
Unmaking and Remaking Tort Law*

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I. INTRODUCTION

The topic for this portion of the symposium is the future of tort law, and it is a challenging one; as Yogi Berra said, “It’s tough to make predictions, especially about the future.” Because of (or despite) that difficulty, this article offers alternative futures for tort law.

One increasingly likely future is the extension of a radical conservative, liability-limiting process that has been underway for the past twenty years, which has come to be called the unmaking of tort law.¹ If it comes to pass, the unmaking of tort law will be a dramatic transformation of tort law.

Through a combination of its own conceptual defects and the political efforts of its opponents, the unmaking may not fully take effect. If it does not, tort law is unlikely to extend in a grand way the liability expansion based on general principles of negligence and

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1. Professor Stephen Sugarman coined the term. Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455 (1999). See also JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (2004); Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE UNIVERSITY LAW REVIEW 1 (2004).

strict liability that dominated the 1960s and 1970s. Instead, a remade, progressive tort law is likely to be ad hoc, emphasizing the need to apply tort law and to innovate to fill gaps in other means of the regulation of safety and the compensation of victims.

The one near-certainty about tort law in the foreseeable future, of course, is that in many ways it will look like tort law today. Debate about tort law tends to focus on dramatic cases, cutting-edge issues, or drastic reform proposals, but a great deal of tort law is just a process of carrying-on. In making these predictions, however, the focus here is on large-scale changes of the kind we can see only at the generational level.

II. UNMAKING TORT LAW

One possible future is the unmaking of tort law. Broader than what is ordinarily referred to as the tort reform movement, this future is the dismantling of neoclassical tort law, the body of tort law that developed through most of the twentieth century and culminated in the liability-expanding developments of the 1960s and 1970.² Without overestimating the long-term effect of short-term events, the realization of this future has become more likely as a result of the November 2004 election, in which George W. Bush was elected on a platform that prominently featured medical liability reform, Republican majorities in the Senate and House of Representatives were strengthened, tort reform ballot measures were adopted in several states, and business-friendly judicial candidates won election to prominent state courts.

A. *Origins of the Unmaking*

This vision of tort law and tort reform crystallized during the Reagan Administration, in the Report of the Tort Policy Working Group.³ The Report begins by identifying a “rapidly expanding crisis in liability insurance availability and affordability,”⁴ and dismisses any explanation for the crisis—economic conditions, a fall in interest rates, or insurance company mismanagement—other than four “problem areas”⁵ in tort law. Three of the areas relate to substance:

2. For expanded discussions of the conservative movement to unmake tort law, see FEINMAN, *supra* note 1; FEINMAN, *supra* note 1.

3. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986) [hereinafter Tort Policy].

4. *Id.* at 1.

5. *Id.* at 30.

the decline of fault as a basis of liability,⁶ the undermining of causation,⁷ and the “explosive growth”⁸ in damage awards, a growth caused by disregard of the established principles of fault and causation. The fourth problem area is the allegedly high transaction costs of the system,⁹ only of benefit to lawyers, presumably caused by litigating exaggerated or spurious claims.

The Report then presents a non-exhaustive list of reforms “which if implemented should return tort law to a credible fault-based compensation system that provides a fair and reasonable level of compensation to deserving plaintiffs through a more predictable and affordable liability allocating mechanism.”¹⁰ The first two of its principal reforms reestablish the core principles: “Retain fault as the basis for liability”¹¹ and “Base causation findings on credible scientific and medical evidence and opinions.”¹² The next four aim to reduce victims’ damages, by eliminating joint and several liability,¹³ limiting noneconomic damages (including limiting or abolishing punitive damages),¹⁴ providing for periodic payment of damages,¹⁵ and abolishing the collateral source rule.¹⁶ The two remaining recommendations go to process: Reduce contingency fees and establish alternative dispute resolution mechanisms with strong disincentives to litigation.¹⁷

B. Changes Made and Proposed

From the Working Group report to the present, conservatives have proposed and often have been able to implement a variety of changes in three categories. First, make it harder for injury victims to get to court. Second, make it harder for plaintiffs to win if they get to court. Third, reduce damage recoveries for plaintiffs who do win. The changes have come through the tort reform movement in the legislatures and a shift to conservatism in the courts. The list is familiar, so here are simply a few highlights (or lowlights).

6. *Id.* at 30-33.

7. *Id.* at 33-35.

8. Tort Policy, *supra* note 3, at 35-42.

9. *Id.* at 42.

