] and West Virginia.[115]

In other states (for example, Arizona), a reduction in accountability is achieved by limiting contingency fees with the goal of disincentivizing civil litigation.[116] Candidates run for office on a platform of securing relief from frivolous lawsuits and excess damages,[117] a.k.a., tort reform, despite the absence of proof of the problem or the fact that the "reforms" they promise are unlikely to do anything to aid

97. MO. ANN. STAT. § 538.210 (West 2022).

98. MONT. CODE ANN. § 25-9-411 (West 2021).

99. NEV. REV. STAT. ANN. § 41A.035 (West 2021).

100. N.C. GEN. STAT. § 90-21.19 (2021).

101. OHIO REV. CODE ANN. § 2323.43 (West 2022).

102. OKLA. STAT. tit. 23, § 61.2 (2022), *invalidated by* Beason v. I. E. Miller Servs., 441 P.3d 1107 (Okla. 2019).

103. OR. REV. STAT. ANN. § 31.710 (West 2021).

104. S.C. CODE ANN. § 15-32-220 (2021).

105. S.D. CODIFIED LAWS § 21-3-11 (2021).

106. TENN. CODE ANN. § 29-39-102 (2021).

107. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2017).

108. UTAH CODE ANN. § 78B-3-410 (West 2021), *invalidated by* Smith v. United States, 356 P.3d 1249 (Utah 2015).

109. W. VA. CODE ANN. § 55-7B-8 (West 2021). The statutes cited *supra* notes 86–109 were originally compiled in a student note. *See* Baldemar Gonzalez, Note, *When Tort Law Falls Short: Crisis, Malpractice Liability, and Women's Healthcare Access*, 119 COLUM. L. REV. 1099, 1106–07 (2019).

110. COLO. REV. STAT. § 13-64-302 (2021).

111. IND. CODE ANN. § 34-18-14-3 (West 2021).

112. LA. STAT. ANN. § 40:1231.2 (2022).

113. NEB. REV. STAT. ANN. § 44-2825 (West 2021).

114. N.M. STAT. ANN. § 41-5-6 (West 2021).

115. W. VA. CODE ANN. § 8.01-581.15 (West 2021).

116. *See* ARIZ. REV. STAT. ANN. §§ 41-801 to 41-805 (West 2021); *see also* Glenn Hamer, *Another Tort Reform Bill Signed Into Law*, ARIZ. CHAMBER OF COMM. & INDUS. (Apr. 15, 2011), https://azchamber.com/04-15-2011/ [https://perma.cc/P2EN-N3W3].

117. Michael R. Wickline, *3 Vie for Nomination in State Senate Race*, ARK. DEMOCRAT-GAZETTE (Feb. 4, 2018, 2:59 AM), https://www.arkansasonline.com/news/2018/feb/04/3-vie-for-nomination-in-state-senate-ra/ [https://perma.cc/SG93-NQ96].

consumers.[118] State politicians work to make the public aware of their success[119] when tort reform legislation is passed based on a well-founded belief that the public buys into the mythology—the big lie that tort reform is good for the consumer[120] and helps those who have been harmed.[121] As noted earlier, the tragedy of the COVID-19 pandemic was also an opportunity for state politicians to garner public support by backing tort reformist, liability-limiting legislation.[122] Such is the depth of the belief

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118. Mary Stroka, *Iowa Legislators Seek Tort Reform*, CTR. SQUARE (Mar. 9, 2021), https://www.thecentersquare.com/iowa/iowa-legislators-seek-tort-reform/articlefcd6762e-8123-11eb-8ada-3ff85f8a84fb.html [https://perma.cc/KKA9-S74R]; Dave Williams, *Georgia House Speaker Ralston Forms Committee to Handle Tort Reform*, CLAYTON NEWS-DAILY.COM (Mar. 5, 2020), https://www.news-daily.com/news/georgia-house-speaker-ralston-forms-committee-to-handle-tort-reform/article_e468ed60-0173-5320-9b8b-61132e777a0f.html [https://perma.cc/9VVR-RUYR].

