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Behind the Curtain of Tort Reform

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Behind the Curtain of Tort Reform

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I. INTRODUCTION

In the 1939 movie, *The Wizard of Oz*, Dorothy, Scarecrow, Lion, Tin-Man, and Toto all go to meet the Wizard of Oz after melting the Wicked Witch of the West.¹ As they are impressed and

1. *The Wizard of Oz*, IMDB.COM, http://www.imdb.com/title/tt0032138/?ref_=nv_sr_1 (last visited Oct. 2, 2015).

frightened by the loud voice and pyrotechnics going on around the Wizard, Toto, Dorothy's dog, proceeds to pull back a curtain revealing the Wizard of Oz as an old man running an elaborate machine of fire, smoke, and loud noises to intimidate Dorothy and her friends. In this article, I hope to draw back at least some of the curtain² of tort reform to see the tort system for what it really is, and what it really is not.

A tort is “[a] civil wrong, other than breach of contract, for which a remedy may be obtained.”³ The term, “tort,” encompasses a wide range of non-contract disputes outside of criminal culpability. The tort reform debate “has been especially heated when it comes to medical malpractice.”⁴ Thus, this article will mainly discuss tort reform issues in the context of medical malpractice torts; however, it will also address the importance of tort reform in other areas of the law.

The purposes of the tort compensation system inform any discussion of tort reform. Most commentators agree that these purposes are to: (1) compensate injured parties and (2) deter future inappropriate behavior.⁵ John Goldberg offers a more comprehensive purpose and definition of tort law:

[T]ort is best understood as a law for the redress of private wrongs. Taking seriously tort's structure, vocabulary and 'grammar', leads one to grasp that the point of this body of law is to articulate duties of conduct that individuals and entities owe to one another, and to empower those injured by breaches of these duties (i.e., by wrongs) to invoke the law to go after their wrongdoers. Tort law, in other words, is best theorized as a special kind of victims' rights law. As such, it promises to deliver various goods within our liberal-constitutional system of government apart from deterrence and compensation, even though it will sometimes deliver those as well. In particular, it reinforces and refines norms of responsible

2. In the tort reform context, the curtain is the belief or perception that plaintiffs' tort cases are a problem with the tort system, and that by systematically limiting the rights of injured parties, the tort system will somehow fix itself. Additionally, part of the curtain assumes that the tort system is in fact “broken” in its current state.

3. *Tort*, BLACK'S LAW DICTIONARY (9th ed. 2014).

4. The tort reform debate is often heated “when discussing medical malpractice torts.” Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DEPAUL L. REV. 675, 675 (2010).

5. *Id.* at 694.

conduct, helps sustain a distinctively liberal notion of civil society, assures citizens that government is committed to attend to their complaints on a more or less individualized basis, and avoids excessive reliance on top-down regulation.⁶

Goldberg's more comprehensive thoughts on the purpose of the tort system are instructive in analyzing the arguments for and against tort reform. In a sense, his thoughts give a type of measuring tool to determine whether the reforms, made or proposed, will better assist the tort system in accomplishing its goals.

This Article will address a wide variety of arguments for and against tort reform, and will discuss possible solutions to improve the current tort system. My purpose in writing this Article is not to offer a definitive solution to the tort reform debate, but instead to accurately present and analyze tort reform issues in the hope that someday a "wise agreement"⁷ will be negotiated that meets the needs of all parties involved in the tort system.

II. A CASE FOR TORT REFORM

The following subsections are a general overview of the arguments often made by proponents of tort reform. To start, I provide a high-level overview of the purposes and goals of tort reform. Next, I discuss typical tort reform arguments, including: unreasonable litigation, harm to physicians, undeserving parties, and tort reform success stories.

A. The Purposes and Goals of Tort Reform

In a general sense, tort reform often "refers to legislative proposals or enactments that modify the common law rules of torts."⁸ From a less formal point of view, tort reform often means passing laws to deter outrageous jury verdicts and windfall recoveries

6. John C. P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075, 1076-77 (2006) (footnotes omitted).

7. ROGER FISHER & WILLIAM URY, GETTING TO YES 4 (Bruce Patton ed., 2d ed. 1991) ("A wise agreement can be defined as one that meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.").

8. Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL'Y 119, 120 n.3 (2007).

to undeserving parties. In essence, tort reform is a political agenda developed in response to perceived problems with the current tort system.

B. Typical Tort Reform Arguments

Arguments made by proponents of tort reform vary significantly. However, there are similar themes running throughout the majority of the arguments. For instance, corporations, some of the main proponents of tort reform, often paint themselves as victims, and plaintiffs and their attorneys as the unreasonable aggressors.⁹ Christopher Roederer refers to these themes as “tort tales” and provides four typical categorical arguments made by proponents of tort reform: “1) elegance (they communicate moral messages that are instantly understandable); 2) stereotypic characterization (plaintiffs are blameworthy, defendants are not); 3) holler of the dollar (plaintiffs are always greedy); and 4) extraordinary occurrences symbolize ordinary outcomes (as if they were normal occurrences).”¹⁰

Roederer, apparently opposed to tort reform, portrays these “tort tales” in a negative or somewhat cynical light. However, they are still useful to show that the arguments and purpose of tort reform are usually at least following similar themes. The question is whether these themes—or assumptions—are well founded.

1. Unreasonable litigation

Perhaps the most prevalent theme of argument supporting tort reform revolves around unreasonable lawsuits. This includes how litigious Americans are, the recent explosion of tort litigation, frivolous lawsuits, litigation lottery, jumbo verdicts, and astronomical punitive damages. Each of these will be addressed below.¹¹

9. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 733 (1998).

10. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 680 (2008) (footnotes omitted).

11. Each of these topics will be explained from a tort reformer point of view and then critiqued in corresponding arguments found *infra* Section III.D.

a. Litigiousness of Americans. The litigiousness of Americans is a favorite topic of discussion for tort reformers. This argument assumes that Americans are suing one another every chance they get. If this were true, it would be a significant concern. Some scholars take this argument a step—or a massive leap—further by implicating that the true problem is that as a society, we “are diminished by reliance on the court system.”¹² Kelner goes on to argue that “we are culturally disempowered by the courts, as we are made less self-reliant, less willing to assume responsibility for our own actions, and less able to cooperate for the common good. In short, we are made weaker.”¹³ Kelner’s argument, that by relying on a fatally flawed system, we as a society become weaker, is compelling. However, his argument, like the arguments of many tort reformers, fails to take into the account the alternative.¹⁴ In sum, the argument boils down to the proposition that refraining from lawsuits is the responsible thing to do, and those who decide to sue are doing so because they are irresponsible.

b. Explosion of tort litigation. Tort reformers also reference the recent explosion of tort litigation as a major reason to enact tort reforms. The idea of an explosion of tort litigation is widespread and widely accepted. For instance, Texas, a state at the forefront of tort reform, is often seen as having a significant increase in tort cases in recent decades.¹⁵ An across-the-board increase in tort litigation, if supported by empirical evidence, would be a significant cause for concern and a strong foundation for tort reform.

c. Frivolous lawsuits. Hand in hand with the litigation explosion rationale, proponents of tort reform argue that not only has there been a significant increase in tort litigation, but these new lawsuits arise out of frivolous matters. This argument is crucial to tort reform because an increase in lawsuits alone would not necessitate drastic

12. Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. DAYTON L. REV. 243, 296 (2006).

13. *Id.* (emphasis in original).

