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Articles

STEALTH TORT REFORM

Sandra F. Gavin*

I. INTRODUCTION

The widespread call for “tort reform” over the past three decades is a calculated product of political rhetoric operating outside of the common law. The very phrase “tort reform” functions as a political symbol “in which both sides engage in lobbying and propaganda that contains some element of real problems, half-truths, and outright distortions.”¹ “Tort crisis,” “litigation lottery,” “lawsuit hell,” “mad dog lawyers,” “runaway juries,” “junk science,” “tort tax,”—all these phrases have been used to describe the present state of our civil tort system. Considerable scholarship has been directed toward debunking the basis for claims made by the tort reformers. For instance, Professor Marc Galanter published many law review articles aiming to expose the large gap between the claims and the facts underlying the tort reform rhetoric during the 1990s;² scholarly experts have documented that plaintiffs rarely win large judgments against corporations for defective products;³ the volume of products liability cases and medical malpractice cases

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¹ NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 270 (1995) (stating that both sides cloak themselves in American values and claim that the other side threatens democracy and the American way of life). See also F. Patrick Hubbard, *The Physicians’ Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of “Tort Reform”*, 23 GA. L. REV. 295, 296-97 (1989) (providing a review of the opposing camps and the importance of symbolic issues in the general “tort reform” debate).

² See, e.g., Robert J. MacCoun, *Inside the Black Box: What Empirical Research Tells us About Decision Making by Civil Juries*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* (Robert E. Litan ed., 1993); Marc Galanter, *Real World Tort: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); 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 (1992).

³ See, e.g., AUDREY CHIN & MARK A. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985) (this early study used information from published jury reports in Cook County to compile the first, systematic statistical database on civil jury trials and verdicts); STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995) (utilizing broader geographic data bases); Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (1996) (drawing on the database maintained by the National Center for State Courts).

have not increased significantly;⁴ and, juries generally produce reasonable outcomes.⁵

However, what has been called the “realist account”⁶ of the tort reform movement is not the subject of this Article other than to note that such scholarship has not stopped the movement’s proliferation.⁷ While such realist sociolegal scholars rely heavily on statistical studies to document how the tort reform campaign “radically distort[s] empirical truth about legal practice[,]”⁸ it is generally recognized that the rhetoric of the reform movement itself plays a major role in shaping public opinion and in thwarting further judicial expansion of the doctrine.⁹

⁴ See generally DANIELS & MARTIN, *supra* note 3.

⁵ See *id.* (concluding that juries perform their functions reasonably well).

⁶ WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 7-8 (William M. O’Barr & John M. Conley eds., 2004).

⁷ This Article is not concerned with the empirical battle in the sense of disproving the tort reformers; instead I take the position that, in the absence of studies allowing the conclusion that the reformers have drawn, common law should prevail. See, e.g., DANIELS & MARTIN, *supra* note 3, at 58, concluding:

The rhetoric’s critics argue there is a substantial gap between the image portrayed in the rhetoric and what the best available evidence can tell us. This gap is much more a result of the political marketing of ideas tied to that political struggle over which image of the civil justice system will govern policy than it is a result of the limitations of the empirical literature. Viewed in this light, the interesting and troubling issue is not simply the fact that there is a substantial distance between rhetoric and empirical evidence, but that the image portrayed is accepted regardless of its veracity.

Id. See also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 721-22 (1998). Galanter comments:

One of the accomplishments of law and society scholarship has been to criticize and refute the body of belief I have called the jaundiced view. Contrary to our expectations, error did not retire from the field; it proved quite resilient. The kind of knowledge that law and society scholars proffered has had some impact on courts and legislatures, but it has not carried the day in wider popular or political forums.

Id. (citations omitted).

⁸ HALTOM & MCCANN, *supra* note 6, at 8 (emphasis in original). See generally CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* (2001); JAY M. FEINMAN, *UN-MAKING LAW, THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (2004); HALTOM & MCCANN, *supra* note 6, at 73-110; Theodore Eisenberg & James A. Henderson Jr., *Inside the Quiet Revolution In Products Liability*, 39 UCLA L. REV. 731, (1991); Deborah Jones Merritt & Kathryn Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999); Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397 (2000).

⁹ See Eisenberg & Henderson, *supra* note 8, at 792 (“More important than the reality of an insurance crisis is whether the American public generally *perceived* an insurance crisis and whether the perception was successfully tied to the products liability system in a way

These contemporary reformers, often funded by the constituents seeking to profit from their campaign, have succeeded masterfully in swaying public opinion as they seek to roll back the common law.¹⁰

When the critics of our common law tort system fail to achieve all the reform legislation they seek, they are increasingly successful in winning tort reform by stealth—they covertly manipulate our civil justice system and perhaps our perception of what is socially just.

II. THE “WHY” BEHIND THE “ORIGINAL TORT REFORM”

Strict liability in tort evolved during a time when three people were killed every hour of every day from household hazards: color television sets routinely caught fire; unglazed glass doors and walls sliced through vital organs causing disfigurement, paralysis, or death; hot water vaporizers reached scalding temperatures producing third-degree burns; furniture polish produced an epidemic of chemical pneumonia; dishwasher detergents contained pH values similar to values found in lye; circular saws maimed thousands; and, rotary lawn mowers routinely

that could have reshaped opinion. It was; public perception of a 1980s insurance crisis is undeniable”).

¹⁰ See, e.g., FEINMAN, *supra* note 8, at 174-76 (noting the various coalitions of drug, oil, tobacco, insurance, chemical corporations, and trade associations funding the “conservative attack on the common law[,]” including the American Tort Reform Association (“ATRA”), the U.S. Chamber of Commerce, and the Manhattan Institute); HALTOM & MCCANN, *supra* note 6, at 45-49 (under the heading, “Financing Reform Advocacy”); Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America’s “Lawsuit Crisis”*, WASH. MONTHLY, Oct. 1, 2004, at 18. Mencimer documents the funding by business groups behind the media’s “We All Pay the Price” pro-reform campaign, and states:

One of the most influential of those groups is the Manhattan Institute, founded by the late CIA director William Casey. In 1986, the institute created its Project on Civil Justice Reform with funding from all the same insurance companies who’d been responsible for circulating bogus lawsuit horror stories. The project was targeted specifically at journalists. In a 1992 memo, institute president William Hammett explained the strategy, for molding reporters into a “pro-tort reform” position, “Journalists need copy, and it’s an established fact that over time they’ll ‘bend’ in the direction in which it flows. For that reason, it is imperative that a steady stream of understandable research, analysis, and commentary supporting the need for liability reform be produced. If sometime during the present decade, a consensus emerges in favor of serious judicial reform, it will be because millions of minds have been changed, and only one institution is powerful enough to bring that about: the combined force of the nation’s print and broadcast media, the most potent instrument for public education—or miseducation—in existence.

Id.

sent a parade of patients holding bloody towels around lacerated or amputated hands or feet to emergency rooms across the United States every spring.¹¹ In 1970, the President's Commission on Product Safety reported that some twenty million Americans were injured each year as a result of incidents connected with consumer products.¹² An additional seven million injuries were reportedly connected to industrial products.¹³ Men, women, and children suffered devastating injuries from unsafe products and neither negligence law nor governmental regulation was up to the task of promoting safer products.¹⁴ Thus, before assessing the validity of the contemporary tort reform movement, it is helpful to revisit the "why" behind modern products liability in tort.

Nineteenth century tort law protected the interests of defendants in general as well as particular categories of defendants.¹⁵ The principle of *caveat emptor* as well as the doctrines of negligence and contract protected the merchants, reflecting a "new nation's devotion to individualism and free enterprise."¹⁶ The fault-based approach to liability for injuries caused by products was a reflection of the nature of society at large in the preindustrial era, when consumer transactions generally took place face-to-face; it also coincided with *laissez faire* political philosophy and principles of individualism that were prevalent at the time.¹⁷ An injured consumer could only recover damages if it could be proved that the merchant or manufacturer engaged in unreasonable conduct. "Emerging industries and enterprises flourished under the protective cover of negligence principles."¹⁸ Obstacles to

¹¹ See U.S. CONSUMER PRODUCT SAFETY COMMISSION, ANN. REP., ch. 2, 9-34 (1990).

¹² See FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY (1970), LIB. CONG. NO. 76-600753.

¹³ See THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH (1972).

¹⁴ See Alvin S. Weinstein et al., *Products Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 462 (1974) (an early study of "new federal agencies for both occupational safety and product safety" and their effect on product safety, concluding that "these mechanisms [federal agencies], apart from the legal system, afford an incomplete basis for adjudication of legal and economic responsibility").

