Linking Tort Reform to Fairness and Moral Values

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INTRODUCTION

You know the old saying, “Don’t cry over spilled milk.” Well there certainly has been a lot of crying over spilled coffee in the last year, specifically scalding hot McDonald’s coffee. The crying has been primarily by talk show hosts, journalists and politicians, a cry of outrage to reform the tort system, with Stella Liebeck’s spilled coffee¹ as the flagship case.

Reporting selective facts of a case may easily enrage the public. Take for example the voice-over introduction from CNN’s news talkshow “Crossfire”: “What’s going on? . . . In recent days, there was a . . . $2.9-million award against McDonald’s for a case involving a hot coffee spill by a drive-in customer.” ² This narrative

¹ Liebeck v. McDonald’s Restaurants, No. CV-930-2419, 1995 WL 360309 (N.M. Dist. 1994). The facts of the case as reported by numerous sources are as follows. On the morning of February 27, 1992, as a seated passenger in her grandson’s parked car, 79-year-old Stella Liebeck placed a cup of McDonald’s coffee between her knees to remove the lid. She took this action because the Ford Probe was not equipped with a cup holder and the dashboard was slanted. As she tugged to remove the lid, the scalding coffee spilled into her lap. Before her grandson could help her get out of the bucket seat, the 170 degree coffee had caused second and third-degree burns to her buttocks, thighs and labia. Mrs. Liebeck spent seven days in the hospital, three weeks recuperating at home, and then had to return to the hospital for skin grafts. The burns and the grafts were extremely painful. Are Lawyers Burning America? NEWSWEEK, Mar. 20, 1995, at 33.

² Crossfire (CNN television broadcast, Sept. 2, 1994). The introduction also
implies that Mrs. Liebeck was driving at the time and she was not. The introduction omitted essential facts surrounding the case such as: the severity of her injuries, the length of her initial hospitalization (seven days), and the fact that extensive skin grafts were required. Nor does it acknowledge McDonald's admission that it had not lowered the 170 degree temperature of its coffee, despite having received over 700 burn complaints in a ten year period.\(^3\) The jurors' initial reaction to the case was similar to that of the public. One juror recalled that she thought it was a ridiculous case, while another juror initially thought the case was frivolous.\(^4\) However, after listening to all the testimony and both versions of the facts, the jury awarded compensatory damages of $200,000, reduced by 20% for Mrs. Liebeck's comparative negligence.\(^5\) The jury awarded $2.7 million in punitive damages, the equivalent of two days receipts from the sale of McDonald's coffee. Subsequently, the trial judge reduced the punitive damage award to $480,000, three times the compensatory damages.\(^6\)

Have judges and jurors gone wild? Do we need to drastically change or reform our civil tort damage system? Most commentators

referred to the Domino's pizza delivery case and the Dow Corning breast-implant settlement, as follows:

"What's going on? There have been a lot of very large lawsuit awards lately, ranging up to $79 million in an individual award against Domino's for an auto accident involving one of its delivery cars. In recent days, there was a $4.25 billion settlement in a breast-implant case and $2.9 million award against McDonald's for a case involving a hot coffee spill by a drive-in customer. Have lawsuits gotten out of control?" \(^{Id.}\)

3. \textit{Are Lawyers Burning America?}, supra note 1, at 35.

4. \textit{Id.}

5. \textit{Id.} Defense counsel argued to the jury that Mrs. Liebeck only had herself to blame for the accident. However, even if putting the cup between her knees was not the most reasonable course of conduct, the jury had to decide whether McDonald's negligent conduct in selling coffee at a temperature capable of causing second-degree burns within three seconds of hitting the skin was a cause in fact and a proximate cause of Mrs. Liebeck's injuries. The jury obviously decided that McDonald's conduct was a substantial factor. \textit{Id.}

6. As will be discussed, much of the present tort reform movement is aimed at eliminating or reducing punitive damages. The "Common Sense Legal Reforms Act of 1995,"\(^{H.R. REP. NO. 956, 104th Cong., 1st Sess. § 107(B) (Ninth Version June 26, 1995).}\) The trial judge in the \textit{Liebeck} case used this formula. Punitive damages are seldomly awarded, and only in cases where the defendant's conduct is willful, wanton, or intentional. Punitive damages are designed to punish and to deter, and only when the evidence sufficiently alleges such conduct will the judge permit the jury to receive a punitive damage instruction.
today recommend radically changing the way the tort system operates, perhaps replacing it altogether with a first-party insurance system funded by individuals or the government.

Radical change is not necessary. In fact, it could defeat the basic purposes that underlie our present system, compensating the plaintiff for injury and deterring future undesirable conduct. The problem is the American public’s perception of the tort system, not the system itself. The public’s misperception is fostered by the media and politicians. “Beliefs about jury behavior, more than any other single factor, seem to have fueled tort reform.”

Jury verdicts are easily viewed as ludicrous or outrageous. But these conclusions are reached without considering all the evidence the jury used in its deliberation. Furthermore, jury discretion is not unbridled. The trial judge controls a jury’s outrage and passion by remitting excessive verdicts.

The first section of this article will examine the development of tort liability, the history of tort reform, and the present tort reform solutions. The article will discuss the advantage of our present system, relying on jury adjudication as an essential element in reaching a fair resolution. Current tort reform hampers what is right about the present system by limiting the jury’s role. As Professor Wells artfully concluded in her seminal law review article justifying jury adjudication, the value of the tort system is in its quest for individual justice. “[F]airness is an important aspiration for tort law and case-specific consensus decisionmaking is essential to achieving fair outcomes.”


10. Catharine Pierce Wells, Tort Law as CorrectiveJustice: A Pragmatic Justification for Jury Adjudication, 88 MICH. L. REV. 2348, 2413 (1990). Professor Wells’ article argues that fairness is a better justification for corrective justice than fault. “The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held financially responsible for the plaintiff’s injuries. . . . The central element of the conception [of corrective justice] is fairness rather than fault.” Id. at 2358-59.
The second section of the article asserts that morality-based tort reform would foster an improved public perception of the law. Not only does the public distrust juries, judges, and lawyers, the public frequently views the law as being senseless, immoral, and unjust. A valid objective for true tort reform would be to change the law in ways that reflect community norms and values and a sense of collective morality. 11 "The law can be a positive force in encouraging and improving social relations, rather than reinforcing our divisions, disparities of power, and isolation." 12 Tort reform should strive for morality-based law that encourages positive conduct, rather than seek to reduce the frequency and size of judgments. 13 This type of tort reform would make "common sense" and improve the public's perception of the law.

This article proposes changing the "no duty to aid" rule as a beginning for morality-based tort reform. During the same thirty year period that Congress and state legislatures have been reforming modern tort law, commentators have consistently recommended changing the substantive law rule requiring no affirmative aid to strangers in peril. Too frequently the media reports that a victim of crime was brutalized while bystanders observed without helping. 14 The Kitty Genovese murder 15 in 1964, observed by thirty-eight of

11. Id. at 2399. Morality based law faces an up-hill battle because of perceptions that morality is individualized and represents social and economic bias. The legal pragmatist, however, sees the source of moral judgment as "a communal property of human experience rather than a distinctly individual response to surrounding circumstances." Id. (discussing Hume's moral theory and how it justifies the collective judgments of juries made free from the distortions of perspective and bias). Whether the suspicion is justified or not, morality is the basis of many modern laws. One example is the laws against drunk drivers which have so pervasive an effect as to enter the Bankruptcy Code in the form of an exception to discharge for a tort judgment based upon facts where the defendant was intoxicated.


13. It appears that the only goals for reform in the 1980's and 1990's is to reduce the dollar amount that defendants spend. "[T]he real heart of the present crisis may be money." Michael J. Saks, If There be a Crisis: How Shall We Know It?, 46 MD. L. REV. 63, 72 (1986).

14. One Charged in Beating Death of Man, DET. NEWS, July 26, 1995, at 1D. The story reports that the deceased victim's brother is "trying to understand how several people could have done nothing to help while his brother Dean lay badly beaten on a lawn for hours." Tom Curley, Anger, Disbelief Swirling After Detroit Attack, USA TODAY, Aug. 23, 1995, at 3A. "Detroit residents are struggling to make sense of the death of a woman who jumped from a bridge to flee an assailant as a crowd looked on." Id.

her neighbors, fueled significant debate about the rule, including a 1965 symposium at the University of Chicago. 16

Then in 1983, a Massachusetts woman was repeatedly raped in a tavern while at least fifteen patrons observed. 17 Nevertheless, tort reform focused on automobile negligence and medical malpractice crises, and ignored the "no duty to aid" rule. Tort reform in the mid 1980's, fostered by a perceived insurance crisis, did not address the rule despite voiced public concern.

Admittedly, a change in the "no duty to aid rule" would probably have little or no impact on the nation's economy. 18 It is doubtful that it would affect litigation or jury verdicts. What it could do is start a trend in law reform aimed at the law being a positive force in our everyday lives.

