South Carolina Law Review

Volume 58 | Issue 2 Article 4

Winter 2006

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TOWARD NEUTRAL PRINCIPLES OF STARE DECISIS IN TORT LAW*

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* The authors wish to thank the late Professor Herbert Wechsler of Columbia University for inspiring the title of this Article. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

The authors also wish to thank Justice Stephen Markman for sharing his thoughts and experience in addressing stare decisis as a justice on the Michigan Supreme Court, federal Judge Jack B. Weinstein of the Eastern District of New York for his constructive suggestions about the Article's content, and Justices Harriet O'Neill of the Texas Supreme Court and Harold F. See, Jr. of the Alabama Supreme Court for their time and thoughts in reviewing the Article. We greatly benefited from the experience of each of these jurists, but they are not responsible for the article's content.

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I. INTRODUCTION

> Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. . . . *If we seek principles, we must seek principles of change no less than principles of stability.*[1]

For more than two hundred years, courts in the United States have developed tort law through common law judicial decisions. This process has an important guardian: the doctrine of stare decisis. Stare decisis enhances the stability and predictability of tort law by ensuring that change is gradual. It recognizes that people rely on court rulings as existing law. When courts set aside stare decisis, they suggest that there is a greater force than stare decisis that requires a change in the common law. To date, most changes in the common law have been for the purpose of expanding liability and dropping barriers to recovery. Plaintiffs' lawyers have been a very strong engine for effecting these changes. In recent years, defense interests have begun to seek changes in tort law that could alter outmoded rules that favor plaintiffs. Both of these pressures create a clear need for judges to seek neutral principles for deciding whether to adhere to precedent or if and how to take an evolutionary step in tort law.

In developing such neutral principles, much can be learned from decisions over the past century. These decisions illustrate when it is appropriate to modify the common law and when to adhere to existing law. Neither courts that radically change tort law to fit their own agenda nor those that stubbornly adhere to precedent, despite changes in the legal or societal landscape, contribute to the orderly development of the law.

This Article suggests to judges "neutral principles" that properly permit incremental change in tort law. These principles can and should be applied to requests for departures from stare decisis by either plaintiff or defense counsel. Part II of this Article provides a brief history of the origin and development of common law, including the public policy purposes of stare decisis, describes how tort law has generally developed to expand liability, and provides an explanation for that trend. Part III of this Article proposes ten neutral principles to guide judges in deciding whether it is appropriate to change tort law rules. The first seven principles are principles of change. The final three principles are principles of stability. The principles of stability, though fewer in number than the principles of change, should be given particularly heavy weight in the stare decisis calculus.

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1. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (photo. reprint 1986) (1923) (emphasis added).

II. THE ROLE OF STARE DECISIS IN THE DEVELOPMENT OF COMMON LAW

A. The Doctrine of Stare Decisis

The concept of stare decisis is common to many areas of law, not just tort law.[2] The term is Latin for "to stand by things decided."[3] The doctrine is a foundational legal principle that demands adhering to prior case law unless there is a "special justification" for an exception.[4] Thus, it makes a court's ruling on a point of law binding on that court and the lower courts in the same jurisdiction when the same legal issue arises in future cases.[5] "In other words, courts cannot depart from previous decisions simply because they disagree with them."[6] The doctrine embodies important social policies of continuity and reliability in the law.[7]

Judges created the doctrine of stare decisis to help assure that the law develops impartially, predictably, and consistently.[8] The United States Supreme Court has often recognized that the doctrine "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[9]

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2. This Article does not discuss whether the doctrine of stare decisis is an adaptation of custom or is constitutionally required. For such a discussion, see generally Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 106–07 (2001) (arguing that stare decisis is a crucial means by which the judiciary preserves its legitimacy under the Constitution).

3. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004). For a history of the development of the doctrine of stare decisis, see Matheney v. Commonwealth, 191 S.W.3d 599, 615–20 (Ky. 2006) (Cooper, J., dissenting). *See also* Healy, *supra* note 2, at 54–91 (detailing the "slow, organic" development of stare decisis in England and comparing it to the American approach); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, at 3 AM. J. LEGAL HIST. 28, 50–51 (1959) (providing an analysis of the formative years of stare decisis in America); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659–87 (1999) (describing the development of precedent up through the Rehnquist era of the U.S. Supreme Court).

4. Randall v. Sorrell, 126 S. Ct. 2479, 2489 (2006) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

5. *See, e.g.*, Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 554 (Kan. 1990) (upholding a statutory cap on noneconomic damages as constitutional when the court previously addressed the statute's constitutionality in earlier cases).

6. Healy, *supra* note 2, at 52.

7. Helvering v. Hallock, 309 U.S. 106, 119 (1940); *see also* Adams v. Buffalo Forge Co., 443 A.2d 932, 935 (N.H. 1982) ("The doctrine has been said to serve as 'a brake upon legal change to be applied in the interest of continuity.'" (quoting Amoskeag Trust Co. v. Trs. of Dartmouth Coll., 200 A. 786, 788 (N.H. 1938))).

8. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)). *See generally* Michael B. W. Sinclair, *What is the "R" in "IRAC"?*, 19 N.Y.L. SCH. J. HUM. RTS. 87, 88–89 (2003) (positing that courts need rules to follow and that stare decisis and the principles for departing from precedent provide those rules).

9. *Randall*, 126 S. Ct. at 2489 (quoting United States v. IBM Corp., 517 U.S. 843, 856 (1996)); *Payne*, 501 U.S. at 827; *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (recognizing that rationales for following stare decisis include "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith

Requiring courts to ground their decisions in existing legal principles encourages the public to rely on the judicial system in shaping personal and business dealings in accordance with fixed rules of law.[10] Adherence to precedent also promotes judicial economy and public trust in judicial decision-making "by preventing the constant reconsideration of settled questions."[11] The Supreme Court has explained the role of stare decisis:

> [T]he important doctrine of stare decisis . . . permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.[12]

Stare decisis, however, is not to be followed "blindly."[13] It should not be followed when doing so would be illogical or against important public policy considerations. The Supreme Court has recognized that "[s]tare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"[14] Justice Louis Brandeis underscored this point in his dissent in a case upholding the immunizing of "vast private incomes" from federal and state taxation.[15] The doctrine, he said mockingly, apparently reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[16]

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in the judiciary as a source of impersonal and reasoned judgments."), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1251, 1263 (1972) (codified as amended at 33 U.S.C. § 905(b) (2000)).

10. *See* Plein v. Dep't of Labor, 800 A.2d 757, 766 (Md. 2002) (quoting State v. Green, 785 A.2d 1275, 1285 (Md. 2001)).

11. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

12. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

13. Todd C. Berg, *Chief Justice to Carry on Court's Textualist Tradition*, MICH. L. WKLY., Mar. 14, 2005, at 1, 23 (quoting Michigan Supreme Court Chief Justice Clifford W. Taylor).

14. *Payne*, 501 U.S. at 828 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)); *see also* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58–59 (1977) (applying a "rule of reason" standard of analysis in an antitrust suit to a location restriction in a franchise agreement rather than the per se rule set forth in an earlier case).

15. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting) (upholding appeals court reversal of ruling allowing state tax commissioner to tax corporation revenues generated through use of land leased from government where taxation of revenues would interfere with government's use of land to provide for local schools), *overruled by* Helvering v. Mountain Producers Corp., 303 U.S. 376, 386 (1938).

16. *Id.* at 406.