14. This is addressed further *infra* Section III.D.1.a.

15. Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1226 (2004).

reforms of the tort system,¹⁶ but the assumption that the alleged increase in lawsuits is driven by frivolous claims, if true, would be concerning.

d. Litigation lottery. The litigation lottery argument is fascinating and possibly one of the most compelling arguments in the tort reformer's arsenal. The litigation lottery argument is twofold: 1) those entering the lottery are doing so for personal gain as opposed to recovering for their injuries and 2) the odds of success of any claim is unrelated to the merits of the claim.¹⁷ The litigation lottery is sometimes referred to as "jackpot justice" to reflect the assumption that the tort system issues random results for lucky plaintiffs.¹⁸ To further support this argument, proponents of tort reform typically include anecdotal stories, such as the McDonald's hot coffee suit.¹⁹ These stories also highlight the supposed issue of irrational juries awarding unfounded non-economic damages.

e. Jumbo verdicts. Linked closely, perhaps inextricably, with the litigation lottery argument is the jumbo verdicts argument. This argument is simple: juries award ridiculously large verdicts that in turn bankrupt or put physicians out of business. The jumbo verdicts argument overlaps with the litigation lottery argument in that sometimes a plaintiff may win the litigation lottery with a jumbo verdict. However, it differs in the sense that the jumbo verdict argument also applies to plaintiffs with meritorious claims in that maybe the plaintiff did deserve some type of recovery but the irrational juries and activist judges continually turn what should be reasonable jury verdicts into jumbo verdicts.

f. Astronomical punitive damages. According to tort reformers, juries often arrive at jumbo verdicts through the irrational and unsubstantiated application of punitive damages. Again, the main support for this argument is anecdotal stories in which special

16. Reforms would likely be necessary to accommodate the larger volume of non-frivolous cases, but these are not the reforms suggested by proponents of tort reform.

17. Kelner, *supra* note 12, at 266.

18. David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1092 & n.22 (2006).

19. See generally *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

damages were of a limited amount and the jury, for allegedly no reason, awarded significant or, as tort reformers would put it, astronomical punitive damages.

2. *Harm to physicians.*

The second prong to the tort reform argument often focuses on the alleged harms that the current tort system causes to physicians. Physicians carry significant weight in the tort reform debate because they are “the most respected and visible representatives” of the healthcare industry—an industry with “inconsistent positions” on tort reform.²⁰ Physicians tend to be quite vocal in support of tort reform, often arguing that high malpractice insurance rates are due to the tort system and that the tort system encourages such practices as defensive medicine.²¹ High insurance premiums and defensive medicine in turn lead to geographic areas where doctors are allegedly unwilling to practice—sometimes referred to as judicial hellholes. Each of these three issues will be discussed below.

a. Outrageous insurance premiums. Outrageously high insurance premiums are one of the more logical reasons to support tort reform. However, a causal link between the current tort system and medical malpractice premiums has yet to be established. Nevertheless, if a link existed, this would become a powerful and legitimate reason to support tort reform.

Florida’s largest medical liability insurer used the promise of reductions in medical malpractice premiums as a “carrot” to incentivize the state legislature to pass tort reform bills.²² After dangling the carrot, Governor Bush said that passing the proposed legislation would help reduce the malpractice premiums in the state.²³ However, as will be discussed later, simply passing bills does not guarantee, or even appear to affect, medical malpractice premiums.

20. Davies, *supra* note 8, at 151.

21. *Id.* at 152.

22. Stephanie Francis Ward, *New Tactic in Tort Reform Battle: Insurer Promises Lower Rates if Legislature Caps Damages*, 2 No. 23 A.B.A. J. E- REP. 4 (Jun. 13, 2003).

23. *Id.*

b. Defensive medicine. Defensive medicine occurs when physicians make treatment decisions based on potential legal liability as opposed to strictly medical concerns. In other words, defensive medicine prevents physicians from acting in the best interests of their patients.²⁴ Proponents of tort reform argue that defensive medicine occurs because the tort system is out of control and physicians are sued constantly.

Defensive medicine is conceptually easy to swallow. The logic behind it—if it is indeed supported by logical evidence—is that large verdicts lead to higher premiums, which lead to physicians being scared to make mistakes. Logical or not, this view was widely adopted and even touted by President George W. Bush.²⁵

c. Judicial hellholes. Each of the above physician-related arguments combine to create what some organizations have termed judicial hellholes.²⁶ Judicial hellholes result when the compounding effects of jumbo verdicts, high premiums, high healthcare costs, decrease in insured individuals, and defensive medicine all lead to physicians allegedly avoiding certain geographical locations.²⁷

3. *Undeserving parties*

The third prong to the tort reform argument is that the parties, both the injured plaintiffs and their attorneys, are undeserving and irresponsible. This argument tends to focus on anecdotal stories about flamboyant or ridiculous trial attorneys and uneducated, undeserving, and greedy plaintiffs, both filing lawsuits just to make money.

a. Greedy plaintiffs. Perhaps the most common iteration of the undeserving-plaintiff argument is that personal injury or medical

24. Kelner, *supra* note 12, at 297.

25. Peter Baker, *Bush Campaigns to Curb Lawsuits; President Says 'Junk' Litigation is Driving Small-town Doctors out of Business*, WASH. POST, Jan. 6, 2005, at A6 (“America’s health care professionals should be focused on fighting illnesses, not on fighting lawsuits. Junk lawsuits change the way docs do their job. Instead of trying to heal the patients, doctors try not to get sued.”) (quoting President George W. Bush).

26. For a list of the American Tort Reform Association’s top “judicial hellholes,” see <http://www.atra.org/newsroom/california-again-ranks-1-%E2%80%98judicial-hellhole%E2%80%99>.

27. Zeiler, *supra* note 4, at 675.

malpractice plaintiffs are inherently greedy. They are greedy in that “plaintiffs seek to exploit the legal system for profit, rather than, seek redress for severe and serious injuries.”²⁸ Some proponents of tort reform even go as far as to call these injured plaintiffs “goldiggers.”²⁹ Kelner further paints a picture by referencing a stereotypical view of injured plaintiffs: “The familiar image the argument conjures is that of the man wearing a neck brace in the courtroom for the benefit of the jury, but who no doubt will remove it once a verdict is delivered.”³⁰

Kelner also notes a variation, or sub-argument, of the greedy plaintiff contention—“resort to the court system should ordinarily be unnecessary, even when an injury is suffered.”³¹ The idea behind this argument is that injured plaintiffs should take responsibility and if they take responsibility, there is no need for filing lawsuits.³² The underlying message of these arguments is that many plaintiffs know they do not deserve anything, but they still irresponsibly sue to make money.

b. Passive plaintiffs. Another variation on the undeserving-plaintiff argument is that plaintiffs are passive participants to the legal process. Kelner refers to these plaintiffs as “passive participa[nts] in the lawyers’ expeditions.”³³ These plaintiffs differ from the greedy plaintiffs in that they may not fully understand what they are doing, and in fact, they are probably doing very little. In this case, most of the blame falls on the attorneys for “using” their clients just to make money off their claims. Here, the attorneys make the money while their injured clients are unaware and merely along for the ride.

c. Greedy trial lawyers. The third and final variation of the undeserving-plaintiff argument is that trial lawyers are greedy and motivated by money rather than helping people. Kelner succinctly summarizes this argument, “Essentially, trial lawyers have both the skill and resources to capitalize upon an unsuspecting public and a

28. Kelner, *supra* note 12, at 257.

29. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 CAP. U. L. REV. 701, 709 (1997).