I. MODERN TORT LAW AND REFORM

A. History of Recent Tort Law

Tort law as we know it today, founded primarily upon a fault-based negligence cause of action, is relatively new, less than 150 years old. Legal historians generally regard the case of Brown v. Kendall, 19 as the case which abandoned strict liability for direct, forcible injury (trespass) and replaced it with a fault based (negligence) system in the United States. In Brown, the defendant attempted to separate two fighting dogs with a stick and hit the plaintiff in the eye. 20 In ordering a new trial based upon erroneous instructions at the trial court level, the appellate court held,

[If it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence,
carelessness, or want or prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.21

Whether this shift in the law was adopted to protect developing industry in this country, or out of sympathy for the injured victim, has been debated.22

It was during the second half of the nineteenth century that American lawyers started using the word "tort" as a single concept covering all liability imposed for personal injury suffered by the plaintiff resulting from the defendant's wrongful acts.23 This new theory of tort liability based on the universal, scientific nature of the law, was designed to cover all situations. Accordingly, judges believed they could apply rules of law with mathematical certainty.

The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal. Change can only be legislative and even legislative change will be treated with a wary and hostile distrust.24

From Brown until after World War I, American tort jurisprudence focused on the reasonably prudent person standard applied routinely without much concern for the facts at hand. During this period, the doctrine of negligence as a matter of law developed,25 permitting judges to frame universal standards of behavior constituting negligence. An infamous Holmes opinion held that it was contributory negligence as a matter of law not to get out of the car at a railroad

21. Id. at 298.
24. Id. at 62.
crossing and walk to the edge of the tracks where there was no clear view of the tracks.\textsuperscript{26}

During this period, tort law remained stable with contributory negligence, assumption of the risk, and the fellow servant rule predominating as defenses.\textsuperscript{27} The first major tort reform of the twentieth century removed the case of the injured employee from the tort arena when statutory workers' compensation schemes were adopted. The no-fault workers' compensation system was the beginning of compulsory first-party insurance systems as a replacement for the tort arena.

The other area of reform during the first half of the twentieth century involved product liability. As a result of misreading Winterbottom \textit{v.} Wright,\textsuperscript{28} courts required a plaintiff to be in privity of contract with a defendant in order to recover when the defendant's negligence in manufacturing a product caused the plaintiff personal injury. American jurisprudence followed the English case, and held that a lack of privity barred recovery by the plaintiff based on the defendant's active negligence.\textsuperscript{29}

In 1916, Judge Cardozo authored the landmark opinion that established negligence as a viable cause of action to recover against a manufacturer when a defective product causes personal injury. In \textit{MacPherson v. Buick Motor Co.},\textsuperscript{30} the court held the manufacturer of an automobile liable to the purchaser where the wheel had collapsed. Foreseeable danger resulting from a manufacturer's negligence resulted in liability to the plaintiff; privity was not required.

Therefore, up until the 1960's, negligence was the predominant tort cause of action, regardless of the facts presented, and contributory negligence on the part of the plaintiff was the premiere defense, since even a scintilla of negligence on the part of the plaintiff barred recovery.\textsuperscript{31} The bar of contributory negligence caused plaintiffs the greatest difficulty, and commentators denounced its lack of fairness.\textsuperscript{32}

\textsuperscript{27} KEETON, supra note 25, § 65 at 451.
\textsuperscript{28} 10 M. W. 109, 152 Eng. Rep. 402 (Exch. Pl. 1842). In that case the plaintiff coachman was thrown from the coach and seriously injured because the defendant neglected to repair the coach under a contract with the plaintiff's employer.
\textsuperscript{29} See Losee \textit{v.} Clute, 51 N.Y. 494 (1873).
\textsuperscript{30} 111 N.E. 1050 (N.Y. 1916).
\textsuperscript{31} RESTATEMENT (SECOND) OF TORTS §§ 463, 467 (1965).
\textsuperscript{32} Leon Green, \textit{Illinois Negligence Law}, 39 ILL. L. REV. 36, 116, 197 (1944);
Contributory negligence created some obstacles in product liability cases based upon negligence. Probably the greatest obstacle in these cases, however, was the plaintiff's inability to point to specific conduct establishing the defendant-manufacturer's breach of duty. As a result, the doctrine of res ipsa loquitur became essential to permit a jury to infer from the circumstances the defendant's negligent conduct. The doctrine has been the source of some considerable trouble to the courts. Furthermore, the doctrine was inapplicable in some cases because the plaintiff could not establish the defendant's exclusive control, or eliminate other potential negligent causes of the harm.

Two dramatic changes in tort law developed to address these problems and to help plaintiffs recover. First, in 1963, the California Supreme Court decided *Greenman v. Yuba Power Products, Inc.*, announcing a tort standard of strict product liability which eliminated a warranty basis.

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

Within two years, Section 402A of the Restatement Second of Torts reformulated the rule announced in *Greenman* and within a
decade, a majority of jurisdictions adopted the strict product liability standard of 402A.  

The second major substantive law reform also began in earnest in the 1960’s. Contributory negligence as a bar to a plaintiff’s recovery was replaced by a comparative negligence scheme, which permitted a reduction in recovery based upon the plaintiff’s relative fault. By the mid-1980’s a majority of jurisdictions had adopted pure or modified comparative negligence.

B. Tort Reform of Modern Tort Law

The year 1960 or 1965 is usually cited as the beginning of modern tort law. Assuming that these major changes in substantive tort

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


38. See 1 JERRY J. PHILLIPS & ROBERT E. PRYOR, PRODUCTS LIABILITY § 1-8(d), at 75-79 (2d ed. 1993).

39. Technically, several federal statutes had been applying a comparative negligence, reduction in recovery based upon a comparative fault standard for years. For example, in 1908, the Employers’ Liability Act, 45 U.S.C. §§ 51-60 (1988) was enacted. See also the Jones Act, 46 U.S.C. § 688 (1988).

40. With pure comparative negligence, a plaintiff’s contributory negligence does not operate to bar his recovery altogether, but does serve to reduce his damages in proportion to his fault. KEETON, supra note 25, § 67 at 472. Under modified comparative negligence, a plaintiff’s contributory negligence does not bar recovery so long as it remains below a specified proportion of total fault, usually 50 or 51 percent. Id. at 473. For a list of jurisdictions adopting pure and modified comparative negligence, see Id. at 471-73 nn.28, 31, 39 & 40. Even in 1983 only ten states retained the doctrine of contributory negligence (Alabama, Arizona, Delaware, Kentucky, Maryland, Missouri, North Carolina, South Carolina, Tennessee, and Virginia). Id. at 471 n.30.

41. 1965 is a logical point because it marks the adoption of the Restatement Second of Torts and Section 402A. The year 1965 also marks the publication of Robert Keeton and Jeffrey O’Connell’s comprehensive proposal for no-fault automobile insurance. ROBERT E. KEETON & JEFFREY O’CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965). Professor Schwartz
law started during the 1960's, it is fair to say that an attempt to reform the new rules began soon thereafter. The battle-cry of tort reformers through the last three decades has been "litigation explosion," a concern that too many lawsuits are filed. Undoubtedly, the adoption of 402A strict product liability and comparative negligence increased the number of valid complaints. The plaintiff no longer had to prove specific negligent conduct on the part of the manufacturer. Nor would a slight amount of negligence on the part of the plaintiff bar recovery. But whether the adoption of these substantive rules created a "litigation explosion" is questionable.

The first major solution to the litigation explosion was the adoption of "no-fault" automobile insurance in a majority of the states. The basic idea behind automobile no-fault is to replace third-party liability insurance coverage with first party coverage. Third-party tort liability coverage would only be retained for large claims that involved more than property damage. The major arguments supporting adoption of no-fault were: (1) minor automobile accidents were clogging the judicial dockets; (2) fault was extremely difficult to determine in many cases; and (3) a first-party insurance system would be more efficient than third-party insurance. The efficiency would be demonstrated by lower insurance rates and higher percentages of payout per insurance premium dollar. Most jurisdictions adopting no-fault did so by 1975.

Again during the 1970's tort reformers complained about the "litigation explosion." This lament was made despite the fact that in many jurisdictions filings had decreased because many automobile negligence cases were removed from the tort arena. The major areas of crises appeared to be medical malpractice and product liability.

With respect to the area of medical malpractice, it is interesting to note that the major substantive changes could not have affected the


42. Roger C. Henderson, No-Fault Insurance for Automobile Accidents: Status and Effect in the United States, 56 OR. L. REV. 287 (1977). The states' plans vary dramatically from plans having virtually no impact on tort litigation involving automobiles to plans that limit access to the tort arena to serious injury cases.

43. Id. at 304.

44. Id. at 288. By 1977, 24 states had adopted some form of no-fault automobile insurance and several other states were considering legislation. Id.

number of malpractice claims filed. The strict product liability cause of action is not relevant to medical malpractice claims, except with respect to a possible third-party claim against a manufacturer of medical equipment, hardware, or pharmaceuticals.\(^\text{46}\) Clearly, medical malpractice cases are based in negligence, not strict liability, and the standard of care is a professional one,\(^\text{47}\) requiring expert testimony in the overwhelming majority of cases to establish a breach of that standard of care.\(^\text{48}\) Additionally, the adoption of comparative negligence would rarely impact the outcome in a medical malpractice case, since the plaintiff-patient puts her care and well-being in the hands of the professional health provider.