State courts have similarly noted that "stare decisis does not command blind allegiance to precedent" at the expense of assuring that the law is right.[17] For example, the California Supreme Court has advised that the policy underlying stare decisis "is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case."[18] While the decision to overrule a precedent is a matter of judicial discretion,[19] most state courts have required departures from stare decisis to be rooted in what the Connecticut Supreme Court described as "the most cogent reasons and inescapable logic."[20] In particular, departure from the rule should not occur based on changes in the composition of the court.[21] It is a doctrine that ensures that disputes are governed by the rule of law, not the "proclivities of individuals."[22]

Courts that have successfully departed from precedent have carefully and fully explained their decisions to ensure that they are not acting in an arbitrary or capricious manner.[23] The primary reason for changing precedent in all areas of law, particularly in constitutional law, is to overrule precedent that contains obvious or manifest error.[24] Courts also have tended to look at the unreasonableness or unworkability of principles of law established by the precedent;[25] whether the law

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17. State v. Gray, 654 So. 2d 552, 554 (Fla. 1995), *superseded by statute*, FLA. STAT. ANN. § 782.051 (West 2000 & Supp. 2006).

18. People v. Birks, 960 P.2d 1073, 1077 (Cal. 1998) (quoting People v. Latimer, 858 P.2d 611, 617 (Cal. 1993)); *see also* Sherwood v. Carter, 805 P.2d 452, 461 (Idaho 1991) ("Stare decisis is not a confining phenomenon but rather a principle of law. And when the application of this principle will not result in justice, it is evident that the doctrine is not properly applicable." (quoting Smith v. State, 473 P.2d 937, 943 (Idaho 1975))).

19. *See, e.g.*, Naftalin v. King, 102 N.W.2d 301, 302 (Minn. 1960) (citing Hertz v. Woodman, 218 U.S. 205, 212 (1910)).

20. City of Waterbury v. Town of Washington, 800 A.2d 1102, 1126 (Conn. 2002) (quoting Rivera v.Comm'r of Corr., 756 A.2d 1264, 1286 (Conn. 2000)).

21. *See, e.g.*, Norwest Bank N.D., Nat'l Ass'n v. Christianson, 494 N.W.2d 165, 169 (N.D. 1992) (Johnson, J., concurring) ("Care must be taken to assure that *stare decisis* is not applied based only upon the views of a given group of judges at a given point in time. Change in the composition of the appellate courts should not create uncertainty . . . .").

22. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

23. *See* Johnson Controls, Inc. v. Employers Ins. of Wausau, 665 N.W.2d 257, 285–95 (Wis. 2003).

24. *See* Boys Markets, Inc. v. Retail Clerks Union, Local 770, at 398 U.S. 235, 241 (1970) (noting that the precedent at issue constitutes significant departure from the Court's "otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration" and "does not further but rather frustrates realization of an important goal of our national labor policy"); Morrow v. Commonwealth, 77 S.W.3d 558, 559 (Ky. 2002) (stating that the doctrine of stare decisis does not commit the state supreme court "'to the sanctification of ancient [or relatively recent] fallacy'") (quoting Hilen v. Hays, 673 S.W.2d 713, 717 (Ky. 1984)).

25. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 18–19 (1997) (citing Copperworld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984)) (overturning the rule that vertical maximum price fixing is a per se violation of the Sherman Act, where the rule had been widely criticized since its inception and the Court's subsequent cases eroded the views underlying it); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (one of a "series of prudential and pragmatic considerations" is "whether the rule has proven to be intolerable simply in defying practical workability" (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965))).

has developed to such an extent that the old rule is essentially abandoned doctrine;[26] whether the facts or circumstances have significantly changed between the time the old rule was established to the time of reconsideration;[27] and whether the parties and the public rely on the rule so that overruling it would cause undue hardship or create inequities.[28]

B. The Development of Tort Law Under Stare Decisis

In tort law, stare decisis borrows from these same general principles, but the dynamics in tort law are significantly different from constitutional law, statutory interpretation, and contract law. Constitutional law is entwined in a historic document whose meaning often can be fathomed from its text or documents that surrounded it and gave meaning to the Constitution at the time it was drafted.[29] Statutory interpretation and contract law have similar dynamics; in both cases, a court can look to a basic document.[30] Conversely, tort law, and the procedural and evidentiary issues surrounding it, is anchored in centuries-old common law, not documents.

At the time the American colonies of England became the United States of America, state legislatures delegated to state courts the ability to develop tort theories through the common law. This power was provided to judges through

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26. *See, e.g.*, Herrera v. Quality Pontiac, 73 P.3d 181, 188 (N.M. 2003) (explaining that New Mexico's adoption of comparative fault rendered the precedent at issue in the case an abandoned doctrine).

27. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting); *Herrera*, 73 P.3d at 181; Keltner v. Washington County, 800 P.2d 752, 754 (Or. 1990) (citing G.L. v. Kaiser Found. Hosps. Inc., 757 P.2d 1347, 1349 (Or. 1988)).

28. *See, e.g.*, *Casey*, 505 U.S. at 854–55 (providing that another consideration is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation" (citing United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924))).

29. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that neutral principles should be applied where text, history, and precedent do not give definitive answers).

30. The Supreme Court has stated that it is less willing to overrule cases interpreting statutes and more willing to overrule cases interpreting the Constitution. *See Khan*, 522 U.S. at 20 (citing Illinois Brick Co. v. Ill., 431 U.S. 720, 736 (1977). In constitutional cases "correction through legislative action is practically impossible." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing *Burnet*, 285 U.S. at 407 (1932) (Brandeis, J., dissenting)); *see also* Samsel v. Wheeler Transp. Servs., 789 P.2d 541, 554–55 (Kan. 1990).

> The distinction between decisions construing statutes and those construing the constitution is that if the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter, or modify the statute. The constitution, on the other hand, is organic and intended to be enduring until changing conditions of society demand more stringent or less restrictive regulations. If a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote.

Samsel, 789 P.2d at 554–55.

"reception statutes."[31] Reception statutes, now an arcane part of legal history, "received" the common law of England at the time each colony became a state.[32] The state then delegated to courts the power to develop that common law through the reason and experience of the judiciary.[33] Finally, the legislature reserved the power to retrieve lawmaking in the area of tort law, as well as many other areas of the common law.[34] For the most part, however, state legislatures did not exercise their power to retrieve this area of the law, rather they left the development of the law of torts to judges.[35]

This distinction in a judge's role in developing tort law means that judges have more flexibility, and, one might argue, more responsibility, to develop the law through the judicial decision-making process.[36] In doing so, as William Blackstone wrote in the eighteenth century, most often, "judges do not pretend to make a new law, but to vindicate the old one from misrepresentation."[37] This adherence to the

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31. *See* Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 363 (1983) (recognizing that "reception statutes were the mechanism for transferring the common law of England to the new United States").

32. *See* VICTOR E. SCHWARTZ, MARK A. BEHRENS & MARK D. TAYLOR, WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES? app.c (1999) (listing state reception statutes).

33. *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 649 (1987).

34. *See* 5 ILL. COMP. STAT. ANN. 50/1 (West 2005) (establishing that the Illinois General Assembly could repeal any part of the English common law); *see also* City of Sterling v. Speroni, 84 N.E.2d 667, 671 (Ill. App. Ct. 1949) (citing Miller v. Pennington, 75 N.E. 919, 920 (Ill. 1905)) (noting that the common law is in force until repealed by statute).

35. An early example of states exercising this power is the enactment of "dram shop acts" by state legislatures in response to what was viewed as an overly harsh common law rule that precluded tort actions against a seller of intoxicating liquor to a person who became voluntarily intoxicated and, as a consequence, injured the person or property of another. *See* Craig v. Driscoll, 813 A.2d 1003, 1011–12 (Conn. 2003) (discussing the history of the dram shop act in Connecticut). Several state legislatures have also adopted a form of strict liability for injuries caused by dog bites where common law required a plaintiff to show that the owner had knowledge of the animal's dangerous propensity. *See* Borns *ex rel.* Gannon v. Voss, 70 P.3d 262, 272 (Wyo. 2003) (declining to eliminate the scienter element of a strict liability action by common law ruling but noting that states that have adopted pure strict liability in dog bite cases have done so "by statute, and not by court decision"). In recent years, state legislatures have retrieved their rights to make law in many areas through tort reform, but most tort reform has been limited to specific problem areas. No state has adopted a comprehensive "tort code" as they did in contract law with the adoption of the Uniform Sales Act in the late 1800s, and later, the Uniform Commercial Code. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 909 (2001).