¹⁵ See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467-87 (2d ed. 1985); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 67-108 (1977); G. EDWARD WHITE, TORT LAW IN AMERICA 61-62 (1980).

¹⁶ See DAVID G. OWEN ET AL., PRODUCT LIABILITY AND SAFETY 19 (4th ed. 2004) (for a history of the doctrine in early products liability law).

¹⁷ See 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 12.3 (2d ed. 1986) [hereinafter THE LAW OF TORTS] (noting that during the Industrial Revolution, society firmly believed that newly emerging industries deserved protection to promote expansion and that they would survive only if they were not burdened with all the losses that they actually caused. Fault-based negligence principles promoted this social policy).

¹⁸ John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197, 1201 (1991).

recovery developed from the often confusing overlap of contract and tort theory applied to actions involving consumers injured by products.¹⁹

Social values as well as economic policies supported the pro-merchant era, and it was not until the middle of the twentieth century that protectionist attitudes toward product defendants changed.²⁰ Simultaneously, the recognition that negligence and contract principles afforded the consuming public insufficient protection from product related injuries emerged.²¹ In his concurrence in *Escola v. Coca Cola Bottling Company*, Justice Traynor asserted that, while negligence was not proven, it was unnecessary to prove, and further argued that “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”²² Thus, “the original tort reform” promoted social justice and product safety, evolving to rectify the harsh doctrines that barred consumers from recovery.²³

While this reform movement had its theoretical underpinnings in the doctrine of enterprise liability as set forth by Justice Traynor in *Escola*,²⁴ it took an additional two decades for this theory to supplant contract principles as a basis upon which to recover damages for injuries and to control sources of products injury.²⁵ Twenty years after *Escola*, a new era

¹⁹ See generally Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980) (for a summary of the contract-to-tort approach underlying products liability).

²⁰ See THE LAW OF TORTS, *supra* note 17, at § 28.27 (commenting on the social justice underpinning; of product liability doctrine, it notes, “[p]ublic policy goals undergirding the societal commitment to a notion of expansive manufacturer liability for defective products could not be effectively realized in view of the limitations inherent in negligence or implied warranty.”); Birnbaum, *supra* note 19, at 596; Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

²¹ Vargo, *supra* note 18, at 1202.

²² *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463 (Cal. 1944).

²³ See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 384 (1960) (wherein the New Jersey Supreme Court, prior to *Greenman*, eliminated the privity requirement in a breach of implied warranty action, holding that the manufacturer’s obligation is not grounded in the contract law of sales, but “upon ‘the demands of social justice.’”).

²⁴ *Escola*, 24 Cal. 2d at 453.

²⁵ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (N.Y. 1916). Judge Cardozo allowed Mr. MacPherson, who purchased his Buick from a local dealer not in privity with the manufacturer, recovery in negligence despite the contractual privity defense. *Id.* Similar cases were in the minority and limited to situations where it could be shown that the purchaser or intervening seller would not inspect for defects. *Id.* Although *MacPherson* was decided in 1916, it may be read today as a precursor of the strict liability standard enunciated later by Justice Traynor in *Escola* and *Greenman*. Decades would intervene while the contract approach generally prevailed. See, e.g., Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 653 (1990) (“Enterprise liability, which posits that a business or

for consumers commenced when, writing for a unanimous court in *Greenman v. Yuba Power Products, Inc.*, Justice Traynor rejected warranty's "timely notice" obstacle to the consumer claim, announcing that public policy demanded that the burden of accidental injury be placed on the entities who marketed them.²⁶ Strict liability in tort was born, and *Restatement (Second) of Torts*, Section 402(A) followed in 1965 providing:

[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.²⁷

Thus, strict products liability evolved at common law to implement an important social policy: to provide greater protection to the injured consumer than either contract or negligence law. Defendant manufacturers and sellers could no longer hide beneath the protective cloak of traditional contract or negligence principles. *Greenman* and Section 402(A) heralded the "original tort reform," and the common law contours of this legal doctrine developed rapidly over the next two decades. Legal duties more stringent than those imposed by government regulation developed to protect consumers.²⁸

activity should bear the costs of the harm it causes, provided the major impetus for the shift from a negligence theory to a strict liability theory in products liability.") (citations omitted); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (tracing the history of the doctrine as part of a conference addressing critical issues in tort reform at Yale Law School in 1984).

²⁶ *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63 (1963) (Judge Traynor wrote, "[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves.").

²⁷ RESTATEMENT (SECOND) OF TORTS § 402A cmt. c. (1965).

²⁸ See, e.g., BOGUS, *supra* note 8, at 150-51 (arguing that while asbestos caused 170,000 deaths, the Environmental Protection Agency was never able to ban it, and lawsuits forced it from the marketplace); Birnbaum, *supra* note 19, at 593; Weinstein, *supra* note 14, at 462-63.

Deterrence is a major function of tort law,²⁹ and the doctrine of products liability benefits consumers.³⁰ “Primary among these benefits is the deterrent effect that it has on negligent behavior and unsafe products.”³¹ As Judge Posner has noted, “although there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law . . . deters.”³² Even those who question the level of deterrence in tort law concede that it delivers a “moderate amount of deterrence.”³³ A primary social benefit of products liability tort law is deterrence to substandard conduct, or, put another way, an “incentive to beneficial conduct.”³⁴ While the threat of liability

²⁹ *Webb v. Navistar Int’l Transp. Corp.*, 692 A.2d 343, 346 (Vt. 1996) (stating that strict liability “protects the consumer . . . by creating an incentive for manufacturers to produce safe products, . . . or as other courts have stated, a deterrence to producing unreasonably dangerous products.”) (citation omitted); *Gantes v. Kason Corp.*, 679 A.2d 106, 111 (N.J. 1996) (“[t]he goal of deterrence, acknowledged generally to be part of tort law, is especially important in the field of products-liability law . . . [T]his state has a strong interest in encouraging the manufacture and distribution of safe products . . . and, conversely, in deterring the manufacture and distribution of unsafe products”); *West Am. Ins. Co. v. Oberding*, 451 A.2d 239, 242-43 (Pa. Super. Ct. 1982) (noting the deterrent effect caused by product liability suits); Frank J. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, 64 DENV. U. L. REV. 703, 710 (1987-1988) (“. . . our concept of strict liability has developed over time to make it easier for consumers to obtain compensation from manufacturers or sellers when injured by their products”).

³⁰ See W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 25-26 (5th ed. 1984).

³¹ Peck et al., *supra* note 8, at 436.

³² WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987).

³³ Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 443-44 (1994). Schwartz states:

Yet between the economists’ strong claim that tort law systematically deters and the critics’ response that tort law rarely if ever deters lies an intermediate position: tort law, while not as effective as economic models suggest, may still be somewhat successful in achieving its stated deterrence goals

. . .

Nevertheless, even if tort law is only moderately successful in deterring negligent conduct, this success has been largely unacknowledged by the realist critics and has a major bearing on any public-policy review of the tort system.

Id. See also Anita Johnson, *Products Liability “Reform”: A Hazard to Consumers*, 56 N.C. L. REV. 677, 692 (1978) (stating “[t]he breadth and flexibility of the common law have permitted it to effectively discipline the harmful effects of technology.”); Joseph A. Page, *Deforming Tort Reform*, 78 GEO L.J. 649, 681-89 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988) (responding to Huber’s criticism of the tort system “for ignoring safety disincentives that might flow from the imposition of liability”).

³⁴ M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1034 (1998).

may not be the sole reason behind safety innovations, scholars note that it plays an important interactive role.³⁵ Companies exhibiting “callous disregard for consumer safety have been hauled into court,” resulting in safer consumer products.³⁶ Specifically, products liability doctrine promotes safer product containers, safer product handling,³⁷ and, in particular, safer automobiles³⁸ and pharmaceuticals.³⁹ In 1983, the Rand Institute studied the “serious public policy problem, namely the manufacture of products that may have been unreasonably dangerous to their users[.]” to determine what external pressures had the greatest influence on promoting products safety and concluded, “[o]f all the various external social pressures, product liability has the greatest influence on product design decisions.”⁴⁰

³⁵ See, e.g., John D. Graham, *Product Liability and Motor Safety*, in PETER W. HUBER & ROBERT E. LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY AND SAFETY ON INNOVATION* 120, 180 (1991) (summarizing safety innovations in the automotive industry, “[t]he case studies establish that vehicle safety is enhanced by the interplay of consumer demand, regulation, liability, and professional responsibility.”); Schwartz, *supra* note 33, at 384-85.