In an effort to deal with the malpractice crisis of the 1970's, some jurisdictions adopted mandatory arbitration or malpractice disclosure panels.\(^\text{49}\) Other jurisdictions adopted caps on damages, mandatory

\(^{46}\) Strict products liability usually applies only to one who sells a product. See Restatement (Second) of Torts § 402A. A physician usually does not sell products, but performs services.

\(^{47}\) The modern trend is toward a national standard of care which requires that "a physician must exercise that degree of care, skill and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances." Vergara v. Doan, 593 N.E.2d 185, 187 (Ind. 1992).

Michigan standard jury instructions sets forth the standard of care as:

When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [doctor] of ordinary learning, judgment or skill in [this community or a similar one/_________] would do, or the doing of something which a [doctor] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

It is for you to decide, based upon the evidence, what the ordinary [doctor] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances.

Michigan Standard Jury Instructions (Second) 30.01 (ICLE, 1995 Supp.).

\(^{48}\) Ordinary negligence cannot be inferred simply from an undesirable result. Expert testimony is required to establish the breach unless any layperson is competent to conclude from common experience that such things do not happen if there has been proper skill and care. Keeton, supra note 25, § 32 at 188-89. Unfortunately, an excellent example of a case where "layperson's experience would be sufficient" was reported this past year in Grand Rapids, Michigan at Butterworth Hospital. In that case, the physician removed the wrong breast while performing a mastectomy on a cancer patient. Joyce Price, Mistake Stirs Worry Over Hospital Care Incompetence 'Epidemic' in U.S. Charged, Wash. Times, June 11, 1995, at A3. See also Deborah Sharp, Errors Renew Call For Doctor Review, USA Today, Mar. 27, 1995, at lA (doctor amputating the wrong leg).

offset of collateral benefits, shorter statutes of limitation, and limitations on attorneys' contingency fees.\textsuperscript{50} One study showed these changes reducing the mean value of the awards.\textsuperscript{51} Interestingly, another study illustrated that 1970's tort reform did not reduce insurance premiums.\textsuperscript{52} Binding arbitration, however, increased the frequency of claims, primarily by encouraging smaller claims.\textsuperscript{53}

Was the medical malpractice crisis caused by frivolous lawsuits, too many attorneys, or too many negligent health care providers? There is very little data to support any theory. Surely one reason for increased medical malpractice costs is that parties injured by physician negligence are more likely to survive today, thereby incurring more economic and non-economic damages. When medical malpractice results in a wrongful death claim, the size of the judgment diminishes.

Clearly, scientific advancements save more lives, potentially causing more long-term damages for care, pain, and suffering.\textsuperscript{54} Larger jury awards reflecting increases in damages, therefore, are not irrational. Scientific advancements that increase life and its relative care and pain do not justify capping verdicts in medical malpractice cases. Caps may reduce the variance in insurance risk pools and the range of potential liability outcomes,\textsuperscript{55} but at what cost to individual well-being? Caps on jury verdicts in medical malpractice cases impact most significantly seriously injured and young plaintiffs.

Additionally, several new causes of action and theories of medical malpractice were created, increasing potential exposure of health care providers. Wrongful birth,\textsuperscript{56} birth trauma, failure to timely diagnose,

\textsuperscript{50} PATRICIA MUNCH DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1982).

\textsuperscript{51} Id. For a study showing 1970's tort reform did not reduce insurance premiums, see Sloan, State Responses to the Malpractice Insurance "Crises" of the 1970s: An Empirical Assessment, 9 J. HEALTH POL. POL'Y & LAW 629 (1985).

\textsuperscript{52} Id.

\textsuperscript{53} PATRICIA MUNCH DANZON, MEDICAL MALPRACTICE 198-224 (1985).

\textsuperscript{54} This is reflected in one commentator's statement:

If a large fraction of damages is for the cost of medical care and rehabilitation, then awards are not rising if they merely track the rate of health cost inflation. To the degree that medicine and other emergency services have improved their ability to rescue people and prolong life, that may raise costs justifiably.

Saks, supra note 13, at 73.


\textsuperscript{56} Wrongful birth cases, for instance, are a recent phenomenon,
and informed consent are just a few examples. New technology, such as kidney dialysis machines, also generate potential malpractice claims.\textsuperscript{57} While also creating potential claims against the manufacturer for defective design and production flaws, new technology additionally creates potential liability against the health care provider for negligently using the technology.

Product liability was the other area of concern for tort reformers in the 1970's. The major concern stemmed from design defect cases and whether manufacturers would be liable for injuries caused by a defective design that could only be viewed as defective retrospectively. In other words, courts were asked to decide whether strict product liability was truly liability without fault or knowledge. If a product was designed as safely as possible based on available knowledge, could the manufacturer be held liable if the design subsequently injured the plaintiff?\textsuperscript{58}

No, answered the overwhelming majority of jurisdictions, rejecting the hindsight approach to risk-utility balancing\textsuperscript{59} in determining whether the utility of the products design outweighed its potential risks. Almost universally, jurisdictions adopted the negligence risk-utility balance approach, holding the manufacturer accountable only for risks known at the time of distribution of the product.\textsuperscript{60} Adop-

possible only as a result of the development of new medical technology and the legalization of abortion. If states allowed recovery for full economic and emotional harm, these cases potentially might produce significantly large judgments. Accordingly, any interpretation of changes in the size of damage awards against obstetricians must account for these other factors.

Sanders & Joyce, supra note 8, at 229.


58. This liability has been referred to as superstrict liability, and it was rejected in most jurisdictions. Even New Jersey, which applied the doctrine to an asbestos manufacturer in \textit{Beshada v. John-Mansville Prods. Corp.}, 447 A.2d 539 (N.J. 1982), subsequently reversed itself in \textit{Feldman v. Lederle Lab.}, 479 A.2d 374 (N.J. 1984).

59. Under this approach, a manufacturer is strictly liable, even if she could not reasonably know of the risks when the product was distributed, if the utility of the product does not outweigh the risks known at the time of trial.

tion of this test injected negligence into the strict product claim, making it much more difficult for plaintiffs to prove design defects and to recover damages.

Despite these changes, the tort reform relief of the 1970’s proved inadequate to prevent the alleged insurance crisis and claimed litigation explosion of the 1980’s. The year 1986 is viewed as the peak of the insurance crisis, a time when the cost of liability insurance skyrocketed and the availability of coverage for some products and services disappeared altogether. The public in general and the insured specifically were told that the crisis was caused by a litigation explosion.

The flagship case for outrage in the 1980’s involved a man who was struck by an automobile driven by a drunk driver while standing in a phone booth. Plaintiff Bigbee sued the telephone company for the loss of his leg in this accident because the telephone booth was defective and he could not escape due to the defective door. The trial court granted a summary judgment in favor of the telephone company, which was reversed on appeal.

This time the outrage about the civil litigation system focused on the California Supreme Court finding that Bigbee stated a valid cause of action against the telephone company. As usual, the media distorted the facts, ignoring the defective telephone booth, and arguing that it was absurd to hold the telephone company liable when the drunk driver was at fault for running into the booth. Even the President of the United States got into the act, using the Bigbee case as an example of what was wrong with civil litigation. Mr. Bigbee was so dismayed that the President of the United States distorted the

61. Insurers had increased premiums drastically for an unusual set of products, such as vaccines, general aircraft, and sports equipment, and for an equally diverse set of services such as obstetrics, ski lifts, and commercial trucking. In still other cases—i.e., intrauterine devices, wine tasting, and day care, insurers had refused to offer coverage at any premium, forcing these products and services to be withdrawn from the market.

Priest, supra note 55, at 1521.

62. For an article citing numerous sources claiming that the problem was the civil litigation system: lawyers, jurors, judges, and the law, see Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986).


facts of his case and made light of his tragedy, he testified before a congressional committee.\textsuperscript{66}

A report from the Department of Justice documented the insurance crisis and concluded that developments in tort law were the major cause of the increased insurance premiums.\textsuperscript{67} The Justice Department report recommended numerous specific reforms in tort law.\textsuperscript{68} The most significant recommendations included: a combined cap of $100,000 for non-economic and punitive damages; awarding punitive damages only where actual malice was proven;\textsuperscript{69} the elimination of joint and several liability; limiting the collateral source rule;\textsuperscript{70} scheduling attorney contingency fees;\textsuperscript{71} and deference to government agency standards.