36. For example, the Supreme Court recognized that it has more freely overturned precedent on procedural and evidentiary issues than it has in cases involving property and contract rights, where reliance interests are more pronounced. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) (overturning two cases that created a per se rule barring the use of victim impact evidence); *see also infra* notes 280–83 and accompanying text (suggesting that courts have accorded too little significance to reliance interests in overruling tort law precedent).

37. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 70 (photo. reprint 1979) (1766), *quoted in* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 71 (2006).

underlying precepts of tort law requires the prudent judge to adhere to Blackstone's tenet "that precedents and rules must be followed, unless flatly absurd or unjust."[38] As this passage indicates, stare decisis is not the destination; it is the means of serving the underlying tort law values.

Most judges have used their power to develop common law in a conservative and thoughtful manner. They modify tort law only when necessary to meet changing times. They also craft rulings that provide slow and incremental change, with "gradual and successive alterations."[39] This way, both potential plaintiffs and defendants have adequate notice of the changes. This approach also reflects the inherent recognition that "future conscientious decisionmakers will treat [a court's] decision as precedent, a realization that will constrain the range of possible decisions about the case at hand."[40] Common law torts, as Justice George Wheeler of the Connecticut Supreme Court of Errors keenly understood, relies on this smooth transition of the law from generation to generation:

> That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life.[41]

Oliver Wendell Holmes has expounded on the importance of judges to understand their place in the time continuum of the common law:

> [I]f we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because

38. *Id.*

39. Sellers, *supra* note 37, at 71–72 (citing James Wilson, Lecture of the Common Law, *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Bird Wilson ed., 1804), *reprinted in* 1 THE WORKS OF JAMES WILSON 353 (Robert Green McCloskey ed., 1967)).

40. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1987).

41. Dwy v. Conn. Co., 92 A. 883, 891 (Conn. 1915) (Wheeler, J., concurring), *superseded by statute*, CONN. GEN. STAT. ANN. § 52-572e (West 2005).

> without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. [42]

C. *Initiating a Review of Tort Law: Most Judges Wait to Be Asked*

Experience has shown that judges have broken from stare decisis more often in the direction of expanding tort liability than in a manner that is likely to reduce liability or damages. Since the publication of the *Restatement of Torts* in the 1930s,[43] among the most significant developments in tort law have been the development of strict products liability law,[44] expansion of causes of action and damages related to emotional injuries,[45] elimination of contributory negligence and assumption of risk as complete bars to recovery in favor of fair apportionment of fault between the parties,[46] reduction in defenses and immunities that alleged tortfeasors could raise,[47] and expansion of the availability and frequency of punitive damage awards.[48]

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42. Oliver Wendell Holmes, *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 110 HARV. L. REV. 991, 1001 (1997); *see also* Marshall v. Moseley, 21 N.Y. 280, 292 (1860) ("The common law, we know, is not a stiff and inflexible system, immutable, like the laws of the Medes and Persians; but, its distinguishing characteristic is, that it is pliable, accommodating itself to the circumstances of society; and this characteristic is in truth as much a part of the law as any of its direct and positive maxims. The judges, therefore, are not obliged, before they can pronounce a rule obsolete, to wait for the intervention of the legislature. When the reason for the rule ceases, they have the right to renounce it.").

43. RESTATEMENT OF TORTS (1938).

44. *See infra* notes 203–17 and accompanying text.

45. *See infra* notes 218–28 and accompanying text.

46. *See infra* notes 54–68 and accompanying text.

47. *See infra* notes 229–50 and accompanying text.

48. *See* Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1006–08 (1999) [hereinafter Schwartz et al., *Reining In Punitive Damages*]; *infra* notes 251–58 and accompanying text.

Some legal observers have concluded that this overall trend toward expanding liability suggests that judges are pro-plaintiff.[49] This Article suggests that other dynamics may be at play. Most judges strive for impartiality and neutrality; generally they do not change the law absent a motion or appeal making such a request. The fact of the matter is that in modern tort litigation, plaintiffs' lawyers are more likely than defense lawyers to ask for a departure from stare decisis. The nature of plaintiffs' work requires attorneys to think creatively and aggressively in developing the theory of a case and drafting a complaint. Plaintiffs' lawyers also have great leeway in determining trial strategy. They generally do not have extensive discussions with lay clients about such initiatives, and they continue to handle the case throughout the appeals process.

By contrast, defense counsel are in the position of defending against specific charges and are not often in the mind-set of trying to change the underlying law. Should local trial counsel request such a change, they must carefully consult with national counsel and corporate clients, who often are highly skilled lawyers. Corporate defendants' lawyers tend to be risk averse and must keep a keen eye on ensuring legal costs are modest. They generally make their decisions about cost based on the probability of success and how seeking such a change would impact the rest of their docket. Further, different attorneys are likely to handle an appeal of the issue, giving less incentive for trial counsel to ask for reforms in the first place.

There is evidence that this cultural reluctance of corporate counsel and their defense lawyers to seek modifications in the law may be changing.[50] As that metamorphosis occurs, judges will have more frequent opportunity to reflect on consistent, neutral principles for whether and when to abandon precedent and not follow stare decisis, regardless of which party is seeking to modify the common law.

III. NEUTRAL PRINCIPLES OF STARE DECISIS IN TORT LAW

As the introductory sections of this Article have demonstrated, courts and scholars have widely recognized that when the factual or legal basis for a law has been substantially altered so as to render its underlying public policy obsolete, the law itself should change. This sentiment was expressed well by the learned Justice

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49. *See, e.g.*, John S. Baker, Jr., *Respecting a State's Tort Law, While Confining Its Reach to That State*, 31 SETON HALL L. REV. 698, 700 (2001) ("The causes of these problems, according to the 'reformers,' are pro-plaintiff state laws, judges, and injuries.").

50. *See, e.g.*, Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21 (2005) [hereinafter *Moving Toward the Fully Informed Jury*] (advocating a departure from current rules in order to allow juries to hear evidence about a plaintiff's role in receiving her injury or the sources of other compensation she may receive); VICTOR E. SCHWARTZ, STEVEN B. HANTLER & LEAH LORBER, HOW DEFENSE COUNSEL CAN CHANGE THE COMMON LAW OF TORTS: MOVING TOWARD THE FULLY INFORMED JURY (2006), http://www.AmericanJusticePartnership.org [hereinafter PRACTICE GUIDE] (follow "Law Journal Articles" hyperlink to "Download Practice Guide") (giving practical advice to defense counsel on shaping their cases to advance change in tort law).

Benjamin Cardozo in saying that when "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day," the law must conform to what "the needs of life in a developing civilization require them to be."[51] When courts undertake such an assessment, as Roscoe Pound, the well-respected former dean of Harvard Law School, has said, they "must seek principles of change no less than principles of stability."[52] This Part explores ten neutral principles of stare decisis in the common law that affect tort outcomes.

The first seven are principles of change:

Principle 1: A significant shift in the legal foundation underlying a rule may warrant a departure from stare decisis;

Principle 2: A tort law rule that is no longer compatible with the realities of modern society may need to shift to meet changing times;

Principle 3: Changes in the nature of modern tort litigation may require alteration of a tort law rule;

Principle 4: Advances in science or technology may require extending or invalidating an earlier tort law doctrine;

Principle 5: Previous decisions that have so chipped away at a tort law rule to render it superfluous may support abandonment of the rule in its entirety;

Principle 6: Unintended consequences of previous departures from precedent may require revisiting and correcting earlier rulings;

Principle 7: A preference for uniformity and consistency in tort law may favor abandoning tort law doctrines that persist in some jurisdictions, despite their near universal abandonment in sister states.