³⁶ Peck et al., *supra* note 8, at 438 (reviewing court cases involving the Ford Pinto and Chrysler minivan and documenting the companies’ “callous disregard for consumer safety”); Johnson, *supra* note 33, at 677. Johnson concludes:

Private personal injury lawsuits can help to control exposure to unsafe products in addition to compensating injured consumers and workers. Court decisions in these suits have played an active role in developing manufacturers’ legal duties to the public and in providing incentives for manufacturers to improve products and thereby avert future litigable injuries.

Id. See also Marc S. Moller & Paul Indig, *Products Liability Law Revisited: A Realistic Perspective*, 31 *TORT & INS. L. J.* 879, 881 (1996) (“Fortunately, and perhaps as a result of the products liability movement of the 1960s and early 1970s, most American consumer products are the safest available in the world.”); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 *CAL. L. REV.* 435, 451 n.107 (1979) (quoting a newspaper article describing the redesign of a vaporizer found to be defectively designed in McCormack v. Hanksraft Co., 154 N.W.2d 488, 497 (1967)).

³⁷ Johnson, *supra* note 33, at 677 n.2 (citing a series of cases forcing safer products).

³⁸ See Graham, *supra* note 35, at 180 (citing a series of cases involving automobile safety); Peck et al., *supra* note 8, at 437 (“One industry in which consumers have clearly seen safety benefits derived from the tort system is the automobile industry.”).

³⁹ See generally Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in *THE LIABILITY MAZE*, *supra* note 35, at 293 (reporting that products liability laws and litigation have a “marginal effect” on prescription drug safety, but pharmaceutical manufacturers recognize that they *can* take steps to further contain risks and increase the safer use of their prescription products).

⁴⁰ GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS, CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* iii-viii (1983) (based on a study of large manufacturers of consumer products which developed corporate level safety offices after the 1960s).

Collectively, the doctrinal “why” behind the original tort reform reveals much about the social justice theory fueling the doctrine.⁴¹ While a rapid proliferation of unsafe products during the 1970s and early 1980s provided the social impetus for strict products liability in tort, the common law played a pivotal role in refining a doctrine providing incentives for manufacturers to improve the safety of their products. Broader civil justice goals of product safety and court access were major forces in development of the law.⁴² An early doctrinal basis for promoting these goals was enterprise liability,⁴³ and scholars debated and disagreed on the “dominant” source of law for the dramatic changes taking place.⁴⁴ Was the dominant strand risk-spreading or risk-deterrence?⁴⁵ If “strict liability” meant something less than absolute responsibility and pure insurance, where did one draw the line?⁴⁶

⁴¹ See, e.g., Madden, *supra* note 34, at 1096 (“[E]fficiency and corrective justice principles operate and will continue to operate in a beneficial symbiosis, each a check and a balance upon the other, with each as a necessary, but neither a sufficient, rationale for modern accident law objectives.”).

⁴² Johnson, *supra* note 33, at 692.

⁴³ See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453 (1960). The majority of the California Supreme Court utilized a somewhat tortured negligence approach to allow recovery for injury caused by an exploding Coke bottle. *Id.* In his concurrence, Judge Traynor set forth a more direct path to recovery, stating:

[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings [P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Id. at 440 (Traynor, J., concurring).

⁴⁴ See, e.g., *Critical Issues in Tort Law Reform: A Search for Principles, A Conference Sponsored by Yale Law School*, 14 J. LEGAL STUD. 459 (1985) [hereinafter *Critical Issues in Tort Reform*] (containing papers exploring the foundations of modern tort law presented at the conference); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099 (1960) (providing a status report on the original “assault upon the citadel of privity”); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

⁴⁵ Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1810 (1997) (“Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties.”). *But see* Priest, *supra* note 25, stating:

In my view, the contours of modern tort law reflect a single coherent conception of the best method to control the sources of product-related injuries. This conception, which its proponents called the theory of

However, while the debate raged concerning the parameters of the doctrine, no scholar seriously contested the legitimacy of promoting product safety or deterring substandard conduct. During this period of rapid doctrinal expansion, inquiry into its essential nature and a search for its proper limits continued. Professor John Wade articulated his seven factors;⁴⁷ Professor James Henderson ruminated on the appropriate limits of manufacturer liability;⁴⁸ Professor David Owen critiqued a catalogue of rationales behind strict products liability.⁴⁹ An entire volume of *The Journal of Legal Studies* serves as a compendium of the search for the intellectual foundations of tort law in general, and in particular, for “strict liability in tort.”⁵⁰

Despite debate among academics, court after court accepted the doctrine of enterprise liability.⁵¹ This doctrinal expansion took place in state and federal courts across the country under the guidance of the judiciary. While this Article does not advance the choice of one correct theory upon which to ground product liability law, it opines that the fact that the doctrine has been the subject of great debate among scholars and the fact that it expands and contracts is a reflection that the common law is alive and well and doing what it is supposed to do. The scope and volume of the debate indicates to this author that the experiential nature of the common law process worked well during the evolution of the original tort reform and that it developed exponentially, adjusting to changing societal norms and fostering the broad civil justice goal of promoting safe products.

enterprise liability, provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce.

Id. at 463 (citations omitted).

⁴⁶ David G. Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681 (1980).

⁴⁷ See Wade, *supra* note 44, at 837-38.

⁴⁸ See Eisenberg & Henderson, *supra* note 8.

⁴⁹ See Owen, *supra* note 16, at 529.

⁵⁰ See *Critical Issues in Tort Reform*, *supra* note 44, at 459.

⁵¹ See THE LAW OF TORTS, *supra* note 17 (listing cases advocating risk distribution). See, e.g., Priest, *supra* note 25, at 501; Madden, *supra* note 41, at 1034-55. Madden remarks that:

[t]he decisional law with virtually no dissent repeats a deterrence role in accident law, without specifically assigning this result to the operation of either corrective justice or efficiency principles. When those disputing the vitality of a deterrence role achieved by decisions tracking corrective justice principles are largely academicians, I am inclined to side with the conclusions of judges who *try the cases and read the records*.

Id. at 1034-55 (emphasis added).

Given the unprecedented rapid proliferation of pro-consumer case law during the period of doctrinal expansion for strict liability in tort, it was not surprising that a pro-manufacturer backlash would ensue, and it did so under the skewed and misleading label of “tort reform.” However, this movement has taken place separate and apart from the common law and appears to be based on social policies antithetical to the policies underlying the “original tort reform.”⁵² Contemporary reformers have taken their cause to the court of public opinion and the very phrase “tort reform” has become a political tool used to manipulate the judiciary and the public at large by depicting our tort system as “a Mad Hatter world of avaricious lawyers, fluff-headed jurors, and permissive judges . . .”⁵³ The lexical meaning of the phrase reveals that its use has extended beyond its historical meaning as reflected in the language of 402(A) of *Restatement (Second) of Torts*. The phrase now seems to serve as short hand rhetoric for *any* perceived attempt by injured consumers to invoke tort law.⁵⁴

Stealth tort reform operates to manipulate public perception about the state of the law without regard to truth or logic. It is not directed toward promoting social justice other than to “change perceptions of what the common good ought to be.”⁵⁵ Most importantly, stealth tort reform is not interested in truth; unlike the common law, it persuades through assertive rhetoric and not through the give-and-take of orderly proof and argument, but through manipulation of images and ideas.

⁵² See Page, *supra* note 25, at 654-55. Page states:

As history suggests, the old tort reform constituted but one swing of a pendulum that later began to reverse itself in the wake of the crises of the 1970s and 1980s. Thus, construed most favorably, the “new tort reform” has become an effort to eliminate alleged excesses perpetrated by the old tort reform and to restore equilibrium to the system.

Despite their apparent similarities, there is an important difference between the old and the new tort reform. The former derived inspiration and major impetus from the ideas of scholars and had its primary influence on the courts. The latter is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system. In essence, the new tort reform is a political attack on tort law in the legislative arena.

Id.

⁵³ BOGUS, *supra* note 8, at 4.

⁵⁴ See generally William H. RIKER, *THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION* 9 (1996) (dissecting the use of language as rhetoric).

⁵⁵ Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV 1019, 1050 (2000).

