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FREEDOM, RESPONSIBILITY, AND RISK: FUNDAMENTAL PRINCIPLES SUPPORTING TORT REFORM

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INTRODUCTION

The free enterprise system is the engine that drives America's healthy economy, the benefits of which necessarily include inherent risks. Unfortunately, many facets of America's civil justice system operate to shift all of those risks to the entrepreneurs who produce the consumer goods and services that make people's lives easier or more pleasant. Moreover, just as taxes imposed on businesses are necessarily passed on to consumers, consumers must also realize that businesses have passed the costs of outlandish tort verdicts onto them in the form of higher prices. Even worse, many vitally important businesses have simply chosen not to operate in the United States out of fear of litigation.

The tort system has undergone a transformation from one designed solely to redress wrongs to one focusing more and more on criminal-style retribution and redistribution of wealth. In circular fashion, this expansion in tort liability is both a cause and effect of the mind-set that any injury, damage or untoward turn of events in a person's life is the fault of another, for which a lawsuit could bring hefty monetary returns. The lawyers who bring these actions become not only the legal voice for their immediate clients, but for all their potential clients who might someday, somewhere, be "victimized" by people engaged in business.

To counteract this mindset, many states and the federal government are enacting tort reform laws to reduce the most obvious abuses of the civil justice system. These laws seek to equitably balance the risks and benefits of the free enterprise system in a way that protects consumers and promotes a healthier economy. As described below, limitations on tort actions are premised on three important policies: (1) American society as a whole benefits when the freedom to innovate and make mistakes allows entrepreneurs to bring ever-better products to market; (2) people must accept responsibility for the consequences of their choices, even when those choices are foolish; and (3) individuals must be

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allowed to assess what risks they are willing to assume, even if they are willing to accept more risk than the courts or legislature deems prudent.

Part I of this Article describes the importance of innovation and competition to America's economic and social health and then addresses the impact of tort liability on one of the sectors of the economy that most requires an incentive to innovate: vaccines and biomedical technology. Part II of this Article focuses on personal responsibility by tracing some of the factors that have encouraged an abdication of individual choice and responsibility in favor of a victim mentality that looks for others to blame. This part considers the impact of "junk science" and the media in promulgating the worldview that every accident or injury must be compensated. Part III of the Article considers the ability of individuals to engage in their own risk assessment and how this intersects with the legal concept of foreseeability. Finally, Part IV of this Article examines a sample of tort reform measures that have emerged in the past ten years in an attempt to once again acknowledge the country's economic and social health as a factor justifiably considered in the formation of tort policy.

I. FREEDOM: THE CATALYST FOR EXPERIMENTATION AND INNOVATION

A. *The Prospect of Tort Liability Inhibits Innovation*

Scientists and inventors toiled for fifty years trying to perfect the electric lamp. The trick was to find the perfect filament that could withstand the heat and still conduct energy for long periods of time. Starting in 1878, Thomas Edison's crew experimented on 6000 types of materials for the filament, eventually narrowing the choices down to just two: platinum and carbonized cotton thread. Platinum could not handle the current without melting, but the carbon filament lasted thirteen hours on the first test. This success went far beyond academic satisfaction. Edison immediately began developing a commercial electric system, and in less than three years after obtaining the patent for the electric lamp,¹ New York City's first power station went into operation in 1882.²

But imagine if Thomas Edison's innovation had come upon the scene 100 years later. The Edison Electric Light Company's legal department would dog the innovators in research and development every step along the way: "Sorry, Tom, we think this electric light bulb idea has promise, but think of the potential liability! We can't risk some bulb overheating and exploding, disfiguring a child and having his parents sue us for everything we've got. Or what if a lamp burns out during some critical medical procedure and the surgeon can no longer see the

1. "Patent law creates ownership rights in the results of certain types of innovation. This attracts capital to those research efforts, arming modern-day Edisons with the resources they need to develop innovative ideas." Douglas Gary Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 MINN. L. REV. 693, 693 (1997).

2. See *Invention of the Light Bulb*, <http://ushistory.net/electricity.html> (last visited Oct. 15, 2001).

patient?³ And, frankly, Tom, at this stage of our business, it wouldn't take but one or two adverse judgments to bankrupt us." Fortunately, no legal department stifled Edison's inventions, and the benefits to society multiplied in his wake. Innovation creates societal value whenever resulting products are brought to market. Consumers who need the product rush to buy it; producers who manufacture the good at a cost below what people are willing to pay rush to sell it. As more people demand the product, and the number of producers increase to respond to the demand, prices decrease.⁴

Innovation depends on the ability to experiment and make mistakes. A fair legal system must provide for the evolution of technology and manufacturing or risk the loss of inventions that benefit all members of society. Unfortunately, the American civil justice system weighs heavily on innovators. As Harvard Business School Professor Michael Porter described it: "In the United States . . . product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly, and, as importantly, lengthy product liability suits."⁵ It is as though an anvil labeled "potential tort liability" swings precariously over any inventor, manufacturer, or business that dares to deviate from current knowledge and technology.⁶ Any decision to diverge from a well-worn path risks severing the rope holding the anvil and delivering a crushing blow to the business and its innovation. This is particularly anomalous when part of traditional tort law's philosophy is to encourage innovation and repair to decrease future harm.⁷

A manufacturer that conducts no research can generally avoid liability

3. Certainly such accidents are in the realm of possibility. See, e.g., *Bruther v. Gen. Elec. Co.*, 818 F. Supp. 1238 (S.D. Ind. 1993) (glass bulb separated from metal base, causing the worker who was attempting to change the bulb to experience an electrical shock); *Preston v. United States*, 624 F. Supp. 523 (E.D. Mo. 1986) (building owner's failure to replace burned out light bulb over stairs was negligent when visitor to building tripped and fell in the darkness).

4. See Lichtman, *supra* note 1, at 705. For example, the cost of a videotape recorder was \$3000 in 1975, but better, "hi-fi" VCRs are now routinely available for \$80. See Stephen A. Booth, *The Expanding Universe of VCRs*, 162 POPULAR MECH. 92, 93 (1985); CONSUMER REPORTS BUYING GUIDE 2002 at 57 (2002). Many VCR manufacturers are themselves responding to DVD technology by producing VCR/DVD "combo" units (priced about \$300). For a general review of the new technology, see <http://www.consumersearch.com/www/electronics/vcrs/> (visited Oct. 9, 2002).

5. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 649 (1990).

6. In a 1987 survey, Egon Zehnder International, a New York-based executive search firm, interviewed 101 senior-level executives at large publicly held companies (72% from the industrial sectors; 28% from the service side) on this very question. The survey found that 62% agreed that "innovation and experimentation had been constrained in the last few years." And of those who believed that, 91% blamed "fear of liability suits" as the leading impediment to innovation. Kenneth Moore, *"Fear of Liability" Blocks Innovation; in American Industry; Results of Survey by Egon Zehnder International*, 15 METALWORKING NEWS 6 (Jan. 18, 1988).

7. *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 872 (Cal. 1985).

because plaintiffs and government research programs are unlikely to conduct scientific research on their own. Voluntary safety research, on the other hand, might reveal a long-term risk associated with a product, a revelation that could provide vital evidence for aggressive plaintiffs' attorneys and ultimately increase, rather than reduce, the manufacturer's exposure to lawsuits and potentially catastrophic liability.⁸

Businesses are devoting more and more resources that could be used for innovation into defensive measures to protect against the risk of huge verdicts. The increasing incidence and variability of punitive damages awards prompt businesses to allocate greater resources into risk management and insurance to protect against potential financial ruin.⁹ This allocation draws resources away from new product designs and other innovations.¹⁰ But businesses cannot simply reallocate existing resources by gutting research and development. A certain amount of innovation is required to maintain one's competitive position in the market. Consequently, a business must compensate for an overall increase in costs by raising prices or by reducing payment levels to its creditors (e.g., bondholders and vendors).¹¹ Insurers also spread increased costs among their other policyholders.¹²

1. *The Impact of Tort Liability on Vaccine and Biomedical Device Availability.*—Allowing state tort claims against manufacturers may chill a manufacturer's desire to produce new products because of potential liability costs.¹³ This argument has been forcefully advanced in the context of drug

8. Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 775 (1997) (footnotes omitted). For a similar point, see Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2139 (1997).

9. See Peter Kinzler, *Recent Studies of Punitive Damage Awards: The Tale of the Tape*, 15 J. OF INS. REG. 402, 418 n.11 (1997) (citing Milton Bordwin, *Practicing Preventive Law; Legal Issues Affecting Corporate Risk Management*, 41 RISK MANAGEMENT 79 (May 1994) (describing corporate risk management response to legislation, regulation, and litigation)).

10. See *Do-It-Yourself Insurance*, THE ECONOMIST, Dec. 3, 1994, at 19. Most companies have a limited ability to insure themselves. For example, if a large, heavily indebted firm that self-insures has to pay for a major loss, its resulting finances may render it unable to obtain future capital. The company may have to delay other investments in research and development to pay for the disaster. Small companies face different, but equally daunting, prospects. If a small company is funded by many small investors for whom this one company is their major investment, the investors may not be willing to accept a company policy of paying for disasters that could have been covered by insurance. Conversely, companies that insure against every possible risk could alienate investors for failing to maximize shareholder value. *Id.*

11. See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 101 (1997).

12. See Kinzler, *supra* note 9, at 402-20.

13. Laura K. Jortberg, *Who Should Bear the Burden of Experimental Medical Device Testing: The Preemptive Scope of the Medical Device Amendments Under Slater v. Optical Radiation Corp.*,

manufacturer liability.¹⁴ As one scholar writes:

Drug manufacturers on the whole produce valuable, sometimes life-saving products. The specter of liability . . . chills the manufacturer's incentive to develop new products, making it prefer instead the tried and true remedies which appear safer from a liability standpoint. Because it is the nature of medical science to advance and progress, a pharmaceutical industry that lags woefully behind scientific advances prevents the public from partaking in new remedies for illness.¹⁵

Tort liability may even force manufacturers to take existing products off the market.¹⁶ The public then suffers from the current liability system because "when it is not cost-benefit effective to produce approved drugs or develop new drugs, the public pays the price in unnecessary and unrelieved suffering."¹⁷

The stifling effect of the tort system is not speculative; examples abound. For instance, vaccines have saved countless lives and greatly improved the health of millions.¹⁸ The statistics demonstrating vaccines' beneficial effects are striking. For the week ending June 8, 1946, health departments reported 161 cases of poliomyelitis (polio), 229 cases of diphtheria, 1886 cases of pertussis, and 25,041 cases of measles.¹⁹ For the first half of 1996, through the week ending June 22, there were no cases of polio, one case of diphtheria, 1419 cases of pertussis, and 263 cases of measles.²⁰ The difference is largely due to widespread vaccination. The Center for Disease Control licensed vaccines for all these conditions after 1946: diphtheria and tetanus toxoids and pertussis vaccine in 1949, inactivated polio vaccine in 1955, live polio vaccine in 1961, and measles vaccine in 1963.²¹ The importance of vaccines could not be more clear. In 1980, eight pharmaceutical manufacturers produced the DPT vaccine; yet, by 1986, there were only two.²² According to the American Medical

43 DEPAUL L. REV. 963, 984 (1994).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; see also PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988) (discussing how America's tort system costs manufacturers more than \$80 billion a year in direct payments and insurance costs and thus has prevented new and possibly safer products from entering the marketplace).

18. John P. Wilson, *The Resolution of Legal Impediments to the Manufacture and Administration of an AIDS Vaccine*, 34 SANTA CLARA L. REV. 495, 505 (1994).

19. United States Center for Disease Control, *Historical Perspectives Notifiable Disease Surveillance and Notifiable Disease Statistics—United States, June 1946 and June 1996*, 45 MORBIDITY & MORTALITY WKLY. REP. (June 28, 1996), available at <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00042744.htm> (last visited Oct. 10, 2002).

20. *Id.*

21. *Id.*

22. See Jeffrey J. Wiseman, *Another Factor in the "Decisional Calculus": The Learned Intermediary Doctrine, the Physician-Patient Relationship, and Direct-to-Consumer Marketing*,

Association, “[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance.”²³ In particular, “[c]urrent legal interpretation of product liability law, especially the doctrine of strict liability, diminishes the incentives of a manufacturer to research, develop and produce vaccines.”²⁴ Within the 1980s, ten of the thirteen companies producing vaccines for five serious childhood diseases left the market.²⁵ Not coincidentally, the number of liability suits filed against vaccine manufacturers from 1978 to 1985 increased significantly.²⁶ These lawsuits, resolved either by court awards or out-of-court settlements, forced the pharmaceutical manufacturers to reallocate “an ever larger percentage of the revenues from vaccine sales to the costs of insurance and of defending against potential liability.”²⁷ Thus, the cost of products entering the market reflects the manufacturers’ increasing cost of purchasing insurance needed to defend against actual and potential lawsuits.

Despite vaccines’ spectacular accomplishments, fewer drug companies than ever currently produce much-needed vaccines. For example, with so many manufacturers fleeing the market, the cost per dose of the DTP vaccine increased from eleven cents in 1982 to \$11.40 in 1986.²⁸ Eight dollars of this price paid for liability insurance.²⁹

The fear of liability is responsible for much of the increased cost of vaccines over the past decade Before the liability crisis, back in 1982, the private-sector cost of immunizations for a two-year-old was \$20.17. Ten years later . . . the cost of a complete regimen of vaccinations had risen to \$188.19³⁰

52 S.C. L. REV. 993, 1002 (2001).

23. Wilson, *supra* note 18, at 513 (quoting ALAN R. NELSON, AM. MED. ASS’N, IMPACT OF PRODUCT LIABILITY ON THE DEVELOPMENT OF NEW MEDICAL TECHNOLOGIES 1 (1988)).

24. *Id.* (quoting NELSON, *supra* note 23, at 2).

25. *Id.* at 505 (citing W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 105, 111 (Peter H. Schuck ed., 1991)).