30. Kelner, *supra* note 12, at 258.

31. *Id.* at 294.

32. *Id.* at 255, 294.

permissive media in the advancement of their cause.”³⁴ This argument carries significant weight because successful trial lawyers often become wealthy and influential. Former Solicitor General Theodore Olson noted how influential trial lawyers have become, referring to trial lawyers as a “third political party” and contending that trial lawyers contribute “more money to political elections than any other segment of American society.”³⁵

This argument is not entirely without merit. The claim that all trial lawyers are motivated by morally sound reasons is naïve, but it is important to understand that this argument is furthered significantly when tort reformers use extreme examples to prove their point.³⁶

4. *Tort reform success stories*

A final, but less commonly used argument is based on tort reform success stories. These stories often provide anecdotal or unsupported claims that tort reform in certain areas has increased business growth or helped physicians. While tort reform has in some cases lessened payouts by insurance companies, it has rarely, if ever, been found to be directly correlated with business growth through decreases in malpractice premiums.

C. *Current Tort Reforms*

The following are a few of the more common types or avenues of tort reform. Each will be discussed briefly to provide context for the proposed reforms at the end of this article.

33. *Id.* at 254.

34. *Id.* at 250.

35. Theodore B. Olson, *Clinton's Payoffs to the Trial Lawyers*, WALL ST. J., March 15, 1996, at A10.

36. An infamous example of an over-the-top trial attorney is Willie E. Gary. Despite not being an accurate representation of trial attorneys in general, the videos on Gary's website embody the arguments presented by tort reformers. *Willie E. Gary Attorney Profile*, THE LAW OFFICES OF GARY, WILLIAMS, PARENTI & WATSON, PLLC, <http://www.garylawgroup.com/gary/index.html> (last visited Oct. 2, 2015). Another example is Jamie Casino's Super Bowl 2014 commercial in which he smashed fiery gravestones with a sledgehammer in the rain. JAMIE CASINO INJURY ATTORNEYS, <http://jamiecasinoinjuryattorneys.com/> (last visited Oct. 2, 2015).

1. *Caps on damages*

Damages caps are arguably one of the most pervasive and widespread types of tort reform in the United States. These caps place limits on a wide variety of damages including by limiting “joint and several liability, limiting the collateral source rule, and capping non-economic damages, including both punitive damages and pain and suffering damages.”³⁷ As was noted above, these caps often come in response to promises by insurance companies to lower malpractice premiums.

2. *Limits on attorney fees and the plaintiffs’ bar*

Another common tort reform is to restrict and place limits on the types of contingency agreements trial attorneys can enter into in order to make it more difficult for trial attorneys to take cases.³⁸ Another limit placed is that of fee limitations for economic damage and non-economic damages—similar to the damages caps.³⁹

3. *Changing liability rules*

Instead of limiting recovery in the same liability framework, some tort reforms have actually changed the liability structure and elements required to recover. These reforms include “making liability less strict in products liability cases, setting up procedural obstacles in medical malpractice cases, and providing immunity from suit for certain industries.”⁴⁰ According to Roederer, these reforms make “it less likely that plaintiffs and their lawyers will sue in the first place.”⁴¹

4. *Administrative regulation*

Although undemocratic in nature, the administrative process is often the vehicle for tort reform measures. For example, the George W. Bush administration was a strong proponent of administrative

37. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 687 (2008).

38. JAY M. FEINMAN, UNMAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 27–28 (2004).

39. *Id.* at 29–30.

40. Roederer, *supra* note 10, at 686–87.

41. *Id.* at 687.

tort reform.⁴² Administrative tort reform often occurs when other forms of tort reform are unsuccessful.

III. A CASE AGAINST TORT REFORM

The following subsections address tort reform arguments in three ways. First, I discuss the functionality of the current tort system, arguing that the system is not as broken as tort reform proponents suggest. Second, I discuss the pervasiveness of tort reform and tort reform misconceptions. Third, I respond to the typical tort reform arguments addressed previously in this Article.

A. The Functionality of the Current Tort System

Many scholars do not believe that the current tort system requires fixing or adjustment through tort reform.⁴³ In fact, many studies have been performed that disprove the arguments made in support of tort reform above. However, definitively stating that tort reform is not required in any form goes too far because reliable statistical data on the American civil litigation system is quite limited.⁴⁴ The studies done by opponents of tort reform have proved that many of the current tort reform measures cause more harm than good and seem only to benefit large insurance companies. These studies will be addressed below in more detail.

That being said, there are definite reforms that could be made to the tort system to improve its effectiveness. Some scholars argue that the tort system needs to be reformed because injured plaintiffs are not compensated often or not compensated enough.⁴⁵

Opponents of tort reform also tout the flexibility of the tort system as a significant factor in favor of leaving the tort system in its current state. Thomas Galligan, Jr. discussed the flexibility of the tort system in great detail in his article *The Tragedy in Torts*.⁴⁶ Galligan

42. *Id.* at 688–89.

43. See Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 172 (1996).

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

45. See Patricia Born, W. Kip Viscusi & Tom Baker, *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. RISK & INS. 197, 198 (2009).

46. Galligan, *supra* note 43, at 139.

argues that this flexibility allows the judge or jury “great freedom to mete out ‘justice’ in the particular case before the court,” and that this flexibility enables the tort system to be “more responsive than other areas of private law to the specifics of the dispute.”⁴⁷ The personal nature of the tort system coincides with the high value our culture places on personal identity.⁴⁸ Additionally, the personal nature of the system appeals to our innate desire for equality and for the law to treat everyone equally.⁴⁹ The flexibility in the tort system also allows judges and juries to take into account “compelling concerns of the community.”⁵⁰ Galligan also notes that the types of damages incurred by plaintiffs are inherently personal in nature and they must be considered in a personal manner to arrive at a just decision.⁵¹ Galligan concludes that if we abandon the specificity of the current tort system in favor of many of the generalizations proposed by tort reform, we run the risk of losing the “compassionate response of the community.”⁵²

B. Pervasiveness of Tort Reform

Despite the lack of statistical evidence to support tort reform, it has become alarmingly widespread. For example, as of 2002, thirty-two states have passed limits on the recovery of punitive damages, thirty-five states have imposed joint and several liability limitations, and thirteen have limited prejudgment interest reform.⁵³ Since then, tort reform has continued to expand and has now entered into the laws of almost every jurisdiction.⁵⁴ The pervasiveness of tort reform is concerning for multiple reasons. First, tort reforms are often unconstitutional because they violate the constitutional rights of injured individuals. Second, the more pervasive tort reform becomes, the easier it is for the public to accept it, regardless of the lack of

47. *Id.*

48. *Id.* at 141.

49. *Id.* at 146.

50. *Id.* at 160.

51. *Id.* at 173.

52. *Id.* at 183.

53. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 66 (2002).

54. See RONEN AVRAHAM, DATABASE OF STATE TORT LAW REFORMS (5th ed. 2014) for a comprehensive explanation of the different tort reforms passed in each state.

evidence in support of tort reform. Third, injured individuals in every state are now harmed by tort reform.