III. ASSERTIVE RHETORIC AND CONTEMPORARY TORT REFORM

Our common law is designed to “seek the truth” by an orderly presentation of evidence in a court of law pursuant to rules developed over decades to ensure that all sides have a fair opportunity to be heard. Juries perform the function of factfinder, which is “to weigh the evidence and decide the truth of the matter.”⁵⁶ The common law places innate trust in the reasoned logic of citizen jurors. Reason, not passion, is the bulwark of our judicial system. However, “assertive rhetoric” is central to understanding the clandestine nature of the strategies used to manipulate public opinion while circumventing thoughtful application of the common law. In addressing the nature of such rhetoric, F. G. Bailey, in *The Tactical Uses of Passion, An Essay on Power, Reason and Reality*, discusses and dissects various modalities of persuasion and posits that our American culture champions persuasion based on reason over persuasion resulting from *passion* when seeking to find *truth*.⁵⁷ With regard to the modality of persuasion through passion he writes:

The . . . (direct use of passions) seeks to eliminate the mind and the critical faculties. It provokes feeling rather than thought. It is employed when the persuader suspects that the logical steps in the argument will not survive critical examination, or when he can find no shared value that will serve as the premise for an argument by reason. The appeal to emotion may be designed either to create such a shared value or to provoke a direct connection between feeling and action without the intervention of mind and its capacities for criticism.⁵⁸

“Assertive rhetoric” is the term Bailey uses to describe a passion-based method of persuasion “directed to ensuring that only one side of the question gets a hearing.”⁵⁹ The reformers have masterfully engaged in a public relations campaign of assertive rhetoric which begs the question and is designed to ensure that “only” their side of the question “gets a hearing.” Their campaign has been assimilated into our culture to the point that very few recall the social and moral justifications for the

⁵⁶ Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda Building*, 52 LAW & CONTEMP. PROBS. 269, 274 (1989).

⁵⁷ See BAILEY, *THE TACTICAL USES OF PASSION: AN ESSAY ON POWER, REASON, AND REALITY* (1983).

⁵⁸ *Id.* at 23.

⁵⁹ *Id.* at 124.

original tort reform of the 1960s and 1970s.⁶⁰ In his chapter, “The Rhetoric of Assertion,” Bailey summarizes:

In short, assertive rhetoric inescapably must proceed by begging the question: by simple assertion of the correctness of one answer to the question at issue. There is no other way of arguing about intrinsic values, for these are ends in themselves. The speaker asserts a truth by identifying the true believers who “happen” to be those who believe that truth. Accordingly, it is inappropriate to ask whether an argument advanced in this form of rhetoric is valid or invalid, and to test it by the rules of logic. The proper question to ask about assertive rhetoric concerns effectiveness. It is intended to provoke attitudes of approval or disapproval, to compel assent, to bring people over to one’s own side.⁶¹

Bailey focuses on the *rhetorical* devices that are directed toward ensuring that only one side of the question gets a hearing, including: ethos, the invocation of authority, the uses of fright, the focus on personalities, and the significance of the vivid example.⁶² These heresthetical devices eliminate logic by structuring the dialogue (or lack thereof) so people will want to join the campaign or will feel forced by circumstances to align with the argument without question.⁶³ While “logic” is concerned with the truth value of language, “rhetoric” and “heresthetic” are concerned with the persuasion and strategy value;⁶⁴ the

⁶⁰ See HALTOM & MCCANN, *supra* note 6.

⁶¹ See BAILEY, *supra* note 57, at 135-36.

⁶² See BAILEY, *supra* note 57, at 123-43.

⁶³ RIKER, *supra* note 54. Writing in the political science arena, Riker invented the term “heresthetic[.]” stating:

“*Heresthetic*” is a word I coined from a Greek root for choosing and deciding, and I use it to describe the art of setting up situations—composing the alternatives among which political actors must choose—in such a way that even those who do not wish to do so are compelled by the structure of the situation to support the heresthetician’s purpose.

Id.

⁶⁴ WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* x (1986). Riker states: the traditional liberal arts of language are logic, rhetoric, and grammar . . . Logic is concerned with the truth-value of sentences. Grammar is concerned with the communication-value of sentences. Rhetoric is concerned with the persuasion value of sentences. And heresthetic is concerned with the strategy-value of sentences. In each case, the art involves the use of language to accomplish some purpose: to arrive at truth, to communicate, to persuade, and to manipulate.

reformers strategize to obscure the truth by manipulating the game, by moving the battle from the court of law to the court of public opinion. This is the essence of tort reform by stealth.

The late William H. Riker, in many of his last writings, including his posthumously published *The Strategy of Rhetoric*, observes that “[t]he line between heresthetic (manipulation) and rhetoric (persuasion) is wavy and uncertain...”⁶⁵ In conducting studies of communications in political campaigns, he concludes that “heresthetic and rhetoric are inseparably linked and must be analyzed together.”⁶⁶ Contemporary tort reformers have masterfully maneuvered much of the reform debate to the political arena, discrediting the common law along the way. They have endeavored to re-shape public perception and the way the American public conceives justice. Law and society scholars have debunked the claims of the contemporary tort reformers. However, the attack on our civil justice system persists. The attack must be examined from a political perspective in order to distill perception from reality. Today’s reformers strategically rely on the heresthetic to ensure that their view—and only their view—gets a hearing, bypassing the due process safeguards in place in the law courts.

A. *The Ethos of Stealth Tort Reform*

1. Crisis Labeling and Fear Mongering

[I]n a political context the content of the talk seems to be irrelevant, as is its logic and its responsiveness to issues and questions. It is as though any verbal display, especially if it is delivered with style and flair, encourages audiences to believe in the speaker’s competence and in his or her likelihood to deal with governmental issues in ways that benefit the audience. An occasional memorable or quotable phrase seems to be more persuasive than an argument that is empirically and logically impeccable and thorough.⁶⁷

The contemporary “torts crisis” evolved not through empirically and logically impeccable arguments responsive to issues and questions, but as a result of reformers manipulating the public mood through strategic

Id.

⁶⁵ RIKER, *supra* note 54, at 9.

⁶⁶ *Id.* at 10.

⁶⁷ MURRAY EDELMAN, *THE POLITICS OF MISINFORMATION* 97 (2001).

use of the media financed by business interests.⁶⁸ Advertising strategies designed to influence the public mood were built around the “memorable phrase[,]” utilizing appeals to passion through advertising devices directed to ensuring that only one side of the question got a hearing.⁶⁹ Manufacturers whose liability insurance premiums suddenly soared,⁷⁰ invoked the threat of danger and characterized the perceived problem as a “products liability crisis.”⁷¹ Hand-picked reports designed to show just one side of the story (“out of control” claims in which plaintiffs won large verdicts for seemingly small or nonexistent wrongs) produced positive results for their industry sponsors. Commentators soon noted that a “tort explosion” was undermining Corporate America.⁷² The crisis label rhetorically mandated a call to action, forcing the public to align without question. It spread rapidly beyond products liability until a full-blown “torts crisis” was perceived.⁷³ Advocates of this mentality eventually succeeded in vesting the very term “tort reform” with a politically useful, if skewed, meaning.⁷⁴

The labeling of the situation as a “crisis” is yet another example of the heresthetic in which the structure of the argument compels “even those who do not wish to do so... to support the heresthetician’s purpose.”⁷⁵ Indeed, the very term “crisis” invokes a threat that the public must rally around and face together. “More powerfully, perhaps, than any other political term, it suggests a need for unity and for

⁶⁸ See, e.g., MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* 194 (2000) (noting a strategic shift among business interests and stating, when it comes to *unifying* issues like tort reform, the most effective strategy involves shaping “public mood”).

⁶⁹ See HALTOM & MCCANN, *supra* note 6, at 39-46.

⁷⁰ See VIDMAR, *supra* note 1, at 269 (commenting on plausible explanations for the “insurance crisis” such as “increases in legitimate malpractice claims or bad economic forecasting by liability insurers that forced them to raise insurance rates”); Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry*, <http://www.centerjd.org/ANGOFFReport.pdf> (last visited Sept. 10, 2007) (documenting a correlation between poor industry investments and increasing med-mal premiums).

⁷¹ See, e.g., DANIELS & MARTIN, *supra* note 3, at 49 (documenting the media coverage of the “insurance or liability crisis” reported as “a new national crisis.”) (citations omitted).

⁷² *Id.* at 47 (documenting the use of the term “litigation explosion” in the media beginning in the mid 1980s and chosen as the title for Walter Olson’s book).

⁷³ *Id.* at 49.

⁷⁴ *Id.* at 651.