Most studies of this report and the data upon which it was based found that the litigation statistics did not support the Justice Department's claim that there was a litigation explosion.\textsuperscript{72} Total claim

\begin{itemize}
\item \textsuperscript{68} For an excellent discussion of the recommendations, see Sanders & Joyce, supra note 8, at 207.
\item \textsuperscript{69} With a combined cap of $100,000 for pain and suffering and punitive damages, it seems unlikely that a plaintiff would actually recover any punitive damages. Punitive damages are not awarded routinely and usually only in cases where the economic damages are substantial. When economic damages are substantial, awards for pain and suffering are usually commiserate. It should be noted that actual malice is the federal standard in the 1995 tort reform bill. H.R. REP. No. 956, 104th Cong., 1st Sess. § 101(1) (1995) (Ninth Version June 26, 1995).
\item \textsuperscript{70} Under the collateral source rule, now abrogated in most jurisdictions, the plaintiff could collect damages for loss which the plaintiff had already recovered from a collateral source. See Mich. Comp. Laws Ann. § 600.6303 (West 1982) (abrogating the collateral source rule in Michigan). See Martha Middleton, A Changing Landscape, A.B.A. J., Aug. 1995, at 59. The only states retaining the collateral source rule are the following: Colorado, Florida, Iowa, Missouri, New Jersey, North Dakota, Ohio, and Oregon. Id. at 59-60. The best example is where the plaintiff's medical expenses are paid by medical insurance coverage.
\item \textsuperscript{71} The schedule provided for 25% of the first $100,000, 20% of the next $100,000, 15% of the next $100,000, and 10% for any additional amount. Insurance Report, supra note 67, at 72. No recommendation was made concerning defense fees.
\end{itemize}
costs increased dramatically from 1975 to 1986, but not the number of claims. While there was an increase in federal court caseload, a large percentage of the increase included social security and civil rights cases. Product liability filings did increase rather dramatically in the federal courts during the nine year period from 1975 to 1984. However, the increase can be significantly attributed to mass latent tort litigation, specifically the asbestos cases.

State court filings for tort claims did not document a litigation explosion during the period examined by the Justice Department report for federal filings. A press release issued in April of 1986 by the National Center for State Courts stated that there was "no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-84 time period." From 1978 through 1984, the total tort filings in state courts increased nine percent, while the population increased eight percent. Domestic relations cases comprised the greatest single source of any state court increase in filings.

Nonetheless, apparently following the recommendations of the Justice Department report, forty-eight jurisdictions adopted tort reform legislation between 1985 and 1988. Most jurisdictions placed caps on damage awards, altered punitive damage recoveries, changed rules involving joint and several liability, and abolished the collateral source rule. A majority of states also changed state governmental

73. Nye & Gifford, supra note 72, at 922.
74. Galanter, supra note 62, at 16-19. According to Professor Galanter, half of the total increase over a nine year period involved cases where the federal government sought "to recover overpayment of veterans' benefits by litigation and to curtail disability benefits by summarily removing beneficiaries from the rolls." Id. at 17.
75. Id. at 24.
76. Hensler, supra note 72, at 479.
80. See Sanders & Joyce, supra note 8, at 207 for tables outlining the reforms in each jurisdiction. Id. at 220-22. According to this study, only Pennsylvania and Vermont did not enact tort reform legislation during the period. Id.
immunity rules, and adopted court rules or statutes providing sanctions for the filing of frivolous suits.82

The 1980’s present a multiple choice question: was it a litigation crisis, an insurance crisis, all of the above, or none of the above? Supporting the proposition that it was an insurance crisis rather than a litigation crisis is an examination of insurance cycles.

When interest rates are high, insurers cut prices and insure bad risks to obtain new capital to invest. When interest rates go down, insurers raise prices and cancel bad risks. . . . It is this insurance cycle, not the cost related to the legal system, that is the primary cause of large insurance premium increases.83

As to the litigation crisis, substantial data indicates that the percentage of legitimately injured parties who file claims is low.84 "Although the perceived problem is that the system rewards frivolous claims, the reality [may very well be] that a large number of valid claims go uncompensated."85 In the medical malpractice arena, for example, only one in ten injuries resulting from negligence is litigated.86

Furthermore, if it was in fact a litigation crisis which caused the insurance crisis and motivated tort reform throughout the country, would tort reform stabilize or lower insurance rates? In an Insurance Service Office study, over 1200 insurance claims adjusters analyzed the impact of the proposed tort law changes on insurance rates.87 The study found that changes made in 1986 by fifteen states would not affect insurance rates.


83. Stanoch, supra note 77, at 444-45.


85. Saks, supra note 13, at 69.


Ironically, an article in the New York Times in April of 1986, predicted that the insurance industry's profit cycle would start declining in a year or two toward a 1995 insurance crisis. 88

C. Common Sense Tort Reform of 1995

One part of the "Contract with America" unveiled in September of 1994 by Georgia Representative Newt Gingrich was "Common Sense Legal Reform." 89 In March of 1995, the House passed several bills which reflect recommendations made by the Justice Department report of 1986 and which in some cases preempt the states control over civil litigation. This Section will review the significant provisions of those bills to see whether the reforms solve the "litigation crisis." This is done, however, with one important caveat: the reform may have died before birth. According to the Washington Times in July, Speaker Gingrich stated that product liability tort reform is dead, at least for now. 90

Well, just in case it is not dead, what was reformed? Both the House 91 and the Senate 92 have acted with respect to product liability law. Significantly, Congress preempted the field of strict product liability and adopted the lesser standard of negligence against the product's seller. In order to recover for injuries caused by a defective product, a plaintiff must prove that a retailer was negligent (lacked reasonableness). 93 This provision eliminates a 402A strict product liability cause of action against a product's seller unless the manufacturer is not subject to service of process or is judgment proof. Unless there are long arm jurisdiction problems, the seller will not usually be sued in products liability cases. 94

89. The "Contract with America" was part of the campaign strategy of Republican candidates throughout the country during the 1994 election.
93. H.R. 956 § 104(a); S. 565 § 5(a).
94. Undoubtedly, manufacturers had hoped to escape strict product liability with preemption of the field and a federal statute that permitted the cause of action based upon negligence instead. The total elimination of the 402A strict product liability cause of action would provide significant proof problems for many plaintiffs injured by defective products. Even though there was a high correlation between manufacturing negligence and manufacturing defects, proving the specific negligent conduct was frequently an obstacle for the plaintiff.
Two other provisions of the passed House and Senate bills are significant with respect to product liability litigation. First, is an elimination of joint and several liability. The elimination of joint and several liability was recommended by the Justice Department in 1986. An overwhelming majority of states modified or abolished the rule as part of the 1980’s tort reform movement. Accordingly, the purpose here is uniformity among the jurisdictions. Second, and potentially more significant, the provision caps punitive damages at $250,000, or two (Senate Bill) or three (House Bill) times the compensatory damages, whichever is larger.

Punitive damages have been attacked on a number of grounds. First, punitive damages are inconsistent with the idea that damages compensate the plaintiff for harm suffered as a result of a defendant’s actions. Second, punitive damages are intended to punish the defendant, having no correlation to the harm suffered. Third, the range of potential liability with punitive damages is enormous.

In product liability cases, punitive damage awards are intended to deter the manufacturer from acting with reckless indifference to safety. They relate to corrective justice through deterrence of conduct. Liability for punitive damages affects corporate behavior by cost minimalization and safety decisions. Corporations involved in a continuing problem-solving process are more likely to be deterred from future conduct than individuals. Who can forget the outcry when the jury awarded $125 million dollars in punitive damages against Ford Motor Company in the exploding Pinto gas tank case. Although the amount was reduced on appeal to $3.5 million, the jury had made its point. Based upon community values, the jurors were outraged that the manufacturer knew of the danger and intentionally failed to warn the consumer-user.


95. See Sanders & Joyce, supra note 8, at 221-22 (indicating that limits on joint and several liability appeared in nearly every tort reform act).

96. Sugarman, supra note 7, at 574-75.


98. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981). The $127 million dollar verdict was reduced to $6.7 million on appeal. Grimshaw, 174 Cal. Rptr. at 349. The $125 million in punitive damages was reduced to $3.5 million. Id.
But as a matter of fact punitive damages are not awarded routinely in product liability cases, but only where there are circumstances of aggravation. These include reckless indifference to safety, gross negligence, and concealment by the manufacturer of the dangerousness of his product from consumers. The last is a form of fraud, which is an intentional tort, and the economic case for punitive damages is the same as in other intentional tort cases.99

While gross negligence may be a borderline case, economists strongly favor punitive damages in intentional tort cases. Even Professor Priest who wants to eliminate third-party insurance from tort liability, favors punitive damage awards based on fraudulent behavior where manufacturers deliberately misrepresent product safety.100

Inconsistent with the conception of runaway jury verdicts, the liberal states of New York and California do not produce an abundance of punitive damage awards in product liability cases. In a survey of twenty New York and California product liability cases, plaintiffs won fifty percent of the cases, however no punitive damages were awarded.101 Furthermore, as indicated previously, punitive damage awards are frequently subjected to remittitur.

The question remains then whether these caps are an appropriate tort reform measure, or if the caps will negatively impact deterrence of deliberate misrepresentation of product safety. The outgoing president of the International Association of Defense Counsel contends that caps on punitive damages are “one of the most important changes” in tort reform,102 since different plaintiffs may be awarded punitive damages for the same conduct.