C. Tort Reform Misconceptions

A central misconception is that tort reform was never just about changing the actual law, but instead has “been a broad political campaign aimed at altering the environment in which civil litigation occurs.”⁵⁵ Advocates for tort reform have been remarkably successful in influencing public sentiment, and thus the jury pool, about tort reform. These changes have made it much more difficult for plaintiffs’ lawyers to stay profitable, resulting in plaintiffs’ lawyers finding different work and turning away injured individuals.⁵⁶ In their research, Daniels and Martin interviewed ninety-six Texas plaintiffs’ lawyers and found that the effects of tort reform in Texas were much farther reaching than just malpractice torts.⁵⁷ They found that many of the attorneys were most affected by the decrease in value of smaller “auto cases.”⁵⁸ The plaintiffs’ lawyers believed that the insurance companies were aware that the jury pool in Texas had become pro-defense and partial to tort reform ideas, and thus stopped settling smaller value cases and instead forced the plaintiffs’ attorneys either to try or not to take on low-value cases.⁵⁹ By influencing the jury pool, tort reforms affected many more individuals than the tort reform laws themselves touched.⁶⁰

Other scholars argue that the purpose of tort reform is not to improve the tort system but instead is a “conscious goal-oriented practical activity’ designed to produce a dominant discourse that will predispose legislators, judges, legal academics and the general public to support liability-limiting tort doctrines.”⁶¹ Roederer refers to the

55. Daniels & Martin, *supra* note 15, at 1227.

56. *Id.* at 1229.

57. *Id.* at 1237–38.

58. *Id.* at 1238.

59. *Id.* at 1248.

60. Other scholars have found that attitudes toward tort reform often predict the potential juror’s verdict. Gary Moran et al., *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 L. & PSYCHOL. REV. 309, 324 (1994).

61. Rustad & Koenig, *supra* note 53, at 5.

recent waves of tort reform as “‘tort deform,’ ‘tort retrenchment,’ ‘corporate cost shifting’ or ‘corporate welfare.’”⁶²

Roederer also brings up the interesting argument that recent tort reform is based on the concept Steven Colbert has popularized—truthiness. Truthiness is defined as “sort of what you want to be true, as opposed to what the facts support. . . . Truthiness is a truth larger than the facts would comprise it—if you cared about facts, which you don’t, if you care about truthiness.”⁶³ Roederer goes on to argue the falsity of tort reform is

[B]ased in many little lies, in which cases are exaggerated, and the amount of and the effect of frivolous lawsuits, the impact of regulations on property rights, as well as the impact of liberal adjudication on the sanctity of contract are all overstated. When combined, they feed into the big lie that the common law has been hijacked by greedy plaintiffs and lawyers, as well as by liberal activist judges.⁶⁴

D. Responses to the Typical Tort Reform Arguments

1. Unreasonable litigation

a. Litigiousness of Americans. Contrary to the arguments made by tort reformers, Americans are not nearly as litigious as they are portrayed. For example, only 10% of Americans injured in an accident make a liability claim, and only 2% file a lawsuit.⁶⁵ Likewise, only 5% of Americans who feel that they have lost more than \$1,000 file suit.⁶⁶ Another interesting comparison is the estimated number of medical injuries compared to the number of malpractice lawsuits filed each year. This comparison reveals that approximately 8.5% of Americans injured by medical malpractice file suit.⁶⁷ Hyman and

62. Roederer, *supra* note 10, at 677.

63. Jacques Steinberg, 2005: *In a Word; Truthiness*, N.Y. TIMES, Dec. 25, 2005, § 4, at 3 (quoting Colbert’s comments from a “recent interview”).

64. Roederer, *supra* note 10, at 678–79.

65. Hyman & Silver, *supra* note 18, at 1089 (citing THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 3 (2002)).

66. *Id.*

67. Hyman & Silver, *supra* note 18, at 1089.

Silver also note three other studies on the litigiousness of injured parties, finding nearly the same results across the country.⁶⁸

b. Explosion of tort litigation. Likewise, there is little empirical support for the alleged explosion of tort litigation. For example, from the 1980s to the early 2000s, tort cases filed in Texas, generally considered an active tort reform state, district courts decreased from 9.4% of civil filings to 8.6%.⁶⁹ Also in Texas, between 1995 and 2000, “the filing rate for all tort cases decreased by 31.7% . . . and the rate for auto and non-auto cases decreased by 22.2% and 42.4% respectively.”⁷⁰ Interestingly, in the early 2000s, family law cases accounted for 55.1% of the civil cases filed in Texas.⁷¹ The fact that many Americans believe that there was or still is an explosion of tort litigation is a prime example of what is lurking behind the curtain of tort reform. It is an example of how popular ideologies often overcome statistical evidence in the political realm.⁷²

Hyman and Silver addressed both the irony⁷³ of the litigation explosion argument and present reasons why most injured patients choose not to sue. They provide six reasons injured parties do not file suit for malpractice claims. First, many injured patients do not realize they are injured, or if they do realize, it is often after the statute of limitations on their claim has expired.⁷⁴ Second, many

68. *Id.* at 1089–91 (Injuries in California exceeded malpractice claims filed by ten times, in New York only 2% of injured parties filed malpractice claims, similar findings in Colorado and Utah, in Florida malpractice injuries exceeded malpractice suits by a factor of 6.3, and just over 10% of mothers in Florida sought legal advice when they or their child experienced serious birth injuries or death but none filed suit.).

69. Daniels & Martin, *supra* note 15, at 1230.

70. *Id.* at 1232.

71. *Id.* at 1231. Daniels and Martin note that “[t]he percentage of other family matters doubled in the 1990s compared to the 1980s. The filing rate per thousand population for these cases increased by 109% from 1981 to 2000. In contrast, the rate per thousand population for tort matters decreased by 17.4% between 1981 and 2000. It is somewhat curious that the increases in family-related matters—which could fairly be called an ‘explosion’—have not led to a ‘crisis’ in the civil justice system or provoked a wide array of proposed solutions.” *Id.* at 1231 n.22.

72. Robert L. Nelson, *Ideology, Scholarship, and Sociolegal Change: Lessons From Galanter and the “Litigation Crisis”*, 21 L. & SOC. REV. 677, 689 (1988).

73. Hyman & Silver, *supra* note 18, at 1113 n.92 (“When injured patients sue, tort reformers decry their litigiousness. When they do not sue, tort reformers point out that the malpractice system fails to compensate them. ‘Heads, I win; tails, you lose,’ anyone?”).

74. *Id.* at 1113–14.

injuries caused by malpractice are not severe enough to sue.⁷⁵ Third, the treatment required to overcome the malpractice injuries is often covered by the injured patient's insurance.⁷⁶ Fourth, the costs of making a claim through the current tort system is too high, both monetarily and emotionally.⁷⁷ Fifth, plaintiffs making malpractice claims often receive poor outcomes that do not cover their medical expenses.⁷⁸ Sixth, injured parties often use cheaper and faster alternatives than litigation to resolve their claims.⁷⁹

Despite the small amount of injured patients that actually file suit, medical providers and insurance carriers "rarely compensate patients until threatened with litigation."⁸⁰ If medical providers and insurance carriers chose to compensate injured parties for valid claims before litigation, the nonexistent tort litigation explosion would likely decrease even more.

c. Frivolous lawsuits. Equally unsupported is the tort reform argument that courts are swamped with frivolous suits. Hyman and Silver note that what little research has been done on the amount of frivolous lawsuits filed has only revealed that no "hard evidence" exists that frivolous lawsuits are a serious problem.⁸¹ They also note a study by the Federal Judicial Center that 85% of judges view frivolous lawsuits as either "no problem," a "very small problem," or a "small problem."⁸²

Hyman and Silver also reference an interesting study performed by Professor Bert Kritzer on the screening performed by plaintiffs' attorneys.⁸³ Kritzer's research found that nearly 70% of potential personal injury claims, and over 80% of potential malpractice claims, were declined representation because of either a lack of evidence of

75. *Id.* at 1114.