⁷⁵ RIKER, *supra* note 54, at 9.

common sacrifice.”⁷⁶ Such crisis labeling is a rhetorical tactic utilized for political blame shifting:⁷⁷

By calling a situation a crisis, and by identifying certain causes, the labeler can disavow responsibility for its occurrence and mask the true recurring nature of the so-called unique phenomenon. With respect to the insurance crisis, the problem may be rooted in the industry’s boom and bust cycle. By labeling the situation a crisis, however, the critics focus the debate on causes outside the industry itself.⁷⁸

In response to the rhetorically created crisis, the reformers garner public support in debating how to best engage in “crisis management.”⁷⁹

Playing on public fears of ever-elevating medical costs, the reformers turned to the issue of medical malpractice insurance, inciting fear that a rash of lawsuits would leave Americans without access to doctors or life-saving products.⁸⁰ The reformers chose their rhetoric carefully; labels like “litigation mentality” and “lawsuit lottery” have considerable salience for Americans who value self sufficiency, calling for a return to the days of personal responsibility where the public is cautioned to refrain from filing lawsuits.⁸¹

A *Newsweek* cover story captures the rhetorical fear-mongering tactic wherein it warned, “Doctors. Teachers. Coaches. Ministers. They all

⁷⁶ MURRAY EDELMAN, *POLITICAL LANGUAGE, WORDS THAT SUCCEED AND POLICIES THAT FAIL* 45 (1977).

⁷⁷ *Id.* at 45-47.

⁷⁸ See Daniels, *supra* note 56, at 276.

⁷⁹ EDELMAN, *supra* note 76, at 47 (stating that in response to a semantically created crisis, “crisis management” is a way to build public support).

⁸⁰ See Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J. L. & PUB. POL’Y 523, 524 (2002). Finzen and Tassoni state:

[The reformers] have endeavored to sell the public on the notion that the legal system has been overtaken by money-grubbing trial lawyers who manipulate junk science to demonize life-saving drugs and destroy the companies that make them.- They have also attempted to sell the public on the idea that a litigation explosion threatens to bankrupt the innocent, deprive the world of life-saving products, and line the pockets of plaintiffs’ lawyers with ill-gotten gains.- To sell the public on the idea that immediate reform must take place before society pays too great a price.

Id.

⁸¹ See Daniel J. Page, *The All American Blame Game*, N.Y. TIMES, Dec. 14, 1998 (advertisement).

share a common fear: being sued on the job. Our litigation nation—and a plan to fix it”⁸² The article claimed that the country is suffering from an “onslaught of litigation” and featured tales in support of its claim that America’s desire to “win a jackpot from a system that allows sympathetic juries to award plaintiffs not just real damages . . . but millions more for the impossible-to-measure ‘pain and suffering’ and highly arbitrary ‘punitive damages.’”⁸³ While a tremendous amount of empirical study contradicts many of the claims of the “crisis[,]”⁸⁴ none of it was included in the *Times* or *Newsweek* stories. The graphic cover story appealing to fear and common sense simply illustrates the obvious, and the perception that follows is that, “[a]s a result of such dire consequences, the civil justice system needs change and people should, indeed must, support those changes.”⁸⁵ It is not just the reformers that suffer from the crisis, but, as the insurance industry public relations campaign claims, “we all pay the price.”⁸⁶ This crisis-labeling is a symbolic and emotionally charged appeal to unexamined assumptions, and empirical data is not likely to defeat such claims.⁸⁷ As Walter Olson, author of *The Litigation Explosion*,⁸⁸ related in response to criticism that evidence of a litigation explosion was lacking—it’s the stories that really matter, not the empirical data.⁸⁹

2. Myths, Urban Legends, and the Demons: Lawyers, Victims, and Juries

Media mogul, Steven Brill, first wrote about litigation myths in the media as early as 1986. He researched the archives of stories appearing in *Time*, *The Economist*, *Forbes*, and the television show *60 Minutes* and found that many of the stories presented in support of what newscaster Harry Reasoner called a “litigation binge[,]” were simply urban

⁸² See Stuart Taylor Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003.

⁸³ *Id.*

⁸⁴ See *supra* notes 2-5 and accompanying text.

⁸⁵ Stephen Daniels & Joanne Martin, “The Impact That It Has Had Between People’s Ears:” *Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000).

⁸⁶ Mencimer, *supra* note 10, at 18; see also *We All Pay the Price: An Industry Effort to Reform Civil Justice*, 47 INS. REV. 58 (1986).

⁸⁷ See *Common Sense as a Cultural System*, in CLIFFORD GERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 75 (1983) (stating that a common sense argument “rests its [case] on the assertion that it is not a case at all The world is its authority”).

⁸⁸ WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) (targeting lawyers as responsible for a litigation explosion).

⁸⁹ Diane Gale Cox, *Tort Tales Lash Back*, 14 NAT’L L. J. no. 48, Aug. 3, 1992, at 37.

legends.⁹⁰ However, these legends, whether fabrication or distortion of truth, mislead the public into thinking that they are representative of a class of cases, that they are typical cases, when in fact they may be aberrations.⁹¹ These stories take on a life of their own and catch on precisely because of their heresthetic appeal. Anthropologist and law professor, Robert Hayden, has hypothesized that such anecdotes persuade because they portray a threat important to the American cultural value of personal responsibility and tort reformers have utilized such assertive rhetoric to appeal to this moral value.⁹² Urban legends combine the moral imperative with dramatic examples that are easy to comprehend.⁹³ Thus, contemporary reformers draw on American cultural norms and ideals, on what political scientist Deborah Stone calls “motherhood issues[,]” issues that everyone supports when they are stated abstractly.⁹⁴ Urban legends serve as symbolic appeals to prejudice and unexamined assumptions. The tales are simply common sense illustrations of the obvious; if you believe in common sense, they must be true.⁹⁵ In the words of F. G. Bailey describing assertive rhetoric, “they assert truths that they present as inescapable, defying argument, so essentially true that they are beyond the need for corroborating evidence.”⁹⁶ The legends become fact and, as Bailey states, “[i]n rhetoric, to proclaim something a fact is to tell the audience that they have no alternative other than to give their assent, on pain of being excluded as crazy people.”⁹⁷

By the mid-1990s, reform rhetoric began to sway public opinion in a broader way by demonizing the personal injury trial lawyer.⁹⁸ The rhetoric accused lawyers of everything from stirring up “[f]alse [i]llness[es]”⁹⁹ to attempting to “bypass . . . democracy.”¹⁰⁰

⁹⁰ See generally Steven Brill & James Lyons, *The Not So Simple Crisis*, N.J. L.J., May 15, 1986, at 1.

⁹¹ 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 (1992).

⁹² See Robert M. Hayden, *Neocontract Polemics and Unconscionable Scholarship*, 24 LAW & SOC’Y REV. 863 (1990).

⁹³ DANIELS & MARTIN, *supra* note 3, at 44 (recounting many of the urban legends such as the “The Pinto and the Horse,” “The Ladder in the Manure,” “The Drunk in the Phone Booth,” and “The Fat Man and the Lawnmower.”).

⁹⁴ Deborah Stone, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 12 (1997).

⁹⁵ See Gertz, *supra* note 87.

⁹⁶ BAILEY, *supra* note 57, at 125.

⁹⁷ *Id.* at 132.

⁹⁸ See generally OLSON, *supra* note 8; BAILEY, *supra* note 57, at 139 (noting that assertive rhetoric “tends to focus on persons rather than just on deeds”).

⁹⁹ Michael Fumento, *How the Media and Lawyers Stir Up False Illness*, <http://www.fumento.com/illness.html> (last visited Sept. 10, 2007).

Contemporary reformers claim that “[p]ersonal injury lawsuits and other tort claims represent a \$40 billion per year industry built upon the abuse and misuse of America’s legal system by contingency-fee lawyers.”¹⁰¹ By putting a personal face on the fear-mongering claims, those making the claims attach blame to the actor, encouraging the audience to make a judgment about the character of those doing the deed (the lawyers filing the lawsuits), rather than allowing the facts to speak for themselves.¹⁰²

This rhetoric of assertion is promoting a return to a traditional contract and negligence-based products liability system. The movement seeks to return the burden of accidental injuries caused by products to the consumer, insulating those who market them from liability—a repudiation of the doctrinal theory fueling the *Restatement (Second) of Torts* and theories supporting post-Restatement expansion.¹⁰³ Unlike the common law process out of which the original reform evolved, this political movement, by its very nature, does not invite discussion. A return to the moral imperative of individual responsibility is touted today by reformers seeking pro-business legislation. However, the rhetoric presents only one side of the issue and fails to address either product safety or business accountability:

By publicizing all the horrors of the tort system, they [the reformers] get a lot done. . . . You pass legislation that curbs their liability—that’s the ultimate prize. But short of that, you affect juries, you affect elected officials, you affect judges, you affect the entire discourse of the United States.¹⁰⁴

The success of the reform movement lies in the mindset of the judiciary and the public at large; however, much of the public at large no longer

¹⁰⁰ Walter K. Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000, at A26.