26. H.R. REP. NO. 99-908, at 6 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6347.

27. John K. Iglehart, *Health Policy Report: Compensating Children with Vaccine-Related Injuries*, 316 NEW ENG. J. MED. 1283, 1286 (1987).

28. Gregory C. Jackson, *Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 AM. U. L. REV. 199, 205 (1992) (citing Gina Kolata, *Litigation Causes Huge Price Increases in Childhood Vaccines*, 232 SCIENCE 1339 (1986)); see also *Brown v. Super. Ct. of San Francisco*, 751 P.2d 470, 479 (Cal. 1988) (citing same statistics).

29. *Brown*, 751 P.2d at 479; see also Robert M. McKenna, Comment, *The Impact of Product Liability Law on the Development of a Vaccine Against the AIDS Virus*, 55 U. CHI. L. REV. 943, 955 (1988) (analyzing possibility of similar price stress on development of vaccine for human immunodeficiency virus (HIV)).

30. *The Vaccine Scapegoat*, WALL ST. J., Feb. 23, 1993, at A20.

This cost also included the added costs for two new vaccines.³¹

Without the ability to purchase insurance, pharmaceutical companies respond in two ways. First, they reallocate resources to self-insure; second, they work to improve the safety of their product designs as well as the language of their warning labels to cover any conceivable mishap.³² While these extra efforts do not present a problem per se, companies cannot recover the costs of excessive efforts through an unending series of price increases.³³ The increasing costs, therefore, may ultimately drive the product off the market.

Manufacturers are rightfully wary of widely varying jury awards, particularly when punitive damages are involved.³⁴ Given the history of vaccine litigation, the pharmaceutical companies cannot be faulted for their fear of future liability. The companies' responses to the vaccine litigation suggest that "low liability costs have a positive, stimulative impact on innovation, but high liability costs tend to depress it."³⁵ However, future cases are unlikely to echo precisely the cases that came before because of the highly complex interaction between liability, product design, and product distribution.³⁶ Understandably, they have become apprehensive about entering new markets and cautious about remaining in old ones.

In the past, product liability actions related to vaccine products did not differ from other types of product liability litigation: plaintiffs proceeded under theories of negligence, breach of express or implied warranty, strict liability in terms of design defect, and failure to warn.³⁷ Federal requirements of rigorous testing and review, however, ensured that a vaccine would rarely be improperly prepared.³⁸ Rather, as with many drugs, the problem is that vaccines will always

31. *Id.*

32. Wilson, *supra* note 18, at 507.

33. *Id.*

34. See generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 239-41 (2002) (detailing conclusions derived from empirical studies of jury and judge behavior when confronted with punitive damage award scenarios, and noting specifically that, despite good intentions, juries seem cognitively unable to translate their outrage to dollar amounts in any consistent fashion, and without regard for the standards relayed to them in jury instructions).

35. Wilson, *supra* note 18, at 508 (citing Viscusi & Moore, *supra* note 25, at 122).

36. See *id.* at 536. The recent history of products liability and toxic tort litigation suggests that a single finding of liability for one substance tends to unleash a firestorm of suits involving the same and related products. See, e.g., Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 4 (1993) (cataloging more than 2000 cases involving anti-nausea drug). "Once a single birth control device or type of asbestos fiber is found culpable, every other type of device or fiber quickly becomes guilty by association." Dan L. Burk & Barbara A. Boczar, *Biotechnology and Tort Liability: A Strategic Industry at Risk*, 55 U. PITT. L. REV. 791, 838-39 (1994).

37. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 694 (5th ed. 1984).

38. Federal law establishes a system of premarket approval to ensure that new drugs are safe

create some unwanted side effects.³⁹ The people who may be injured by their use usually cannot be identified in advance.⁴⁰ The pharmaceutical companies (who have deeper pockets than individual physicians) are the targeted defendant when individuals do, in fact, suffer adverse reactions to a vaccine.⁴¹ A tiny minority of those vaccinated may contract the very diseases the vaccines are intended to prevent or suffer other serious, potentially deadly, side effects.⁴² For most

and effective. *See* 21 U.S.C. § 355 (2000). The FDA, advised by outside medical authorities, regulates the premarket testing of new drugs, the approval process, drug manufacturing, labeling and advertising, and post-approval reporting of adverse events. *See id.* §§ 351-355; 21 C.F.R. §§ 200-369. FDA also imposes analogous requirements on biological products such as vaccines. *See* 42 U.S.C. § 262 (1994 & Supp. V 1999). The regulatory controls over new drugs are enforced through criminal penalties as well as civil sanctions. *See, e.g.*, 21 U.S.C. § 333(a)(2) (2000) (felony violations punishable by imprisonment for not more than three years or a fine of not more than \$10,000 or both); *id.* § 333(a)(1) (misdemeanor violations); *id.* § 332 (injunction proceedings); *id.* § 334 (seizures). *See generally* SUBCOMM. ON SCIENCE, RESEARCH & TECH. OF THE HOUSE COMM. ON SCI. & TECH., 96TH CONG. REPORT ON THE FOOD AND DRUG ADMINISTRATION'S PROCESS FOR APPROVING NEW DRUGS (Comm. Print 1980) ("the FDA product approval process has become far more sophisticated than the approval process for most other products and also more cumbersome").

39. *See* Wilson, *supra* note 18, at 537 (citing Okraner C. Dark, *Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?*, 19 TOLEDO L. REV. 799, 817 (1988)).

40. *See* Barbara A. Noah, *Adverse Drug Reactions: Harnessing Experiential Data to Promote Patient Welfare*, 49 CATH. U. L. REV. 449, 459 (2000) (noting that clinical trials are based mostly on white males; thus, adverse reactions that might be more likely to occur in women or minority populations may be underreported); Lisa J. Steel, Note, *National Childhood Vaccine Injury Compensation Program: Is This the Best We Can Do for Our Children?*, 63 GEO. WASH. L. REV. 144, 145 (1994) (noting that it is virtually impossible to determine before a child's first vaccination whether he or she will suffer adverse reactions); *see also* Brown v. Super. Ct. of San Francisco, 751 P.2d 470, 481-83 (Cal. 1988) (holding that all prescription drugs are unavoidably dangerous and subject to a negligence standard).

41. *See* Scott Neuman & Arthur Borja, *Prozac, an Antidepressant That May End up Depressing its Manufacturer*, 2 J. PHARM. & L. 245, 247 (1994) ("To potential plaintiffs' attorneys, Eli Lilly represents a deep pocket that can pay high judgments [in litigation over adverse effects of Prozac]"); Chester Chuang, Note, *Is There a Doctor in the House? Using Failure-to-Warn Liability to Enhance the Safety of Online Prescribing*, 75 N.Y.U. L. REV. 1452, 1456 n.18 (2000) (individuals harmed by "failure to warn" by an online prescription website will likely choose to sue the manufacturer rather than the website because the manufacturer has deeper pockets).

42. The oral polio vaccine is estimated to cause polio once in 3.2 million doses (approximately five cases per year). Swelling of the brain (encephalitis) occurs after the DTP vaccine approximately 43.2 times each year and after the measles vaccination approximately 10 times each year. Vaccine-related deaths are estimated to be a total of five to six cases each year. Mary Beth Neraas, Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149 n.3 (1988) (citing *Vaccine Injury Compensation, 1984: Hearings on H.R. 556 Before the Subcomm. on Health and the Env't*, 98th Cong. 140 (1984) (statement of Dr. Alan R. Nelson, Member, Board of Trustees, American Medical

people, however, vaccines provide an enormous benefit.⁴³

Other benefits to life and health have suffered as well. In 1983, Merrill Dow Pharmaceuticals voluntarily removed Bendectin from the American market in response to multi-million dollar claims that it caused birth defects in children carried by women who took the drug during pregnancy to combat nausea and vomiting (i.e., morning sickness).⁴⁴ Despite Bendectin's use in over thirty million pregnancies, experts were sharply divided on whether the drug caused birth defects; the majority opinion, however, was that Bendectin "was not a significant teratogen."⁴⁵ The FDA and most courts held there was no increased risk of birth defects associated with Bendectin.⁴⁶ Despite the legal vindication of Bendectin, the American market continues to lack any drugs approved for the treatment of morning sickness, and American pharmaceutical companies have not chosen to invest in research for a new morning sickness drug.⁴⁷ Even members of the plaintiffs' bar concede that Bendectin was driven from the market by unjustified litigation.⁴⁸

Tort litigants have also targeted other lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints, resulting in biomedical suppliers leaving the American marketplace.⁴⁹ In

Ass'n).

43. See Center for Disease Control, *What Would Happen if We Stopped Vaccinations*, at <http://www.cdc.gov/nip/publications/fs/gen/WhatIfStop.htm> (last visited Oct. 10, 2002) (detailing number of people who suffered from polio, measles, mumps, tetanus, Hib meningitis, whooping cough, German measles (rubella), hepatitis B, diphtheria, before vaccinations and the extent to which they have been eradicated today). Congress responded to the insurance crisis by enacting the National Childhood Vaccine Injury Act of 1986 (Act), 42 U.S.C. §§ 300aa-1 to -34 (1988), establishing a no-fault system of compensation for injuries suffered as a result of certain vaccine usage. See *infra* notes 176-88 and accompanying text.

44. See Jackson, *supra* note 28, at 207.

45. See *id.* (citing Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 318-19 (1992) (noting that none of thirty-nine epidemiological studies clearly concluded Bendectin caused birth defects)).

46. See *id.* (citing *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1350 (6th Cir. 1992) (finding insufficient evidence to conclude Bendectin caused plaintiff's birth defect), *cert. denied*, 506 U.S. 826 (1992); *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 803 (D.D.C. 1986) (citing and following independent FDA advisory panel finding nothing to implicate Bendectin exposure as cause of increased incidence of birth defects), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988)).

47. A small Canadian company, however, has developed an anti-nausea drug that is available only in that country. See <http://www.duchesnay.com/prodcenter.html> (last visited Sept. 27, 2002) (describing effectiveness and availability of Diclectin®).

48. See Jackson, *supra* note 28 (citing Michael A. Pretl & Heather A. Osborne, *Trends in U.S. Drug Product Liability—The Plaintiff's Perspective*, in *PRODUCT LIABILITY INSURANCE AND THE PHARMACEUTICAL INDUSTRY: AN ANGLO-AMERICAN COMPARISON* 109, 114 (Geraint G. Howells ed., 1990) (noting that evidence suggests that Bendectin causes no more incidence of fetal deformities than in the newborn population as whole)).

49. For example, Biomet, Inc., an Indiana-based medical supplies firm, sells a broad range

1993, DuPont Co. sold \$10.5 billion worth of the industrial fibers Dacron®, Teflon®, and Delrin®. Of those sales, only .0057% were to biomedical-implant manufacturers.⁵⁰ However, DuPont ended up spending eight years and \$40 million successfully defending itself against lawsuits involving a faulty jaw implant that contained a nickel's worth of Teflon®.⁵¹ DuPont was the defendant of choice in these lawsuits despite its negligible participation in the development of the defective product for the obvious reason: it had deep pockets.⁵² In contrast, the lawsuits soon bankrupted the small implant makers.⁵³

Biotechnology represents more than simply the hope of improved health care products; it holds the potential to revolutionize products and manufacturing in a variety of industrial sectors and thus is critical to the health and competitiveness of the national economy. However, recent close brushes with the tort system bode ill for this strategic industry. Full-blown litigation over some real or perceived injury is almost inevitable, and the complex scientific issues raised by such litigation appear certain to bring out the worst in our present dispute resolution process.⁵⁴

As described in Part IV below, the severe impact of tort litigation on these critical industries ultimately led to a statutory response.⁵⁵

2. *The Impact of Tort Liability on Competitiveness.*—As the section above demonstrates, not only do consumers of medical and safety devices suffer these losses, but uncontrolled tort liability hampers American businesses' ability to compete in the global market. As liability standards have been expanded since the 1970s, manufacturers have made greater investments to reduce the extent of

of spinal implant products outside the United States. However, it chose not to enter the \$300 million domestic spinal implant products market because pending litigation over such products involves sums three times the annual market size. Daniel Gross, *Deflating Product Liability*, CFO, Apr. 1995, at 70.

50. See Naomi Freundlich, *Congress Should Protect this Medical Lifeline*, BUS. WK., Apr. 21, 1997, at 120.

51. See James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, 7 B.U. J. SCI. & TECH. L. 327, 332 n.26 (2001). The primary products liability decision related to DuPont is *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 872 F. Supp. 1019 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996). All the other cases were similarly decided.

52. See Kerouac, *supra* note 51, at 358-59 (suggesting that plaintiffs bring suits against biomedical suppliers even understanding that they are likely to lose on the merits because of the plaintiffs' belief that they will be able to extract a favorable settlement).

53. See Freundlich, *supra* note 50, at 120.

54. See Burk & Boczar, *supra* note 36, at 863. In response to DuPont's business decision (which was echoed by some other biomedical suppliers), Congress passed legislation protecting suppliers of bulk components and raw materials for implants from lawsuits.