10. *Id.* at 60.

11. *Id.* at 61-62.

12. *Id.* at 62-64.

13. Tort Policy, *supra* note 3, at 64-65.

14. *Id.* at 66-69.

15. *Id.* at 69-70.

16. *Id.* at 70-72.

17. *Id.* at 72-75.

1. Make it harder for injury victims to get to court

More than twenty states already regulate contingent fee agreements, either in all cases or, as a result of tort reform efforts, in medical malpractice and other health care liability cases, but proposals for stricter limitations are pending in other states and in Congress. The organization “Common Good,” for example, has introduced a proposal in more than a dozen states so far that would cap the fees of the victim’s lawyer at 10% of the first \$100,000 and 5% of anything more¹⁸

Another means of increasing the risks to victims’ lawyers is to threaten sanctions for questionable cases. In September 2004, the House of Representatives passed proposed amendments to Rule 11 that would impose mandatory sanctions, including suspension from practice, on lawyers who file pleadings that a judge decides are unwarranted. It also would make the revised Rule 11 mandatory in state courts as well as federal courts.¹⁹

Under “early offer” mechanisms, defendants in tort cases could offer to pay a plaintiff’s economic losses, often before the plaintiff’s lawyer had an opportunity to engage in discovery. If the plaintiff accepted the offer, she would be barred from seeking recovery for noneconomic losses, and her attorney would be limited to an hourly fee that could not be greater than a modest percentage of the recovery. If the plaintiff rejects the offer and goes to trial, she could recover her economic loss less the amount of insurance or other benefits received, but could recover damages for noneconomic loss only if she proved by “clear and convincing evidence” that the loss was caused by “intentional or wanton misconduct.”²⁰

A limitation of access to lawyers on a grander scale is the object of legislation making it more difficult for states and municipalities to hire private attorneys to assist in major litigation, such as the landmark litigation against the tobacco companies or pending cases against gun manufacturers, manufacturers of lead paint, and oil companies that produce MTBE, a gasoline additive that has polluted

18. Adam Liptak, *In 13 States, a Push to Limit Lawyers' Fees*, N.Y. Times, May 26, 2003; A.B.A. Tort Trial & Ins. Prac. Sec. Task Force on Contingent Fees, *Report on Contingent Fees in Medical Malpractice Litigation 2004*, available at <http://www.abanet.org/tips/contingent/MedMalReport092004DCW2.pdf> (last visited April 27, 2005).

19. Carl Hulse, *Bill to Require Sanctions on Lawyers Passes House*, N.Y. TIMES, September 15, 2004.

20. *E.g.*, Legal Reform and Consumer Compensation Act of 1996, 104th Cong., S. 1861; Lawsuit Reform Act of 1995, 104th Cong., S. 300.

water supplies around the country.²¹ Some proposals, for example, establish a special, politically-freighted approval process for contingent fee contracts and limit the amount of the fee without regard to the complexity or the riskiness of the litigation.²²

A final means of keeping victims out of court is to limit their ability to join together in a class action. A series of tort reform proposals, such as the Class Action Fairness Act, aims to move most class actions out of state courts into federal courts, which are traditionally less plaintiff-friendly, to give defendants greater powers to challenge whether a class action is appropriate, to delay the proceedings, to limit plaintiffs' attorneys' fees, and to punish attorneys who bring defective class actions.²³

2. Make it harder for plaintiffs to win if they get to court

The principal means of preventing victims from winning if they do get to court is through doctrinal change, particularly through halting and reversing the generalization of negligence and contracting the law of product liability.

The most dramatic method of limiting the generalization of negligence is by increasing the number of potential defendants who are simply immunized from liability altogether.²⁴ Immunities have been extended in this way to suppliers of raw materials for medical devices,²⁵ teachers, businesses that donate food to charitable groups, "Good Samaritans" of various sorts, ski resorts, community volunteers,²⁶ and airlines and security firms following the September 11 attacks.²⁷ The Protection of Lawful Commerce in Arms Act would prohibit suits against gun manufacturers for injuries suffered by the unlawful misuse of a gun.²⁸ The Personal Responsibility in Food Consumption Act—the "cheeseburger bill"—aims to provide immunity to food manufacturers and sellers for health claims related

21. CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 197-99 (2001); THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 210-11 (2001).

22. *E.g.*, Vernon Tex. Code Ann. §2254.101-109.

23. *E.g.*, Class Action Fairness Act of 2005, P.L. 109-2 (Feb. 18, 2005).