119. For example, in 2014, a local newspaper reported comments by Haley Barbour, the former Governor of Mississippi, about comments that he made regarding tort-reform efforts he had initiated over ten years earlier:

> 'Hospitals were closing maternity wards,' said . . . Barbour, who led the charge in 2004 on tort reform. 'There was a health care crisis. There was a gigantic number of liability lawsuits, and insurance premiums had skyrocketed for doctors and hospitals. . . . Every small business in Mississippi was one lawsuit away from bankruptcy. . . . Businesses would not consider coming to Mississippi because of lawsuit abuse.'

Geoff Pender, *Mississippi Tort Reform at 10 Years*, CLARION LEDGER (May 5, 2014, 10:10 PM), https://www.clarionledger.com/story/news/2014/05/05/mississippi-tort-reform-years/8750203/ [https://perma.cc/Z89E-SFX3] (second and third alterations in original).

120. *See, e.g.*, Mark Ballard, *John Bel Edwards Signs the Tort Reform Bill*, THE ADVOCATE (July 16, 2020, 3:22 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_1f80317e-c7a2-11ea-a78e-bb8190e7bdf9.html [https://perma.cc/8ZXW-L8CV] ("Gov. John Bel Edwards, as promised, signed the Civil Justice Reform Act of 2020 that changes how courts will operate when considering injuries caused in car crashes. He announced signing House Bill 57 on Thursday without fanfare.").

121. Nicholas Alford et al., *Indiana Passes COVID-19 Civil Tort Immunity Bill*, JD SUPRA (Feb. 22, 2021), https://www.jdsupra.com/legalnews/indiana-passes-covid-19-civil-tort-1777896/ [https://perma.cc/PBD4-F4CM].

122. For example, Henry McMaster, the Governor of South Carolina, wrote an open letter urging the South Carolina House of Representatives to pass COVID-19 tort-immunity legislation:

> This week, the House Judiciary Committee will take up S. 147, the COVID-19 Liability Safe Harbor Act. I ask that the House pass this bill without delay so that I may sign it into law.
>
> South Carolina's small businesses have borne the brunt of the financial impact of the COVID-19 pandemic. Despite much needed federal and state financial assistance, 10% of our state's small businesses have been forced to close permanently. Among those who remain open, 70% of them cite the lack of liability coverage as the greatest threat to their future.
>
> To date, thirty-nine states have adopted some degree of COVID-19 liability protection, including every state in the southeast—Georgia, Florida, Alabama, Mississippi, Louisiana, North Carolina, Tennessee, and Kentucky. It's time for South Carolina to join this list.
>
> South Carolina business owners—including those in the hospitality, tourism, manufacturing, and healthcare sectors—should not be placed at future risk for following the recommended safety protocols which allowed them to operate and employ people during the pandemic.
>
> These business owners are the reason South Carolina's economy continues to thrive. I ask that you stand with them and pass the COVID-19 Liability Safe Harbor Act.

Letter from Henry McMaster, Governor of South Carolina, to the Members of the South Carolina House of Representatives (Apr. 19, 2021) (available at https://perma.cc/DFX6-CZ3P); *see also* Chris Dickerson, *COVID Liability Immunity Bill Passes State Senate, Heads to House of Delegates*, W. VA. REC. (Feb. 19, 2021), https://

that reducing or eliminating liability for civil wrongdoing is consistent with the public's perception of good government. That the public is voting against its own interest[123] just does not enter the equation—but it should. If the big lie and its concomitant anti-consumer reforms go unchecked, the promise of civil justice—the goal of better, more efficient, safer goods and services, cannot be achieved.