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100. Priest, supra note 55, at 1589.
101. LANDES & POSNER, supra note 99, at 305. In a sample of 359 cases, punitive damages were allowed in only seven, or two percent of the cases. Id. These results were consistent with a study of all civil jury trials in San Francisco and in Cook County, Illinois between 1960 and 1984, conducted by the Rand Corporation’s Institute for Civil Justice. In this entire period there were only eight awards of punitive damages in products liability cases. In percentage terms, only eight-tenths of 1 percent of all jury trials in San Francisco in products liability cases resulted in such an award; the corresponding figure for Cook County was only one-tenth of 1 percent. Id. at 306-07. Furthermore, these figures may overstate the plaintiffs’ success, because the figures do not report whether the jury awards were reduced by the trial judge or on appeal.
102. San Francisco lawyer Kevin Dunne stated, “In my view, [punitive damages] really were a threat to the civil justice system and had a huge effect on the American economy.” Middleton, supra note 70, at 61.
Undoubtedly, the preemptive nature of the federal bills is to avoid a subsequent ruling by the courts that setting federal standards for state civil procedures violates Congress’ power under the Commerce Clause. Nevertheless, this type of federal legislation may still be challenged under the Tenth Amendment as a violation of state sovereignty.

The House tort reform bills passed in March of 1995 are more extensive and affect litigation outside the products liability arena. First, the previously mentioned cap on punitive damages applies to all civil cases in the state and federal courts. The House bill will effectively eliminate defamation claims by the stars against tabloids sold at grocery store checkout counters. The House bill also eliminates joint and several liability in all civil cases in state and federal courts. It is unclear how this provision will effect vicarious liability created by statute or common law and whether several liability will eliminate indemnification in this context.

This same House bill also preempts state tort law concerning non-economic damages in most medical malpractice cases. The bill imposes a non-economic damage cap of $250,000 and preempts state law. Many states, including Michigan, have already placed caps on non-economic damages in medical malpractice cases. Indiana has a cap on economic damages as well. The Indiana statute provides for a state fund, similar to an uninsured motorist fund for

103. “By enforcing limits on the commerce power, the Court effectively warned Congress to move carefully when federalizing criminal law or setting federal standards for civil procedure, such as punitive damages and fee-shifting.” David O. Stewart, Back to the Commerce Clause, A.B.A. J., July 1995, at 46. This article discusses the somewhat surprising ruling of the United States Supreme Court in United States v. Lopez, 115 S. Ct. 1624 (1995).

104. Middleton, supra note 70, at 56, 60.


106. “In a product liability action that is subject to this title, the liability of each defendant for noneconomic loss shall be several only and shall not be joint.” H.R. 956 § 110(a).

107. “This Act supersedes a state law only to the extent that state law applies to an issue covered under this title.” Id. at § 102(B)(1).

108. Michigan’s cap on non-economic damages is $225,000 plus an annual adjustment in accordance with the consumer price index. Mich. Comp. Laws Ann. § 600.1483(1) (West 1988).

109. See Ind. Code Ann. § 27-12-14-3 (Burns 1994). After January 1, 1990, the total amount recoverable for an injury or death may not exceed $750,000. Id.
automobile negligence cases, to pay the economic loss above the statutory limit.\(^{110}\)

Caps on non-economic damages are far more troublesome than the caps on punitive damages. Contingency fees are traditionally paid out of non-economic damages. Additionally, litigation expenses are paid by this source. In complicated medical malpractice cases, litigation expenses can be immense. Accordingly, caps on non-economic damages effectively eliminate some malpractice claims, undoubtedly the result sought by lobbying forces.

When examining tort reform, caps on non-economic damages in medical malpractice actions are most unfair because of the nature of the claim. Risks in medical malpractice cases are non-reciprocal;\(^{111}\) the risk of harm runs only to the patient and not to the health care provider. A recent Florida case provides illustration. In the clearest case of negligence, the healthy kidney was removed from the patient during surgery rather than the cancerous kidney. There was no risk of harm to the tortfeasors, while the innocent plaintiff had a loss of the quality of life and a capped recovery for pain and suffering. At least the litigation costs will be minimal because an expert witness will not be required to establish the obvious breach of the standard of care. In most medical malpractice cases, however, the burden of proof is significant. The plaintiff has to use expert witnesses to establish the breach of the standard of care, and determine that the breach was a proximate cause of the resulting harm.\(^{112}\) With tougher standards for expert witness qualification, where the plaintiff is successful, the defendant has in fact been negligent.

Finally, caps in medical malpractice cases significantly affect the seriously injured and the young.\(^{113}\) A striking example of the lack of fairness is the case of Steven Olsen, a blind and severely handicapped child.\(^{114}\) A California jury awarded Steven $4.2 million for medical bills and future wages, and $7 million for non-economic loss. The trial judge reduced the $7 million to $250,000, the statutory cap for non-economic damages in medical malpractice cases in California.

\(^{110}\) See IND. CODE ANN. § 27-12-15-1 (Burns 1994).

\(^{111}\) George Fletcher, Fairness and Utility in Tort Law, 85 HARV. L. REV. 537 (1972).

\(^{112}\) See MICH. COMP. LAWS ANN. § 600.2169 (West Supp. 1994-95). This statute places numerous restrictions on the qualifications of an expert witness in a medical malpractice case. \(\text{Id.}\)

\(^{113}\) Rabin, \textit{supra} note 9, at 40.

Steven is a catastrophically injured plaintiff. The non-economic award represents pain and suffering and the loss of quality of life. Assuming that the attorney in Steven’s case acted pro bono, Steven received approximately $4,000 a year for the loss of quality of his life, assuming he lives to be sixty. The problem with medical malpractice caps is that individuals suffer loss so that society can control medical costs and encourage physicians to stay in business.

Caps in medical malpractice cases punish those who suffer the most. In catastrophic cases there is objective proof of pain and suffering and of a loss in quality of life. From a fairness standpoint, juries in these cases should be permitted to award damages without limitation. Limiting or eliminating non-economic damages in less serious cases and uncapping recoveries for devastating injury is a more just approach to tort reform. The Michigan automobile no-fault threshold for non-economic recovery is illustrative. Unfortunately, this would not reduce the frequency and the size of the judgments.

Finally, it should be noted that caps on non-economic damages are unfair because they affect the poor and economically disadvantaged most severely. As sad as severe injury is, if the injured plaintiff has an annual income in excess of $300,000 a year, the economic damages will insure as much comfort as is possible under a reduced quality of life. This is not true if the plaintiff is a minimum wage earner, or a child who will not be able to establish future potential earning capacity as a corporation president.

As part of the tort reform package, the House also passed a bill modifying the American rule that attorney fees are paid by the individual client. In order to limit frivolous litigation, the bill adopts a modified version of the English rule, that the losing party pays the attorney fees. This provision of the bill applies only in federal court diversity cases. It is a modified version because the plaintiff may still have to pay the defendant’s attorney fees if she prevails at trial and establishes that the defendant wrongfully harmed the plaintiff. Parties are permitted to make settlement offers until ten days before trial. A party who rejects a settlement offer will be liable

115. Michigan’s no fault statute bars the plaintiff from recovering any non-economic losses unless the plaintiff demonstrates an injury enumerated in the statute. A motor vehicle accident plaintiff has met the statutory threshold if the plaintiff has suffered: (1) death, (2) permanent, serious disfigurement, or (3) the serious impairment of a bodily function. Mich. Comp. Laws Ann. § 500.3135 (West 1988).

for the opponent’s attorney fees if the settlement offered exceeds the judgment awarded to the rejecting party.\footnote{117}

The perceived problem with the English rule is that only the rich can afford the risks of litigation.\footnote{118} While there is merit in discouraging “long-shot” cases, this rule could “discourage meritorious suits by people who fear the cost of losing.”\footnote{119} “If the English rule had been in effect here, none of the civil rights cases would have been brought. If they had lost, a single lawsuit would have wiped out their treasuries.”\footnote{120}

The modified English rule of the House bill may be worse than the actual rule. The idea that a plaintiff, who has proven liability on the part of the defendant, would have to pay the defendant’s attorney fees when the jury award was a few dollars less than the defendant’s final settlement offer is a very one-sided rule. Additionally, it is unclear whether the costs of litigation are also covered by this rule.

As stated earlier, it is possible that none of these changes will in fact become law. Nevertheless, the need for these changes should be questioned. Since the 1970’s, state legislatures have been reforming tort law. During the 1980’s, forty-eight of the fifty states enacted tort reform legislation covering recommendations of the Justice Department Report.\footnote{121} Currently, many jurisdictions continue to refine tort law.\footnote{122} For example, Illinois recently adopted a major tort reform

\footnote{117. If all offers made by a party . . . with respect to a claim or claims, including any motion to dismiss all claims, are not accepted and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorneys’ fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys’ fees, incurred with respect to the claim or claims from the date the last such offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made. 

\textit{Id.} at § 2.


\footnote{121. See Sanders & Joyce, \textit{supra} note 8, at 207.

\footnote{122. “During their current sessions, state legislatures have taken up more than 70 new tort law bills, according to the American Tort Reform Association. . . . Among states with new tort rules are Illinois, Indiana, Montana, North Dakota, Texas and Wisconsin.”}
Michigan followed suit substantially changing Michigan tort law in two major pieces of legislation. The question is how much reform do we need, and is the current legislation headed in the right direction?

These reforms are focused almost exclusively on limiting the size and source of damages or remedies available to plaintiffs. A basic concern seems to be that the tort system ultimately imposes the costs on the consumer by making defendants pay large awards. However, when individuals are injured, costs are normally transferred to others in some way. Assuming that tort reform discourages litigation, who will take care of the injured party? If the injured party has medical insurance, the medical expenses caused by the defendant will be passed on to the consumer public as increased health care premiums. Proposed tort reform will transfer the costs of plaintiffs’ injuries from the responsible defendants to the consumer public at large.