55. See *infra* notes 165-225 and accompanying text.

product-related injuries.⁵⁶ These investments do not occur in a vacuum, however, and must be evaluated in terms of both benefits and costs. From an economic view, manufacturer investments in product design is only one means of achieving safety.⁵⁷ Consumer investments also play a role. Consumers may choose to reduce the probability of a product-related injury in various ways, “including choosing a product suitable for the consumer’s needs and using the product in a way that optimizes safety, both with respect to the method and frequency of use.”⁵⁸ Consumer investments in safety are inversely related to manufacturer investments: the more manufacturer’s invest in safety, the less careful consumers must be,⁵⁹ and vice-versa.⁶⁰ Along these lines, one district court has emphasized that defendants should not have to spread among its customers the economic loss resulting from injuries from a product that is *not* defective, and for which the risk of harm can be eliminated by operating the product properly and heeding given warnings.⁶¹

Safety equipment for various sports has also suffered from the anvil of tort liability. Julie Nimmons, Chief Executive Officer of Schutt Sports Group, testified to Congress in 1993 that material suppliers are reluctant to sell to her company, a manufacturer of protective sporting goods equipment, for fear of liability. As a result, the company was unable to obtain the raw materials needed to produce and market a new baseball safety helmet that functioned well in prototype testing.⁶² This reluctance sometimes kills new product development. For example, the company chose not to produce hockey helmets, even though interest in the sport has grown substantially in the United States. Nimmons testified that “[i]n the final analysis, we felt we could not pursue this market because of the additional, uncontrollable liability exposure it would create.”⁶³

56. See George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U.L. REV. 115, 136 (1993) (citing George L. Priest, *Products Liability Law and the Accident Rate*, LIABILITY: PERSPECTIVES AND POLICY 184 (Robert E. Litan & Clifford Winston eds., 1988)) (comparing product design before and after the expansion of liability standards).

57. See *id.*

58. See *id.* (citing George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1310-13 (1981)).

59. See *infra* notes 126-64 and accompanying text (describing the impact of safety devices on consumers’ willingness to accept greater risks).

60. See Priest, *supra* note 56, at 136.

61. *Monahan v. The Toro Co.*, 856 F. Supp. 955, 964 (E.D. Pa. 1994) (determining that a fatal accident involving lawn tractor was not manufacturer’s fault where warning cautioned against mowing on a steep slope and decedent had actual knowledge that the tractor was prone to tip over in such circumstances).

62. *Product Liability Law Revision: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 105th Cong. 2 (1997) (statement of Julie Nimmons), cited in Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 263-64 (2000).

63. Schwartz & Behrens, *supra* note 62, at 264.

Even beyond the innovation of a new product, manufacturers may decline to improve existing products because they are afraid that the improvements will lead to a jury's inference that the previous version of the same product was deficient or unsafe.⁶⁴ Rather than take that chance, they do not make the improvement.⁶⁵ And even while manufacturers hesitate to innovate new products or improve existing products, "certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks."⁶⁶

These lawsuits—both actual and potential—have a deleterious effect on a company's competitiveness by drawing resources away from innovation and production to legal defense. In 1995, an average product liability suit not involving an appeal was estimated to cost about \$70,000. If there is an appeal—as is almost certain when punitive damages are awarded—the cost could run as high as \$250,000 to \$1 million.⁶⁷ Under the American Rule for attorneys' fees, these costs are incurred whether the manufacturer wins or loses.⁶⁸ In 650 lawsuits against DuPont over Teflon materials in jaw implants, the company lost \$26 million in cases in which it *prevailed*.⁶⁹

Moreover, this "chilling effect" extends beyond product manufacturers. Former Secretary of Commerce Robert A. Mosbacher testified to Congress in

64. Jurors have long been known to exhibit hindsight bias. *See generally* Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (1994); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 L. & HUM. BEHAV. 501 (1996); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post [is not equal to] Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89 (1995).

65. "Companies have no choice but to avoid the courtroom by withdrawing products, keeping others off the market, and restricting the scope of research and development . . ." Richard J. Mahony & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395, 1395 (1989).

66. Charles J. Walsh & Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 1035 n. 631 (1996) (citing AMA Board of Trustees, *Impact of Product Liability on the Development of New Medical Technologies*, 137 PROC. HOUSE OF DELEGATES 79). Even new technology has its skeptics: "The risks of older technology are known risks. Moreover, knowledge is widespread about how to use older technology most safely. New technology, by contrast, brings extra risks just because it is new, its hazards less foreseeable, and its safe use less knowable." Mark M. Hager, *Civil Compensation and its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 551 (1990).

67. Ronald Begley, *Product Liability; Even the Wins Are Costly*, CHEMICAL WK., Aug. 2, 1995, at 23.

68. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser").

69. Begley, *supra* note 67, at 23.

1990 that, in some cases, universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the “deep pocket” if there is litigation involving the product.⁷⁰ Thus, many companies now regard product liability as a cost of doing business. The Goodman Equipment Corp., which makes underground mining locomotives and plastic blow-molding machinery and has sales of under \$50 million views product liability as a separate line item when considering the company’s financial health.⁷¹ “Even though Goodman has never gone to trial in a product liability case, [the company] calculates that gross product liability costs—insurance, settlement costs, out-of-pocket time, and legal fees—consume about 11 percent of the firm’s payroll.”⁷² American society benefits from innovation and should reward, not punish, innovators. The civil justice system should not be the anchor holding innovation still in flowing waters.

II. RESPONSIBILITY: THE FREEDOM TO MAKE PERSONAL CHOICES
NECESSARILY DEMANDS PERSONAL RESPONSIBILITY
FOR THE RESULTS OF THOSE CHOICES

With free will comes individual responsibility. Acceptance of individual autonomy and freedom means that one cannot externalize moral blame; instead, “one has the ability to consider and choose among various alternatives and must face, with full dignity, the consequences stemming from the chosen action.”⁷³ This ability to choose one’s own course “validates and gives purpose to human existence.”⁷⁴ Many world religions share this view.⁷⁵

70. *Hearing on S. 1400 Before the Consumer Subcomm. of the Senate Comm. on Commerce, Sci., and Transp.*, 101st Cong. 249 (1990) (statement of Secretary of Commerce Robert A. Mosbacher).

71. Daniel Gross, *Deflating Product Liability*, CFO, Apr. 1995, at 70.

72. *Id.*

73. See Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1132 (1997).

74. See *id.* at 1133.

75. See Robert W. Lannan, *Catholic Tradition, and the New Catholic Theology and Social Teaching on the Environment*, 39 CATH. LAW. 353, 373 (2000) (discussing free will teachings in Catholicism); Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271, 276 (1996) (briefly examining Buddhism’s teachings on free will); Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. REV. 277, 286 (2001) (discussing Judaism’s concept of free will). But see Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT’L 593, 601 (1997) (explaining how Islam defines individuals by their adherence to the community).

A. Evolution of Tort Law from Personal Responsibility to Victim Mentality

Historically, many communities would stigmatize a member of their group who sued another member in tort.⁷⁶ Most accident victims did not look to the courts for their recovery; either they accepted their fate or sought to recover their damages informally.⁷⁷ Obviously, this is no longer the state of affairs. These days, communities expect people to sue if they suffer an injury of any magnitude. Accident victims want to “get theirs” because “everybody else is doing it.”⁷⁸ Many victims believe themselves entitled to recovery, and, if at all possible, eagerly transfer blame for their predicament away from themselves. They may find such lawsuit appealing as they are cast as the underdog against what they perceive as a huge, faceless corporation.⁷⁹

The media’s role in this transformation should not be underestimated. Certain newspapers, popular magazines, and television shows have placed victims in some personal injury cases in the national spotlight, allowing the plaintiffs to bask in their fifteen minutes of fame while the journalists rake the corporate defendants over the coals. For example, in 1990, CBS anchorwoman Connie Chung interviewed women who claimed to have autoimmune disease caused by breast implants.⁸⁰ “The broadcast implicitly blamed the FDA [Food and Drug Administration] for permitting hazardous medical devices to be sold.”⁸¹ An FDA advisory panel heard impassioned testimony from women who believed their implants made them ill. In April 1992, FDA Commissioner David Kessler banned breast implants for all purposes except in clinical trials of breast reconstruction after cancer surgery.⁸²

Two years later, the New England Journal Of Medicine published a retrospective cohort study from the Mayo Clinic finding no association between breast implants and 12 connective-tissue diseases.⁸³ An additional study in 1995

76. Stephen D. Sugarman, *Symposium on Law in the Twentieth Century: A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2409 (2000).

77. *Id.*

78. *Id.* at 2409-10.

79. *Id.* at 2410.

80. Peter J. Goss et al., *Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence, and the Silicone Gel Breast Implant Litigation*, 56 FOOD DRUG L.J. 227, 236 (2001) (noting that Connie Chung is credited for terrorizing millions of women with victim anecdotes).

81. Mark Herrmann, *From Saccharin to Breast Implants: Mass Torts, Then and Now*, 26 LITIGATION 50, 50 (1999).

82. *Id.* (citing Marcia Angell, *Shattuck Lecture—Evaluating The Health Risks Of Breast Implants: The Interplay Of Medical Science, the Law, and Public Opinion*, 334 NEW ENG. J. MED. 1513 (1996)).

83. Sherine E. Gabriel et al., *Risk of Connective-Tissue Diseases and Other Disorders After Breast Implantation*, 330 NEW ENG. J. MED. 1697 (1994); see also H. Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED. 1649 (1992).

reaffirmed the results.⁸⁴ By then, however, the implant manufacturer Dow Corning Corporation had filed for protection under Chapter 11 of the Bankruptcy Code.⁸⁵ The impact of these events is borne out by the numbers: In 1991, breast implant plaintiffs filed 137 lawsuits against Dow Corning; the next year saw 3500 lawsuits filed and by 1995, the year Dow Corning filed for bankruptcy, the company was defending more than 19,000 lawsuits.⁸⁶ Richard Hazleton, the Chairman and CEO of Dow Corning, wrote at the time that the company was facing “more than 75 trials, many with multiple plaintiffs, in a period of a few months. . . . [S]imultaneously fielding dozens of trial teams and witnesses to defend ourselves when settlement demands are unreasonable has become impossible.”⁸⁷ Dow Corning was a \$2 billion company that provided jobs to more than 8,000 employees.⁸⁸ Thanks to a health “crisis” that, as it turns out, was little more than media-driven hysteria based on junk science, a thriving company was destroyed, taking with it all the livelihood of its employees, a devastating human cost when one considers the ripple effect through those employees’ families contending with joblessness and uncertain prospects.⁸⁹

B. Personal Choices

Accidents happen. People sometimes do foolish things. These two statements would be wholly unremarkable except for one thing: some courts and legislatures do not believe that people should accept the consequences of their behavior. There is an increasing tendency toward victimhood in America, and a corresponding desire to assign blame for any misfortune to anyone but oneself. Phyllis Eisen, director of risk management for the National Association of Manufacturers, identifies both sides of the coin:

The underlying question is, what kind of risks are we willing to take and what kind of personal responsibility do people have to take in order to have a society that encourages risk? In truth, you can have a very cautious society where everyone’s rights are protected to the hilt.

84. Jorge Sanchez-Guerreiro et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666 (1995); see also Heather Bryant & Penny Brasher, *Breast Implants and Breast Cancer—Reanalysis of a Linkage Study*, 332 NEW ENG. J. MED. 1535 (1995).

85. Herrmann, *supra* note 81, at 50.

86. Richard A. Hazelton, *The Breast Implant Controversy: Threats and Lessons for All of Us*, 65 VITAL SPEECHES OF THE DAY 114-18 (1998).

87. Richard Hazleton, *The Tort Monster That Ate Dow Corning*, WALL ST. J., May 17, 1995, at A19.

88. Sugarman, *supra* note 76, at 2409-10.

89. Cf. Andres Cowan, *Note: Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2391 (1992) (noting that fines for corporate wrongdoing may ultimately fall on relatively blameless consumers, shareholders, and employees).

But there is a much bigger loss on the other side. If a society is gaged ultimately on what it creates—and it is—whether its music, its art, its law, or its widgets, then there has to be some underlying encouragement for that creation. It doesn't happen by accident. You create an atmosphere that gives them that edge.⁹⁰

Unfortunately, the courtroom seems to hold higher promise to many people than the laboratory, and “personal responsibility” as a value, has declined in American esteem.

For example, a former member of the armed services sued several doctors at the Department of Veterans Affairs Medical Center, on a theory that the physicians did not do enough to assist her in making life changes—including quitting smoking and losing weight—that might have prevented her subsequent heart attack. The lawsuit alleges that the physicians knew she had “multiple risk factors to develop heart disease” but dismissed her symptoms as “basically normal and non-life threatening.”⁹¹ She further alleges that the doctors failed to prescribe aggressive anti-cholesterol medication.

Automobile accidents have generated a substantial body of law which, in practice, absolve drivers from personal responsibility when their own negligence is coupled with alleged design defects. In thirty states, automobile manufacturers are not permitted to introduce evidence in court about whether a person injured or killed in an accident was wearing a seat belt.⁹² Even in many states with mandatory seat belt laws, jurors are not told of the plaintiff's disobedience of that law as evidence of at least some responsibility for the accident.⁹³ In South Carolina, a jury ordered DaimlerChrysler to pay a \$262.5 million judgment (\$250 million of which was punitive damages) in a case involving the tragic death of a six-year-old child.⁹⁴ Any mention of the mother's responsibility to her child and her own safety were kept from the jury. Jurors were not told that the mother

90. Tracy E. Benson, *Product Liability: Deep Waters To Debate*, INDUS. WK. 46, Aug. 6, 1990, at 46.

91. Terrie Morgan-Besecker, *Woman Suing VA Doctors*, WILKES-BARRE (PA.) TIMES-LEADER, Sept. 11, 2002, at 3A.

92. For example, Illinois, Indiana, Oklahoma, and Connecticut statutes provide that failure to wear a seat belt in violation of the statute shall not be considered negligence in any civil action nor limit or apportion damages. See CONN. GEN. STAT. § 14-100a(a)(4) (2001); 625 ILL. COMP. STAT. 5/12-603.1(c) (1993) (“Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, . . . shall not diminish any recovery for damages arising out of the . . . operation of a motor vehicle.”); IND. CODE § 9-19-10-7 (2002); OKLA. STAT. ANN. tit. 47 §12- 420 (West 2003).

93. Barry C. Bartel, *Tort Law and the Safety Belt Defense: Analysis and Recent Oregon Developments*, 26 WILLAMETTE L. REV. 517, 518 (1990) (stating that in some mandatory seat belt law states, courts may allow evidence of non-use to constitute negligence per se).