IV. TORT REFORM'S EXPLOITATION OF THE PUBLIC'S TRUST CAN BE UNDONE

Reciting that tort law has been modified by the changes noted thus far is the best evidence that the tort pendulum has swung significantly in favor of defendants. Regardless of whether the party causing harm is the federal government or private entities, interests, or parties, the effort to confine liability (the goal of tort reform) has regrettably—though by no means permanently—been successful.[124]

Just why members of the public have bought into this is no mystery. An article by Georgia attorney Jason Sheffield provides a succinct explanation: "Through countless television, radio, and print advertising campaigns, tort reformers were able to shift public opinion toward a view that condemns civil litigation and its participants."[125] Professors Stephen Daniels and Joanne Martin explored this question over twenty years ago.[126] Daniels and Martin noted that "tort reform public relations campaigns have been very successful, [and have] profoundly [a]ffect[ed] the cultural environment surrounding civil litigation."[127]

In place of liability, one of the more stunning approaches those seeking limitations on liability and accountability have taken is to compel an apology.[128] Such apologies are premised on the idea that people who are harmed by wrongdoing feel better when the party causing them harm tells them how sorry they are.[129] Though compelled apologies were intended to decrease the frequency of civil litigation (a goal of tort reform), they seem to have little effect on the frequency and outcome of

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wvrecord.com/stories/574507583-covid-liability-immunity-bill-passes-state-senate-heads-to-house-of-delegates [https://perma.cc/J3DW-F9CU].

123. Eliot T. Tracz, *Half Truths, Empty Promises, and Hot Coffee: The Economics of Tort Reform*, 42 SETON HALL LEGIS. J. 311, 320 (2018).

124. *See generally* Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445 (2016).

125. Sheffield, *supra* note 24, at 33.

126. *See generally* Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000).

127. *Id.* at 455–56.

128. Benjamin J. McMichael, *The Failure of "Sorry": An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice*, 22 LEWIS & CLARK L. REV. 1199 (2018) (assessing the mostly unsuccessful use of an apology as part of a tort reform strategy); Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door*, 90 S. CAL. L. REV. 1199 (2017) (discussing the use and lack of success of apology theory in corporate liability cases).

129. McMichael, *supra* note 128; Arbel & Kaplan, *supra* note 128.

tort actions thus far.[130]

Back to why so many people accept the premise of tort reform: consider that many politicians have been making the same arguments.[131] Limitation of liability is often a central theme, ostensibly to improve healthcare or the quality of goods and services. For President George W. Bush, limitation of liability in malpractice cases was a central campaign theme.[132]

Beyond substantive changes, tort reformers fought hard and successfully to keep as many cases as possible out of court and settled on forced arbitration as one effective method to achieve that goal. In so doing, they endangered what is left of Seventh Amendment[133] rights. The United States Arbitration Act[134] and various Supreme Court cases[135] force people into arbitration,[136] which reduces the important role that juries play in civil justice.[137]

The campaign for forced arbitration, like the other tort reform initiatives, undoubtedly cost a fortune—but consider the accumulated wealth of those desiring to limit liability. They are not inhabitants of some small segment of the marketplace. It is all health care providers, all insurance companies, all retailers, and all manufacturers. After all, what business of any kind wants to be sued? Why not contribute to those supporting changes to the legal system where one is rarely brought into a court of law, rarely accountable in any setting for errors and missteps that cause harm?

With literally no controls on the accuracy of information, tort reform messaging is designed to frighten potential plaintiffs by convincing members of the public that pursuing legitimate claims in a court of law would somehow be against their interests.[138]

Most of us have not been the victim of medical malpractice, injured by a defective product, defrauded, damaged, defamed, or suffered from illness or injury resulting from negligence or worse. Perhaps tort reform has engendered mass denial, a belief structure where common reasoning or thought goes something like this: "Those

130. *See generally* Arbel & Kaplan, *supra* note 128.

131. Ulrich Matter & Alois Stutzer, *The Role of Party Politics in Medical Malpractice Tort Reforms*, 42 EUROPEAN J. POL. ECON. 17, 26–27 (2016).