24. See Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503 (1997).

25. Biomaterials Access Assurance Act, 21 U.S.C. § 1604 (1998).

26. Volunteer Protection Act, 42 U.S.C. §§ 14501-14505 (1997).

27. Air Transportation Safety and System Stabilization Act, 49 U.S.C.A. § 40101 (2001).

28. H.R. 1036, 108th Cong. (1st Sess., 2003); Sheryl Gay Stolberg, *Senate Leaders Scuttle Gun Bill Over Changes*, N.Y. TIMES, Mar. 3, 2004 at A1.

to obesity.²⁹ The Energy Policy Act of 2005, as passed by House of Representatives, contained a controversial immunity for manufacturers of MTBE.³⁰

Other limitations of negligence include pockets in which special rules rather than general principle negligence applied. The move toward a general standard of liability for occupiers of land has arguably been halted, for example, in favor of preservation of the traditional categories of invitee, licensee, and trespasser.³¹

In product liability law, the basis of liability was always participating in the chain of distribution of a product, but there is a broad effort to reverse that presumption, immunizing distributors and retailers in whole or part except for their individual negligence.³² In another limitation, statutes undertake to prohibit suits brought by cities against gun manufacturers for the wrongful marketing and distribution of handguns.³³

The definition of a design defect has been a major focus for narrowing liability. One step is to move away from consumer expectations as a basis of liability. Decisions involving complex products are argued to be beyond the ken of ordinary consumer expectations, so the test may not be applied.³⁴ A limited conception of consumer expectations as a matter of law also has been presented.³⁵ The Restatement (Third) formalizes the trend by removing consumer expectations as a basis of liability, maintaining it only as an element of its risk-utility test.³⁶ At the same time, challenges have moved the risk-utility test from one of strict liability to negligence, except in limited situations. The Restatement (Third) introduces a requirement that the plaintiff prove that a “reasonable alternative design” was available to the product manufacturer for the design to be defective,³⁷ and its definition of factors relevant to risk-

29. H.R. 339, 108th Cong. (2d Sess, 2003).

30. H.R. 6, 109th Cong. sec. 1502 (passed April 21, 2005); Seth Borenstein & Sumana Chatterjee, *Energy Bill Would Benefit Industry*, PHILADELPHIA INQUIRER, Nov. 16, 2003 at A13; Editorial, *Out of Gas*, NEWS AND OBSERVER (Raleigh, N.C.), Dec. 16, 2003 at A12; Bruce Alpert and Bill Walsh, *On the Hill*, TIMES-PICAYUNE, Dec. 7, 2003 at A10.

31. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 433(5th ed. 1984); DAN B. DOBBS, THE LAW OF TORTS § 619-620 (2000).

32. Frances E. Zollers, et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1033 (2000).

33. Roselyn Bonanti, *Tort ‘Reform’ in the States*, 36 TRIAL 28 (2000).

34. *E.g.*, *Pruitt v. General Motors Corp*, 86 Cal. Rptr. 2d 4 (Cal. Ct. App. 1999).

35. *E.g.*, *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992).

36. Restatement (Third) of Torts: Prod. Liab. §2, cmt. f. (1998).

37. Restatement (Third) of Torts: Prod. Liab. §2(b) (1998).

utility balancing³⁸ is narrower than the list commonly employed by the courts. Most importantly, the Restatement test ignores the enterprise liability principle, stated by Professor John Wade as “the feasibility, on the part of the manufacturer, of spreading the loss by setting the product price or carrying liability insurance.”³⁹

In some other cases, the question of the dangerousness of the product is taken away from the jury altogether, or submitted to the jury with a strong presumption of reasonableness. When a drug manufacturer receives FDA approval for a product, an automaker complies with federal safety standards, or a corporation otherwise complies with governmental requirements, the product would be presumed to be safe under this rule.⁴⁰

Manipulating the rules of proof also potentially limits liability. From the Tort Working Group report onward, a number of means have been proposed, and some adopted, to place higher burdens on plaintiffs in proving their cases. Allowing trial and appellate judges to set finer screens for scientific and technical evidence is an example; the case law under *Daubert* has been reported to have this effect. Also, there has been an effort to limit the availability of expert testimony in medical malpractice cases by requiring an expert to have an active clinical practice in the same specialty as the defendant. Outside of the courtroom, the increasing campaign by medical associations, specialty societies, and licensing boards to decertify plaintiffs’ experts has an effect.⁴¹