76. *Id.*

77. *Id.* at 1114–15.

78. *Id.* at 1115.

79. *Id.*

80. *Id.* at 1122.

81. *Id.* at 1101 n.45 (citing Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 163 n.2 (2000)).

82. *Id.* at 1101 n.46 (citing DAVID RAUMA & THOMAS E. WILLGING, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL JUDICIAL CENTER 3 (2005)).

83. *Id.* at 1102.

liability or small damages.⁸⁴ Thus, it is hard to believe that frivolous lawsuits are actually a serious problem if attorneys are screening the majority of the potential claims that are brought to them.

d. Litigation lottery. Litigation outcomes in the tort system are substantially correlated to the merits of the claims brought. Hyman and Silver summarize multiple studies supporting the proposition that the current tort system awards injured parties based on the merits of their claim.⁸⁵ The summary of the research revealed that those injured by actual malpractice were usually compensated, those not injured usually did not receive compensation, and where the presence of malpractice was unclear the results were varied.⁸⁶ Hyman and Silver note that “[t]he malpractice system does not sort cases perfectly, but perfection is an unrealistic standard.”⁸⁷

e. Jumbo verdicts. Jumbo verdicts, especially in medical malpractice litigation, are close to nonexistent. The jumbo-verdicts argument is not supported for two reasons. First, actual verdicts are often not an accurate representation of the amount paid by the losing party. Second, medical malpractice verdicts in favor of plaintiffs are exceptionally rare.

Research shows that verdicts are often significantly more than the amount actually paid by the losing party. Zeiler notes four reasons for the decrease in actual recovery after a verdict is entered: “(1) adjustments made through remittitur, (2) appellate court reversals, (3) imposition of statutory damages caps, and (4) post-verdict settlement negotiations.”⁸⁸ One study found that, on average, injured parties recovered only 56% of the final verdicts.⁸⁹ This same

84. *Id.* (citing HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 69–74 (2004); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 754–57 (2002); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 24 (1997); Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, WIS. LAW., Mar. 1997, at 10, 63).

85. *Id.* at 1097 tbl. 2.

86. *Id.* at 1097.

87. *Id.*

88. Zeiler, *supra* note 4, at 688.

89. David A. Hyman et al., *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003*, 4 J. EMPIRICAL LEGAL STUD. 3, 27 (2007).

study found that the percentage actually recovered decreased as verdicts increased.⁹⁰

Not only are large verdicts rarely paid in their entirety, or even close to their entirety, but also they are seldom obtained. Hyman and Silver note three studies on the success rate at trial in medical malpractice cases.⁹¹ The studies cited showed that defendants are successful in medical malpractice trials between 73% and 81% of the time.⁹² This is a stark contrast to civil tort trials where plaintiffs prevail 52% of the time.⁹³

The result of reduced verdicts and the lack of malpractice verdicts in general is more pervasive within the tort system than is apparent. Daniels and Martin note that participants in the tort system “look to jury verdicts to help set the going rates used to settle the vast majority of matters that do not go all the way to a trial.”⁹⁴ The reductions in jury verdicts and the low likelihood of success at trial for medical malpractice claims has incentivized insurance companies to “toughen[] their stance in the settlement process that disposes of the vast majority of cases.”⁹⁵ This in turn leads to plaintiffs’ lawyers screening more and more cases and precluding a larger portion of injured individuals from obtaining any type of fair recovery.

f. Astronomical punitive damages. Along with jumbo verdicts, and often contributing to the notion that jumbo verdicts are common, is the idea that juries often award undeserving plaintiffs astronomical punitive damages. However, this is rarely the case. For example, Roederer notes studies showing that punitive damages “are only awarded in about 6% of all the cases won by plaintiffs.”⁹⁶ Additionally, the amount of punitive damages awarded by a jury will

90. *Id.* at 6.

91. Hyman & Silver, *supra* note 18, at 1107.

92. *Id.*

93. *Id.*

94. Daniels & Martin, *supra* note 15, at 1247–48.

95. *Id.* at 1243.

96. Roederer, *supra* note 10, at 680.

always be subject to appellate review if the defendant believes the punitive damages are unreasonable.⁹⁷

Finally, the idea that a plaintiff deserves, or more importantly doesn't deserve, punitive damages is beside the point. Punitive damages are awarded to punish bad behavior, not to compensate the injured.⁹⁸ The fact that punitive damages compensate injured parties while punishing the offending party is irrelevant to whether the punitive damages are justified.

2. *Harm to physicians*

a. Outrageous insurance premiums. Insurance premiums for physicians may be high, but this is not because of the current tort system. Professor Tom Baker wrote an entire book debunking the myths behind tort reform and addressed insurance premiums in great detail.⁹⁹ Baker found that increased malpractice premiums had little or nothing to do with the alleged explosion of tort litigation and were instead just another component of the tort reform myth.¹⁰⁰ For example, Baker notes that malpractice premiums are cyclical in nature and that “[t]he sharp spikes in malpractice premiums in the 1970s, the 1980s, and the early 2000s are the result of financial trends and competitive behavior in the insurance industry, not sudden changes in the litigation environment.”¹⁰¹ Baker also noted that even if malpractice premiums were exploding, they account for less than 1 percent of total health care costs and thus are unlikely to be precluding physicians from practicing.¹⁰²

Based on this lack of information, it is not surprising that many people, plaintiffs' lawyers especially, have serious doubts that passing tort reform laws, such as damages caps, will actually decrease malpractice premiums.¹⁰³ These doubts are rational if, in fact, the tort system has little effect on malpractice premium rates.

97. See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (striking down a civil punitive damages award as excessive and in violation of the Due Process Clause of the Fourteenth Amendment).

98. Punitive Damages, *Black's LAW DICTIONARY* (10th ed. 2014).

99. TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 2–21 (2005).

100. *Id.*

101. *Id.* at 3.

102. *Id.* at 9.

103. Ward, *supra* note 22, at 2.

What little research that has been done on this issue has revealed that malpractice premiums are largely uncorrelated with the tort system. For example, in 2003, Weiss Ratings Inc. issued a report showing that damages caps reduced insurer payouts but did not reduce malpractice premiums.¹⁰⁴ This same study indicated that “caps may be *inversely correlated* to med[ical] mal[practice] premium levels.”¹⁰⁵

Instead, Davies notes that “[t]here is considerable scholarship attributing pricing of medical malpractice insurance to the cyclical nature of the insurance industry’s underwriting cycle.”¹⁰⁶ For example, Baker notes that the malpractice insurance industry is especially susceptible to influence by the underwriting cycle.¹⁰⁷

Hyman and Silver use Texas as an example where premiums increased while tort lawsuits did not,¹⁰⁸ referencing a study on the trends of malpractice premiums between 1988 and 2002.¹⁰⁹ This study found that the number of claims and the size of payouts were stable over the fourteen years while the malpractice premiums rose significantly.¹¹⁰

b. Defensive medicine. The defensive medicine argument often presented by physicians and insurance companies also lacks factual support. Most studies on defensive medicine reveal that higher malpractice premiums do not affect medical practices by physicians.¹¹¹ Mello and Brennan reference studies performed by the Office of Technology Assessment of the U.S. Congress in 1994 that confirmed other research about the lack of facts supporting defensive

104. MARTIN D. WEISS ET AL., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND THE AVAILABILITY OF COVERAGE 7–13 (2003).