Furthermore, most Americans do not have disability insurance unless they are disabled in the workplace. Thus, while more affluent Americans who are injured may have long term health care and disability insurance, most Americans do not. Therefore, cost-spreading to the consumer will continue because if the costs are not shifted to the defendant’s consumers, then the costs will be shifted to the government and taxpayers. Economists generally agree that it is better to do cost-spreading within the marketplace where deterrence and safety and design improvements will be encouraged.

Before altering the law to save defendants money, we need to ascertain if changes in real terms have occurred, and if so what has caused them. Even if an increase in average awards reflects nothing more than jurors placing a higher value on life and health than they once did, or on intangible hurts, we need to think hard about whether this is undesirable.

Middleton, supra note 70, at 56-57.

123. 1995 Ill. Legis. Serv. 89-7 (West) (also known as the Civil Justice Reform Amendments of 1995). For a comprehensive discussion of the statute see J. Jeffrey Zimmerman et al., A Review of the Illinois Civil Justice Reform Act of 1995, 83 Ill. B.J. 282 (June 1995). The act is similar to the federal bills in that it caps punitive damages at three times the economic award, eliminates joint and several liability, and limits recovery for non-economic damages in personal injury actions to $500,000 or less.


125. This refers to whether or not their juries have gone wild.

Reforms are aimed primarily at improving the economy by creating a favorable business climate and reducing insurance costs. While these purposes are laudable, it must be understood that we are sacrificing individual rights of injured persons to benefit society as a whole. These purposes are inconsistent with corrective justice which seeks to correct wrongs and accomplish justice between parties.

Do we want a tort system that values business and jobs over an individual’s health and welfare? Do we want a system that protects Dow Corning and its employees at the expense of the class action litigants who suffered injury because of silicone breast implants? Based on letters to the editor received by the Detroit News during July, 1995, the answer depends on personal perspective. Employees of Dow Corning want to protect their jobs, breast implant victims want to be compensated for the harm.

Generally, the public appears willing to accept a policy to improve the economy and lessen the recovery of the individually harmed plaintiff. This acceptance may be blamed on the public lack of trust in juries, judges or lawyers. The public attitude about jury behavior is a key factor in fueling tort reform. Unfortunately, the attitude is based in part on media distortion. The media reports the most bizarre facts out of context, convincing the public something is wrong with the tort system. “A feature of much reporting is that it fails to

127. These were the stated purposes of the recent Illinois legislation. See supra note 123.
129. The following is a quote from an emotional letter to the editor from a victim of the implant tragedy:
From my perspective as a victim...[y]ou demonstrated brilliantly that what is wrong with America today has to do with a society that values corporations over individuals and money over morality; that supports fat cats who lie about research to market defective products and line their pockets with the tears and fears of unsuspecting customers; that turns the tables on those customers, many of whom have already had enough heartache; and whose newspapers pick and choose the medical studies they report about to sway public opinion in favor of the poor, downtrodden multibillionaire company. In my house, the question[s] is not, “Dad are you gonna lose your job?”
Dad, will Mom die from this? DET. NEWS, July 30, 1995, at A12 (editorial letter from Marjorie Immekus).
130. Sanders & Joyce, supra note 8, at 248.
identify the basis for imposing liability." Thus the public is led to believe that anytime someone is injured they can collect money from a deep pocket.

The idea that one can collect for any injury is reinforced by attorney advertising. The voice from the television asks, "Have you slipped, fallen, been injured in an automobile accident or at work? If so, call 1-800-attorney." The plethora of these ads convinces the public that everyone is suing. Special interest groups then use these ads to support their argument that the litigation explosion is causing all of the country's economic problems. The groups argue that attorneys are making all the money, and Joe Public is paying the price.

To reverse support for tort reform, attitudes must change. First, the public must understand the devastating affect this legislation has on individuals. The best way to comprehend the impact is for the public to put itself in an injured person's position. Imagine yourself as a young, previously healthy adult who has been rendered a paraplegic by the wrong-doing of a drunk driver. What dollar amount fairly represents your pain, suffering and loss of enjoyment of life? Should you, the injured individual, and other innocent plaintiffs similarly situated be forced to assume the burden of maintaining lower insurance rates? Placing ourselves in the plaintiff's shoes permits us to perceive the burden damage caps place on the individual. Public awareness could also change public reaction to several liability and the modified English rule for attorney fees.

Second, the public needs to be educated on the value of the jury process. The jury uses community values to determine the financial responsibility of the defendant for the plaintiff's injuries. The jury reaches a consensus judgment based upon its understanding of the case that is pieced together from the testimony of the witnesses and the parties. The judge instructs the jury on the rules of law which provide the framework and a shared vocabulary for jury deliberation. Competence of the jury is the function of two attributes:

132. Id. at 36.
133. Although this sounds like a real ad, it is just an illustration.
134. When involved in this exercise in class, torts students universally arrive at large dollar amounts, minimally several million dollars. The exercise undoubtedly illustrates why the golden rule argument is generally inadmissible since it urges the jurors to substitute themselves for the plaintiff in determining the dollar value to place on pain and suffering.
135. Wells, supra note 10, at 2406.
its number and its interaction. The jury process works well at bringing out the facts and narrowing down the important issues.

Not every coffee spill results in liability on the part of the seller for the resulting harm. Only under some facts will fairness and an examination of fault require that the seller be held financially responsible for the plaintiff's injuries. The judge in the Liebeck case told the jury that McDonald's was required to use ordinary care in serving coffee. Based upon community standards, the jury decided what ordinary care was under the circumstances, and reached a consensus judgment. The jury consensus judgment was based upon community values to fairly right the wrong inflicted on the plaintiff by the defendant. Educating the public on the jury process will improve its public image. Bolstering the public image of the jury will improve the country's perception of the entire litigation system.

Third, attorneys must also improve their public image. The public needs to understand the purpose for contingency fees. Contingency fees permit attorneys to take cases that middle class injured persons would not otherwise be able to bring. Plaintiffs' attorneys advance thousands of dollars in costs for experts, accident reconstruction, and investigation attempting to prove a case. They are not always successful. Plaintiff attorneys who work on contingency provide a valuable service to the public.

A jury decision, however, is more than an average of the verdict preferences of six or twelve citizens who represent a variety of experiences. Ideally, the knowledge, perspectives, and memories of the individual members are compared and combined, and individual errors and biases are discovered and discarded, so that the final verdict is forged from a shared understanding of the case. This understanding is more complete and more accurate than any of the separate versions that contributed to it, or indeed than their average. This transcendent understanding is the putative benefit of the deliberation process.


137. Id. at 64.

138. A case in point: recently a plaintiff's attorney advanced over $70,000 in costs attempting to prove a plaintiff's closed head injury from a vehicular accident. The jury found no cause of action, apparently believing the defense argument that the plaintiff was faking. Sliwinski v. Goodman, No. 94-403420 (3d Cir. Mich. 1994). Changing the way attorney fees are paid may not alter business law practice but it will definitely impact negatively on a plaintiff's ability to go to trial.
Finally, another way to help strengthen the image is to work on tort reform that makes sense to the public. Our law should reflect basic moral values that we share as members of the human race without regard to religion or national origin. When the law lags too far behind widely held notions of justice, the community will lose its respect for and confidence in the law.\textsuperscript{139} Accordingly, tort reform efforts should address the concerns of the public and recommendations of the commentators regarding improvements in the quality of law. The common law should reflect the universal moral principles of our society.

It is difficult to defend a legal system which contains rules that are revolting to any moral sense.\textsuperscript{140} An excellent example of such a law is the "no duty to aid" rule. Assume that a blind person is about to step into the street in front of an automobile. According to the rule, one witnessing the blind person’s prospective demise is under no duty to warn or prevent the accident even though it could be done without peril or delay to one’s own progress.\textsuperscript{141} Correspondingly, there is no legal obligation to render assistance to the victim of crime.

The public has frequently responded with horror and shock when a person is brutalized while bystanders observe without rendering aid. The absence of a rule of law requiring simple rescue or assistance to crime victims shocks the conscience. When teaching torts, predictably the one rule which astonishes students is that there is no duty to aid a victim.\textsuperscript{142}

The need for morality based tort reform appears clear. Tort reform which makes sense to the public can only improve the public’s

\textsuperscript{139} Francis H. Bohlen, \textit{The Moral Duty to Aid Others as a Basis of Tort Liability}, 56 U. Pa. L. Rev. 217, 337 (1908).
\textsuperscript{140} This is how Dean Prosser described the common law rule of "no duty to aid."
\textsuperscript{141} \textit{Restatement (Second) of Torts} § 314, illus. 1 (1965) provides:
A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street and is not liable to B.
\textsuperscript{142} Professor Leslie Bender commented similarly in her article. Bender, \textit{supra} note 12, at 3. Professor Bender points out that while the students originally find the "no duty" rule to be reprehensible, they become immersed in the reasoned analysis. "They are taught to reject their emotions, instincts, and ethics, and to view accidents and tragedies abstractly."
\textit{Id.}
perception of the legal profession. Tort reform should be based on morality with positive conduct goals, rather than aimed at reducing the frequency and size of judgments. Therefore, although only one major common law rule is addressed here, a movement toward morality-based, rather than economic-based tort reform, could foster a new found respect for the law.