The final three are principles of stability:

Principle 8: Individuals, nonprofit organizations, and businesses may significantly rely on a tort law rule in structuring their affairs and deciding where and how to do business;

Principle 9: Prudential concerns may favor awaiting legislative intervention where the court finds that policymakers are better suited to alter or replace a tort law rule;

Principle 10: Departures from precedent should be incremental and must respect fundamental principles of tort law.

These ten principles can apply to requests from both plaintiffs and defendants. They are factors for a court to consider; they are nonexclusive and are not a mathematical formula. A particularly strong basis under a single principle or a

51. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053, (N.Y. 1916).
52. POUND, *supra* note 1, at 1.

combination of multiple principles may support a departure from precedent. Additionally, the final three principles should be accorded heavy weight given the importance of predictability, consistency, and reliability in tort law. They reflect the judiciary's historic commitment to gradual and incremental change. Decisions that abandon this incremental approach can adversely affect the nation's civil justice system, as well as those who seek to abide by its rules.

Over the past century, the most successful departures from stare decisis have been guided by these core principles of change and stability. As the following discussion shows, in those cases courts tweaked the law to the minimal extent possible and only when necessary to adhere to the larger ideals of the tort system. They often distinguished their cases from precedent and were extremely wary of overturning a line of cases.[53] They also kept their decisions as narrow as possible to insure the decision only affected a specific, stated public policy goal and to minimize any unintended negative consequences.

A. Principles of Change

1. A Significant Shift in the Legal Foundation Underlying a Tort Law Rule May Warrant a Departure from Stare Decisis

The first, and probably the most obvious, reason for breaking with precedent is when the foundation for the principle of law upon which the precedent is based no longer exists or has significantly changed. Often, the public policy basis underlying the precedent is no longer viable. When this happens, the doctrine or rule hangs like an ornament without a Christmas tree. When the Christmas tree is removed, the ornament falls.

One of the more prevalent examples of this principle is the impact on defenses and damage assessments of the near-universal shift from contributory negligence to comparative fault.[54] Until the past few decades, the contributory negligence rule provided that a person who contributed to his or her own injury through negligence to any degree was completely barred from recovery.[55] This "all or nothing" rule often created results that a court or jury regarded as unjust, depriving a plaintiff who was slightly at fault of all recovery and granting tortfeasors a windfall defense.

As a result, courts created a number of judicial devices to ameliorate the harsh effects of the rule of contributory negligence.[56] These devices include placing the burden of pleading and proving contributory negligence on the defendant;[57] leaving

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53. *See* Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41, 89 (2004).

54. As of 2001, all but four states and the District of Columbia have adopted some form of comparative negligence. *See* VICTOR E. SCHWARTZ WITH EVELYN F. ROWE, COMPARATIVE NEGLIGENCE 29 (4th ed. 2002 & Supp. 2003) [hereinafter COMPARATIVE NEGLIGENCE].

55. *Id.* at 5.

56. *Id.* at 41–55.

57. *See, e.g.*, Brown v. Piggly-Wiggly Stores, 454 So. 2d 1370, 1372 (Ala. 1984) (noting that the rule that a plaintiff who has proximately caused any part of his own injury many not recover "applies only where contributory negligence has been raised as an affirmative defense" and outlining the

the question of contributory negligence to the jury;[58] requiring a plaintiff's negligence to be a substantial factor in bringing about the result;[59] limiting the scope of proximate cause for plaintiff's negligence;[60] emphasizing "assumption of the risk" as a defense to liability;[61] and applying the "last clear chance" doctrine to place responsibility on the defendant in cases where the defendant had the opportunity to avoid the accident after the opportunity was no longer available to the plaintiff.[62]

By the 1970s, many states, some through judicial decision but most through statute, abandoned the harsh doctrine of contributory negligence in favor of comparative fault.[63] Comparative fault does not bar the plaintiff from recovering if

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defendant's burden of proof).

58. *See, e.g.*, Lazar v. Cleveland Elec. Illum. Co., 331 N.E.2d 424 (Ohio 1975) (noting that findings of contributory negligence are "uniquely tailored to the jury function"); Urban v. Wait's Supermarket, Inc., 294 N.W.2d 793, 796 (S.D. 1980) ("Ordinarily questions of negligence and contributory negligence are for the jury.").

59. *See, e.g.*, Bahm v. Pittsburgh & Lake Erie Rd. Co., 217 N.E.2d 217, 221 (Ohio 1966) ("[F]or contributory negligence to defeat the claim of the plaintiff, there must be not only negligent conduct by the plaintiff but also a direct and proximate causal relationship between the negligent act and the injury plaintiff received.").

60. *See, e.g.*, Furukawa v. Yoshio Ogawa, 236 F.2d 272, 274 (9th Cir. 1956) (applying California law to find that plaintiff was contributorily negligent in falling, but not in falling upon a hook); Smithwick v. Hall & Upson Co., 21 A. 924, 925 (Conn. 1890) (finding that plaintiff was negligent as to the danger of slipping off an unguarded icy ledge, but not as to wall collapsing onto him).

61. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (1998) (stating that due to the harsh effects of the contributory negligence rule, the American Law Institute in its RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) "altered the general tort defenses by narrowing the applicability of contributory negligence and emphasizing assumption of risk as the primary defense").

62. See Belton v. Wash. Metro. Area Transit Auth., 20 F.3d 1197, 1198–1201 (D.C. Cir. 1994) (discussing last clear chance doctrine where plaintiff, "outfitted in a Batman cape, and roaming the streets of Georgetown and taunting motorists," slid under a bus).

63. *See* COMPARATIVE NEGLIGENCE, *supra* note 54, at 2–3. In fact, the abandonment of contributory negligence in favor of comparative fault provides an example of a basis for overruling precedent. In 1992, when the Tennessee Supreme Court adopted comparative fault, it stated:

> [W]e conclude that it is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault. Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants recompense for their damages.

McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992). The *McIntyre* court also reaffirmed its commitment to stare decisis as a flexible policy, finding that "[w]hile '[c]onfidence in our courts is to a great extent dependent on the uniformity and consistency engendered by allegiance to *stare decisis*, . . . mindless obedience to this precept can confound the truth and foster an attitude of contempt.'" *Id.* (quoting Hanover v. Ruch, 809 S.W.2d 893, 898 (Tenn. 1991)). The *McIntyre* court took pains to adhere to the general guideline that departing from stare decisis requires strong arguments and justification. Fifteen years earlier, when first asked to adopt comparative fault, the court declined to do so "unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by advocacy that the ends of justice will be served by adopting the rule of comparative negligence." Street v. Calvert, 541 S.W.2d 576, 586 (Tenn. 1976). The court's ruling in *McIntyre* came "[a]fter exhaustive deliberation that was facilitated by extensive briefing and argument by the parties, amicus curiae, and Tennessee's scholastic community." *McIntyre*, 833 S.W.2d

he and the defendant shared responsibility for the injury; it reduces recovery by comparing the plaintiff's fault with that of the defendant.[64] The jury must consider "*all* evidence relevant to responsibility."[65]

It stands to reason that all or some of the devices used to ameliorate that harsh defense were no longer needed in the law. Indeed, many states properly rejected the last clear chance doctrine as incompatible with the principle of liability in proportion to fault.[66] As a result, a jury could apportion damages based on the fact that a person was drunk when he collapsed in the street even if a motorist could have avoided hitting him but accidentally hit the accelerator instead of the brake.[67] Similarly, courts have changed assumption of risk from a complete defense to a factor in assessing proportionate fault. A defendant's liability is reduced to the extent that a plaintiff assumed the risk at issue in the case.[68]

Yet, other rules that were in place to soften the now discarded contributory negligence defense still persist, particularly in regard to automobile and motorcycle accidents. For example, most states do not allow juries to consider that a party to an accident lacked a valid driver's license, even when the lack of license and proper training is highly relevant to a claim or defense.[69] Violation of a statute that protects the public could have been considered negligence per se under the laws at the time. In a well-known case, Judge Cardozo declared that traveling after dark in a buggy without the required lights is not only evidence of negligence, "[i]t is negligence in itself" because "[l]ights are intended for the guidance and protection of other travelers on the highway."[70] This exclusionary rule was intended to limit the unfairness associated with contributory negligence when a plaintiff drove with all due care, but had a lapse in his or her license.