94. *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 444 (4th Cir. 2001) (involving an accident where a child was killed when thrown from a Dodge Caravan when the liftgate latch unhitched upon collision).

caused the accident by running a red light,⁹⁵ or that the child was not wearing a seatbelt.⁹⁶

Criminals have also been known to sue for damages when their illegal enterprises take a wrong turn and the criminals themselves end up injured. One of the most notorious examples of this line of jurisprudence involved Emil Matasareanu, a bank robber responsible for the deadliest shooting spree in Los Angeles history. Wearing full body armor, Matasareanu and his partner Larry Phillips robbed a bank in North Hollywood. When the police closed in, the two men fired more than 1200 rounds with high-powered automatic weapons as they tried to get away. Nine police officers and two civilians were injured.⁹⁷ Phillips shot himself rather than be captured and Matasareanu was shot 29 times, dying on the scene from his injuries.⁹⁸ Subsequently, Matasareanu's mother and children sued the Los Angeles Police Department and individual police officers alleging violations of Matasareanu's civil rights and "wrongful death," alleging that Matasareanu was denied prompt medical care that would have saved his life.⁹⁹

95. *Id.* at 453 (affirming district court judge's exclusion of the red light evidence); *accord* Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992) (determining that a plaintiff's negligence in causing an accident should not be considered in apportioning damages based on injuries that are enhanced as a result of a defective product); Andrews v. Harley-Davidson, Inc., 796 P.2d 1092 (Nev. 1990); *see also* Robert J. Eaton, *Automobile Safety: Transportation, Mobility, Safety and Fun*, 64 VITAL SPEECHES OF THE DAY 214-17 (1998). *But cf.* Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995) (citing Doupnik v. Gen. Motors Corp., 275 Cal. Rptr. 715 (3rd Dist. 1990)); Dahl v. BMW, 748 P.2d 77 (Or. 1987); Austin v. Ford Motor Co., 273 N.W.2d 233 (Wis. 1979); Keltner v. Ford Motor Co., 748 F.2d 1265 (8th Cir. 1984) (based on Arkansas law); Huffman v. Caterpillar Tractor Co., 645 F. Supp. 909 (D. Colo. 1986), *aff'd*, 908 F.2d 1470 (10th Cir. 1990) (based on Colorado law); Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981) (based on Montana law); Hinkamp v. Am. Motors Corp., 735 F. Supp. 176 (E.D.N.C. 1989), *aff'd*, 900 F.2d 252 (4th Cir. 1990) (based on North Carolina law). Note that in all of these cases, the courts allowed evidence of comparative negligence.

96. *Jimenez*, 269 F.3d at 455-56. The Fourth Circuit Court of Appeals held that the exclusion of the seatbelt evidence was not harmless error and reversed the judgment on that ground. *Id.* at 456.

97. *Whitfield v. Heckler & Koch, Inc.*, 98 Cal. Rptr. 2d 820, 824 (2000). Alas, certain police officers were not immune to the lure of judicial recovery either, and sued the weapons manufacturers for the injuries they suffered in the shoot-out. *Id.* at 823. The theory against the gun manufacturer of "negligent marketing," however, was rejected by the California Supreme Court in *Merrill v. Navegar*, 28 P.3d 116 (2001), and *Whitfield* was remanded for reconsideration in light of that case. 12 P.3d 1067 (Cal. 2000) (deferring action pending result in *Navegar*) and 40 P.3d 718 (Cal. 2001) (dismissing and remanding the case).

98. Jim Hill and Associated Press, *Lawsuit Accuses L.A. Police of Letting Wounded Gunman Die*, CNN (Feb. 28, 2002), at <http://www.cnn.com/2000/US/02/28/shootout.death/index.html>.

99. Jim Hill, *Family of Robber Killed in L.A. Shootout Sues*, CNN (Apr. 12, 1997), at <http://www.cnn.com/US/9704/12/bank.shootout.lawsuit/>; *see also* Matasareanu v. Williams, 183 F.R.D. 242 (C.D. Cal. 1998) (noting fact of suit and resolving issue relating to timing of service).

Other courts exhibit greater reticence to expand liability. For example, in *Epler v. Jansport*, a man wearing a jacket on a windy day accidentally snapped the elastic cord around the hood of the jacket and snapped himself in the eye.¹⁰⁰ Mr. Epler sued Jansport, the jacket's manufacturer, but the court rejected his theories of liability, noting three important points: First, Jansport had no record of any other similar incidents occurring with the jacket in question. The court held that just because some injuries may occur does not mean that a product is defective.¹⁰¹ Second, a user could avoid the dangers associated with the elasticized cord and cord locks by being mindful of the propensity of elastic cords to recoil and by exercising care by not pulling forcefully on such a cord in the vicinity of the user's face. Such care could reasonably be exercised even in adverse weather conditions.¹⁰² Finally, citing the general public's awareness of elasticized items such as rubber bands and bungee cords, the court assumed that average consumers are well acquainted with the tendency of all elastic items to recoil after they have been extended and released.¹⁰³

In Massachusetts, the Supreme Judicial Court dismissed the case of Joseph O'Sullivan, who was visiting his girlfriend's grandparents in Methuen and decided to dive into the shallow end of their pool. He had swum in the pool before so he knew its dimensions. An experienced swimmer and twenty-one years old at the time, O'Sullivan was not paralyzed but did crack two vertebrae and proceeded to sue the grandparents for negligence for not stopping him or providing warnings.¹⁰⁴ The trial court "correctly concluded that the open and obvious danger rule obviated any duty to warn the plaintiff not to dive headfirst into the shallow end of the defendants' swimming pool. Plain common sense . . . convince[s] us that this conclusion is indisputably correct."¹⁰⁵

In another example of a court applying common sense, in *Hansen v. PECO Energy Co.*,¹⁰⁶ a man got drunk at a bar and, while subsequently walking along some railroad tracks, decided to climb the catenary. Of course he ended up

In March, 2000, the judge declared a mistrial in the case after the jury hung, 9-3, in favor of the police. Jack Dunphy, *The LAPD Surrenders to the Feds*, NAT'L REV. ONLINE (Sept. 18, 2000), <http://www.nationalreview.com/comment/comment091800b.shtml>. The case was later settled with the City of Los Angeles and the complaint against the individual officers dismissed. E-mail from David Martin, Chairman, Law Enforcement Legal Defense Foundation (Oct. 3, 2002) (on file with author); see also David Rosenzweig, *Children Offer to Drop Suit in Robber's Death*, L.A. TIMES, June 20, 2000, at A1.

100. No. 00-CV-153, 2001 U.S. Dist. LEXIS 1890 (E.D. Pa. Feb. 22, 2001).

101. *Id.* at *10.

102. *Id.* at *14.

103. *Id.* at *15.

104. O'Sullivan v. Shaw, 726 N.E.2d 951, 953 (Mass. 2000).

105. *Id.* at 956. The court further noted that although the Legislature had abolished the "assumption of the risk" doctrine, the question of whether the danger was "open and obvious" went to whether the grandparents had a duty to the plaintiff. The court held that they did not. *Id.* at 958.

106. No. 98-1555, 1999 U.S. Dist. LEXIS 13388 (E.D. Pa. Aug. 25, 1999), *aff'd in unpublished decision*, 229 F.3d 1138 (3rd Cir. 2000).

electrocuting himself on the high voltage wires, but rather than thanking his lucky stars that he was still alive, he sued the railroad for negligence in failing to make the catenary inaccessible.¹⁰⁷ He argued that the railroad should have foreseen that a young adult like himself (aged 20 at the time of the accident) would be attracted to it.¹⁰⁸ Moreover, he even argued that his drunken state was not his fault, because the bar had illegally served him (as he was underage).¹⁰⁹ These attempts to distance himself from his own blameworthy conduct did not sway the judge: "Such reasoning, however, cannot excuse Plaintiff from accepting responsibility for his own conduct. . . . Plaintiff did have a choice in this matter—he should not have climbed the structure."¹¹⁰

These cases reflect the mental state, increasingly common among plaintiffs, that

if a real or perceived ill befalls me at any point in society, well, there has to be a legal cause of action, there has to be a remedy, there has to be a bureaucrat to make me feel better, there has to be a regulation, and there has to be money in my pocket.

This mind-set, all too often rewarded by courts and juries, has tremendous costs, not only in dollars paid to individuals who suffer the consequences of foolish acts, but also to society as a whole.

Beyond taking responsibility for simply foolish acts, freedom-loving Americans should be entitled to make choices about the level of safety risk they are willing to accept. For example, the more safety devices an automobile manufacturer installs in a particular model, the more expensive the car. Manufacturers therefore choose to make some safety devices optional.

The consumer theoretically was aware of the optional safety device and, after making a similar conscious or unconscious cost-benefit analysis, elected to forgo purchasing the device. The consumer apparently possessed more knowledge as to his or her needs, the amount of money available, or the ultimate use of the product as evinced by the consumer's rejection of the options. The manufacturer did not and could not possess knowledge of the consumer's purchasing criteria. Considering current technology, there is no possible way a manufacturer can read a consumer's mind to ascertain each individual's needs, and until there is a way to do this, the manufacturer must at some point be able to rely on the decisions a consumer makes. Therefore, the manufacturer's decision to offer optional safety equipment appears eminently reasonable, as the manufacturer is unaware of the ultimate

107. *Id.* at *2-3.

108. *Id.* at *3.

109. *Id.* at *16.

110. *Id.* at *18; see also Shannon P. Duffy, *Being Drunk Doesn't Excuse Trespass*, THE LEGAL INTELLIGENCER (Sept. 1, 1999).

needs of the consumer.¹¹¹

People, especially those in low-income brackets, are frequently willing to trade some safety features for a less expensive vehicle. When people cannot afford the safest (and more expensive) vehicle, they should be permitted to choose between a somewhat less safe car and no car at all.

Poor consumers have more pressing needs for their current income—another reason they are less likely to spend it to protect their future income. In other words, it is rational for poorer consumers to bear risks that wealthier consumers will pay to mitigate. Courts that refuse to credit a consumer's willingness to assume risk are often forcing a wealthy person's set of preferences on the poor. In doing so they impoverish the most needy consumers, who already spend a larger percentage of their income on consumer goods than do the rich.

If unable to purchase anything but the highest quality, many poorer consumers will choose not to purchase at all.¹¹²

An individual forced to forego car ownership because it has been priced out of his reach will require public transportation, which often has its own safety issues.¹¹³ Some courts, however, are unwilling to allow individuals to make this choice, instead imposing on automobile manufacturers a duty *in tort*¹¹⁴ to provide

111. Thomas E. Powell, II, *Products Liability and Optional Safety Equipment - Who Knows More?*, 73 NEB. L. REV. 844, 845-46 (1994)

112. Michael I. Krauss, *Restoring the Boundary: Tort Law and the Right to Contract*, 347 CATO INST. POL'Y ANALYSIS 11 (June 3, 1999).

113. Women are more dependent on public transportation than men. Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 191 (2001). Women are more likely than men to be victimized—or fear being a victim—on public transit, and are more likely to respond by refusing to ride public transit, even if this means forgoing travel altogether. *Id.* at 191-92. Moreover, danger often awaits public transit riders while waiting at, and walking to and from, transit stops. *Id.*

114. The important topic of regulation through litigation is beyond the scope of this Article. For an overview, see Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 857-59 (2002); Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685 (2000); William H. Pryor, Jr., *State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 604 (2001); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001); Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23 & 30, 1999, at 21 (“[A] threat to the rule of law is that many states and cities are resorting to government-sponsored litigation to achieve what they could not do through the legislative process, thus violating the principle of separation of powers—a centerpiece of the federal constitution and no less important at the state level.”).

certain safety features.¹¹⁵ This may have the perverse result of forcing the safest possible product from the market entirely, because it is simply too expensive to include every safety precaution.¹¹⁶

In *Geier v. American Honda Motor Co.*,¹¹⁷ Alexis Geier was driving a 1987 Honda Accord in Washington, D.C. and, although wearing a lap belt and shoulder harness, she suffered serious head injuries when her car spun out of control and struck a tree. She sued Honda for negligence, breach of warranty, and strict products liability, arguing that if the car had a driver's side airbag, she would not have been seriously injured. When Ms. Geier's car was made in 1987, airbags were not mandatory under federal law, but was one of several passive restraint options from which car manufacturers could choose to comply with federal standards.¹¹⁸ The Supreme Court considered whether the Federal Motor Vehicle Safety Standard ("FMVSS"),¹¹⁹ which did not require the 1987 Honda in question to come equipped with passive restraints, preempted the plaintiff's action.¹²⁰ The FMVSS contains an express preemption provision providing that

115. Whether created by evolving tort law or by regulations, mandatory safety features inevitably increase the cost of automobiles. In the early 1960s, the very popular original Volkswagen Beetle weighed only 1800 pounds (compared to 3995 for the "wide-track Pontiac"), and had no air bags, no "crumple zones," no five-mph bumpers, no computers, and no emissions controls. It cost \$3000. When it was no longer technically or economically feasible to comply with the increasing number of federal regulations, Volkswagen took the Beetle off the market in 1979. When the "new Beetle" returned in 1998, it had front-wheel drive, a water-cooled motor, airbags, an anti-lock braking system, an engine with complicated computer controls, and a cost of \$16,500 to \$20,000. Eric Peters, *The Lost Bug*, NAT'L REV., Feb. 9, 1998. By 2002, the New Beetle Turbo S had a list price of \$23,400. James G. Cobb, *This Bug Says, "Step on It,"* N.Y. TIMES, June 9, 2002, at L1. By contrast, in Mexico, the old Beetle never went out of production and was available in 2001 for an average of \$7800. The Mexican Beetle meets Environmental Protection Agency emissions standards but not noise level standards and it does not have air bags. Tessie Borden, *New Beetle? Mexicans Never Let Go of the Beloved Original*, SEATTLE TIMES, Apr. 13, 2001, at F1.