3. Reduce damages awarded to victims who do win their cases

The response to allegedly excessive awards for noneconomic loss has been to propose caps on damages, particularly in medical malpractice cases.⁴² Other states include limits on the total damages that can be awarded, including economic damages, without regard for the nature of the injury or the amount of resulting harm.⁴³ Federal

38. Restatement (Third) of Torts: Prod. Liab. §2, cmt. F (1998).

39. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 838 (1973). Similar limitations also have been adopted in tort reform statutes and by a number of courts. *E.g.*, Tex. Civil Practice & Remedies Code 82.005(a) & (b). *See Hernandez v. Tokai Corp.*, 2 S.W. 3d 251 (Tex. 1999).

40. *E.g.*, Mich. Stat. Ann. §27A.2946(4); *see* Thomas Frank, *Erasing the Rules*, NEWSDAY, October 11, 2004.

41. Adam Liptak, *Doctor's Testimony Leads to a Complex Legal Fight*, N.Y. Times, June 20, 2004; Terry Carter, *M.D. with a Mission*, A.B.A. J., 41, (Aug. 2004).

42. Dobbs, *supra* note 31, at § 384. The model is California’s Medical Injury Compensation Reform Act, Cal. Civ. Code § 3333.2.

43. *See* Megan Rhyne, *Cap Cuts Virginia’s Largest Med-mal Award*, NAT’L L.

preemption of tort law through a national cap also has been proposed by President Bush.⁴⁴

Some attacks have been directed at joint and several liability, as imposing damages out of proportion to fault, and the collateral source rule, as allowing recovery of damages beyond the extent of loss, and these rules have been abrogated in a number of jurisdictions or types of cases.⁴⁵

Punitive damage reform has proceeded in the legislatures and in the courts. The thrust of the statutory reforms includes establishing an actual malice threshold⁴⁶ and a “clear and convincing evidence” standard for the award of punitive damages,⁴⁷ capping punitive damages by amount or formula,⁴⁸ eliminating awards for the same conduct in multiple actions, and increasing judicial review of jury awards.⁴⁹ In a series of cases, the Supreme Court constitutionalized the law of punitive damages and defined a narrow scope for their application, including limiting the conduct considered in awarding punitive damages and limiting the size of damages themselves.⁵⁰

C. *The Unmaking as a Whole*

If we put all of these individual changes and proposals together and extrapolate them into the future, we get a rather stark alternative to our current understanding of tort law. There will be fewer cases, fewer plaintiff victories, and smaller damages.

Beyond that obvious conclusion, the effects of the unmaking become clear by focusing on how the unmaking plays out in three central elements of tort law:

- Tort law as a dispute processing scheme;
- Tort law as a forum for private redress that relies on incentives to victims and their lawyers; and
- Tort law as a residual system that relies on innovation.

1. *Dispute processing.* Particularly in cases involving modest stakes and the application of settled law to uncomplicated facts, tort

J., Apr. 28, 2003, at B1

44. Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, at C1.

45. American Tort Reform Ass’n, *ATRA Issues: Tort Reform Record*, June 30, 2004.

46. *E.g.*, *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653 (Md. 1992).

47. *E.g.*, COLO. REV. STAT. § 13-25-127 (1987).

48. *E.g.*, CAL. CIV. CODE § 3333.2; MD. CODE ANN., Ct. & Jud. Proc. §11-108.

49. DOBBS, *supra* note 31 at § 384 (2000).

50. FEINMAN, *Un-Making Law*, *supra* note 1, at 41-42.

law functions less as a forum for the principled adjudication of individual rights and more as a dispute processing scheme.⁵¹ In most automobile accident and slip-and-fall cases, for example, insurance claims agents, plaintiffs and defense lawyers, and judges are participants in a bureaucratic administration. Under the unmaking of tort law, liability and damage rules will become more clear and more defendant-friendly, accelerating this process. Changed elements of the incentive structure, such as draconian limitations on attorney fees and early offer schemes, will increase the risk of litigation, making some cases unlikely to be litigated, and others more likely to be pursued only to a limited extent. The cases will become fewer and the stakes smaller. As a result, dispute processing will become more expeditious, with denials of claims or trivial payments a more frequent occurrence, and trials, which are now rare, practically nonexistent.