¹⁰¹ Institute for Legal Reform, *Trial Lawyers’ Influence*, www.instituteforlegalreform.com/issues/issue.cfm?issue=TLI (last visited Aug. 10, 2007).

¹⁰² See BAILEY, *supra* note 57, at 139-40.

¹⁰³ See John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 507 (1996) (for an in depth discussion of the American Law Institute’s movement from “[p]ro -consumer to [p]ro- manufacturer” as embodied in the drafting of Restatement (Third) of Torts, despite its lack of consensus at common law).

¹⁰⁴ See Dan Zegart, *The Right Wing’s Drive for ‘Tort Reform’*, THE NATION, Oct. 25, 2004, at 18 (quoting Pamela Gilbert, a lobbyist for plaintiff’s lawyers).

remembers the policies that drove our legal system to implement the original Restatement.

IV. JURIES AND THE JUSTICE SYSTEM

Our common law legal system is based on principles and the rule of law. While formal legal rules define the causes of action and the legal procedures, the broader common law is shaped by the attitudes the jurors bring with them, not only when deciding an individual case, but also on future cases: "By casting its shadow over the negotiation and settlement process, the jury influences the actions of present and future litigants and their attorneys."¹⁰⁵ The result may be a manipulation of our underlying cultural assumptions or what anthropologist Robert Hayden calls our "common sense" concerning our civil justice system and how it works.¹⁰⁶ The rhetorical threats to the American democratic way of life "may have affected potential jurors, who are, after all, consumers. The publicity may have influenced their decisions about damage awards for many years to come."¹⁰⁷

Further, jurors themselves are affected and influenced by assertive rhetoric,¹⁰⁸ and the heresthetic appeal to personal responsibility may be depriving litigants of a fair impartial trial.¹⁰⁹ One researcher labels this "jury shadows[;]"¹¹⁰ another explains that, "[d]eliberating in the shadows . . . jurors often viewed themselves as responsible for returning

¹⁰⁵ Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 111 (1992).

¹⁰⁶ See Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, Inst. For Legal Studies, Working Papers Series 9 (1989).

¹⁰⁷ Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 808 (1990).

¹⁰⁸ See Hans & Lofquist, *supra* note 105, at 111-12 (finding this additional aspect of jury shadows in their study). Hans states:

Jurors themselves are affected and influenced by other juries' decisions in a number of ways. The jurors we interviewed appeared to be quite cognizant of other civil juries, real and apocryphal. Their concerns about deep pockets, the litigation crisis, and the integrity of plaintiffs were implicitly and explicitly linked to the presumed excesses of antecedent juries.

Id.

¹⁰⁹ See, e.g., Eugene Pavalon, *The Insurance Industry: Do Its Ads Undermine Jury Impartiality*, 75 A.B.A. J. 46 (1989) (reporting on Aetna Life & Casualty's ad campaign on the subject of law suit abuse).

¹¹⁰ See generally Marc Galanter, *Jury Shadows: Reflections on the Civil Jury System and the "Litigation Explosion*, in MORRIS S. ARNOLD ET AL., THE AMERICAN CIVIL JURY (1987) (describing this facet of what he terms "jury shadows").

moderation and good judgment to the civil justice system.”¹¹¹ Stealth tort reform through manipulation of juror attitudes may have greater impact on our civil justice system than implementation of formal reform measures.¹¹² The victim of this publicity may be our civil justice system and a plaintiff’s constitutionally-guaranteed right to a fair and impartial jury trial—tantamount to jury tampering wherein juries are conditioned to sympathize with one class of individuals.¹¹³ In fact, there is data supporting a thesis that the multi-million dollar rhetorical “crisis” aimed at manipulating public opinion has prejudiced juries against plaintiffs and has produced an observed pro-defendant trend.¹¹⁴

Neil Vidmar conducted a comprehensive study of the civil jury in medical tort cases, concluding:

The widespread criticism of juries in medical negligence cases appears to be based on anecdotes and on findings from several studies of jury verdicts. The data from the studies do not allow the conclusions that have been drawn from them because very plausible alternative hypotheses that could explain the results cannot be ruled out. The methodological critique I have offered does not allow the inference that juries are doing a good job; it only says that the evidence does not allow us to say one way or the other.¹¹⁵

¹¹¹ Hans & Lofquist, *supra* note 105, at 112.

¹¹² Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas*, 80 TEX. L. REV. 1781, 1802 (2002).

¹¹³ See, e.g., VIDMAR, *supra* note 1 (and accompanying text); Pavalon, *supra* note 109 (commenting on the effect of media campaigns on jury impartiality); Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1484 (2007) (concluding that data show that juries consistently sympathize more with doctors who are sued than patients who sue).

¹¹⁴ See Eisenberg & Henderson, *supra* note 8, at 739. Eisenberg and Henderson state:

The combination of dramatic increases in insurance rates [in the 1980s], widespread reporting of the insurance crisis, a multimillion dollar publicity campaign to link the insurance crisis to products liability rules, and such rules’ effects on daily life, may have created the kind of massive, widespread shift in attitude needed to produce the observed pro-defendant trend.

Id.

¹¹⁵ VIDMAR, *supra* note 1, at 226. Vidmar’s purpose was “to empirically examine the merits of the claims that malpractice juries deviate extensively from medical standards and that they are a primary culprit behind the ills that plague the American health care system.” *Id.* at 265.

While Vidmar urges caution in extrapolating his finding about malpractice juries to others such as products liability,¹¹⁶ he states emphatically that his findings should raise very serious questions about the reformers basic assumptions of jury behavior as well as their broad indictments of products liability juries.¹¹⁷ In the same year Vidmar's study was published, Stephen Daniels and Joanne Martin published their study of juries based on data drawn from civil products liability and medical malpractice juries from different parts of the country. Daniels and Martin concluded, "We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system."¹¹⁸

V. VICTIMS AND LAWYERS

Contemporary tort reform rhetoric not only covertly threatens the right to an impartial fact finder in the jury box but may significantly restrict access to the civil justice system and may affect the size of the pool of lawyers willing to take on the injured consumer's case. Jury researchers Stephen Daniels and Joanne Martin, in a study of the market effects of contemporary tort reform in Texas on legal practice, note, "changes in jury verdicts—real or perceived—reverberate throughout the civil litigation process because they help set the 'going rate' for settling claims."¹¹⁹ The perceived jury attitude in turn affects the economic realities of private civil practice and, concomitantly, access to legal representation. Because plaintiffs' attorneys are the civil justice system's "gatekeepers[.]" their perceptions have a significant influence on the civil justice system.¹²⁰ In their study, Daniels and Martin detail plaintiff lawyers' perceptions of changes in the legal environment and separately assess the perceived effect of "formal legal changes"¹²¹ and of the "tort reform public relations campaigns."¹²² The study concludes:

¹¹⁶ *Id.* at 274.

¹¹⁷ *Id.* at 273; *see also* Daniels & Martin, *supra* note 85, at 456-82 (detailing the effects of tort reform on jury attitudes and awards).

¹¹⁸ DANIELS & MARTIN, *supra* note 3, at ix-x.

¹¹⁹ *See* Daniels & Martin, *supra* note 112 (conclusions drawn from ninety-six in-depth interviews and 554 survey responses of plaintiffs' lawyers in Texas).

¹²⁰ *See generally* Herbert M. Kritzer, *Contingency Fees Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997).

¹²¹ Daniels & Martin, *supra* note 112, at 1797.

¹²² *Id.* at 1802-03, Table 6a, Table 6b.