116. See, e.g., *Brown v. Super. Ct. of San Francisco*, 751 P.2d 470 (Cal. 1988) (discussing the rising prices and restricted availability of prescription drugs and citing as an example, Bendectin, the only antinauseant drug available for pregnant women, which was withdrawn from sale in 1983 because the cost of insurance almost equaled the entire income from sale of the drug. Before it was withdrawn, the price of Bendectin increased by over 300%). See also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 49 U.S. 936 (1991).

If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, 'companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.

Id. at 496.

117. 529 U.S. 861 (2000).

118. *Id.* at 864-65.

119. 15 U.S.C. §§ 1381-1431 (1966), now codified at 49 U.S.C. §§ 30101-30169 (2000).

120. *Geier*, 529 U.S. at 866.

no State shall have any authority to establish any safety standard applicable to the same aspect of performance of such vehicle which is not identical to the Federal standard.¹²¹ The FMVSS also contains a “savings clause,” which provides that compliance with a federal safety standard does not exempt any person from liability under common law.¹²² The Court concluded that a state tort action which actually conflicted with the federal statute—as Geier’s tort claim did—would be preempted by the federal statute.¹²³

This type of tort claim, if successful, would impose massive liability on automobile manufacturers for a decision to install some other passive restraint system (e.g., automatic seatbelts) rather than airbags. A tort judgment against the manufacturer would have the same effect on the car makers as a state statute or regulation requiring airbags in all vehicles.¹²⁴ The extent of automotive safety features is a policy matter and it is a misuse of the tort system to use the courts to determine safety standards for the performance of a vehicle or item of equipment. This is especially true when the legislative branch of government has already enacted safety regulations intended to preserve a certain amount of flexibility and choice.¹²⁵

Most parents try to teach their children that actions have consequences. If you stand on a chair to reach the cookie jar on a high shelf, you might fall and get hurt. The child is expected to learn these lessons and, as he grows older and ventures further from parental supervision, is expected to exercise enough self-discipline to avoid placing himself in harm’s way. Moreover, if the child deliberately made the wrong choice, parents often respond, “well, it was your own fault for climbing when you know you shouldn’t; don’t come crying to me.” These days, however, the trial lawyers and some courts are teaching an entirely different lesson. “Oh you poor child!” they exclaim, “you’ve fallen and scraped your knee. It must be the chair manufacturer’s fault—he should have foreseen you would climb to get the cookies and built a sturdier chair. Let’s sue’em! And here you go, dear, have a cookie.”

When people are unwilling to take responsibility for their choices, they are

121. *Id.* at 867.

122. *Id.* at 868.

123. *Id.* at 874-75. Compliance with safety standards will not always save a manufacturer from punitive damages. In *Anderson v. General Motors*, a Los Angeles jury voted for a \$5 billion verdict (later reduced to \$1.2 billion) against General Motors for the allegedly defective design of its 1979 Chevrolet Malibu. Appeal currently pending in California Court of Appeals for the Second Appellate District, Division Four, Docket No. B135147. In that case, the plaintiffs’ attorneys successfully prevented General Motors from telling the jury that the accident had been caused by a drunk driver who rammed their van at seventy mph, and who had been convicted of a felony and imprisoned over the accident; or that the Malibu’s real-life crash statistics showed it to be safer than the average car of its era; or that the alternative crash design proffered by plaintiffs raised safety concerns of its own and was not widely used by other manufacturers. Appellant’s Opening Brief (filed Dec. 4, 2000) at 4-10 (copy on file with author).

124. *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997).

125. *Id.* at 1412.

really saying that they do not want to be free. A free society can only exist when people accept the consequences of their own actions rather than seeking to place the blame on others. The shifting of responsibility to a third party is especially harmful to society when the target for blame is chosen solely because of its financial solvency. This “deep pockets” approach to tort litigation drives up the costs of products for everyone, as companies pass the costs of the damage awards on to consumers.

III. RISK: WHEN INDIVIDUALS HAVE THE FREEDOM TO MAKE CHOICES,
AND ASSUME THE RESPONSIBILITY FOR THOSE CHOICES, THEY SHOULD
BE ABLE TO ASSUME THE LEVEL OF RISK THEY FIND
PERSONALLY ACCEPTABLE

Tort liability is intended to reduce the consumption of risky products (i.e., those with a greater likelihood of causing injury) by increasing their prices and thereby discouraging people from buying them.¹²⁶ This objective assumes that consumers tend to underestimate the risks associated with various products.¹²⁷ Price increments reflecting manufacturers’ liability insurance costs remind consumers that the products are associated with certain risks; without such reminders, consumers will purchase relatively risky products in greater volume.¹²⁸ Lower consumption of risky products is likely to result in fewer accidents, thereby reducing the cost to society of paying for accidents.¹²⁹

126. Prices increase as manufacturers pass through the cost of liability verdicts to consumers. See Robert F. Cochran, Jr., *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 PEPP. L. REV. 701, 714 (2000) (“When manufacturers pass these costs to consumers, the price of products will more nearly reflect the costs that the products create to society, and consumers will be forced, through the higher prices, to take into consideration the losses that those products cause”).

127. See CASS L. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 181 (2002) (“One of the most well-established results in the literature on risk and uncertainty is that people overestimate low-probability events and underestimate larger risks.”); see also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960) (“[u]nder modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use . . .”).

128. See Note, *Tort as a Debt Market: Agency Costs, Strategic Debt, and Borrowing Against the Future*, 115 HARV. L. REV. 2294, 2295 (2002) (“a consumer is sold ‘tort insurance’ by paying higher prices ex ante and receiving a tort award in the case of an accident”).

129. See James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1579 (1991); see also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 476 (1993) (A consumer who puts a “product to a uniquely adventuresome use that he should know may exceed the product’s capabilities . . . has no fair claim to compensation from the maker, diminishing the autonomy of the maker’s owners and other consumers, because the accident was caused by the victim’s greed in demanding greater usefulness from the product than other consumers sought and greater usefulness than was reflected in the price he paid.”).

“Risk” is not the same thing as “hazard” or “danger.” Dangers are experienced as a given that exists in the world (e.g., earthquakes, sheer cliffs, and natural disasters).¹³⁰ The idea of risk, however, is bound up with the aspiration to control, and particularly with the idea of controlling, the future.¹³¹ Risk is always related to security and safety.¹³² It is also always connected to responsibility. Although the word “responsible” is much older, “responsibility” first appeared in the English language in the late Eighteenth Century,¹³³ and coincides with the rise of modern political and legal thought. As it is used today, someone who is responsible for an event can be said to be the author of that event. This is the original sense of “responsible,” which links it with causality or agency.¹³⁴ Another meaning of responsibility is where we speak of someone being responsible if he or she acts in an ethical or accountable manner.¹³⁵ The

130. See generally Denis Binder, *Act of God? or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 3 (1996) (noting the 300 year history of the “Act of God” defense to negligence and strict liability tort actions).

131. See Anthony Gidders, *Risk and Responsibility*, 62 MOD. L. REV. 1, 3 (1999) (U.K.).

132. See, e.g., Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J.L. REF. 403, 406-426 (2002) (discussing risks and benefits of genetically modified foods); Margaret Gilhooly, *Deregulation and the Administrative Role: Looking at Dietary Supplements*, 62 MONT. L. REV. 85, 130 (2001) (noting that, with regard to dietary supplements, “the potential to cause serious harm is a risk against which the public needs and, presumably, still wants protection”).

133. See Gidders, *supra* note 131, at 3. The earliest use of “responsibility” noted in the Oxford English Dictionary is by Alexander Hamilton in *The Federalist Papers No. 63* (1787) (“Responsibility in order to be reasonable must be limited to objects within the power of the responsible party”). 8 OXFORD ENGLISH DICTIONARY 742 (John Simpson & Edmund Weiner eds., 2d ed. 1989). The word “responsible” appears at least as early as the Magna Carta, in 1215. See Magna Carta Preamble at ¶4 (1215), at <http://www.constitution.org/eng/magnacar.htm> (last visited Oct. 8, 2002). Courts have a long-standing practice of referring to dictionaries to determine the plain meaning of words. When construing statutory provisions and in determining what Congress meant by certain language, the Supreme Court generally consults dictionaries from the time the statute was enacted. See, e.g., *Molzof v. United States*, 502 U.S. 301, 307 (1992); *Reves v. Ernst & Young*, 494 U.S. 56, 77 (1990) (Rehnquist, C.J., concurring in part and dissenting in part) (citing “contemporaneous editions of legal dictionaries” to define “maturity” as used in the Securities Exchange Act of 1934); *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 598 (1988) (giving statutory language “its normal meaning” and citing a dictionary “from the period during which the [statutory provision] was enacted”). In *United States v. Ramsey*, 431 U.S. 606 (1977) (Stevens, J., dissenting), construing the term “envelope” contained in an Act enacted in 1866 (dealing with authority of customs officials), Justice Stevens stated, “[c]ontemporary American dictionaries emphasize the usage of the word as descriptive of a package or wrapper as well as an ordinary letter.” *Id.* at 629-30, quoted in Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFFALO L. REV. 227, 267-68 (1999).

134. 8 OXFORD ENGLISH DICTIONARY, *supra* note 133, at 742.

135. *Id.*

most relevant definition of responsibility with relation to risk in the tort context, however, is “obligation,” or “liability.”¹³⁶

The relation between risk and responsibility depends on whether people can make decisions to alter the outcome of events. Both concepts presume the ability to decide on a course of action.¹³⁷ What brings into play the notion of responsibility is that someone makes a decision having discernible consequences.¹³⁸ As people perceive themselves as safer or better equipped against a danger, they are more likely to take more risks.¹³⁹ For example, regarding the increasing voluntary use of ski helmets, Jasper Shealy, a ski injury expert at the Rochester Institute of Technology in New York believes that some fatalities were caused by people who took risks they otherwise wouldn't have taken because the helmets made them overconfident. “I've heard several people say, ‘I only wear my helmet when I ski through the trees.’ People think, ‘I can do things I normally wouldn't want to do because I'm wearing a helmet.’”¹⁴⁰

The word “foreseeability” commonly is used to describe “actual, subjective awareness of possible future occurrences.”¹⁴¹ It connotes a consciousness of—and ability to plan for—future possibilities.¹⁴² A foresighted person considers the future and takes necessary precautions to protect himself (and others) from risks while taking advantage of opportunities.¹⁴³ Thus, foreseeability is an integral part of prudent human behavior.

To the extent that we expect humans to be rational beings, they must be charged with some degree of foreseeability. In the context of moral analysis, the meaning of foreseeability derives from its relationship to the concepts of choice and fault. If an actor foresees a possible consequence harmful to himself or others and, disregarding this foresight, acts in a way which allows the avoidable harm to occur, his action would be condemned as morally blameworthy. He would be said

136. See Gidders, *supra* note 131, at 7-8.

137. In the medical malpractice context, Americans, as well as Canadians and the British are viewed as increasingly refusing to accept risk, and its consequences, as a part of life. Instead, they seek to shift responsibility to medical service providers and product manufacturers. See Michael J. Trebilcock et al., *Malpractice Liability: A Cross-Cultural Perspective*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 205, 216 (Peter H. Schuck ed., 1991), cited in Wilson, *supra* note 18, at 509 & n.23.

138. See Gidders, *supra* note 131, at 8.

139. John Adams, *Cars, Cholera and Cows: The Management of Risk and Uncertainty*, *CATO INST. POL'Y ANALYSIS* 6 (Mar. 4, 1999).

140. Stephanie McKinnon McDade, *Heads Up*, *SACRAMENTO BEE*, Jan. 19, 2000, at G1, G5.

141. Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 *CASE W. RES. L. REV.* 286, 290 (1985).

142. *Id.*

143. *Id.* (citing 4 *OXFORD ENGLISH DICTIONARY* 440 (1933) (defining “foresee” as the ability “to see beforehand, have prescience of [or] to exercise foresight, take care or precaution, make provision”).

to be at fault. When we condemn someone for harming another, we may be saying he failed to foresee a happening when he should have, or he foresaw the event and made a bad choice.¹⁴⁴

In a world that is not risk-free and never will be, a purchaser is in a position to avoid certain types of harm. The consumer is free to choose whether or not to purchase a product in the first place. Then, after purchase, the consumer exercises control over the product, choosing whether to follow (or even whether to read) the instructions and warnings that accompany it.¹⁴⁵ Moreover, only the consumer is aware of his or her own peculiar needs and abilities, thus placing him in a better position to insure against injury (or to choose to live dangerously). Some individuals may make a conscious choice to misuse a product. Recognizing this fact, Arizona¹⁴⁶ and North Carolina¹⁴⁷ enacted a statutory defense for the use of products contrary to their “express and adequate instructions or warnings . . . if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.”¹⁴⁸ It is in the public interest to recognize that some injuries are not most effectively dealt with by having their cost spread among consumers through higher prices and insurance.¹⁴⁹

144. McDowell, *supra* note 141, at 290 (internal citations omitted). In *Moran v. Faberge, Inc.*, 332 A.2d 11, 26 (Md. 1975) (O'Donnell, J., dissenting), Judge O'Donnell observed:

It seems to me that the majority has fallen into the pitfall, recognized by Professor Prosser, who, in undertaking to analyze the treatment by the various courts of the illusory concept of “foreseeability” and noting the confusion resulting therefrom, states:

“Some ‘margin of leeway’ has to be left for the unusual and the unexpected. But this has opened a very wide door; and the courts have taken so much advantage of the leeway that it can scarcely be doubted that a great deal of what the ordinary man would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague, general outlines.”

Id. at 26 (quoting W. PROSSER, TORTS § 43, at 269 (4th ed. 1971)).