2. *Incentive structures.* Tort law is famously and correctly characterized as “public law in disguise;”⁵² compensation systems from workers compensation forward and the rise of class actions and mass tort cases have introduced significant collectivized elements. Nevertheless, tort is still distinctively private law, providing individual redress by an injured victim against a particular defendant.⁵³ Accordingly, a central element of the system is the incentives provided to individual victims to pursue litigation. Moreover, because tort litigation is financed by plaintiffs’ attorneys through contingent fee contracts, it is hardly an exaggeration to state that the possibility of reaping substantial contingency fees drives everything else in the system.

The centrality of contingent fees shaping the incentive structure of lawyers has played a part in shaping substantive law. At first glance, for example, the collateral source rule appears to give victims a double recovery. Because the victim must pay a substantial contingency fee out of the recovery, however, damages must over-

51. This is the “first world” of tort litigation, which “consists of routine personal injury suits, mostly auto cases, with modest stakes and settled law.” The remainder of the article merges the “second world” of “high stakes cases, notably product liability [and] medical malpractice,” and the “third world” of “mass latent injury cases, such as those involving asbestos and the Dalkon Shield.” DEBORAH R. HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 30-34 (1987), cited in 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, 1209 (1992).

52. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 257 (1959-60).

53. For a contemporary perspective, see Benjamin C. Zipursky, *Civil Recourse, not Corrective Justice*, 91 GEO. L.J. 695 (2003).

compensate in order to fully compensate, so the rule becomes a source of paying attorneys fees without reducing a fair recovery.

For present purposes, the reverse effect is more important. Measuring the effect of changes in substantive rules must include a consideration of their effect on contingent fees, and the effect of changes may be multiplied by their effect on attorney calculation of the probability of winning and the size of the potential fee. As tort law is unmade, the effect on incentives under contingent fee contracts of particular changes in process or substance are magnified and spread throughout the system. As the size of the potential fee and the likelihood of recovering it decrease, fewer cases will be brought, fewer of those that are brought will be pursued through trial and appeals, and fewer new theories will be presented. Attorney fee regulation, early offer mechanisms, narrowing liability rules, damage caps, barriers to proof, the decline of jury trials, and increasingly searching appellate review coalesce in a perfect storm for plaintiff's lawyers. Any case in which, liability is uncertain, particularly involving technologically complex methods of proof, or in which damages are not likely to be large, will become a high risk case, and attorneys will be reluctant to bring such a case or do more than settle it.

3. *Residual tort law and innovation.* The commonly described objectives of tort law are providing incentives for safety, compensating victims, and promoting fairness. Tort law is residual in that it operates against a background of other social and governmental systems that also promote these objectives, and it most often deals with problems that other mechanisms address insufficiently. Sometimes the preemption of tort law is explicit, as with workers compensation. Other times the scope of tort law is implicitly defined; fully adequate government regulation of automobile safety that reduced the incidence of auto-related fatalities, or a broad social insurance program that provided medical care and income supplements, for example, would leave much less scope for tort litigation. Tort law therefore fills gaps, sometimes on its own and sometimes by identifying problem areas in a way that spurs action by other government entities.

The need for residual tort law to fill gaps in the system rests on the idea that there is a baseline of incentives for safe conduct and compensation of the injured below which it is not desirable to fall. Tort law does not need to deter all potentially unsafe behavior, and sometimes it should leave injured people to their own devices. Nevertheless, all but the most ardently individualistic market advocates recognize that there are some settings in which the state

appropriately promotes safety and protects the unfortunate. Where to draw the line is the tough question. But intervention is particularly needed where there is a prospect of significant injury that otherwise goes undeterred, or where the particularly vulnerable, typically underinsured populations, are subject to injury.

Tort law fills these gaps in two ways. Many cases require little more than the routine application of established rules of law. The gaps in auto safety regulation are filled largely by the application of settled doctrines.⁵⁴ Other cases require innovation.

One of the most striking features of tort law over the past hundred years has been the way in which it innovates in filling its residual role. The typical torts casebook can be read as a history of innovations large and small: the rise of products liability, the creation of market share liability, the abolition of immunities, the development of negligence-based liability for occupiers of land, the creation of informed consent, the availability of recovery for loss of chance in medical malpractice, and many more.

The expansion of tort liability over the past fifty years has been caused in part by a particular approach to tort law that provides space for innovation. That approach is not focused on expanding liability as an end in itself, but is a combination of generalization and policy analysis. The idea that negligence is a general standard for liability and that product liability ought to be driven by enterprise liability, combined with the recognition that doctrines need to reflect a balancing of policies, resulted in a wave of innovative application of existing doctrine, new doctrine, and new theories.