132. *Legal Reform: The High Costs of Lawsuit Abuse*, WHITE HOUSE ARCHIVES, https://georgewbush-whitehouse.archives.gov/infocus/medicalliability/ [https://perma.cc/4QYN-LF8T] (explaining that George W. Bush pushed for caps on noneconomic damages in medical malpractice cases).

133. *See generally* Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489 (2018).

134. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C.A. §§ 1–15 (Westlaw through Pub. L. No. 117-262)).

135. *See e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

136. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (finding fault with mandatory arbitration).

137. Cordúa Rests., Inc., 368 N.L.R.B. No. 43 (2019).

138. John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform,"* 86 OR. L. REV. 533 (2007).

things won't happen to me—they only happen to those stupid enough to do something that invites harm—and I am not that stupid."

Denial no longer works for those who have been harmed through no fault of their own, who pursued their claims in court and watched their quest for deserved compensation fall flat because one thread or another of tort reform or another limited or eliminated the liability for those who caused their harm. Social scientists and advocates for civil justice need to capture these stories. Some of the stories are likely to be troubling because strong cases were never heard, and because even if they were heard and prevailed, the judgments the plaintiffs deserved were unconscionably limited by tort reform. And some plaintiffs who secured decent and deserved victories may describe how the public-relations tort-reform machine horribly twisted the narratives of their cases and made a public mockery of their claims and suffering.[139]

Beyond the untold stories of the recent past, both good and bad alike, a different narrative must be aired. This narrative concerns the *future* victims of wrongdoing for whom tort law will suddenly become critically important and very personal. For them, the idea that their tortfeasors' liability would be grossly limited, or their damages capped, will come as a terrible shock. The rage and anguish of those who will lose family members will be difficult to capture in words. That is the future if the tort reform movement is not reversed and the big lie corrected. Those who find the "tort reformed" civil justice model no longer just and see how those one-sided changes have failed them will be part of the backlash—and a backlash there will be.

Turning around public opinion will require an investment of time and money and a commitment to civil justice. This war has been one-sided for four decades. If a concerted effort is not made to fight back, civil justice will suffer an irreparable blow. The tort reformers have taught a valuable lesson: While changing specific laws is a legitimate result, the actual target has always been the hearts and minds of the American public.[140]

The tort system has not been reformed. It has been pummeled, maligned, and misrepresented over what scholars have accurately deemed a "manufactured crisis."[141] The distortions and the big (and small) lies can and must be challenged in every public forum. The tort-reform political campaign must be disclosed and its organizers shamed for the deception that underlies the premise of the crises they manufactured. This is not a simple task, but it is one that is better faced and taken on now.

Tort law and its potential to help foster a safer and more efficient life—civil justice itself—is misunderstood by those who would most benefit from it. This

139. Caroline Forell, McTorts*: The Social and Legal Impact of McDonald's Role in Tort Suits*, 24 LOY. CONSUMER L. REV. 105, 121 (2011).

140. Daniels & Martin, *supra* note 126, at 491.

141. *See* Nockleby, *supra* note 138, at 533.

misunderstanding can be turned around. Tort reform, a lie in its bare form (insulation from accountability), has convinced all too many people that it was true.[142] A real and vibrant tort system should have a greater chance of success in shifting public opinion because it is real, and therefore does not require adherence to the big lie. It needs the attention of the public and the political world to pass along unmistakably the nature, majesty, and value of civil justice.

V. ADDRESSING THE BACKLASH AND THE START OF CORRECTING THE LIE

The timing and nature of the backlash depend on the success of a comprehensive campaign that demonstrates in graphic ways the harm tort reform has caused. If that campaign is successful, corrects the big lie, and allows for an open-minded reassessment of civil justice, what are the most likely components of the tort system to be recovered? What follows are some suggested targets for the restoration of civil justice.

A. Changing or Eliminating Caps on Noneconomic Loss

It is a safe assumption that most members of the public do not know the difference between economic and noneconomic losses, but they have been told that noneconomic losses are potentially limitless. That is a lie that can be corrected. A campaign focused on defining noneconomic losses and explaining their critical importance to injured consumers has a good chance of changing at least some of the hearts and minds of the electorate.