105. *Id.* at 13.

106. Davies, *supra* note 8, at 133.

107. Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 395 (2005).

108. Hyman & Silver, *supra* note 18, at 1109.

109. *Id.* at 1109 n.81 (citing Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 209 (2005)).

110. *Id.* at 1109.

111. Randall R. Bovbjerg et al., *Defensive Medicine and Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL’Y & L. 267, 269–80 (1996).

medicine and “surveyed several thousand physicians using clinical scenarios to elicit their perceptions of defensive medicine . . . [and] found some evidence that malpractice concerns spurred defensive practices, but the effect was weaker than previously believed.”¹¹²

Mello and Brennan also discuss other studies of defensive medicine—all with mixed results—and offer no firm conclusion as to whether defensive medicine ever did, or still does exist.¹¹³ They do, however, hypothesize that defensive medicine is now essentially nonexistent due to “the growing presence of managed care.”¹¹⁴

c. Judicial hellholes. Similarly, the proposition that judicial hellholes are a serious problem for physicians is not only unfounded, but is not supported by common sense. For example, as of October 2014, in the American Tort Reform Association’s annual list of judicial hellholes, California took the number one spot for worst judicial hellhole in the United States.¹¹⁵ However, according to the 2014 Census, the amount of physicians in California is proportionally average with California registering 370 physicians per 100,000 residents, compared to the national average of 385 physicians per 100,000 residents.¹¹⁶ Thus, it would appear that doctors are not staying away from California, or other states, because of lawsuits.

3. *Undeserving parties*

a. Greedy plaintiffs. The public’s perception of greedy and undeserving plaintiffs in personal injury cases is not accurate. Davies notes that part of this perception is because many plaintiffs are forced into the tort system because they lack insurance, and society views those without insurance as irresponsible and undeserving.¹¹⁷ She also

112. Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1606–07 (2002).

113. *Id.* at 1607.

114. *Id.*

115. *Judicial Hellholes*, AM. TORT REFORM ASS’N, <http://www.judicialhellholes.org/2013-2014/> (last visited Oct. 22, 2014).

116. Aaron Young, et al., *A Census of Actively Licensed Physicians in the United States, 2014*, 101 J. MED. REG. 8 (2015).

117. Davies, *supra* note 8, at 153.

presents the idea that this inaccurate perception “is possibly a product of media exaggeration and misstatement of tort issues.”¹¹⁸

However, the problem with the greedy plaintiff argument is deeper than just misconception. Proponents of tort reform use the greedy plaintiff argument to inflame the public, leading to the adoption of laws that limit the rights of injured parties. Thinking about alternatives to the current tort system provides the best response to this argument. For example, would Americans prefer a system that is allegedly full of greedy plaintiffs getting money for injuries that did not happen, or would Americans prefer to have a system where those who are injured—greedy or not—are unable to recover?

b. Passive plaintiffs. The passive plaintiff argument fails for the reasons presented in the Unreasonable Litigation section above. The fact that so few injured parties file lawsuits and that those who seek attorneys are rejected more than two-thirds of the time strongly suggests that the passive plaintiff argument is unsupported by evidence.

c. Greedy trial lawyers. The greedy-trial-lawyer argument fails for many of the same reasons as the greedy plaintiff argument. However, as mentioned in the corresponding section above, it is naïve to think that trial lawyers are altruistic. Thus, I will address both whether trial lawyers are greedy, along with the alternative argument tort reform implicitly presents.

Most trial lawyers view themselves as “defenders of victims and protectors of future victims.”¹¹⁹ Whether or not this is true will depend on the attorney and his or her approach to the personal injury practice. Some attorneys are motivated solely by money, while others are more motivated by helping others or keeping the “big guys” from overpowering smaller individuals. The bag is surely mixed in this regard.

The more compelling argument against greedy trial lawyers is thinking in the alternative. Would Americans prefer to pass laws that result in the economics of the legal profession preventing injured

118. *Id.* at 154.

119. *Id.* at 155 n.172.

individuals from obtaining representation even more than is already the case? Or would Americans prefer to tolerate a few greedy attorneys in exchange for keeping the door open to injured individuals to obtain adequate representation?

E. The Harm Caused by Damages Caps

The current tort reforms across the country cause significant harm to injured individuals. I will briefly discuss the harms caused by damages caps, the specific groups of individuals harmed by damages caps, under-compensation, and difficulty obtaining representation.

1. Damages caps generally

The goal of damages caps is to reduce malpractice premiums.¹²⁰ Zeiler summarizes multiple studies in her research relating to damages caps and concludes that “tort reforms do not substantially reduce insurance premiums . . . although the most restrictive damages caps seem to have some impact.”¹²¹ However, other scholars contend that a significant problem with damages caps, among other tort reforms, is that they are driven too much by “the political free-for-all of tort reform battles” and too little by empirical evidence.¹²²

Damages caps are also problematic because in many cases they violate the constitutional rights of injured individuals. For example, the Oregon Supreme Court and Ohio Supreme Court overturned damages caps in response to constitutional challenges.¹²³ In response to this constitutional problem, Professor Mark Rahdert argues that courts would be much more willing to adopt “[c]lear damages guidelines for juries and reviewing courts” in place of unconstitutional damages caps.¹²⁴

120. Hyman & Silver, *supra* note 18, at 1087.

121. Zeiler, *supra* note 4, at 682–83.

122. William C. Smith, *Prying Off Tort Reform Caps: States Striking Down Limits on Liability and Damages, and Statutes of Limitation*, 85 A.B.A. J. 28, 29 (1999).

123. *Id.* at 28 (In a nail-gun-accident case, the Oregon Supreme Court restored the jury’s verdict to \$9.3 million after the trial judge reduced the verdict per Oregon’s cap on noneconomic damages. Similarly, the Ohio Supreme Court has held that certain tort reform laws encroached on the judiciary’s power to interpret constitutional issues.).

124. *Id.* at 29.

Another problem with damages caps is that they run against the flexible nature of the tort system. Capping damages prevents juries from awarding what they feel is just compensation to injured individuals. This approach assumes that no one suffers beyond a certain amount, regardless of the injuries or way in which the injuries are inflicted. This is like saying that the pain and suffering for an individual who dies instantly in a head-on collision and the pain and suffering for an individual who was burned to death in a chemical fire both cap out at a certain amount. Not only is this argument illogical, it decreases the right to recovery of injured people—people we should be reluctant to harm further.

A final argument against damages caps is that they significantly increase the “problem of under-compensation by limiting the remedies available to patients with serious injuries and by reducing the number of valid claims that are sufficiently profitable for attorneys to pursue.”¹²⁵ For example, an injured party approaches an attorney with catastrophic injuries totaling over \$5 million. The attorney looks at the case and assesses it will cost roughly \$400,000 to litigate through trial. The attorney then realizes that damages for those particular injuries are capped at \$500,000. In other words, even if the attorney successfully tried the case and obtained a jury verdict of \$5 million, the eventual award would be reduced to \$500,000, leave the attorney with maximum fees of \$200,000, or 40% of the gross recovery.¹²⁶ Spending \$400,000 to try the case, and only recovering \$200,000 will prevent any attorney from signing the client, no matter how catastrophic the injuries are.