The principal incubator for innovations in tort has been the state courts, with an occasional assist from the federal courts and the legislatures. In the state courts, the typical process is the development of a theory by a plaintiff's lawyer, the exploration and development of that theory in trial courts, the review and adoption of the theory by appellate courts, and the continuing refinement of the theory in subsequent cases.

The unmaking of tort law presents an anomaly: The need for tort law as a residual agency is greater, but the possibility of innovation is reduced. The social fact to observe about our current situation, which is likely to extend into the foreseeable future, is the need for tort law to play a significant role as other sources of regulation and compensation are diminished. The larger conservative campaign of

54. Of course, doctrines become settled only after a period of innovation. Crashworthiness is a settled doctrine in products liability law, for example, but that is a development of recent decades.

which the transformation of the common law is a part aims to reduce government's ability to regulate the safety of products, the workplace, and health care, and instead to trust the market to make the world safe. The cumulative effect of cutting both state regulation and tort liability would be to increase substantially the dangers to consumers, workers, and patients. If other forms of government protection are decreasing, the residuum that needs to be filled by tort law will become larger, and it is likely that tort law will respond.

Likewise, the social safety net is being strung closer to the ground through the potential privatization of Social Security, the transformation of welfare, and the reduction of federal and state spending for health, education, and poverty programs. Therefore, compensation through the tort system becomes more necessary, particularly for victims who have fewer other avenues of insurance and income protection, especially homemakers, the elderly, children, and low-income consumers.

At the same time, the unmaking makes innovation more difficult. Under the conservative alternative, tort law becomes increasingly legislative, and it is harder for innovations to occur in the legislature, or for courts to innovate in statutory interpretation than common law decision making. Tort also will become more federalized, removing states as sources of innovation. And in extreme cases, of which punitive damages has been the first but may not be the last, tort even becomes constitutionalized, preventing all other government institutions from innovating. As courts become increasingly rule-oriented, as barriers are erected to the proof of uncertain facts, and as the incentive structure of plaintiff's lawyers is reduced, the litigation process that produces innovation becomes increasingly less available. Finally, at a conceptual level, the unmaking proceeds from assumptions that are hostile to innovation—that there are rigid, not expansive, underlying principles of responsibility, and that the predominant policy is deference to the market, not policy balancing by the courts. As a result, the conceptual basis for innovation is absent, and we can expect contraction, not expansion, of existing law and fewer new torts or new remedies.

D. The Unmaking of Tort Law in Context

The last point suggests the broader political context of the unmaking of tort law. The unmaking is part of a potential future in which government's role will be largely confined to facilitating market transactions, particularly to the benefit of large economic enterprises. Ronald Reagan proclaimed the principal item on the

agenda of this campaign most baldly in his first inaugural address: “Government is not the solution to our problems; government is the problem.”⁵⁵ If government is the problem, then the solution is to reduce the reach of government. Many government programs can be reduced or eliminated altogether; others will be cut by shifting responsibility from the federal government to the states and from government to the market. Publicly-supported retirement and healthcare will be replaced by private investment accounts instead of Social Security and HMOs and private prescription insurance instead of Medicare. Public support of education will be replaced by voucher-funded school choice. Public welfare, already reformed “as we know it” under centrist Democrat Bill Clinton, will be supplanted by voluntary, faith-based initiatives. Tax cuts will starve government across the board. The effect on the broad concerns of tort law will be less direct regulation of safety and fewer sources of government support for the health care or income needs of injury victims.

The effects will be felt in other areas of the common law as well. Contract law will be more formal and less regulatory, reverting to a simple model of contract based on an ideal market, strictly enforcing the bargains that parties make, not reading beyond the four corners of a document in enforcing a contract, and certainly not evaluating the bargains for fairness. As a result, businesses, especially large corporations, will have greater power to use contracts to dictate the terms of the basic relationships that order people’s lives as workers and consumers, and courts will have less power to review the contracts, either to determine that an agreement was really made, to assess the fairness of its terms, or to determine if it complies with the law. (Indeed, contracts limiting or disclaiming tort liability may be more readily enforced). In property law, the takings clause of the Fifth Amendment will be transformed into a roadblock that makes it cumbersome, expensive, or impossible for government to control land development, protect the environment, and rein in business, including potentially in ways that interact with the tort system.