Interestingly, rather than changes in formal law, it is events which affect the broader legal environment that seem to have the greatest impact on plaintiffs' practices. . . . [T]he tort reform public relations campaign and the decisions of the Texas Supreme Court are perceived as having the greatest negative influence on plaintiffs' lawyers' practices, much more so than any . . . specific, formal legal changes . . . The state supreme court and the public relations campaigns impact the everyday working environment, in lawyers' eyes, by affecting the jury or the jury pool. Perceptions about juries and jury behavior are central to the way plaintiffs' lawyers perceive their working environment and construct their practices The public relations campaigns that have touted tort reform are seen as especially pernicious because of their supposed direct effect on the jury pool . . . and creating massive misinformation.¹²³

The perception of the gatekeeper to the civil justice system may play a greater role in shaping our civil justice system than any formal legal reform. This perception will determine whether, and for whom, the law will work in practice.¹²⁴ It is the perceptions that rule: in the aftermath of three decades of assertive rhetoric, public opinion is under the perception that there is a tort litigation crisis and perception is manipulating access to legal process. Truth is irrelevant.

VI. THE JUDICIARY

A pro-defendant "quiet revolution" taking place in the courts was documented by Professors Henderson and Eisenberg based on product liability claims filed in 1990. Henderson and Eisenberg demonstrated that courts had begun to reject—or at least resist expansion of many of the doctrines underlying the "original tort reform."¹²⁵ Since that study, the judiciary continues to waiver on its commitment to original doctrinal underpinnings of products liability law. The judiciary is not immune to the forces shaping public opinion and the electorate. However, there are signs that the judiciary is retreating from its commitment to promoting

¹²³ *Id.* at 1802.

¹²⁴ Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest:" *How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 J. L. & POL'Y 377 (1999).

¹²⁵ See Henderson & Eisenberg, *supra* note 8, at 793.

safety through enforcement and/or expansion of products liability doctrine.

The first and foremost change in attitude emanated from the court where it all began, the California Supreme Court,¹²⁶ signaling a significant retreat from Justice Traynor's original thesis as expressed in *Escola* and *Greenman*.¹²⁷ In *Brown*,¹²⁸ a 1988 drug case, and in *Anderson*,¹²⁹ a 1991 asbestos case, the court referenced the rhetoric of the defendants and made an about face on the "deterrence issue," or from the point of view of the reformers, "overdeterrence."¹³⁰ The California court, once at the forefront of developing consumer protection law, adopted a liability standard more favorable to defendants than most other states.¹³¹ While only a small minority of jurisdictions exempt all prescription drugs from liability,¹³² the fact that the California Supreme Court is leading the roll-back foreshadows a not-so-subtle change in judicial commitment to the safety enhancing doctrine underlying the "original tort reform."

In *Brown*, the California Supreme Court held that strict liability would be inapplicable to *all* prescription drug failure to warn claims, reasoning that the holding was necessary on public policy grounds in order to avoid deterring drug manufacturers from developing and marketing new drugs and to foster reasonably priced prescription drugs. The court surmised that "if" drug manufacturers could not count on limiting their liability to risks that were known or knowable at the time of manufacture or distribution, they "might" be discouraged from

¹²⁶ *Cronin v. J. B. E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972) (illustrating California's tradition of being on the cutting-edge of products liability doctrine expanding consumer rights); *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978) (same); *see also Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980) (in which California became the first court to recognize market share liability).

¹²⁷ *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57 (1963).

¹²⁸ *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

¹²⁹ *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991).

¹³⁰ *See generally* Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 314 (1992) (for a discussion of reformers complaint of "overdeterrence" by a product liability system which is thwarting research and development of products and driving products off the market).

¹³¹ *See* *Castrignano v. E. R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988) (rejecting *Brown* and illustrating that most courts deal with strict liability and prescription drugs on a case-by-case basis); *Toner v. Lederle Lab.*, 732 P.2d 297 (Idaho 1987) (same); *White v. Wyeth Lab.*, 533 N.E.2d 748 (Ohio 1988) (same); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293 (D. Minn. 1988) (same); *Feldman v. Lederle Labs*, 97 N.J. 429 (1984) (same). *See also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

¹³² *See, e.g.*, *Brown*, 751 P.2d at 470; *Lindsey v. Ortho Pharm. Corp.*, 637 F.2d 87 (2d Cir. 1980) (applying New York law); *Mckee v. Moore*, 648 P.2d 21 (Okla. 1982); *Terhune v. A.H. Robins Co.*, 577 P.2d 975 (Wash. 1978).

developing new and improved products.¹³³ In support of these conjectures, the court relied on defendants' rhetorical citing of a "host of examples of products which have greatly increased in price or have been withdrawn or withheld from the market because of the fear that their producers would be held liable for large judgments."¹³⁴ Significantly, the court also noted that the deterrence of strict liability with regard to prescription drugs was unnecessary and inappropriate because the Food and Drug Administration ("FDA") plays a large role in screening new drugs before they are placed on the market,¹³⁵ despite the realities of today's FDA's drug and medical device approval process.¹³⁶

In *Anderson*, an asbestos case, Justice Mosk, the California Supreme Court Justice who authored the opinion in *Brown*, wrote separately to criticize the majority's reliance on *Brown* in extending its rule to non-prescription drug products, stating that the majority stretched the holding and analysis in *Brown* beyond all recognition when it relied on *Brown* in the asbestos litigation involving products other than prescription drugs. Significantly, Justice Mosk warned, "I must express my apprehension, however, that we are once again retreating from '[t]he pure concepts of product liability so pridefully fashioned and nurtured by this court.'"¹³⁷ However, despite Justice Mosk's apprehension in

¹³³ *Brown*, 751 P.2d. at 479.

¹³⁴ *Id.* at 479-80 (relying on E.R. Squibb & Sons's claims that Benedectin was withdrawn from the market in 1983 because of the cost of insurance; that in the mid-1980s a producer of the diphtheria-pertussis-tetanus (DPT) vaccine withdrew its product from the market due to liability exposure and difficulty in continuing to obtain insurance; that unavailability of insurance prevented a manufacturer from marketing a new drug to treat vision problems). *But see* Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 127-49 (Peter H. Scheck ed., 1991) (reporting that the so called tort tax, even without factoring the benefits of promoting safety, is, at most, two percent).

¹³⁵ *See, e.g., Brown*, 751 P.2d at 483 n.12 (citing *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980)); *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991) (affording FDA approved prescription drugs immunity from strict liability).

¹³⁶ *See, e.g.,* Robert Adler, *The 1976 Medical Device Amendments: A Step in the Right Direction Needs Another Step in the Right Direction*, 43 *FOOD DRUG COSM. L.J.* 511, 530 (1988) ("Virtually all observers, including medical device manufacturers, share the view that the FDA's resources are inadequate to meet its obligations under the Medical Device Amendments.") (citations omitted); *Medtronic Inc. v. Lohr*, 518 U.S. 470-80 (1996) (commenting on inadequate resources in the FDA).

¹³⁷ *See Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 561 (Cal. 1991) (Mosk, J., concurring and dissenting). *But see Carlin v. Superior Court*, 920 P.2d 1347, 1351 (Cal. 1996) (five years later Judge Mosk wrote for the majority in a divided opinion rejecting defendants assertions that the standard for failure to warn involving prescription drugs is simple negligence).

applying *Brown's* public policy rationale specific to prescription drugs, later courts extended it to products such as inflatable penile implants, prosthetic heart devices, and Intrauterine Devices ("IUDs").¹³⁸

The California turnaround¹³⁹ is perhaps the clearest example of a court's willingness to accept the rhetoric of the reformers by reigning in products liability law based on unexamined empirical claims. However, the unexamined public policy rhetoric of "overdeterrence" is seeping into other court opinions.¹⁴⁰ For instance, the Utah Supreme Court relied on the public policy considerations of *Brown* in granting immunity from strict liability design defect claims to all prescription drugs approved by the FDA.¹⁴¹ The court granted the manufacturers immunity despite that fact that "not a shred of evidence has been presented to this Court that indicates that liability under the tort system has deterred pharmaceutical companies from introducing new drugs."¹⁴²

Explanations for this changing judicial attitude may be a reflection of the change in public opinion; after all, judges as well as jurors and lawyers are part of the public at large influenced by the relentless assertive rhetoric of the past three decades. Alternatively, in states like California, where the judiciary is elected by a public bombarded with the rhetoric of the past three decades, it may be yet an additional example of

¹³⁸ See, e.g., *Hufft v. Horowitz*, 5 Cal. Rptr. 2d 377 (Cal. Ct. App. 1992) (applying the public policy rationale of *Brown* to an inflatable penile implant); *Plenger v. ALZA Corp.*, 13 Cal. Rptr. 2d 811, 818 (Cal. Ct. App. 1992) (holding that, on policy grounds, no distinctions between prescription drugs and implanted drugs and IUDs existed); *Stangvik v. Shiley Inc.*, 273 Cal. Rptr. 179, 190 n.6 (Cal. Ct. App. 1990) ("Although *Brown* dealt with the manufacture of prescription drugs, the policy may also be applied in the case of manufacturers of advanced medical innovations").