2. Specific parties harmed

Tort reforms, and damages caps specifically, harm certain population groups significantly more than others. For example, empirical research on Texas tort claims suggests that “deceased, unemployed, and . . . elderly plaintiffs endure[ed] much larger reductions in recoveries than other plaintiffs.”¹²⁷ DeVito and Jurs

125. Hyman & Silver, *supra* note 18, at 1087.

126. Attorneys are also permitted to recover their costs in addition to the contingent fee. However, this is a moot point in this scenario because the attorney would only make \$100,000 with the injured party netting nothing.

127. Zeiler, *supra* note 4, at 686.

note other studies with similar findings that female and elderly plaintiffs recovered significantly less than other injured plaintiffs.¹²⁸ While it is somewhat unclear why these parties are affected more than others, it is clear that the effect exists and is seriously diminishing these groups' ability to recover for injuries sustained.

3. *Under-compensation*

Under-compensation occurs when “[d]amages caps act to . . . reduc[e] the compensatory damages available for a valid claim.”¹²⁹ In addition to constitutional problems, under-compensation affects the most seriously injured plaintiffs the most.¹³⁰ Damages caps reduce the recovery of “the most gravely injured, even after their claims have been proven.”¹³¹ By precluding seriously injured plaintiffs from recovering, damages caps “undermine[] a core principle of our legal system, that of equal justice under the law.”¹³²

4. *Difficulty obtaining representation*

In addition to under-compensation, damages caps make it difficult for many injured individuals to find representation—especially those with serious injuries whose compensation will be limited by damages caps.¹³³ Obtaining representation is the crucial first step of the tort system. Without representation, an injured party essentially does not have a claim.¹³⁴ However, because of damages caps, attorneys are forced to screen the majority of cases that come to them for multiple reasons.

First, plaintiffs' attorneys are often paid on a contingency basis and “medical malpractice cases are risky and expensive to litigate.”¹³⁵ This in turn results in attorneys turning away injured individuals with cases with low damage amounts. Additionally, the risk of taking a

128. Scott DeVito & Andrew W. Jurs, “Doubling-Down” for Defendants: The Pernicious Effects of Tort Reform, 118 PENN ST. L. REV. 543, 594–95 (2014).

129. *Id.* at 593.

130. *Id.*

131. *Id.*

132. *Id.* at 595.

133. Zeiler, *supra* note 4, at 686.

134. Hyman & Silver, *supra* note 18, at 1117.

135. *Id.*

malpractice case is significant because of the high win rate malpractice defendants enjoy at trial. This high win rate also makes defendants much less willing to settle before trial. Thus, “plaintiffs’ attorneys’ preference for cases with clear liability and large damages is understandable. Only these cases are likely to generate fees sufficient to cover upfront costs and provide an adequate return on invested time and effort.”¹³⁶ Thus, damages caps are preventing injured individuals from securing representation—without which they could not be compensated for their injuries.

IV. DISCUSSION

Because tort reform is so pervasive and wide-reaching in effect, the discussion must encompass more than just tort reform to grapple fully with the problem. The issues discussed in this section are not discussed to present definitive answers to how to improve the tort system, but instead are referenced to broaden the perspective of the tort system in general and to consider often unmentioned concerns with the current tort system.

A. Tort Reform and the American Healthcare System

In an interesting article, *Reforming the Tort Reform Agenda*, Julie Davies discusses tort reform in conjunction with problems faced by the current healthcare system.¹³⁷ Davies likens her discussion to a game of cards where some shuffling is required; shuffling the issues commonly discussed with tort reform may open the door to creative ideas to address both tort reform and healthcare issues together.¹³⁸ She points out that the current debate on tort reform is “too narrow” and relies on political justifications that reflect only benefits to small groups and “not necessarily [what is] good from a policy standpoint.”¹³⁹

Davies highlights the need for a universal healthcare solution because many plaintiffs in the tort system are forced into the tort system because they cannot afford insurance.¹⁴⁰ While Davies

136. *Id.* at 1120.

137. Davies, *supra* note 8, at 119.

138. *Id.*

139. *Id.* at 123.

140. *Id.* at 121–22.

recognizes that massive change may be difficult, her generalized solution of universal healthcare of some type or another should become a mainstream consideration and discussion topic in all debates on tort reform. Her article also highlights the need for tort reform to be discussed in conjunction with future healthcare reforms.

B. Constitutional Issues

The constitutional issues with tort reform are quite significant and have been discussed previously to some degree. Goldberg presents an interesting view of the problem by referring to tort as “victims’ rights law.”¹⁴¹ Goldberg’s view of tort law is instructive and illuminates the issue at the core—that injured plaintiffs are not all alike. They are unique individuals who have each suffered unique harm. To lump them all together denies these plaintiffs their individual right to the pursuit of happiness as it fits them individually. Tort reform in essence is an attack on individuality to increase the profits of large insurance companies. The increased profits for these corporations should not come at the cost of the violation of the constitutional rights¹⁴² of injured individuals.¹⁴³

C. Political Irony

On the two sides of the tort reform debate are plaintiffs’ attorneys, generally viewed as Democrats, on one side and Republican officials, think tanks, and large corporations on the other.¹⁴⁴ While on one hand, it makes sense that plaintiffs’ attorneys generally align with more liberal views, the paradox¹⁴⁵ is the

141. Goldberg, *supra* note 6, at 1080.

142. Tort reforms may also significantly violate the constitutional right to a civil jury trial. U.S. CONST. amend. VII.

143. Some state courts have begun to find state damages caps unconstitutional. *See, e.g.*, Barbara A. Geisman, *Reform or Reshuffle? Consequences of the 2005 Missouri Tort Reform Act*, 42 WASH. U. J.L. & POL’Y 155, 155–56 (2013).

144. *See Baker supra*, note 100, at 11 (“With some exceptions, Republican legislators favor cutting back on tort liability and Democratic legislators do not.”).

145. The paradox is not why Republicans support tort reform—the answer is they want to keep more of their money. The paradox, or surprise, is how quickly Republicans will abandon the ideals of taking responsibility and a free market in exchange for a regulated market that incentivizes large corporations to not take responsibility.

conservative support of tort reform. Goldberg notes the irony with conservatives in support of tort reform in that “conservatives who wield the idea of ‘personal responsibility’ like a bludgeon, yet miss no opportunity to trash the one body of law that, more than any other, is all about holding persons (natural and artificial) responsible to others.”¹⁴⁶ The irony is that the tort system embodies qualities that both Democrats and Republicans should appreciate. Democrats should appreciate that the tort system holds large corporations in check while protecting the individual. Republicans should appreciate that the tort system fosters responsibility, and if left unreformed, creates a capitalist market where companies need not be regulated by the government.

D. David vs. Goliath

The David vs. Goliath issue is not often discussed in great depth but is one of the perpetuating causes of the tort reform debate. The Goliath side is made up of what Roederer refers to as “a systematic and coordinated campaign by an army of corporations, foundations, lobbyists, litigation centers, think tanks[,] politicians[,] and academics, to unmake or undo developments over the last 100 years across the common law.”¹⁴⁷ These large “Goliaths” on the tort reform side have the means and motivation to promote the tort reform agenda and do so because they receive an economic return on their investment because tort reforms will decrease their liability to injured individuals.¹⁴⁸

On the David side are the plaintiffs’ attorneys. While many of these attorneys are financially successful, none approach the massive resources of the insurance industry.¹⁴⁹ Some plaintiffs’ attorneys have

146. Goldberg, *supra* note 6, at 1081 n.18.

147. Roederer, *supra* note 10, at 677–78 (internal quotations omitted).

148. *See id.* at 679. Corporate and insurance interests potentially hold significant lobbying power. For example, in Florida a local insurance company promised to reduce its premium rates in exchange for the passage of a tort reform bill. Ward, *supra* note 19, at 4.