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at 56.

64. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 (2000).

65. *Id.* § 8 cmt. a. A fact-finder "does not assign percentages of fault, negligence, or causation." *Id.* Rather, the fact-finder assigns shares of responsibility based on all risk-creating conduct that has a causal connection to the harm. *See id.*

66. *See* COMPARATIVE NEGLIGENCE, *supra* note 54, at 159 (citing authority showing that courts in Alaska, California, Florida, Illinois, Maine, Missouri, Nevada, Texas, Washington, Wisconsin, and Wyoming have adopted comparative negligence and abolished the last clear chance doctrine and Connecticut and Oregon did so by statute).

67. *See id.* at 154 (citing WILLIAM PROSSER & JOHN W. WADE, CASES AND MATERIALS ON TORTS 517 (5th ed. 1971)).

68. *Id.* at 202–07 (examining cases in twelve states in which courts "merged implied assumption of risk into contributory negligence even though the legislatures gave no specific direction to do so"). Courts made several other adjustments in response to the change from contributory negligence to comparative fault. Some allowed an instruction on res ipsa loquitor even if the plaintiff was negligent, eliminated the presumption that the moving driver in a rear-end collision was at fault, abandoned the rarely invoked "sudden emergency" doctrine that could excuse liability, or abandoned a rule that barred recovery when a plaintiff was injured by an obvious or patent defect in a product regardless of whether the plaintiff subjectively knew of it. *See id.* at 51–53, 250–51.

69. *See generally* R. P. Davis, Annotation, *Lack of Proper Automobile Registration or Operator's License as Evidence of Operator's Negligence*, 29 A.L.R. 2D 963, 970–76 (1953) (citing cases demonstrating that this exclusionary rule was adopted in response to contributory negligence in most jurisdictions in the early to mid-twentieth century).

70. Martin v. Herzog, 126 N.E. 814, 815 (N.Y.1920).

With adoption of comparative fault and dissipation of this negligence per se doctrine, it no longer makes sense to broadly exclude important information about the status of a person's license. This information may be quite relevant to the case, such as when the plaintiff's competence to drive or inexperience is relevant to show how fault should be apportioned.[71] A plaintiff who never pursued a license may have some degree of responsibility for an accident due to the lack of training and drivers' education required in obtaining a license.[72] Yet, many courts deny such information from the jury because the courts have not reevaluated this rule; they continue to mechanically cite pre-comparative fault case law with no analysis of this significant change in the law.[73]

Another survivor of the contributory negligence regime in the automobile arena is the rule against permitting a fact-finder to consider a party's failure to wear a seat belt.[74] First, it could have been argued decades ago that a reasonably prudent person may choose not to use a seat belt. Second, courts were understandably hesitant to allow a jury to deprive a plaintiff who was not wearing a seat belt of all recovery against the person who negligently caused the accident. The rule would grant the tortfeasor a "fortuitous windfall."[75] Although a handful of states have abandoned

71. The link between lack of licensure and the probability of involvement in a tragic accident is particularly strong in the case of motorcycle accidents. *See* UMESH SHANKAR & CHERIAN VARGHESE, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., RECENT TRENDS IN FATAL MOTORCYCLE CRASHES: AN UPDATE 32 (2006), http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2006/810606.pdf.

72. In some situations, the status of a party's driver's license may have no relevance to the facts of a case and may be properly excluded. For example, in a case where a highly experienced driver is involved in an accident and his license expired merely because he neglected to timely pay the renewal fee, such evidence would have no bearing on the driver's comparative fault in an accident. Such a technicality also occurs where a party to an accident has a valid driver's license, but fails to physically possess the license at the time of the accident. *See, e.g.*, Balterman v. Flores, 103 N.Y.S.2d 815, 816 (N.Y. App. Term 1951) ("The failure to carry a driver's license by a licensed driver at the time of the happening of an accident does not constitute contributory negligence as a matter of law."). A court might also properly exclude evidence of the lack of a driver's license where the driver's competence is not at issue in the case. *See, e.g.*, Almonte v. Marsha Operating Corp., 696 N.Y.S.2d 484, 484–85 (N.Y. App. Div. 1999) (finding no negligence when an unlicensed teenage driver whose car was stationary at a red light was hit from behind by a speeding car because "the absence or possession of a driver's license relates only to the authority for operating a vehicle, and not to its manner of operation"); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 cmt. b, illus. 1 (2000) (noting that a fact-finder would not consider a driver's intoxication in allocating comparative responsibility where the driver is rear-ended at a red light and the same accident would have occurred had he been sober).

73. *See Almonte*, 696 N.Y.S.2d at 485.

74. *See* Christopher Hall, Annotation, *Nonuse of Seat belt as Reducing Amount of Damages Recoverable*, 62 A.L.R. 5TH 537, § 3 (1998).

75. *See, e.g.*, Fischer v. Moore, 517 P.2d 458, 459–60 (Colo. 1973) (holding that the plaintiff's failure to wear a seat belt in a rear-end automobile accident should not prevent recovery against a tortfeasor whose negligence caused injury). Other courts declined to admit such evidence due to the lack of a convincing showing of the effectiveness of seat belts at the time. *See infra* notes 145–151 and accompanying text.

this exclusionary rule, roughly two-thirds of the states continue to bar evidence of the plaintiff's failure to wear a seat belt despite adoption of comparative fault.[76]

The license and seat belt laws offer two examples that illustrate the inequities that can result when courts do not make downstream corrections in the law. Their continued existence is incompatible with the concept of comparative negligence.

2. *A Tort Law Rule That Is No Longer Compatible With the Realities of Modern Society Must Shift to Meet Changing Times*

In the earliest days of the American colonies, territories such as North Carolina, recognized that the common law should be followed "so far as they are compatible with our Way of Living and Trade."[77] Justice Cardozo has similarly explained that "[i]f judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."[78] Wise judges have followed this advice. They have departed from tort law precedent when that precedent has become outdated because of substantial changes in the way Americans live and do business.

The law of trespass, one of the long-standing principles of tort law, provides a vivid example of how tort law must change when it is fundamentally incompatible with modern advances. Under the tort of trespass, a person is liable if he "intentionally enters or causes direct and tangible entry upon 'another's land' unless the entry is privileged or consented to by the owner."[79] Traditionally, an individual's possessory interest in land includes the air space above it as well as the space below ground.[80] In fact, courts once held that a person owned the airspace rights "up to the heavens."[81] Consequently, extending one's arm over a property line[82] or a utility line above it has constituted a trespass.[83]

With the advent of air travel, courts needed to adjust the common law of trespass. In the 1930s, some courts applied a flexible or practical approach to air travel, stating that "[t]he owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."[84] Under this theory, "traversing the airspace above [someone's] land is not, of itself,

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76. In some states this is a statutory rule, but in others it is a common law doctrine that can be changed by judges. *See Moving Toward the Fully Informed Jury*, *supra* note 50, at 32 n.50.

77. An Act for the More Effectual Observing of the Queen's Peace, and Establishing a Good and Lasting Foundation of Government in North Carolina, ch.XXXI, § V (1715), *reprinted in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1669–1751, at 39 (John D. Cushing ed., 1978).

78. *See* CARDOZO, *supra* note 11, at 152.