145. Michigan Lawsuit Abuse Watch (MLAW) sponsors the annual “Wacky Warning Label Contest” to reveal how lawsuits, and concern about potential lawsuits, have created a need for common sense warnings on many of the products consumers use every day. Among the “winners” in 2001 were the fireplace log with the warning, “Caution: Risk of Fire”; the box of birthday candles labeled, “DO NOT use soft wax as ear plugs or for any other function that involves insertion into a body cavity”; and the CD player with the unusual warning, “Do not use the Ultradisc2000 as a projectile in a catapult.” Press Release, MLAW, Warning That “Fireplace Log May Cause Fire” Wins Award in Fifth Annual Contest of Nation’s Wackiest Labels (Jan. 22, 2002), at <http://www.mlaw.org> (last visited Oct. 8, 2002).

146. See ARIZ. REV. STAT. ANN. 12-683(3) (West 1992).

147. See N.C. GEN. STAT. 99B-4(1) (1999).

148. *Id.*, cited in David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 6 (2000).

149. See generally Owen, *supra* note 129, at 427 (discussing a variety of “misuse” defenses).

Manufacturers cannot guard against or prevent *all* hazards. For example, in *Romito v. Red Plastic Co.*,¹⁵⁰ a construction worker who failed to tie himself to a safety line died when he accidentally fell through a skylight. His family brought a products liability action against the skylight manufacturer under negligence and strict liability theories. The California Court of Appeal rejected the claim:

We acknowledge the appeal of the logic that Dur-Red, in the interest of public safety, readily could have used a stronger material at no extra cost that would have saved Romito's life. This logic, however attractive in this case, fails to satisfy our broader policy concerns. Any product is potentially dangerous if accidentally misused or abused, and predicting the different ways in which accidents can occur is a task limited only by the scope of one's imagination. To require skylight manufacturers to adopt technological safety advances and recall, replace, or retrofit their older products or risk exposure to tort liability would be unreasonable in the absence of defined risks of harm. . . .

Here, the injury resulted from an accidental fall. If we were to impose a duty of care in this situation, should the manufacturer also owe a duty of care to a victim of crime? As the level of violence in modern society increases, even state of the art products may soon be rendered unsafe. For example, automobile windshields and home and office windows could be made of bulletproof glass but most are not. Must glass companies refuse to sell anything but bulletproof glass to auto manufacturers and construction companies simply because the stronger material exists and the risk of shootings is ever increasing in many urban neighborhoods?¹⁵¹

Other types of injury may impose such substantial society costs that a legislature may legitimately curtail personal freedom. For example, motorcycle helmet laws were fiercely debated as legislators attempted to strike a balance between the competing interests of riders who valued the personal freedom of riding without a helmet with the societal value of saving taxpayer dollars used to support uninsured riders who had accidents and suffered head injuries, requiring long-term care. *See, e.g., Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989):

A motorcyclist without a helmet is more likely to suffer serious head injury than one wearing the prescribed headgear. State and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense. If permanently disabled, the cyclist could require public assistance for many years. As Professor Tribe has expressed it, "in a society unwilling to abandon bleeding bodies on the highway, the motorcyclist or driver who endangers himself plainly imposes costs on others."

150. 44 Cal. Rptr. 2d 834, 838 (1995), *rev. denied*, 1995 Cal. LEXIS 7120 (Cal. Nov. 22, 1995).

151. *Id.*

Some injuries are better borne or avoided by the consumer.¹⁵²

If courts develop tort law to further the public policy of improving overall safety, they cannot escape the need to address comparative risk.¹⁵³ The “abatement of risk in one area sometimes comes only with unintended effects that actually may increase other sorts of risk.”¹⁵⁴ “Every form of transportation, medical treatment, or food storage involves some risks, and it is worse than useless to do away with one hazard in ways that push society toward more hazardous substitutes.”¹⁵⁵ As an example of this type of application of the law of unintended consequences, consider that the silicon breast implant litigation reduced the availability not only of breast implants,¹⁵⁶ but also of shunts made of silicon used to divert excess water from the brains of children with hydrocephalus.¹⁵⁷ Thus, if safety rules render air travel overly expensive, more vacationers will drive; if the government shuts down nuclear power generators, there will be more underground coal mining.¹⁵⁸

152. *Seely v. White Motor Co.*, 403 P.2d 145, 150 (Cal. 1965) (“If under these circumstances defendant is strictly liable in tort for the commercial loss suffered by plaintiff, then it would be liable for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses, even though those needs were communicated only to the dealer. Moreover, this liability could not be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products.”).

153. See Walter K. Olson, *Comparative Risk*, MANHATTAN INSTITUTE CIVIL JUSTICE MEMO NO. 1 (1987), at http://www.manhattan-institute.org/html/cjm_1.htm (last visited Oct. 8, 2002).

154. Richard Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 Mich. L. Rev. 1121, 1196 (1999) (citing John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 10-19 (John D. Graham & Jonathan Baert Wiener eds., 1995)).

155. See Olson, *supra* note 153.

156. See *supra* notes 81-84 and accompanying text.

157. See Nagareda, *supra* note 154, at 1196 (citing Linda Ransom, *Lawyers May Kill My Daughter*, WALL ST. J., Mar. 20, 1996, at A14).

158. See Olson, *supra* note 153. This is not to suggest that the general public has a perfect record of risk-assessment. As one commentator notes, the Three Mile Island incident is instructive regarding public perception of risk:

Despite the fact that not a single person died at Three Mile Island, and few if any latent cancer fatalities are expected, no other accident in our history has produced such costly societal impacts. The accident at Three Mile Island devastated the utility that owned and operated the plant. It also imposed enormous costs (estimated at 500 billion dollars by one source) on the nuclear industry and on society, through stricter regulations, reduced operations of reactors worldwide, greater public opposition to nuclear power, reliance on more expensive energy sources, and increased costs of reactor construction and operation.

Robert Wachbroit, *Describing Risk*, RISK ASSESSMENT IN GENETIC ENGINEERING 370 (Morris Levin & Harlee S. Strauss eds., 1991) (quoting P. Slovic, *The Perception and Management of Therapeutic*

For example, trial lawyers have attacked every major form of contraception in product liability lawsuits,¹⁵⁹ including options that are well-known to be very safe.¹⁶⁰ As a result, research funding has evaporated, especially within the for-profit sector.

American companies spent a mere twenty-two million on contraceptive research in 1995, a year in which Americans spent \$2.9 billion on birth control products. Only two American for profit companies, Ortho and Wyeth-Ayerst, continue to fund significant research on contraceptive development. Instead, nearly all birth control research is now carried out by philanthropic entities; the three nonprofits active in the area, together with the National Institute of Health, have a total contraceptive research budget of about \$50 million, less than one-fifth of what it ordinarily takes to bring a single new drug to market.¹⁶¹

The impact on medical care goes well beyond contraception. For example, physicians serving rural areas are not allowed to contract with patients for a lower level of care than that available to wealthy patients in more prosperous locales.¹⁶² Stripped of the ability to contract for services, and wary of malpractice suits, many rural physicians refuse to engage in obstetrical practice. Women in labor are forced to drive hours to the nearest big city hospital, risking delivery—or miscarriage—en route.¹⁶³

Risk 10 (1989) (unpublished paper presented to Royal College of Physicians) *quoted in* Burk & Boczar, *supra* note 36, at 837 n.286 (1994). “[T]he introduction of new nuclear power facilities has been brought to a standstill without any legislative prohibitions or deterrents, but rather by harassment, agitation, and litigation spawned by opposition groups whose efforts have made nuclear power ‘too hot to handle’ in the political arena.” Harold P. Green, *The Law-Science Interface in Public Policy Decisionmaking*, 51 OHIO ST. L.J. 375, 399 (1990), *quoted in* Burk & Boczar, *supra* note 36, at 837 n.286.

159. See generally William M. Brown, *Deja Vu All Over Again: the Exodus from Contraceptive Research and How to Reverse It*, 40 BRANDEIS L.J. 1 (2001) (“Contraceptive research has been stalled for a generation in the United States. Pharmaceutical and medical device companies have left the business in droves and only a few remain. A major reason for the exodus has been the cost of defending the many product liability lawsuits the companies have faced”).

160. *Id.* at 26-29 (detailing litigation against the Pill, spermicidal jellies, IUDs, and Norplant).

161. Marc M. Arkin, *Products Liability and the Threat to Contraception*, Civil Justice Memo No. 36, Center for Legal Policy at the Manhattan Institute (Feb. 1999), available at http://www.manhattan-institute.org/html/cjm_36.htm (last visited Mar. 13, 2003).

162. Michael I. Krauss, *Restoring the Boundary: Tort Law and the Right to Contract*, 347 CATO INST. POL’Y ANALYSIS 10 (June 3, 1999) (citing *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Kalsbeck v. Westview Clinic PA*, 375 N.W.2d 861 (Minn. Ct. App. 1985); and *Roberts v. Tardiff*, 417 A.2d 444 (Me. 1980) (obstetrical treatment of mother did not attain nationally recognized standards of care)).

163. John Porretto, Associated Press, *Costs Lead Rural Doctors to Drop Obstetrics*, WASH. POST, Nov. 23, 2001, at A4 (insurance companies responded to Mississippi’s reputation for “jackpot justice” by substantially increasing medical malpractice premiums to between \$40,000 and

All human activity carries risk. Given the destructive potential of modern technology, the prospective ambit of that danger can be enormous. Drawing the liability boundary to include all outcomes bearing simple cause-in-fact relationships to the defendant will have dire economic consequences. If defendants must pay judgments from personal assets, many individuals and small businesses may be forced out of the market or into bankruptcy. Fear of this possibility may compel entrepreneurs and individuals to act very cautiously, becoming risk-averse rather than risk-preferring.¹⁶⁴

If we are to treat adults as adults, they must be permitted to assess and accept risks dependent on their own level of risk-aversion. Courts should neither act as though adults have the cognitive capacity of children, nor should they try to impose a risk-free society. Risk moves hand-in-hand with both freedom and responsibility; our tort system must balance all three, while eradicating none.

IV. TORT REFORM PROPOSALS SHIFT THE BALANCE FROM LIABILITY IMPOSED BY JUDICIAL FIAT TO PERSONAL FREEDOM AND RESPONSIBILITY TO ASSESS AND ACCEPT RISK

As much as this Article has described the impacts of expansive tort liability on free enterprise, it is with a certain wry irony that one must note the emergence of a new entrepreneurial sector: the phenomenon of entrepreneurial litigation.¹⁶⁵ Professor Richard Nagareda explains that these lawsuits initially required huge infusions of cash over many years to enable the plaintiff's bar to generate the documentary evidence and expert witnesses needed to substantiate their tort claims.¹⁶⁶ The successful claims then repay the initial investment many times over through a percentage of the clients' damages (especially when punitive damages are awarded). Moreover, using the same evidence and expert witnesses, the trial lawyers can bring essentially the same case over and over again, with new plaintiffs, to generate additional income in the form of contingency fees.¹⁶⁷

\$100,000 per year. As a result, three of the six obstetricians in Cleveland will no longer deliver babies. Yazoo City, with a population of 14,550 residents, does not have a single obstetrician).

164. McDowell, *supra* note 141, at 297.

165. Nagareda, *supra* note 154, at 1166. Professor Nagareda notes that the term "entrepreneurial litigation" originated in scholarship focused primarily upon corporate and securities class actions. *Id.* (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987)). Commentators have extended the analysis to the mass tort context. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347, 1373-76 (1995).

166. *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 909-10 (1996).

167. *See id.* at 910.

This practice became famous (or infamous) in the tobacco litigation,¹⁶⁸ extending to the pooling of financial resources by prominent and well-capitalized plaintiffs' law firms.¹⁶⁹ Even mainstream newspapers have noticed the pervasive involvement by the same group of private lawyers in Medicaid reimbursement actions ostensibly brought by state governments¹⁷⁰ and the financial benefit those attorneys stand to gain.¹⁷¹

168. The tobacco litigation is only one example of the tension between respect for individual choice and respect for what Richard Klein has labeled "healthism," that is, a societal demand that people make choices to benefit, rather than harm, their own health. Nagareda, *supra* note 154, at 1188 (citing RICHARD KLEIN, *CIGARETTES ARE SUBLIME* 191 (1993)). The respect for individual choice extends beyond the demand of the plaintiffs' bar for information and warning labels to allow people the greatest possible information as they make their risk decisions. It is also present in the recognition of a constitutional right of privacy. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception). *See generally* *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (assuming that competent persons have a constitutional right to refuse life-extending treatment). In both contexts, the law has sought to facilitate significant individual choices free from coercion, even when those choices may be considered socially destructive or contrary to the person's best interests. Nagareda, *supra* note 154, at 1188.

In Klein's view, "[h]ealthism has become part of the dominant ideology of America," an ideology that "has sought to make longevity the principal measure of a good life." *Id.* (quoting KLEIN, *supra*, at 185, 191). This use of the courts to define for others what makes life worth living, renders recent developments in the tobacco litigation disturbing, and even threatening, to some. *Id.* In fact, the Medicaid reimbursement suits brought by state attorneys general are based on an argument that smokers' implicit rejection of healthism costs the rest of society (via tax-supported medical care). W. Kip Viscusi argues, however, that while smokers do incur higher medical costs, their shorter life expectancy means that smokers incur a cost of \$0.11 per pack less in nursing home costs and nine cents per pack less in pension costs. On balance, smokers incur about \$0.14 less per pack in costs paid by Massachusetts, while contributing an additional \$0.51 per pack in excise taxes. W. Kip Viscusi, *Smoked Out* (a synopsis of W. Kip Viscusi, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* (2002), at <http://www.press.uchicago.edu/Misc/Chicago/857476.html> (last visited June 14, 2002)).

169. *See* Nagareda, *supra* note 154, at 1166-67 (citing Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at C1 (reporting at the outset of the most recent wave of tobacco litigation that "[c]lose to 60 prominent law firms known for so-called toxic torts are contributing \$100,000 each to a consortium, filling an annual war chest of nearly \$6 million")). *Cf. In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 218 (2d Cir. 1987) (discussing an early example of resource pooling by plaintiffs' counsel in the Agent Orange litigation).

170. Nagareda, *supra* note 154, at 1167 (citing Barry Meier, *In Tobacco Talks; Lawyers Hold Key*, N.Y. TIMES, May 22, 1997, at A1).