149. Compare Arnold & Itkin LLP—one of the most successful trial law firms in the country, recovering slightly over \$1 billion in 5 years, *Our Victories*, ARNOLD & ITKIN LLP (2015), <http://www.arnolditkin.com/Our-Victories.aspx>—with Allstate’s \$2.7 billion in net income and \$35.2 billion in revenue for 2014. *The Allstate Corporation Notice of 2015 Annual Meeting, Proxy Statement and 2014 Annual Report*, ALLSTATE CORPORATION 4 (Apr. 6, 2015), <https://www.allstate.com/resources/Allstate/attachments/annual-report/allstate-2015-am-materials.pdf>.

built their net worth to tens of millions, some even to hundreds of millions, but all of the large insurance companies routinely profit in the billions each year. To skew the playing field further, the insurance industry often unites in support of tort reform while plaintiffs' attorneys remain disjointed. In this sense, it is almost as if one David is fighting an army of Goliaths.

The uneven playing field also allows corporate interests to influence the public by dumping vast amounts of resources into the mass media to portray their version of the tort system. In response, plaintiffs' attorneys can only fight back in court, where they are beset with the task of convincing jurors who view the messages sent by the large corporations.

Critics might respond by saying that nothing is stopping the plaintiffs' attorneys from using mass media to plead their case—and some surely do. However, the larger problem is that even if all the plaintiffs' lawyers spent all of their combined net worth to fight tort reform, it would not amount to even a year's worth of profit in the insurance industry. The uneven playing field prevents a rational approach to tort reform and continues to shrink the constitutional rights of injured individuals.

V. PROPOSED SOLUTIONS

Thus far, I have addressed the many myths of tort reform as well as some obstacles for improvement of the tort system. Now I will share some proposed solutions. These solutions are not meant to be comprehensive, but instead are meant to enrich the discussion of tort reform and hopefully broaden the perspective of those in the debate.

A. Specialized Short Trial Tort Courts

Multiple states have recently adopted short trial courts where matters can be heard and decided on an expedited and cost-effective timetable. My proposal is to use a variation on the general short trial programs to create a short trial system in each state specifically for torts. These courts could expeditiously hear the cases of injured individuals and thus decrease the costs that must be fronted by plaintiffs' attorneys. These courts could also eliminate some of the delaying tactics used by repeat defendants in the tort system.

B. Adverse Fee Incentives

Adverse fee incentives, such as Nevada's offer of judgment rule, would also guard against frivolous suits and encourage settlement. In Nevada, offers of judgment are governed by Rule 68 of the Nevada Rules of Civil Procedure, which reads in relevant part:

- (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,
- (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
 - (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.¹⁵⁰

In Nevada, this rule serves as an effective safeguard to frivolous suits. If defendants feel that they have been sued frivolously, they simply need to extend an offer of judgment in a low amount and then prevail at trial. If they do so, they will be compensated for all of the attorney fees they incurred after the judgment. Likewise, if injured plaintiffs feel that the defendant is not compensating them for a valid claim, the plaintiff can serve an offer of judgment and then beat it at trial, substantially increasing the net recovery. This rule also encourages settlement on both sides by making the consequences of frivolously proceeding to trial more severe.

Critics may point out that this rule will only deter those able to pay the attorneys' fees at the end of the day—in other words, bankrupt plaintiffs will not care if they face a \$250,000 attorneys' fee judgment after a frivolous suit. This concern is valid in that some plaintiffs may not be incentivized to proceed reasonably. However, the proportion of bankrupt and completely financially despondent plaintiffs is significantly low based on the pool of plaintiffs in general. Additionally, the incentive to settle will affect the insurance

150. NEV. R. CIV. P. 68.

companies the most, which in turn will lead to fewer tort cases actually proceeding to trial.

C. Intelligent Damages Caps

Hyman and Silver present an interesting solution to damages caps. Their idea is to apply damages caps based on behavior of the parties as opposed to the current static damages caps.¹⁵¹ Hyman and Silver's frustration with the current damages caps is that they provide no incentives to medical providers to "improve the quality of the services they provide."¹⁵² Their proposed solution is as follows:

One obvious approach is to reward providers for error reporting and punish them for hiding mistakes. For example, when a provider reports an error within a specified time of its occurrence, she would receive the protection of a limit on non-economic damages. When a provider fails to report an error in a timely manner, we propose that non-economic damages be enhanced. One could use a similar strategy to reward providers who improve their performance on certain defined quality benchmarks, by allowing them to take advantage of a second (and lower) cap on non-economic damages.¹⁵³

Hyman and Silver's proposition is rational and would be beneficial both to physicians and injured patients alike. Unfortunately, their proposal will run into the David vs. Goliath problem. As explained above, because of the vast resources of the tort reformers, rational proposals will likely be quashed in favor of self-serving and unfounded reforms.

D. The Invisible Hand

Adam Smith's Invisible Hand metaphor describes a self-regulating marketplace where individuals can maximize their productivity without government interference.¹⁵⁴ An unregulated tort system is the invisible hand in action. When plaintiffs are harmed

151. Hyman & Silver, *supra* note 18, at 1131–32.

152. *Id.* at 1131.

153. *Id.* at 1131–32.

154. ARTHUR SULLIVAN & STEVEN M. SHEFFRIN, *ECONOMICS: PRINCIPLES IN ACTION* 32 (2003).

severely, they should be compensated significantly. This correlated compensation will in turn incentivize those causing the harm to correct their behavior. Over time, the tort system will balance the market by deterring harmful behavior of defendants and fairly compensating plaintiffs.

Hyman and Silver also discuss this principle in the context of allowing malpractice premiums to rise:

Providers are rational. When injuring patients becomes more expensive than not injuring them, providers will stop injuring patients. Stated more delicately, when insurance rates go up, they create a highly salient incentive for providers to improve the quality of the services they are offering. Lowering malpractice premiums through tort reform eliminates this incentive without putting anything in its place. Litigation rates and premiums will fall on their own when providers improve the quality of care—thus decreasing the pool of potential plaintiffs.¹⁵⁵

Again, this idea may be too rational to survive the David vs. Goliath hurdle. On top of that, it would likely be the most heatedly opposed proposition because it would cut into the profits of repeat offenders—insurance companies and physicians—most substantially.

VII. CONCLUSION

In order to improve the current tort system, significant research must be performed. Further research is required in two main areas: (1) to determine whether tort reforms are successful or not, and (2) how verdicts are related to insurer payouts and premiums.¹⁵⁶ Along with these two areas, comprehensive and uniform information about the number of medical malpractice injuries compared to the amount of medical malpractice suits filed each year nationwide would be helpful. Finally, a study on the vast majority of civil tort cases that settle would also be instructive because such a small portion of potential tort cases are filed, let alone proceed to trial.

Creating an intelligent solution to improve the current tort system is an uphill battle. The wealthy insurance industry will do

155. Hyman & Silver, *supra* note 18, at 1131.

156. Zeiler, *supra* note 4, at 686.

anything it can to continue to promote the tort-reform agenda, regardless of the lack of proof supporting their propositions. Trial lawyers will likely not unite to fight tort reform—and even if they did, their combined resources pale in comparison to the wealth of the tort reformers. However, tort reform should nevertheless be debated to inform citizens of its constitutional problems and hopefully pull back at least a corner of the elaborate curtain hiding the truth behind tort reform.

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