79. DAN B. DOBBS, THE LAW OF TORTS § 50 (2000).

80. RESTATEMENT OF TORTS § 159 (1934).

81. *See* Sher v. Leiderman, 226 Cal. Rptr. 698, 702 (Cal. Ct. App. 1986) (discussing early courts' views of a landowner's possesory rights in the context of light and air easements).

82. Kenney v. Barna, 341 N.W.2d 901, 905 (Neb. 1983) (citing Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902); RESTATEMENT (SECOND) OF TORTS § 159, illus. 3 to subsec. 1 (1965)).

83. *See, e.g.*, United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1414 (9th Cir. 1984) (reversing a judgment that a power line did not trespass across public land).

84. Hinman v. Pacific Air Transp., 84 F.2d 755, 758 (9th Cir. 1936).

a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to [the landowner's] possession."[85] Other courts tried to assess a measurement for flights over property, stating that there would be no liability for planes flying over property at an altitude above 500 feet.[86] While no firm rule for trespass of aircrafts has emerged even today, all courts have allowed for reasonable overflights.[87]

The same concept can be applied to the apportionment of damages in tort cases. In recent years, there has been a fundamental shift in the types of benefits people receive as compensation for their damages. Specifically, under traditional law, the collateral source rule does not allow the fact-finder to consider that a plaintiff has already received partial or full compensation from sources other than the defendant for the injury at issue in the lawsuit.[88] The rule came about in the mid-nineteenth century[89] when any recovery that the plaintiff obtained from sources other than the tortfeasor were most likely due to the plaintiff's own foresight in obtaining insurance or taking other action to mitigate the costs of the injury.[90] While the purpose of tort law is to make a person whole, not more than whole, courts, including the California Supreme Court, allowed this exception to persist under the premise "that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence."[91] Further, courts believed that a "'wrongdoer' should not benefit from" the fact that the plaintiff received compensation from another party,[92] and juries should not be prejudiced by the fact that a plaintiff received compensation from other sources.[93]

The very distinguished professor, John Fleming, has called the modern application of the collateral source rule one of "the oddities of American" tort law.[94] As a practical matter, when juries are not aware of collateral sources, they are likely to award plaintiffs the entire amount of the medical expenses, not just the portion the plaintiff paid out of pocket.[95] Such windfall recoveries may not be appropriate,

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85. *Id.* at 758–59.

86. *See, e.g.*, Smith v. New England Aircraft Co., 170 N.E. 385, 391 (Mass. 1930).

87. *See generally* Colin Cahoon, Comment, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 173–77 (1990) (summarizing various legal theories on trespass).

88. *See* RESTATEMENT (SECOND) OF TORTS § 920A (1979); John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

89. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 156 (1854).

90. JEFFREY O'CONNELL & ROGER C. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 114 (1975) ("[T]he wrongdoer ought not to benefit—in having what he owes diminished—by the fact that the victim was prudent enough to have other sources of compensation, which he was probably paying for.").

91. Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970).

92. *See* Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 571 (1986) [hereinafter Schwartz, *Tort Law Reform*] (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.22, at 1344–45 (1956)); Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980).

93. *See Moving Toward the Fully Informed Judiciary*, *supra* note 50, at 24.

94. Fleming, *supra* note 88, at 1478.

95. *Moving Toward the Informed Jury*, *supra* note 50, at 24.

particularly when a plaintiff did not purchase the collateral sources at issue.[96] In today's society, government and other defendants may pay a significant portion of a plaintiff's damages; an individual may receive compensation for the injury through administrative agency action or tort law actions, or may receive restitution through criminal law.[97] For example, payments from government benefits in the post-New Deal era, such as workers' compensation, did not result from any foresight on the part of the plaintiff.[98] The premises behind a blanket collateral source rule, therefore, are either not applicable or are far less persuasive.[99]

Based on this reasoning, the Florida Supreme Court decided to break with the outdated precedent and deny the collateral source rule in certain situations:

> In a situation in which the injured party incurs no expense, obligation, or liability, we see no justification for applying the [collateral source] rule. We refuse to join those courts which,

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96. There has been substantial criticism of the collateral source rule. *See, e.g.*, 2 AM. LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 161–82 (Reporters' Study 1991) [hereinafter 2 ENTERPRISE RESPONSIBILITY] (recommending abolition of the collateral source rule, except with respect to life insurance); Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 695 (1962) (questioning the benefits of the collateral source rule); *see also* Williston v. Ard, 611 So. 2d 274, 278 (Ala. 1992) (finding that services provided by the state are subject to the collateral source rule). *But see* Fla. Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515 (Fla. 1984) (admitting evidence of "[g]overnmental or charitable benefits available to all citizens"); Washington v. Barnes Hosp., 897 S.W.2d 611, 621 (Mo. 1995) (en banc) (admitting evidence of the availability of a free public education).

97. *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 948–60 (2001).

98. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *Toppling the House of Cards That Flowed From an Unsound Supreme Court Decision: End Inadmissibility of Railroad Disability Benefits in FELA Cases*, 30 TRANSP. L.J. 105, 110–114 (2003) [hereinafter Schwartz & Silverman, *Toppling the House of Cards*] (finding that railroad companies pay the greatest share of the money used to finance railroad retirement disability benefits, yet courts do not permit benefits paid to the plaintiff to be deducted from the defendant's liability, or even considered by the jury in computing an award); *see also* Laird v. Ill. Cent. Gulf R.R. Co., 566 N.E.2d 944, 955–56 (Ill. App. Ct. 1991) (recognizing that railroad companies contribute "approximately two-thirds of the annual total contributions" to the Railroad Retirement Act disability fund, but courts continue to apply the collateral source rule to preclude evidence of the plaintiff's receipt of such compensation).

99. In addition to the discussion in this Article, there is no longer any need to use the collateral source rule as a backdoor means to punish wrongdoers in light of the vast expansion of the availability of punitive damages between the 1960s and 1980s. Schwartz et al., *Reigning in Punitive Damages*, *supra* note 48, at 1008–10 (describing the modern trend in punitive damage awards). Awards for the purpose of punishment should fall within the constitutional framework established by the Supreme Court. *See e.g.*, State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433–34 (2001); BMW of N. Am. v. Gore, 517 U.S. 559, 585–86 (1996); Honda Motor Co., v. Oberg, 512 U.S. 415, 434–35 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 14 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc., 492 U.S. 257, 275–80 (1989). In fact, using the collateral source rule as punishment is not persuasive because the rule is applied regardless of the degree of wrongdoing on the part of the defendant, for example when the defendant is strictly liable. *See generally* Schwartz, *Tort Law Reform*, *supra* note 92, at 573 (proposing the abolition of the collateral source rule when strict liability exists).

> without consideration of the facts of each case, blindly adhere to "the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant."[100]

Similarly, in asbestos litigation, one of the most vexing and expansive mass torts facing modern day courts, a single plaintiff typically names scores of defendants and receives payments from bankruptcy trusts, settlements from non-bankrupt defendants, and benefits from government and worker programs.[101] As a North Carolina court wrote in breaking from precedent to offset verdicts by these amounts,

> [T]he weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage, should be held for a credit on the *total recovery* in any action for the *same injury or damage*.[102]

Juries are being trusted with rationing the remaining asbestos litigation dollars while still preventing plaintiffs from bearing the costs for their own medical bills and other enumerated costs associated with their claimed injuries.[103]

Nevertheless, some courts continue to strictly apply the collateral source rule to bar the jury from considering outside payments to offset a defendant's liability.[104] While times have changed, these courts have adhered rigorously to precedent and outdated reasoning.

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100. Fla. Physician's Ins. Reciprocal, 452 So. 2d at 516 (Fla. 1984) (quoting Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 742 (1964)).

101. *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 966, 1003–06 (1993).

102. Schenk v. HNA Holdings, Inc., 613 S.E.2d 503, 509 (N.C. Ct. App. 2005) (internal quotation marks omitted) (quoting Holland v. Utilities Co., 180 S.E. 592, 593–94 (N.C. 1935)).