171. *Id.* (citing Paul A. Gigot, *\$50 Million Men: Tobacco Lawyers Become Sultans*, WALL ST. J., June 27, 1997, at A14; Barry Meier, *Record Legal Fees Emerge as Issue in Tobacco Deal*, N.Y. TIMES, June 23, 1997, at A11; Richard B. Schmitt, *Big Winners in the Settlement Could Be the Lawyers*, WALL ST. J., June 23, 1997, at B1; Matthew Scully, *A Modest Proposal on Tobacco Lawyers Fees*, WALL ST. J., July 9, 1997, at A14).

Mass tort litigation, therefore, serves as a long-term investment in the future of the plaintiffs' bar itself. However, the ultimate fees the plaintiffs' bar hopes will be generated from the litigation depends in large part on expectations about how juries will view the cases. Of course, like all other tort cases, few mass tort claims ultimately yield jury verdicts.¹⁷² But litigants' perceptions (whether accurate or not), as to what a jury would do in a given kind of litigation impact both the initial decision to sue and, later, settlement negotiations.¹⁷³ As the silicon breast implant litigation demonstrates, moreover, verdicts in a few early individual lawsuits can exercise considerable influence upon the subsequent course of events.¹⁷⁴

Congress has enacted few laws to counteract the tort litigation explosion.¹⁷⁵

172. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212-13 (1992) (statistics related to number of tort cases that go to trial, are settled, or otherwise resolved).

173. See Nagareda, *supra* note 154, at 1167. The Texas Supreme Court in *Able Supply Company v. Moye*, 898 S.W.2d 766, 771-72 (Tex. 1995), decried a trial judge's rulings that essentially rendered the defendant companies hostage to 3000 plaintiffs who alleged all types of injury purportedly related to exposure to multiple chemicals over a forty-year span. The judge noted that "[t]he defendants have been parties to this suit for eight years without access to the basic facts underpinning the claims against them. Defense costs have mounted to millions of dollars over the past two years alone." *Id.* at 771. Moreover, the court rejected the plaintiffs' extortionate offer to release defendants who provide them with satisfactory evidence of their nonliability.

This offer is no substitute for meaningful discovery. In the first place, it unacceptably places plaintiffs in the position of the sole fact finder and judge of the defendants' evidence. In the second place, it misconstrues plaintiffs' obligations under the Texas Rules of Civil Procedure. Plaintiffs have an affirmative obligation under Rule 13 to sign pleadings that to the best of plaintiffs' knowledge, information and belief, formed after reasonable inquiry, assert claims that are not groundless and brought in bad faith or groundless and brought for purpose of harassment. TEX. R. CIV. P. 13. Plaintiffs *also* have an obligation to comply with the rules requiring them to answer interrogatories and engage in other discovery. Finally, the offer of voluntary dismissal of "non-liable defendants" is little solace to the defendants who have already participated in eight years of discovery, who are not dismissed by the plaintiffs, and who face continued proceedings with little prospect of a prompt resolution on the merits.

Id. at 772.

174. See *supra* notes 80-87 and accompanying text.

175. Former Senator Spencer Abraham of Michigan made the case for national, as opposed to state, tort reform as follows:

[P]roduct liability, in which rulings and their costs create not a series of competitive state markets, but rather a restrictive, illogical, and inefficient national market. Moreover, we effectively already have a single unitary tort system in the law of products liability. Unfortunately, our unitary system comprises not a coherent, consistent body of laws, but the most commercially restrictive features of the tort laws of individual states.

In three narrow areas in which Congress has specifically addressed the prospect of tort litigation driving valuable products off the market, the results have been dramatic. The first example relates to vaccines. “By 1986, many manufacturers of childhood vaccines had fled the American market and the country had less than six months of vaccine stores left.”¹⁷⁶ Congress feared that the prospect of tort liability for vaccine-related injuries would drive up prices so high that vaccine suppliers would be forced out of the market.¹⁷⁷ Alternatively, Congress also worried that given the uncertain nature of litigation, some deserving victims of vaccine-related injuries might not be fully compensated.¹⁷⁸ Therefore, Congress passed the National Vaccine Injury Compensation Program,¹⁷⁹ that provided a specified recourse for families to pursue injury claims while discouraging further private mass tort litigation against the pharmaceutical companies.¹⁸⁰ “Among other things, the Act established a special tribunal (the

It is not difficult to see how this has come about: The law of the state in which the alleged harm occurs generally decides tort cases. Yet our market for products is national, so every company must be prepared to be sued in any state in which its product might be used. If a car built and sold in Michigan by a Michigan corporation is in an accident on a California freeway, California's tort law will determine whether the car maker is liable. If the California legislature decides that side air bags are a necessary safety feature, it could impose strict liability on the manufacturer of any car made anywhere in the United States without one. . . .

Under these circumstances, how can states serve as “laboratories of democracy” in the area of product liability? No state will know or have any real incentive to find out whether its product-liability “experiment” has succeeded or failed. Why? Because liability costs—in the form of higher prices for goods and services—are spread nationwide. Meanwhile, the benefits of the state's product-liability system flow primarily to its residents, who constitute the vast majority of potential plaintiffs. A state that elects a less costly set of product-liability rules will see the benefits of that system shared by in- and out-of-staters alike, while its residents will continue to pay almost as much for products because of more costly out-of-state tort systems. Congress does not face the same obstacles in enacting product-liability legislation. It, and it alone, can develop a set of national rules designed to maximize the common good whose costs and benefits will be shared by all citizens.

Spencer Abraham, *Litigation Tariff: The Federalist Case for National Tort Reform*, 73 POL'Y REV. 77 (Summer 1995).

176. Arkin, *supra* note 161.

177. See H.R. REP. NO. 99-908, 1, 4, 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6344, 6345, 6347-48.

178. See *id.*

179. Pub. L. No. 99-660, § 311(a), 100 Stat. 3755 (codified at 42 U.S.C. §§ 300aa-11 (2001)).

180. Arkin, *supra* note 161. The “swine flu epidemic of 1976” provides another example. After four people contracted a new strain of influenza dubbed “swine flu,” the “pharmaceutical companies quickly developed a vaccine.” See Wilson, *supra* note 18 (citing HUBER, *supra* note 17, at 133-34). Because insurers, fearing undue exposure to liability, refused to underwrite the new

Vaccine Court), and moved vaccine-injury cases partly outside the customary tort framework.”¹⁸¹ Congress also eased the complainants’ burdens in Vaccine Court by dispensing with the requirement of proving negligence and by greatly simplifying the requisite proof of causation.¹⁸² In return, Congress limited the damages that a victim could obtain for vaccine-related injuries.¹⁸³ Four years later, private pharmaceutical companies were back in business, researching and developing childhood vaccines.¹⁸⁴

In the 1990s, the response by the pharmaceutical companies was even more dramatic. More people received immunizations and wholesale prices of vaccines decreased.¹⁸⁵ Moreover, since 1990, the pharmaceutical companies have not ceased production of a single vaccine in the United States.¹⁸⁶ Even better, the pharmaceutical industry has been re-energized to invest in research and development of new vaccines,¹⁸⁷ including those for diseases for which no vaccines had previously existed, those combining immunizations for multiple diseases, and those improving on existing vaccines.¹⁸⁸

vaccine, *id.*, Congress passed a law providing that a person who developed a malady as a result of having been vaccinated under the National Swine Influenza Immunization Program of 1976 (Swine Flu Act), 42 U.S.C. § 247(b) (j)(1) (2000), may recover just compensation from the United States without proving the government’s fault or negligence. *See* 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1982) (amending Federal Tort Claims Act for swine flu claims); *In re Swine Flu Immunization Prods. Liab. Litig.*, 508 F. Supp. 897 (D. Colo.), *aff’d* 708 F.2d 502 (10th Cir. 1981); *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977) (upholding constitutionality of program). Approximately 4000 administrative claims were filed, resulting in more than 1500 suits in federal district courts. Arnold W. Reitze, Jr., *Federal Compensation for Vaccination Induced Injuries*, 13 B.C. ENVTL. AFF. L. REV. 169, 181 (1986) (citing Rheingold & Shoemaker, *The Swine Flu Litigation*, 8 LITIG. 28 (Fall 1982)). Compare Kellen F. Cloney, Note, *AIDS Vaccine Manufacturers v. Tort Regime: The Need for Alternatives*, 49 WASH. & LEE L. REV. 559, 570 (1992) (stating that pharmaceutical company said that if it produced an AIDS vaccine, Congress would have to provide a safe harbor for liability before the company would be willing to market it).

181. *O’Connell v. Shalala*, 79 F.3d 170, 173 (1st Cir. 1996).

182. *See* National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-11 (2000).

183. *See id.* § 300aa-15.

184. Arkin, *supra* note 161.

185. *See* Elizabeth C. Scott, *The National Childhood Vaccine Injury Act Turns Fifteen*, 56 FOOD DRUG L.J. 351, 357 (2001) (citing Derry Ridgway, *No-Fault Vaccine Insurance: Lessons From the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL’Y L. 59, 76 (1999)).

186. *Id.*

187. *See generally* Nat’l Inst. of Allergy and Infectious Diseases, *The Jordan Report 2000: Accelerated Development of Vaccines*, at <http://www.niaid.nih.gov/newsroom/releases/jordan00.html> (last visited Feb. 28, 2003) (detailing progress on vaccines for malaria, AIDS, tuberculosis, hepatitis, anthrax and more than fifty other diseases; the report also discusses new technologies for administering vaccines, such as through patches on the skin rather than needles).

188. *See* Scott, *supra* note 185, at 357.

Congress also responded to manufacturers' decisions to leave the biomedical supply market by enacting legislation entitled the "Biomaterials Access Assurance Act of 1998" (BAAA).¹⁸⁹ BAAA applies to all implant raw materials and components except the silicone gel and the silicone envelope utilized in a breast implant containing silicone gel.¹⁹⁰ The law supersedes otherwise applicable state laws and procedures by precluding any civil action, regardless of the legal theory upon which it is based, for harm, other than commercial loss or loss of or damage to an implant, caused by an implant.¹⁹¹ The BAAA also provides expedited dismissal procedures for unwarranted suits against biomaterials suppliers.¹⁹²

The full impact of the BAAA on the medical device market is still unknown, but early signs are promising. If the medical device market has potential prospective value, some companies may enter or remain in the market because BAAA serves as a product liability safety net. "For example, Vitrex USA, Inc. will enter the medical implant market 'because the legislation gives it additional liability protection.' Whereas, Thermedics, Inc. stayed in the medical device market all along."¹⁹³ "Some major medical device raw material suppliers that left the market due to concerns over product liability" (e.g., DuPont and Dow Chemical Co.), however, await a court ruling on the BAAA before reentering the market.¹⁹⁴ Due to its very nature, biotechnology already labors under a cloud of controversy such that any verdict of liability can cause disproportionate harm to the industry.¹⁹⁵ However, it seems likely that Congress' intent to protect

189. The Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, § 1, 112 Stat. 1519 (codified at 21 U.S.C. §§ 1601-1606 (2000)).

190. 21 U.S.C. § 1602(2)(D)(iii) (2000).

191. *Id.* §§ 1603(b)(2)(c).

192. *Id.* §§ 1605-1606.

193. Anne Marie Murphy, Note, *The Biomaterials Access Assurance Act of 1998 and Supplier Liability: Who You Gonna Sue?*, 25 DEL. J. CORP. L. 715, 738 (2000) (citing Steven Toloken, *Doubt Shrouds Biomaterials Assurance Act: Resin Makers Take Wait-and-See Stance with Liability Protection Law*, PLASTICS NEWS, May 31, 1999)).

194. *Id.*

195. For example, genetically modified (GM) crops have been banned in Europe since April 1998. In trade talks, the European Union is also pushing for strict controls over the importation of GM foods. BBC News, *EU to Fight for GM Food Ban* (Dec. 13, 1999), at http://news.bbc.co.uk/hi/english/business/newsid_563000/563579.stm (last visited Oct. 4, 2001). The controversy has not exempted the United States. Opposition to agricultural genetic engineering was a major theme for many American protesters at the World Trade Organization meeting in Seattle and International Monetary Fund/World Bank meetings in Washington, D.C. Jen Soriano, *Hot Button Issue: Genetically Modified Foods*, MOTHER JONES (Nov. 24, 1999), at <http://www.mojones.com/wto/soriano2.html> (last visited Oct. 4, 2001). Biotechnology opponent Jeremy Rifkin initiated a class-action lawsuit against Monsanto and other companies for bringing genetically modified seeds to the market. The Foundation on Economic Trends, *Landmark Class-Action Anti-Trust Lawsuit Filed Against Monsanto* (Dec. 14, 1999), at <http://www.biotechcentury.org/> (last visited Oct. 4, 2001). Anti-biotech demonstrators dominated a recent FDA public hearing on GM foods in

biomaterials suppliers from “excessive litigation expenses to guarantee the future supply of lifesaving and life-enhancing medical devices” will, in time, be borne out.¹⁹⁶

The third example relates to statutes of repose for aircraft. Statutes of repose reflect the public policy that, after the passage of a reasonable length of time, manufacturers should be free from the burdens of disruptive litigation over products that are alleged to cause harm after many years of safe operation and use.¹⁹⁷ Almost half of the states have enacted statutes of repose of varying lengths. On the federal level, in 1994, the General Aviation Revitalization Act (GARA) was signed into law to breathe life into an industry that had experienced a ninety-five percent decline in production and a loss of 100,000 jobs in the preceding two decades.¹⁹⁸ Among other things, the legislation limited lawsuits on planes more than eighteen years old.¹⁹⁹ The purpose of GARA is to

establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.²⁰⁰

Five years later, the General Aviation Manufacturers Association issued a report on the Act declaring it “an unqualified success.”²⁰¹ According to the report, general aviation production lines created 25,000 new manufacturing jobs as well as thousands of additional jobs in support industries. Production of general aviation aircraft in the United States more than doubled from 1994 to

Oakland. The agency has a “new initiative to engage the public about foods made using bioengineering.” HHS News, *FDA Announces Public Meetings on Bioengineered Foods* (Oct. 18, 1999), available at <http://www.fda.gov/bbs/topics/NEWS/NEW00695.html> (last visited Oct. 4, 2001).