Imagine a campaign where there is a visual, careful, and clear depiction of pain and suffering, of what the loss of the ability to function physically or psychologically means, injuries that cause a change in appearance, the impact of the loss of family life, the loss of the ability to experience intimacy, the consequences of a change in life expectancy. Putting a face on these changes and demonstrating what was lost would be a powerful force in changing public opinion. That shift has political ramifications[143] and could make possible the restoration of uncapped or less severely capped noneconomic damages. These are highly relatable aspects of life, and there is a good chance that once educated about what was lost, a public backlash will set the stage for their return.

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142. Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75, 139 (2015) ("The parochial nature of courts' common-law dockets represents, to a degree, a consequence of the success of the 'tort reform' movement.").

143. *See* Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 730 (2006) ("[P]oliticians, by denouncing excessive litigation and pressing limited (and often porous) reform bills, may have found a low-cost way of appealing to the many 'individualists' in the electorate, while eschewing more radical reform proposals that could result in an electoral backlash.").

B. Changing or Eliminating Caps on Punitive Damages

Describe egregious behavior that has occurred and explain how that behavior cannot be addressed adequately (sufficient to punish the wrongdoer and deter others from doing the same thing) unless punitive damages are restored.[144] Tort reform has given the impression that people receive punitive damages solely by establishing liability. A good campaign would show that punitive damages are infrequent, justified, and essential. Again, real and highly relatable imagery pertaining to outrageous misconduct could be extremely powerful.

C. Undoing Reasonable Alternative Design

The requirement of reasonable alternative design, which is in place in states that have opted for section 2(b) of the *Third Restatement of Torts: Products Liability*,[145] is extraordinarily onerous.[146] Again, much could be gained from a campaign that explains how difficult it would be to produce an alternative design, how expensive it would be, and how companies that cause harm may be able to walk away untouched because of the inability of the vast majority of people to meet that requirement.

D. Clearing Procedural Obstacles

A campaign that makes clear how difficult and how expensive it has become to initiate litigation after someone has been a victim of wrongdoing would be quite appealing. What was sold to the public as fairness has meant that access to the courts—the one place where fairness is possible—has been made far, far more difficult than necessary.

E. Attacking Compulsory or Forced Arbitration

There is already a backlash to what is now the law regarding compulsory or forced arbitration. A campaign could be quite effective when it explains that the right to request a jury trial (a fair reading of the Seventh Amendment) has been taken from the public. The campaign could focus on the limitations inherent in arbitration, problems with sealed awards or gagged parties, and then set out what typical arbitral outcomes are, what awards are even when a victim prevails, and then compare those

144. *See* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1311 (2005) ("Since 1979, there has been a systematic tort reform backlash against punitive damages in all but a few states."); *id.* at 1302.

145. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Am. L. Inst. 1998).

146. *See* Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 78 (2006) (briefly noting the "possibility of a new backlash against the state courts currently involved with tort reform litigation" which "has already begun in some states").

results to what jury verdicts could and should be.

CONCLUSION

In terms of the actual mechanisms of change, the opening rounds do not begin with clever appellate arguments but rather with taking back the hearts and minds, informing by every means available about the reality of tort reform,[147] communicating what was lost, and letting people know that as quickly as things changed over the last few decades, they can change back again. The tort reform movement convinced people that changes adverse to their interests were a good idea. The campaign proposed above would make clear that those "reforms" give them nothing, that those measures strip them of critical segments of civil justice. Initially, it will not be an easy sell due to the distrust of the legal system and lawyers created by the many and varied voices of tort reform. Trust, however, can be regained. The public can be re-educated, and lost rights can be restored. This is an opportunity that must not be passed up.

147. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1429 n.50 (1997) ("However, a backlash against the rhetoric of crisis and the calls for tort reform has recently occurred.").