E. A Critique of the Unmaking of Tort Law

There are two things wrong with the conservative unmaking of tort law. The first wrong is that it presents a picture of a less just, less safe world. Dramatically reduced compensation for victims of personal injury and incentives toward safety for potential injurers could have

55. JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 151-52 (2002).

disastrous social consequences. This is, of course, a normative judgment, and some people will disagree with it.

The second wrong is conceptual. The conservative vision rests on long-discredited ideas about law in general and tort law in particular.

The conservative vision of tort law rests on two essential points. The first is principled. The vision conceives of society as made up of isolated individuals, each of whom possesses a broad realm of freedom to pursue his or her own ends. From that perspective, tort law is a realm of corrective justice, righting wrongs between individuals. Righting wrongs obviously entails a concept of wrong, which in tort law is embodied in narrow principles of fault and causation. A plaintiff properly should have a tort remedy only where the defendant was at fault and the conduct at fault caused harm.

The second point is explicitly policy-oriented. In addition to a concept of individual rights, the focus on the individual in the conservative alternative flows from an emphasis on the market as the principal institution of social organization. A primary role of the law is to maintain the conditions under which the market operates, as a means of realizing individual freedom and maximizing social welfare. From this perspective, the traditional policy goals of tort law are viewed through a market mechanism and restated as providing reasonable incentives for balancing productive behavior against safety and compensation through a not-too-expensive system of liability. In the analysis of tort problems, compensation is de-emphasized and incentives are left much more to market forces than to legal intervention. At the same time, the market focus promotes personal responsibility in society.

Both of these points lead to a preference for determinate rules over standards. Rules clarify the rights and obligations of market participants; this provides less opportunity for judges to invade individual rights, and it facilitates market transactions by enabling parties to plan more effectively and by reducing the opportunities for judicial interference. The rules require less extensive factual inquiry, and they permit a relatively effective deductive process to operate at several levels.

This picture of tort law is so anachronistic that, if it were not calculated, one might think it delusional. In its reliance on the idea of objective rights, its sole emphasis on the market, and its preference for rules, this vision only modestly updates views that the critique of classical legal thought demonstrated to be flawed almost a century ago. The critique is by now too familiar. Abstract, general principles cannot be mechanically applied to decide particular cases. Courts necessarily make law as well as apply it, drawing on their own sense

of social needs and public policy. To do this, courts have to immerse themselves in the world they regulate. People are not just self-interested individuals, and market values are not the sole measure of social good. Instead, people are social beings and the public as a whole has an interest in non-market values such as fairness, equality, and protection of the disadvantaged. Courts, as much as legislatures, necessarily and appropriately engage in policymaking when they formulate and apply doctrine.

This critique spread across the common law. In Leon Green's famous phrase, tort law became recognized as "public law in disguise."⁵⁶ If judgments about tort liability entailed balancing of social interests, that balancing should be done openly, rather than being concealed by abstract principles of fault or obscure legal doctrines.

The conservative alternative vision of tort law is, therefore, fundamentally flawed. At its core, it repeats old errors. Conceptual errors may not be a bar to political success, of course, but they do provide a means of criticizing the unmaking and suggesting the possibility of a remaking.

III. REMAKING TORT LAW

The unmaking of tort law is well underway. Negligence has been undercut, products liability is in retreat, and full damages are increasingly rare, while tort litigation in many areas is a threatened species.

The future is always uncertain, however, and the social harm produced by the unmaking may produce a strong reaction. If that occurs, how is tort law likely to be remade?

For the near future, two broad, progressive possibilities are very unlikely. Although the tort system has always been something of a hodge-podge produced by conflicting historical circumstances, in the early 1970s there were two trends that could have fundamentally transformed tort law. The first trend was the expansion of tort, composed of a roughly coherent mix of generalized negligence, expansive products liability, and particularized damages, powered by an adequate if inconsistent litigation system. If that trend had continued, tort law would have become more general and the tort system more powerful, applying broad principles to remedy harms and promote safety throughout society. The second trend, somewhat contrarily, was the growth of alternatives to tort law. On the

56. Green, *supra* note 52.

compensation side, both tort-focused systems such as automobile no-fault, the vaccine injury program, and a variety of proposals based on the New Zealand compensation system, and more general programs such as Medicare, Medicaid, and other projects of the Great Society presented the prospect that supporting injury victims through the tort system was much less necessary. On the incentives side, the creation of regulatory agencies such as the Consumer Products Safety Commission, the Occupational Safety and Health Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration potentially diminished the need for tort law as a check on dangerous conduct. Today neither of these alternatives seems likely to return. Even if there is a reaction against tort reform, tort law is likely to be maintained in pockets rather than reinvigorated wholesale. A generation of tax cuts and anti-regulatory fervor has limited the probability that legislative and executive branches will obviate tort law's protection of public safety.