II. THE "NO DUTY TO AID" RULE

During the same thirty year period that Congress and state legislatures have been reforming modern tort law, commentators have consistently recommended altering the "no duty to aid" rule. The first rash of articles began in 1964, immediately after the Kitty Genovese murder. Thirty-eight of Ms. Genovese's neighbors watched for over thirty minutes while she was stabbed to death. No one called the police despite her repeated calls for help. A reexamination of the "no duty to aid" rule emerged in reaction to the Genovese facts. The University of Chicago Law School sponsored a conference to discuss the significant legal questions posed. The problems that the Kitty Genovese case presented were not easily resolved.

Is a citizen required, and should he be required, to lend assistance to another who is in danger of severe personal injury or substantial loss of property? Should it make any difference if the potential loss stems from the commission of a crime, or from accident, Act of God or other causes? Must the passer-by intervene only when he can do so at no peril to himself? Only when the peril to himself is less than the harm which the victim will suffer?

Despite thirty years of comment, the law in the overwhelming majority of states remains the same. One who sees a stranger in peril has no duty to render aid, even if that aid is merely a phone call to the police. Only a few states have enacted a statutory "duty to aid," with several others enacting legislation creating a duty to notify the authorities.

143. Technically, two major articles shortly after the turn of the century began the debate. See Bohlen, supra note 139, at 217; James B. Ames, Law and Morals, 22 HARV. L. REV. 97 (1908).
145. See supra note 16.
146. THE GOOD SAMARITAN AND THE LAW at x (Introduction).
During this thirty year period only one case can be read as adopting a "duty to aid" rule, despite the court's apparent holding to the contrary. In Soldano v. O'Daniels, the defendant owned and operated a restaurant open to the public. The defendant's employee refused to call the police or permit a patron from the bar across the street to call the police, even though the plaintiff's father had been threatened and was subsequently shot and killed. The defense maintained that this was a case of nonfeasance, and that the law did not require the giving of aid to another in peril, even when the aid was only the use of the telephone.

The California court acknowledged that there was no special relationship between the defendant and the deceased. The court then looked at enumerated factors to be considered in determining whether a duty is owed to a third person, and decided that a duty was owed under the facts presented. "We conclude that the bartender owed a duty to the plaintiff's decedent to permit the patron from Happy Jack's to place a call to the police or to place the call himself." After creating a duty to aid the good Samaritan, the court recanted, emphasizing that it was not creating a duty to go to the aid of another. The court found that its decision was a logical extension of Restatement § 327 which imposes liability for negligently

148. These factors were enunciated by the California Supreme Court in Rowland v. Christian, 443 P.2d 561 (Cal. 1968). The factors giving rise to a duty of care were stated as:
the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.
Rowland, 443 P.2d at 564. In Rowland, the court abolished the distinction between trespasser, licensee and invitee for purposes of landowner-occupier liability. This "multi-factor duty approach" is recommended by at least one commentator as an appropriate alternative to the per se rule of no duty to aid in good Samaritan cases. David P. Leonard, The Good Samaritan Rule as a Procedural Control Device: Is It Worth Saving? 19 U.C. DAVIS L. REV. 807 (1986).
149. Soldano, 190 Cal. Rptr. at 310.
150. One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the
interfering with a rescue. Soldano could have created a common law rule of duty to aid one in peril, where there was no risk of harm to the aider. Instead, the case was limited to the facts presented.

Despite the debate and an outcry from the public, legislatures also have been reluctant to act. Only a small minority of jurisdictions have enacted legislation. The first type of legislation, adopted in three states, requires aid be given to one in peril, if that aid can be given without danger or peril to the rescuer. The second type of
legislation imposes criminal sanctions for failure to report a crime.\textsuperscript{152} The crimes that must be reported vary from jurisdiction.\textsuperscript{153} Wisconsin has a hybrid version which creates a duty to report a specified crime or aid a victim of a crime.\textsuperscript{154} Accordingly, even jurisdictions that provide a duty to aid frequently limit the duty to victims of crime.

Several rationales have been enunciated for the apparent reluctance to modify the "no duty to aid" rule. First, creating such a duty would interfere with individual liberty.\textsuperscript{155} Secondly, it has been suggested that creating a duty would be costly, and that the added costs would reduce the number of potential rescuers. Therefore, "the strong swimmer would avoid the crowded beach."\textsuperscript{156} Furthermore, it is claimed that administrative costs would be high because of the large number of potential tortfeasors and the difficulty of allocating fault.\textsuperscript{157}

These reasons provide inadequate justification for failing to adopt a "duty to aid" rule. Before intervening and rendering assistance, a bystander must observe the incident, interpret it to be an emergency, and feel personally responsible. Research documents that the more people present at an emergency the less likely anyone will act, due to

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\item[153.] The Colorado statute is very general and requires the reporting of any crime. COLO. REV. STAT. § 18-8-115. Florida and Rhode Island have specific reporting statutes for sexual battery offenses. FLA. STAT. ANN. § 794.027; R.I. GEN. LAWS § 11-37-3.1.
\item[154.] WIS. STAT. ANN. § 940.34 (West Supp. 1994).
\item[155.] Libertarian writers argue that the purpose of law is to protect individual rights, and so long as one does not interfere with the rights of others, one should be free to act. Richard A. Epstein, \textit{A Theory of Strict Liability}, 2 J. LEGAL STUD. 151 (1973).
\item[156.] This argument is advanced by Richard A. Posner. RICHARD A. POSNER, \textit{ECONOMIC ANALYSIS OF LAW} 174 (3d ed. 1986). The author subsequently appears to have modified this economic analysis: "Although the preceding analysis does not prove that the common law's refusal to impose liability for failure to rescue is efficient, it prevents one from concluding that the absence of such a rule necessarily is inefficient." LANDES & POSNER, \textit{supra} note 99, at 146.
\item[157.] It is claimed the cost of enforcement of a duty to aid would be extremely high, "higher than for any other activity governed by either common or criminal law." Paul H. Rubin, \textit{Costs and Benefits of a Duty to Rescue}, 6 INT'L REV. L. & ECON. 273 (1986).
\end{itemize}
the inertia of the group. However, research also demonstrates that when individuals know they have a legal duty, they are more likely to act positively. Creating a legal duty to aid should encourage action, since all or most present should be aware of their legal obligation. One reason why individuals in a group fail to act to rescue is because they are uncertain as to how others will react to their rescue. Treated as a societal norm, a legal duty to aid would encourage rescue by setting the standard for appropriate behavior. There exists a symbiotic relationship between legal and moral rules, accordingly, creating a legal duty to rescue would increase the number of people who felt morally obligated to do so.

Fulfillment of the legal duty can be as simple as seeking professional help by calling the police or emergency medical assistance. Additionally, professional rescuers are frequently overburdened.

158. We have suggested four different reasons why people, once having noticed an emergency, are less likely to go to the aid of the victim when others are present: (1) Others serve as an audience to one’s actions, inhibiting him from doing foolish things. (2) Others serve as guides to behavior, and if they are inactive, they will lead the observer to be inactive also. (3) The interactive effect of these two process will be much greater than either alone; if each bystander sees other bystanders momentarily frozen by audience inhibition, each may be misled into thinking the situation must not be serious. (4) The presence of other people dilutes the responsibility felt by any single bystander, making him feel that it is less necessary for himself to act.


159. A study of students from different countries illustrated that when students knew that there was a legal duty to aid, they reacted more positively to the duty to aid and judged an ablebodied person’s failure to aid more harshly. “Breaking the law was itself viewed as immoral, thus intensifying the opprobrium directed at the actor’s behavior.” Marc A. Franklin, Vermont Requires Rescue: A Comment, 25 Stan. L. Rev. 51, 58-59 (1980). See Clare Elaine Radcliffe, Note, A Duty to Rescue: The Good, The Bad and the Indifferent-the Bystander’s Dilemma, 13 Pepp. L. Rev. 387, 404 (1986) (concluding that a general public duty to rescue may be a very necessary tool to combat crowd inertia).

160. See Viola C. Brady, Note, The Duty to Rescue in Tort Law: Implications of Research on Altruism, 55 Ind. L.J. 551 (1980). Reviewing psychological studies, the Note concluded, “These results suggest that a legal duty to aid would result in an increase in helping behavior as it would decrease the ambiguity that often surrounds situations of peril by providing a norm, or prescription of appropriate conduct.” Id. at 557.

Imposition of a duty to aid or seek professional help would supplement the overburdened professional rescue mechanisms.\textsuperscript{162}

The strongest argument for adopting a duty to aid is that lives, such as Kitty Genovese's and the Restatement's blind person, would be saved. The question remains whether the creation of the duty to aid should encompass tort or criminal liability. Most early commentators advocated adopting a "duty to aid" rule which imposed criminal liability.\textsuperscript{163} Many European countries impose criminal penalties for failure to rescue where the rescuer is not placed in peril.\textsuperscript{164} The Vermont, Minnesota, and Rhode Island statutes follow these European models.