¹³⁹ See Bill Blum, *Toward a Radical Middle: Has a Great Court Become Mediocre?*, 77 A.B.A. J. 48 (1991) (citing California Supreme Court cases declining to expand plaintiffs' tort claims).

¹⁴⁰ See, e.g., *Young for Young v. Key Pharms., Inc.*, 922 P.2d 59 (Wash. 1996) (adopting the reasoning of *Brown*, holding that when the manufacturer of an unavoidably unsafe product fails to warn of its inherent defects, Comment k to Section 406A in *Restatement (Second) Torts* imposes liability for negligence only, not strict liability); *Grundberg v. Upjohn Co.*, 813 P.2d 89, 95 (Utah 1991) (adopting a rule similar to *Brown* immunizing prescription drugs from strict liability design claims, but only if approved by the FDA); *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198 (N.Y. 1991) (citing *Brown's* public policy favoring some protection for prescription drugs); *Shackil v. Lederle Labs*, 561 A.2d 511, 512 (N.J. 1989) (rejecting collective liability theory in claim based on defective design of DPT vaccine holding that it "would frustrate overarching public-policy . . . by threatening the continued availability of needed drugs and impairing the prospects of the development of safer vaccines.").

¹⁴¹ *Grundberg*, 813 P.2d at 95.

¹⁴² *Id.* at 102-03 (Howe, J. dissenting).

the insidious nature of stealth tort reform manipulating the public today.¹⁴³

Public opinion is a construction of governments, of the media, and of everyday conversation influenced by governments and the media, although it is often accepted as if it were objective reality.¹⁴⁴ The judiciary must be circumspect in making policy decisions based on rhetorical reality. The judiciary must demand more than assertive rhetoric as a basis for retreating from its traditional commitment to promote public safety through enforcement of products liability law doctrine.¹⁴⁵

VII. CONCLUSION

Stealth tort reform is changing our perceptions of the civil justice system in twenty-first century America, and contemporary reformers have masterfully conducted a political public relations campaign which begs the question, and is directed to ensuring, that only one side of the question gets a hearing.¹⁴⁶ While it is tempting to challenge the rhetoric by debating whether its claims are legitimate,¹⁴⁷ political scientists caution that questioning an argument's form is inappropriate and they urge that the proper question to ask about assertive rhetoric concerns its "effectiveness."¹⁴⁸ If we accept this view point, it is difficult to argue that the contemporary tort reform movement is ineffective and, as noted earlier, the extensive empirical work of the law and society scholars has done little to counter public perception. However, I posit that the legal question raised by stealth tort reform is not rhetorical. Thus, the question for debate is whether the contemporary tort reform movement promotes the social values underlying product liability law. Does it foster social justice?

This complex inquiry needs further study. On one hand, the reformers may be right; in the twenty-first century, perhaps we have returned to a culture privileging wealth maximization over individual

¹⁴³ See OWEN ET AL., *supra* note 16, at 490 (noting that *Brown* was decided a few months after three liberal California justices were denied reelection and replaced by judges with more "moderate" views.).

¹⁴⁴ See generally EDELMAN, *supra* note 67, at 52.

¹⁴⁵ See generally Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999) (urging courts to resist reforming the common law when applying tort reform legislation).

¹⁴⁶ BAILEY, *supra* note 57, at 124.

¹⁴⁷ See *supra* notes 2-7 and accompanying text.

¹⁴⁸ See *supra* notes 2-7 and accompanying text.

rights and the enterprise liability doctrine fueling the original tort reform is no longer relevant. Although this explanation is beyond the scope of this Article, this thesis can be supported by the law and economic movement popular among tort scholars today, as well as erosion of strict liability doctrine embodied in the American Law Institute's Restatement (Third) for products liability.¹⁴⁹ However, if this is not the case, or at least has not been proven to be the case, the common law doctrine tells us that "the principle of fairness must have priority over the policy of wealth-maximization."¹⁵⁰

The understanding of "fairness" in twenty-first century America must be debated in a common law context where all sides have an opportunity to be heard. Unfortunately, it appears that much of the public, unschooled in the virtues of the common law process, accepts the perception that America is in a "crisis" due to lawsuit abuse, that greedy trial lawyers are playing a lawsuit lottery, that courts are clogged with frivolous tort cases, that huge jury awards are responsible for skyrocketing insurance premiums driving doctors out of business, closing down schools sports programs, scaring the clergy out of counseling their flocks, and even thwarting research and development of products that society desperately needs. From these rhetorical assertions, it follows that the individual must take personal responsibility and that it is "unfair" to invoke tort law. However, in fairness, should not the shield of moral responsibility be applied equally to defendants' injury causing behaviors? Should fairness to victims be at least as important as fairness to defendants, or have we as a society changed so dramatically that the doctrine of *Escola* and *Greenman*¹⁵¹ is no longer relevant?

What about product safety? In an age where federal regulatory agencies are unable to protect consumers from sophisticated products and corporate misconduct¹⁵² and where consumers injured by products

¹⁴⁹ See John Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 *TOURO L. REV.* 21 (1993).

¹⁵⁰ See, e.g., Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 *MICH. L. REV.* 1266, 1380 n.257 (1997) (citations omitted); *Grundberg*, 813 P.2d at 103 (Howe, J. dissenting) (wherein Judge Howe, after noting the lack of evidence in support of defendants' over-deterrence argument, which the majority relied upon, asks, "[w]hy should those who are seriously injured or suffer because of the death of another have to stand the expense of such losses to support the high profit margins of the drug industry?").

¹⁵¹ See *supra* notes 12-40 and accompanying text.

¹⁵² See, e.g., ADVISORY COMMITTEE ON THE FOOD AND DRUG ADMINISTRATION, FINAL REP. 11, *supra* note 136; BOGUS, *supra* note 8, at 150-51 (remarking that while asbestos causes

can no longer rely on federal or state health care because greater and greater percentages of the population are uninsured or underinsured,¹⁵³ is it fair for injured consumers to assume the costs of injury from products sold for profit in the marketplace? Are the social goals of promoting safe products less important than when the original tort reform evolved under the watchful guise of the common law? Do we now privilege the market place over social responsibility?

Under the common law, facts become “truth” only through the filter of the rule of law and upon application of the rules of evidence subject to rigorous cross examination designed to expose hyperbole, bias, and outright untruth.¹⁵⁴ The “original tort reform” developed at common law, its foundation grounded in legal theory, however imperfect, evolved primarily to protect consumers from injuries caused by unsafe products, regardless of how the theorists would define “unsafe.”¹⁵⁵ While judges and jurors are the voice of the common law, the voice of public opinion is “largely created by those who already wield the greatest power and is then used to rationalize their actions.”¹⁵⁶ Today’s pro-defendant tort reform is a product of the common law’s antithesis with its foundation in assertive rhetoric—the heresthetic. It is a product of political manipulation. It is what Professor Feinman calls, “Politics by [o]ther [m]eans.”¹⁵⁷ It is clear that much of today’s “truth” about products liability reform is a response to a semantically created political crisis; it is a result of a war of words taking place in the media rather than the courts. Its foundation is in impassioned rhetoric, often funded by the very constituents seeking to profit from its agenda. The real question concerning stealth tort reform is not simply whether the contemporary movement fosters social justice, but whether stealth tort reform has covertly manipulated perceptions of what is socially just.

170,000 deaths from lung cancer, the EPA was never able to ban it. Lawsuits forced it from the market).

¹⁵³ *Underinsured in America: Is Health Coverage Adequate?*, KAISER COMM’N ON MEDICAID AND THE UNINSURED (2002) (“researchers estimate that about a fifth of insured individuals are underinsured”); FEINMAN, *supra* note 8, at 194 (commenting on decreasing forms of government protection, including health care).

¹⁵⁴ *See, e.g.*, GEORGE FISHER, EVIDENCE 1 (2002) (“We want juries to return the right verdict, and by that we may mean the *truthful* verdict, the one that accords with *what happened.*”).

¹⁵⁵ *See supra* notes 42-50 and accompanying text.

¹⁵⁶ EDELMAN, *supra* note 67, at 55.

¹⁵⁷ FEINMAN, *supra* note 8, at 189.