196. See generally Kerouac, *supra* note 51, at 331 (arguing that the BAAA furthers both corrective justice policies underlying tort law as well as economic efficiency).

197. See Charles E. Cantu, *The Recycling, Dismantling, and Destruction of Goods as a Foreseeable Use Under Section 402A of the Restatement (Second) of Torts*, 46 ALA. L. REV. 81, 99 n.111 (1994).

198. See Ladd Sanger, *Will the General Aviation Revitalization Act of 1994 Allow the Industry to Fly High Once Again?*, 20 OKLA. CITY U.L. REV. 435, 436 (1995).

199. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, § 2(a), 108 Stat. 1552 (codified at 49 U.S.C. § 40101 (2000)).

200. 140 CONG. REC. at H4998, H4999 (daily ed. July 27, 1994) (statement of Rep. Hamilton Fish R-NY), quoted in *Altseimer v. Bell Helicopter Textron Inc.*, 919 F. Supp. 340, 342 (E.D. Cal. 1996).

201. *General Aviation Manufacturers Association: A Report to the President and Congress on the General Aviation Revitalization Act*, available at <http://www.generalaviation.org/pdfs/garaweb.pdf> (last visited June 22, 2001).

1999. Exports also doubled. Moreover, in the five years after GARA was enacted, investment in research and development by general aviation companies grew by more than 150%.²⁰² This one narrow tort reform measure had very positive results, and a strong ripple effect in communities across the country. For example, Cessna located a new small aircraft plant in Montgomery County, Kansas, that revived the local economy.

[P]rior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators. Its population was dropping, employment was on the decline, per capita income was down, and property values were depressed. Economic growth since the construction of the plant began has exceeded all predictions made in a study the county prepared in 1995. New housing starts are up 260 percent, the value of new homes has doubled, retail sales are up five percent, per capita income has nearly doubled, and nearly 500 people per year are moving into the county.²⁰³

Reform has been more common at the state level, although the courts sometimes seem to exhibit an almost visceral dislike for such measures.²⁰⁴ In California, widespread dissatisfaction with joint and several liability, the “deep pocket” rule, resulted in the overwhelming passage of Proposition 51, the Fair Responsibility Act of 1986, by a 62% affirmative vote.²⁰⁵ Proposition 51 abolished the principle of joint and several liability for nonpecuniary damages by requiring a defendant to pay only his or her proportionate share of noneconomic damages, but still allowed joint and several liability for all economic damages.²⁰⁶ Joint and several liability for noneconomic damages threatened bankruptcies of local governments, other public agencies, private individuals, and businesses; resulted in higher prices and taxes; caused curtailment of essential police, fire, and other protections; and promised to wreak catastrophic economic consequences all because deep pocket defendants were held financially liable for all of the damages found, even if that defendant shared in only a fraction of the fault.²⁰⁷ The people announced that “to remedy these

202. *Id.*

203. S. REP. NO. 105-32 at 123122 (1997) (testimony of John Peterson of the Montgomery County Action Council of Coffeyville, Kansas).

204. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1072-73, for particularly vituperative swipes at the Legislature that *dared* to enact tort reform; *see also* Mark Thompson, *Letting the Air out of Tort Reform: After Making Inroads in State Legislatures, Proponents of Restrictions on Tortsuits New Are Fighting in the Courts to Protect Their Gains*, 83 A.B.A. J. 64, 65 (1997) (“Through the end of 1996, high courts in 24 states had handed down 61 different decisions overturning all or parts of laws that attempted to limit damages or erect other hurdles to discourage tort suits . . .”).

205. Cathie Calvert, *Prop. 51 is Only a Step in Ending State Liability Crisis*, SAN JOSE MERCURY NEWS at 1A (June 4, 1986).

206. CAL. CIV. CODE § 1431.1-1431.5 (2002).

207. *See id.* § 1431.1(a)-(b) (findings and declaration of purpose of Proposition 51).

inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.”²⁰⁸

Even after Proposition 51, multiple defendants still bear joint and several liability for provable medical costs and other tangible amounts. However, each defendant is liable solely in proportion to its assessed degree of fault for noneconomic damages, including pain, suffering, or emotional distress.²⁰⁹ Proposition 51 thus allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which defendants are named. The defendants are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious defendants. However, as to noneconomic damages, the plaintiff must sue all the defendants to enable a full recovery.²¹⁰ “Failure to name a defendant will preclude recovery of that defendant’s proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor.”²¹¹

In 1999, Florida enacted a tort reform law, much more wide-ranging than California’s Proposition 51, to address many of the most common abuses in tort litigation, especially in the context of product liability litigation.²¹² In a particularly notorious case arising from an accident at Walt DisneyWorld in Orlando, Disney was required to pay an entire damages award, even though it was found to be only 1% at fault for the plaintiff’s harm.²¹³ In response, Florida’s tort reform law places restrictions on joint and several liability. Under the new law, a defendant found less than 10% at fault in lawsuits involving multiple defendants is not jointly and severally liable; a defendant found 11% to 25% liable is jointly and severally liable only for economic damages, and then for an amount not exceeding \$200,000, and so on.²¹⁴ The new law also includes

208. *Id.* § 1431.1(c).

209. *Id.* § 1431.2.

210. *Evangelatos v. Super. Ct.*, 753 P.2d 585, 594-95 (Cal. 1988).

211. *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified Sch. Dist.*, 85 Cal. Rptr.2d 672, 681 (Cal. Ct. App. 1999).

212. Act of Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400 (codified at FLA. STAT. § 768.81 (1999)). Provisions include requiring mediation in certain types of actions and creating trial-resolution judges; amending statutes relating to evidence of remedial measures; creating a limitation of liability if security measures are undertaken by convenience-store owners; restricting the liability of possessors of land to trespassers; placing caps on punitive damages; apportioning damages under comparative fault; and imposing sanctions for unsupported claims or defenses.

213. *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987).

214. These restrictions were not the Florida legislature’s first foray into tort reform. In 1986, the legislature eliminated joint and several liability for noneconomic damages in cases where the total damage award exceeds \$25,000. FLA. STAT. § 768.81(3) (1987); *Y.H. Investments, Inc., v. Godales*, 690 So. 2d 1273, 1277 (Fla. 1997) (“[U]nder section 768.81, a tort-feasor who is determined to have been only ten percent at fault in causing an injury will only be liable for ten percent of the damages. That is a simple and rather straightforward proposition and represents a legislative policy choice to apportion liability for damages based upon a party’s fault in causing the

a statute of repose, precluding plaintiffs from suing over the failure of worn out products when they reach a certain age (twelve or twenty years, depending on the product).²¹⁵ In addition, Florida's tort reform law prescribes reasonable caps on the award of punitive damages.²¹⁶ There are many other provisions,²¹⁷ but the common thread is that Florida's tort reform law stems the litigation abuse that places an unwarranted burden on the state's economy, to the detriment of the millions of consumers and citizens who benefit from its many products and services.²¹⁸

Tort reform measures are generally designed to make more uniform and predictable the way in which the legal system will work;²¹⁹ to make it more just;²²⁰ to reduce the cost of litigation and the overall transaction costs;²²¹ to

damage.”).

215. See ch. 99-225, §§ 11, 12, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031 (1997)).

216. The extensive problems associated with punitive damages are beyond the scope of this Article. The general theme of criticism of punitive damages focuses on uncertainty. There is no sure way of determining whether punitive damages will be awarded in a particular case, nor is there any way to guess the amount of punitive damages if they are awarded. Consequently, businesses often end up settling questionable lawsuits just to avoid unpredictable punitive damage awards that are frequently based more on emotion and sympathy than a belief in a defendant's malicious wrongdoing.

217. For a detailed explanation of all the provisions of the law, see generally George N. Meros, Jr. & Chanta G. Hundley, *Florida's Tort Reform Act: Keeping Faith with the Promise of Hoffman v. Jones*, 27 FLA. ST. U. L. REV. 461 (2000).

218. Trial lawyers, unions, and a variety of special interest groups sued to overturn Chapter 99-225 shortly after it was signed into law. The trial court held that the law violated the single-subject rule and struck it down. However, Florida's First District Court of Appeal reversed this decision, holding that the case was not justiciable because the plaintiffs' claims were nothing more than “speculation” and “hypothesis.” *State of Florida v. Florida Consumer Action Network*, 830 So. 2d 148, 153 (Fla. Dist. Ct. App. 2002).

219. See *Quest Medical, Inc. v. Apprill*, 90 F.3d 1080, 1093 (5th Cir. 1996) (noting that the Texas legislature enacted tort reform measures to restore and maintain “reasonable predictability in the Texas system”); N.J. STAT. ANN. § 2A:58C-1(a) (2002) (“The Legislature finds that there is an urgent need for remedial legislation to establish clear rules with respect to certain matters relating to actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages.”); *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 84 (Tex. 1997) (creating “certainty” is a purpose of tort reform).

220. See Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1616 (1997) (“[T]he integrity of the judicial system is threatened when there is unpredictability in the law and its application. Instability in the law and its application breeds discontent and disrespect for the law which, in turn, erodes public confidence in the legal process.”).

221. See *McConkey v. Hart*, 930 P.2d 402, 408 (Alaska 1996) (stating that the purposes of Alaska tort reform law included “to create a more equitable distribution of the cost and risk of

restore the competitiveness of American industry;²²² to provide additional incentives for research;²²³ and to develop and offer for sale in the market new and better medical devices, mechanical products and sporting goods that Americans have come to expect. Moreover, tort reform benefits the small businesses that comprise the vast majority of all business in this country. Small businesses run greater risks of being put out of business quickly.²²⁴ Notwithstanding the economic pressures borne every day by small business, they represent the overwhelming dynamic center of the American economy.²²⁵

injury and increase the availability and affordability of insurance.”) (citing SENATE FINDINGS AND PURPOSE, S. 14-377, 2d Sess. (Alaska 1986)); *Corbetta v. Albertson’s, Inc.*, 975 P.2d 718, 722 (Colo. 1999) (explaining that the purpose of tort reform is to limit plaintiffs’ recovery, especially with regard to punitive damages); *Moody v. Dykes*, 496 S.E.2d 907, 912 (Ga. 1998) (stating that the purpose of tort reform is to bring litigation to an “expeditious but reasonable conclusion”).

222. See e.g., S. REP. NO. 104-69, at 2 (1995) (explaining that American companies are hampered by a liability system when competing in global market); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 559-61 (1992) (discussing President’s Council on Competitiveness’ recommendations for civil justice reform); see generally Priest, *supra* note 5.

223. See e.g., *Brewer v. Fibreboard Corp.*, 901 P.2d 297, 302 (Wash. 1995) (quoting preamble to WASH. REV. CODE § 7.72 (2002) (“Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products.”)).

224. See Brooks M. Beard, *The New Environmental Federalism: Can the EPA’s Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1, 22 (1997) (“For the most part, small businesses’ goals are consistent with those of large industry. Similarly concerned with liability risks and penalty costs, small businesses must contend with the real possibility of being put out of business as a result of financial penalties imposed by the EPA or private lawsuit damages.”).

225. According to the United States Department of State, small businesses represent the backbone of the American economy:

Fully 99 percent of all independent enterprises in the country employ fewer than 500 people. These small enterprises account for 52 percent of all U.S. workers, according to the U.S. Small Business Administration (SBA). Some 19.6 million Americans work for companies employing fewer than 20 workers, 18.4 million work for firms employing between 20 and 99 workers, and 14.6 million work for firms with 100 to 499 workers. By contrast, 47.7 million Americans work for firms with 500 or more employees.

Small businesses are a continuing source of dynamism for the American economy. They produced three-fourths of the economy’s new jobs between 1990 and 1995, an even larger contribution to employment growth than they made in the 1980s. They also represent an entry point into the economy for new groups. Women, for instance, participate heavily in small businesses. The number of female-owned businesses climbed by 89 percent, to an estimated 8.1 million, between 1987 and 1997, and women-owned sole proprietorships were expected to reach 35 percent of all such ventures by the year 2000. Small firms also tend to hire a greater number of older workers and people who prefer to work part-time.

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CONCLUSION

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. Such a system does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs exceed compensation paid to victims. Those transaction costs are passed on to consumers through higher product prices. The system's unpredictability and inefficiency have stifled innovation, kept beneficial products off the market, and have handicapped American firms as they compete in the global economy.²²⁶

Tort reform efforts seek to reduce transaction costs, provide greater certainty as to the rights and responsibilities of all parties involved in product liability disputes, encourage innovation, increase the competitiveness of American firms, reduce burdens on interstate commerce, and safeguard due process rights. The words of former Justice Benjamin Cardozo are instructive: the law is "guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of [legal] problems."²²⁷

For most of its 250 years, America's hallmark has been the vibrant entrepreneurial spirit and energy of its people. Indeed, American free enterprise has facilitated the success stories of millions of individuals and businesses, which have in turn driven the most productive, progressive and responsive economy in the history of the world. But there is mounting concern that over the course of the past three decades that traditional entrepreneurial spirit and energy has contracted a weakening condition, not unlike the symptoms of a parasitic illness. Unless this condition is recognized and addressed, it will eventually succeed in sapping that entrepreneurial spirit and energy so vital to free enterprise.

OF THE U.S. ECONOMY, available at <http://usinfo.state.gov/products/pubs/oecon/chap4.htm> (last visited Oct. 10, 2002).

226. Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform Legislation Is Consistent with Virginia Law and Should Be Strongly Supported*, 4 GEO. MASON L. REV. 279, 280 (1996).

227. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937), cited in Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1169 (1997).