103. Informing the jury in this manner recognizes jurors' fundamental role as "the judge of the facts." Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 523, 524 (1991) ("'[T]he determination of damages is traditionally a jury function. . . . The jury must have much discretion to fix the damages deemed proper to fairly compensate the plaintiff.'" (quoting Whiteley v. OKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983))).

104. *See* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 543 n.6 (11th ed. 2005) [hereinafter PROSSER, WADE & SCHWARTZ 11th ed.] (noting that over half of the states have modified the collateral source rule by statute; yet, some of these statutes have been found unconstitutional); Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 61 & 82–83 n.39 (2005) (identifying numerous state legislative initiatives abolishing or scaling back the collateral source rule).

3. *Changes in the Nature of Modern Tort Litigation May Require Alteration of a Tort Law Rule*

Changes in the nature of litigation may also warrant a deviation from stare decisis. Litigation today has changed in many ways from just a few decades ago. For example, until the 1970s, tort lawsuits were typically between one or two plaintiffs and one or two defendants. With the advent of mass tort litigation, that situation changed dramatically.[105] In these situations, as in asbestos litigation referenced above, it has become common for plaintiffs to name many defendants in a single lawsuit and for courts to consolidate claims of significant numbers of plaintiffs.[106]

a. Effect of Joint and Several Liability in Mass Torts Litigation

Joint and several liability holds a defendant responsible for an entire harm, even though a jury has determined that it was only partially responsible, even only 1%, for that harm.[107] The basis of the theory is that between an injured party and a partially responsible defendant, public policy should place the entire economic burden of the harm on the partially responsible party.[108] Traditionally, when lawsuits involved a limited number of defendants, public policy may have favored requiring that a defendant who was substantially at fault bear the risk of covering the liability of a codefendant who was insolvent, unavailable, or otherwise immune from suit. In such cases, each defendant bore a significant share of responsibility. Today, when a dozen or more defendants are named in a single lawsuit, it is much more likely that some of them will have only a peripheral, even minor, connection to an injury. In such cases, even if a jury finds one or more defendants only 5% responsible, those minimally liable defendants can be saddled with paying 100% of the damages.

In most jurisdictions, juries do not know and are not informed of the effect of joint and several liability.[109] Instead, jurors are often led to believe that a peripheral "defendant will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder."[110] Such "'blindfold' rules,"[111] no matter how well-intended, may result in setting a "trap for the

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105. *See* Hensler & Peterson, *supra* note 101, at 967 (discussing this phenomenon with a comparison of asbestos litigation and automobile accident litigation).

106. *Id.* at 966.

107. *See* Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 204 (Ill. 1983).

108. *See* 2 ENTERPRISE RESPONSIBILITY, *supra* note 96, at 130–31.

109. *See* Julie K. Weaver, Comment, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 463 (1992).

110. *Id.* at 471.

111. *See generally* Jordan H. Leibman, Robert B. Bennett, Jr. & Richard Fetter, *The Effect of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L.J. 349, 350 (1998) (noting in jurisdictions that take the view that juries are exclusively fact-finding bodies, "blindfold" rules prevent juries from realizing the legal consequences of their decisions).

uninformed jury."[112] The unsuspecting jury does not realize that "[i]n reality, this deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault."[113]

Several state supreme courts have addressed this problem by departing from past practice and taking the incremental step of informing juries of the impact of joint and several liability on their decision-making.[114] These courts have found that it is "better to equip jurors with knowledge of the effect of their findings than to let them speculate in ignorance 'and thus subvert the whole judicial process.'"[115] A leading proponent of this rule is the Hawaii Supreme Court, which ruled in a drunk driving case, *Kaeo v. Davis*,[116] that "[a]n explanation of the operation of the doctrine of joint and several liability . . . 'may be necessary to enable the jury to make its findings on each issue.'"[117] Otherwise, jurors would be apt to speculate, possibly incorrectly, about the impact of their decisions: "it would be 'better for courts to be the vehicle by which the operation of the law is explained.'"[118] Informing the jurors about the effects of their decision in *Kaeo* made a demonstrated difference when the case was re-tried, as a party initially found to be 1% liable was determined to have no liability.[119]

In a recent asbestos case, San Francisco Superior Court Judge Stephen Allen Dombrink, in response to a defense motion, gave a simple and straightforward instruction to the jury on the effect of joint and several liability.[120] The judge advised the jury that, under California law, any finding of a proportionate share of liability for economic damages would result in the defendant being responsible for the full amount of economic damages.[121] Presumably Judge Dombrink had faith

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112. Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61, 64 (Idaho 1987) (quoting Seppi v. Betty, 579 P.2d 683, 690 (Idaho 1978)).

113. Weaver, *supra* note 109, at 471.

114. *See, e.g.*, Reese v. Werts Corp., 397 N.W.2d 1 (Iowa 1985) (holding that the trial court should have instructed the jury on the effects of its verdict on the plaintiff's recovery); Decelles v. State, 795 P.2d 419, 419–20 (Mont. 1990); Martel v. Mont. Power Co., 752 P.2d 140, 146 (Mont. 1988) ("[W]e think Montana juries can and should be trusted with the information about the consequences of their verdict."); Coryell v. Town of Pinedale, 745 P.2d 883, 885 (Wyo. 1987) (holding that statute required the court to "inform jurors of the consequences of" its verdict).

115. *Luna*, 743 P. 2d at 64 (quoting *Seppi*, 579 P.2d at 690).

116. 719 P.2d 387 (Haw. 1986).

117. *Id.* at 396 (quoting HAW. R. CIV. P. 49(a) (2006)).

118. *Id.* at 396 (quoting HENRY WOODS, COMPARATIVE FAULT § 18.2, at 367 (1978)); *see also* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2509 (2d ed. 1995) ("[T]here is always the danger that the jury will guess wrong about the law, and may shape its answers to the special verdicts, contrary to its actual beliefs, in a mistaken attempt to ensure the result it deems desirable.").

119. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 310 (1990) (citation omitted).

120. Transcript of Record at 26, Horr v. Allied Packing, No. RG-03-104401 (Cal. Super. Ct. Feb. 15, 2006).

121. *Id.*; *see also* Dentsply's Points and Authorities in Support of Proposed Jury Instruction on Share of Damages 1, Horr v. Allied Packing, No. RG-03-104401 (Cal. Super. Ct. Feb. 14, 2006) (proposing the following jury instruction: "If you find Dentsply liable for any percentage of fault, Denstply will be responsible to pay for its proportionate share of any non-economic damages you may award. With respect to economic damages, Dentsply will [be] responsible for the full amount of those

that the jurors were responsible enough to handle this knowledge.[122] Indeed, while joint and several liability was once the majority rule in the United States, most states have broken with this precedent because it leads to arbitrary liability awards, subverts the jury's intent and understanding in rendering awards, and violates a basic fairness principle that defendants should only have to pay for their fair share of a harm.[123] Where the rule still exists, courts should inform juries so the juries can adhere to the core principle of accurately apportioning liability.

b. Need for Closer Appellate Review of Pain and Suffering Awards Given Their Increasing Size and New Incentives for Abuse

Another change in the tort environment is the growing size, frequency, and variability of awards for pain and suffering.[124] Plaintiffs' lawyers have consistently developed new trial tactics that will help them increase the potential for large pain and suffering awards.[125] One of the newest tactics is to use punitive-damages style "fault" evidence to increase noneconomic damages, which are damages that are supposed to compensate a plaintiff and not punish a defendant.[126]

Pain and suffering damages are subject to abuse under this modern litigation tactic because "[c]ourts have usually been content to say that pain and suffering

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damages less a proportionate share of any settlements that may have been made by other defendants.")