If there is a progressive remaking of tort law, it is likely to be ad hoc. Tort law is likely to become even more residual, as general principles and overarching theories are replaced by a focus on filling gaps. Tort will develop by focusing on particular issues, or pockets of issues, rather than across the board.

The world of routine cases and modest stakes will be little affected by the remaking of tort law. This trend has been underway for generations, and the circumstances to reverse it—an increased litigation consciousness and the devotion of substantially more resources to the litigation process—are not on the horizon. Moreover, there may be little need for shifting small cases from routine dispute processing to litigation. There are relatively few systemic, socially significant gaps in this “world” of tort litigation; as private and social insurance declines, some victims may not be fully protected, but in the litigation process, victims in small cases are as likely to be over-compensated as under-compensated.

In larger cases, a central element of tort law has been innovation to fill its residual role as compensator and regulator of last resort. Innovation in a remade tort law is likely to fall between the great innovation of neoclassical law and the aversion to innovation in the conservative alternative. An ad hoc approach offers an attitude of flexibility and innovation without the emphasis on general theories of liability in neoclassical law, such as generalized negligence and enterprise liability. This attitude looks to innovate where innovation is particularly needed, due to factors such as incentive or compensation gaps. And it preserves the idea that different institutions—courts or legislatures, state or federal—may be needed

to innovate.

Consider a few examples. On particular issues, one variable reflecting the need for innovation is the extent to which different groups of cases present gaps in regulation. One factor that ought to weigh heavily in determining the need for tort law to play a significant role in health care liability cases is what is widely recognized as the paucity of other sources of ensuring the quality of care. There is a degree of self-regulation in medical practice and some private efforts to ensure the quality of service, but the incidence of professional discipline and state regulation are arguably inadequate to the task. That suggests that medical malpractice litigation plays a significant role in establishing and enforcing standards of care. Accordingly, liability rules and subsidiary rules such as proof rules should be expansive. Tort reformers argue that liability is too expansive, but from a safety point of view, that argument is persuasive only if it is accompanied by an account of the effectiveness of other forms of regulation or proposals for increasing that effectiveness.

Consider, too, the related debate over caps on noneconomic damages. In a large number of cases in which the economic loss is small relative to the noneconomic loss, damage caps have the effect of either cutting the compensation for economic loss or denying a remedy altogether, particularly where the collateral source rule has been abrogated. This is in part a product of the contingency fee system; noneconomic damages are often a source for paying the attorneys fee without invading the recovery for economic loss. The effect is most pronounced for particularly vulnerable groups, including women, the elderly, and low-income victims. From an ad hoc perspective, then, limitations on damages are particularly troubling because they produce a regulation and compensation gap that particular disadvantages these vulnerable populations. The combination of limited other sources of safety regulation and the need to maintain noneconomic damages as a means of financing litigation on behalf of classes of victims counsels for extreme caution in adopting draconian damage caps.

Mass torts are a complex area involving different kinds of injuries, and a remade tort law will continue to have a role to play there. Tort law may fill gaps in unusual cases and provide a spur to action in other cases. Not all cases may require a tort remedy. The more speculative these claims become, the less obvious is the gap to be filled. Medical monitoring cases in the absence of present injury, for example, present less powerful claims of gaps than do present injuries. In some cases, however, expansive tort liability has been and

is likely to continue to be the only effective remedy; in the absence of a tort remedy, there would be a gap in compensation and deterrence, particularly in cases involving vulnerable groups. The DES cases are the most obvious instance of this. Finally, even when the tort remedy has been more controversial, it has provided a spur to action that would be missing otherwise. Asbestos, vaccine injury, breast implants, and the September 11 tragedy are examples. Indeed, where the spur has been effective, the tort remedy often becomes less needed.

CONCLUSION

Whether the future of tort law is its unmaking, its ad hoc, progressive remaking, or something else is, of course, currently unknowable. Which alternative comes to pass depends, as legal development always depends, on a combination of politics and ideology. It is remarkably appropriate, therefore, that the conference at which this paper was presented took place four days before our most recent national election. The victories for tort reform forces in that election suggested something about the short-term future of tort law. Perhaps the prospects for the longer-term future are better.