Concerned that rescue would place the rescuer in peril, recent statutes provide criminal sanctions for failure to report serious criminal activity rather than failure to aid. While these statutes should help victims of crime, they do not aid the Restatement's blind person or the drowning victim. To compensate for this oversight, one commentator has proposed a duty to notify in all types of cases where people witness others in serious danger.\textsuperscript{165}

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164. See Alexander W. Rudzinski, The Duty to Rescue: A Comparative Analysis, in THE GOOD SAMARITAN AND THE LAW (1966). The article also briefly presents the private law aspects of the duty to rescue in Europe. Portugal, for example, provides a civil claim for damages to a person violently attacked against a bystander who fails to assist. Id. at 111.

165. The model statute creating a duty to notify provides:

Any person who knows or has reason to know that another person is in serious physical danger, and who witnesses this person's predicament, shall notify a police agency of the danger as soon as reasonably possible, unless: (a) the person witnessing the predicament knows that police agency has already been notified; or (b) the person witnessing the predicament is unable to notify a police agency with a reasonable effort; or (c) the endangered person appears able to notify a police agency without outside help.

Mark K. Orbeck, Bad Samaritanism and the Duty to Render Aid: A Proposal 19 J. L. REF. 315, 343 (1985). The model statute provides for criminal liability in the form of fine or imprisonment. Most interestingly, it also prevents the criminal statute from being used as a tool for enacting civil liability with the following language: "SEC. 3. Proof of a violation of this statute does not constitute grounds for imposing civil liability on persons who violate the statute." Id.
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In the 1990’s, commentators consistently recommended creating a tort duty to rescue. One author would impose a “tort duty to help in an emergency when reasonable people would do so under similar circumstances.”\textsuperscript{166} Another commentator recommended imposing a duty “to act reasonably under the circumstances unless on balance there are recognized policy concerns that militate against imposition of that duty.”\textsuperscript{167} A multifactor approach for determining duty in good Samaritan cases is tempered by increasing the plaintiff’s burden of proof on causation in another article.\textsuperscript{168}

Most recently, Professor Heyman has developed a liberal-communitarian theory of justification for imposition of a “duty to aid” rule. This theory “holds that moral duties are enforceable only to the extent that they can be transformed into duties of right or communi-
The duty to aid, therefore, is based upon "the rights of the endangered person and on the rescuer's obligation as a member of the community." This duty to aid, which recognizes that the rescuer and victim are not strangers, but members of a broader community, is enforceable in both criminal and tort law. It would require:

a citizen in an emergency situation to take action reasonably necessary to prevent either a crime of violence or a substantial risk of death or serious bodily harm to another, unless that action would involve a substantial risk of death or serious bodily harm to the rescuer or to others.

Most commentators limit the duty to aid to situations involving easy rescue where the rescuer can act without risk of injury and with little or no inconvenience to himself. Additionally, most recent commentators rely on a negligence standard of culpability to create tort liability for failure to aid. Although varied approaches have been proposed by commentators, almost universal agreement exists that the common law rule of no duty to aid should be abandoned.

III. THE PROPOSAL

The obvious conflict between the law and moral values justifies concluding that the "no duty to aid" rule is inappropriate. The public was outraged when Kitty Genevese's neighbors listened to her scream for thirty minutes without aiding her. Almost twenty years later the public was again incensed when a woman was sexually assaulted repeatedly in a New Bedford bar for over an hour while patrons watched. Recently, a Michigan woman jumped off a Belle Isle bridge to escape from her attacker while a crowd watched without aiding. Both criminal sanctions and tort liability should apply to these bystanders.

First, jurisdictions should criminalize the knowing failure to aid a victim or report the peril to the authorities. The following is proposed language: "Any person who knows that another is in serious peril shall summon law enforcement officers or emergency

169. Steven J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev. 673, 742 (1994). The article takes the common law duty to prevent a felony as an obligation running not only to the community as a whole, but also to individual citizens. The concept of community "protects the rights and promotes the welfare of its members, who in turn have obligations toward both the community and their fellow citizens." Id. at 746.

170. Id. at 742.

171. Id. at 747-48.

172. Ames, supra note 143, at 97.
medical assistance or shall provide assistance or warning to the victim." The statutory duty is stated in the alternative to permit the rescuer to aid without encountering personal peril. Consequently, the statute contemplates easy rescue; the duty is satisfied by a phone call for emergency assistance. The language encompasses giving assistance to anyone in serious peril whether or not criminal activity is involved. Appropriate fines and jail sentences should be incorporated.

With respect to tort liability, the adoption of a negligence analysis is troublesome at a time when tort reformers are attempting to limit the "litigation explosion." The purpose behind altering the rule is to encourage rescue thereby saving lives and avoiding personal injury, not to increase litigation. Accordingly, instead of a tort duty based upon a negligence standard, tort culpability based upon intentional conduct is more appropriate. The tort liability counterpart would provide that: "Any person who intentionally fails to summon, aid or assist another in serious peril is liable in damages for the harm caused if the failure to act is outrageous under the circumstances."173

Rather than permitting a judge or jury to debate the reasonableness of the defendant's conduct, the question would simply be whether the defendant knew with substantial certainty of the impending peril and chose to ignore it. The requirement that the failure to act must be outrageous under the circumstances is necessary to limit liability to situations where the conduct of the defendant is viewed as intolerable by community standards. The concept is borrowed from the tort of intentional infliction of emotional distress and emphasizes that every failure to aid or seek help is not actionable in tort. "[T]he case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'"174

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173. Only one commentator advocates common law tort liability for a failure to rescue one in serious peril based on an intentional and outrageous conduct level of capability. See Prentice, supra note 16, at 44. Professor Prentice did not recommend criminal liability but suggested that tort liability should be created by United States courts as follows:

A person who fails to rescue or otherwise lend appropriate assistance to another in serious peril will be liable in damages for the harm caused that person if the failure to act was (1) intentional, or in deliberate disregard of the consequences, and (2) extreme and outrageous under the circumstances.

Id. At a time when judicial restraint is the political outcry, it appears that advocating a statutory approach to the creation of liability is the wiser course.

174. RESTATEMENT OF TORTS § 46 cmt. g (Supp. 1948).
Finally, the "Good Samaritan" statutes of the jurisdiction must be reviewed and potentially amended. In a majority of jurisdictions, the bystander who goes to the aid of one in peril is liable only for gross negligence, willful and wanton misconduct, or in some instances, is totally immune from liability for failure to aid in a reasonable manner.\textsuperscript{175} Thirteen jurisdictions, however, limit protection to certain rescuers, most typically medical personnel or professional rescuers.\textsuperscript{176} In these jurisdictions under the proposed legislation, the average citizen without statutory credentials could face criminal liability for failure to aid, but will not be afforded immunity from liability when rendering aid. Accordingly, for those thirteen jurisdictions, a third component to the proposed legislation is the adoption of a "Good Samaritan Statute" providing: "One who renders emergency aid is not liable for damages caused by the aid in the absence of gross negligence on the part of the aider." A legislative alternative, already in effect in some jurisdictions, would be total immunity from suit.

\textbf{CONCLUSION}

Current tort reform efforts nationally and at the state level appear to have two general purposes: to reduce the number of cases filed and limit the dollar amount of the judgments. These reform efforts value business and insurance industries over the corrective justice rights of the injured individual. Public support for these reforms is based on negative views of our legal system, the law, and the players: jurors, judges and attorneys.

Aside from educating the public on the jury process, the best way to improve public attitude toward the legal system is by law reform which reflects community values and adopts morally principled rules. Abandoning the common law "no duty to aid" rule is appropriate tort

\footnotesize{175. For excellent tables reviewing the "Good Samaritan" statutes of every state, see Robert A. Mason, Good Samaritan Laws - Legal Disarray: An Update, 38 \textit{Mercer L. Rev.} 1439, 1461-75 (1987) (excellent tables reviewing the Good Samaritan statutes).}

\footnotesize{176. \textit{Id.} According to the tables, 13 jurisdictions do not cover all rescuers: Alabama, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, Oregon, and Pennsylvania. Of these jurisdictions, Pennsylvania and Missouri cover the greatest number of potential rescuers - anyone with training in a recognized/approved first aid course. New York is the only jurisdiction that restricts Good Samaritan coverage to physicians. \textit{Id.} at 1446. Michigan's statutes cover a variety of rescuers including: physicians, nurses, paramedics, dentists, podiatrists, and restaurant owners or employees removing food from the throat of a customer. \textit{Mich. Comp. Laws Ann.} §§ 691.1501, 691.1502, 691.1522 (West Supp. 1986).}
reform exemplifying this philosophy. Each state should enact legislation which: (1) creates a duty to aid or to report, (2) provides criminal sanctions for failure to aid or report, (3) creates civil liability for damages resulting from an intentional, outrageous failure to aid or report, and (4) creates liability for injuries caused by rescue when the conduct constitutes gross negligence.

It is extremely difficult to defend a legal system containing rules which are revolting to any moral sense. Our law should reflect the basic moral values we share as humans. A movement toward morality-based tort reform could foster a new found respect for the law and its keepers. Legislating a duty to aid is a first step in the right direction.