122. *See* Transcript of Record, *supra* note 120; *see also* Dentsply's Points and Authorities in Support of Proposed Jury Instruction on Share of Damages, *supra* note 121, at 2 ("The proposed instruction will aid the jury in determining the proper amount of damages and making the proper allocation of the ratio of settlement percentages as between the economic and noneconomic damages."). The proliferation of asbestos-related bankruptcies means that the issue of joint liability may be an important factor in more cases. *See generally* Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 210 (2004) (commenting on the significant financial burden placed on solvent defendants in asbestos litigation as a result of the ever increasing number of bankrupt codefendants).

123. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 cmt. a (2000) ("The clear trend over the past several decades has been a move away from pure joint and several liability."). As of this writing, about forty states have either abolished or modified their joint and several liability rules. *See* Steven B. Hantler, Mark A. Behrens & Leah Lorber, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1148–50 (2005).

124. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 48, 64–65 (2002).

125. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1061–64 (2004) [hereinafter Schwartz & Silverman, *Hedonic Damages*] (discussing attempts to admit expert testimony on lost enjoyment of life to provide a scientific basis to support multimillion dollar awards); Martin V. Totaro, Note, *Modernizing the Critique of Per Diem Pain and Suffering Damages*, 92 VA. L. REV. 289, 289–90 (2006) (discussing the popular per diem method in which a plaintiff argues that pain and suffering can be quantified for a small time period—an hour or day—and then multiplies that amount for the remainder of the time the plaintiff will live with that pain, or his complete life expectancy, to arrive at a substantial award); Ari Kiev, *Conveying Psychological Pain and Suffering: Juror Empathy Is Key*, TRIAL, Oct. 1993, at 16 (recommending strategies for achieving large pain and suffering awards); Thomas J. Vesper & Richard Orr, *Make Time Palpable by Using Per Diem Arguments*, TRIAL, Oct. 2002, at 59, 59 (recommending use of the per diem method to boost awards).

126. *See* Schwartz & Silverman, *Hedonic Damages*, *supra* note 125, at 1054–55.

damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide."[127] Moreover, in most states, pain and suffering awards are reversed only if they "shock the conscience."[128] Consequently, plaintiffs' attorneys can attempt to inflame the passions and prejudices of the juries by what has been called "guilt evidence."[129] In those instances, the fundamental purpose of pain and suffering awards—to compensate the plaintiff—is upended.[130] The defendant is "punished," but the award is not subject to the extensive legal controls that help assure that "real" punitive damages awards do not cross the constitutional line or the limits that some states have put on punitive damages.[131] In recent years, pain and suffering damages have reached roughly half of total personal injury awards.[132] The amounts have become unpredictable for comparable injuries.[133] Because of the unpredictability of pain and suffering awards, plaintiffs with similar injuries receive vastly different awards, and defendants have virtually no notice of their potential liability; consequently, insurance premiums rise and fair settlements are difficult to reach.[134]

Under the guidelines set forth in this Article, courts should take incremental steps to assure that those who game the judicial system do not violate fundamental

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127. Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 912 (1989) (quoting DAN B. DOBBS, REMEDIES § 8.1, at 545 (1973)); *see also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985) ("Juries are left with nothing but their consciences to guide them.").

128. *See* PROSSER, WADE & SCHWARTZ 11th ed., *supra* note 104, at 538 n.21.

129. For a more in depth discussion of the increasing use of pain and suffering awards to circumvent standards applicable to punitive damages, see generally Schwartz & Lorber, *Twisting the Purpose*, *supra* note 124, at 60 and accompanying text.

130. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1401 (2004) ("Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law's rationality and predictability—two essential values of the rule of law.").

131. The Supreme Court has held that due process sets an outer limit beyond which punitive damages may not go. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 455–56 (1993) (stating in a plurality opinion that "grossly excessive" punitive damages awards violate due process); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (acknowledging that excessive punitive damages awards could violate the Due Process Clause of the Fourteenth Amendment). The Court has offered guideposts for lower courts to use in deciding whether a punitive damages award is unconstitutionally excessive. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (holding that punitive damages of $145 million were excessive and violated Due Process Clause of the Fourteenth Amendment); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 580, 583, 586 (1996) (outlining three guideposts and holding that punitive damage awards against BMW were grossly excessive).

132. *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 87 (2006); *see also* Neil Vidmar, Felicia Gross & Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 270 (1998) (noting an estimate by the American Medical Association that up to 80% of medical malpractice awards over $100,000 are for pain and suffering and another estimate that pain and suffering accounts for more than 50% of awards).

133. *See* Avraham, *supra* note 132, at 93–94.

134. *See id.* at 95–96.

principles of tort law. First, courts can instruct jurors that the law requires them to focus on the plaintiff's pain and suffering in determining noneconomic compensatory awards and not on alleged wrongdoing, misconduct, guilt, defendant's wealth, or any other evidence offered for the purpose of punishment.[135] Adopting this practice would be an evolution of the common law in light of modern developments in litigation and a recognition of the impropriety of mixing fault-based punitive damages and compensatory damage driven awards for pain and suffering.[136]

Second, judges can place more emphasis on comparing verdicts to prior awards in similar cases as an objective means of evaluating pain and suffering awards.[137] Information of this type was not available in the early development of the common law. The rationale for employing such an approach was succinctly stated by a New York appellate court:

> A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded. . . . [W]here a verdict is much above or much below the average, it is fair to infer, unless the case presents extraordinary features, that passion, partiality, prejudice, or some other improper motive has led the jury astray.[138]

Such verdicts could be considered in remittitur or judicial review of such awards and, according to some commentators, used as precedential value[139] with judges "formulat[ing] acceptable ranges for awards, taking into account possible factual

135. Schwartz & Lorber, *Twisting the Purpose*, *supra* note 124, at 68–69.

136. *Id.* at 68 (suggesting that judges should act as gatekeepers to limit evidence of wrongdoing presented to the jury to establish damages).

137. *See* David Baldus, John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1134–35, 1141–53 (1995). Based on their findings, the authors suggest that courts undertake a comparative review, which "has the potential to control excessive and inadequate general and punitive damages awards and to maintain a reasonable level of consistency among awards in similar cases." *Id.* at 1188.

138. Senko v. Fonda, 384 N.Y.S.2d 849, 851–52 (App. Div. 1976) (citations omitted).

139. *See* James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 178–79 (1990).

variations."[140] In addition, juries can be permitted to consider patterns of awards in comparable cases.[141]

Finally, trial courts can adopt a more rigorous post-verdict evaluation of excessiveness rather than undertake a cursory and totally subjective review of whether the pain and suffering award "shocks the conscience." Appellate courts can decide to review such awards de novo, the standard used for review of punitive damages, rather than applying an abuse of discretion standard. In 2004, Ohio enacted legislation to require courts to undergo this review,[142] but other courts need not wait for such a directive. They are fully empowered to undertake such a review within the confines of the common law, and they would be improving the law to reflect modern needs without unsettling the principles upon which people have relied.

Taking none of these actions would be violative of a judge's responsibility to assure fair and accurate litigation results.

4. *Advances in Science or Technology May Require Extending or Invalidating an Earlier Tort Law Doctrine*

Advances in science and technology can provide compelling reasons for courts to change common law rules in order to give effect to an underlying principle of tort law. For example, scientific learning may make certain types of evidence more reliable than previously considered.[143] Such evidence could help a court better assess fault and derive more accurate verdicts. Science also could facilitate the establishment of causation or detection of injury, thereby allowing some claims to move forward that previously would have been dismissed.[144] But science is not a magical wand with mystical powers; it is a double-edged sword. Judges must assure that only reliable science enters the courtroom, and that scientific advancements are only used to further tort law principles, not undermine them.

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140. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 323 (1989).

141. *See* 2 ENTERPRISE RESPONSIBILITY, *supra* note 96, at 201–02 (noting that, without being provided a basis for comparison, jurors are left with only their "enlightened conscience" to guide them when determing damages) .

142. *See* OHIO REV. CODE ANN. § 2315.19 (LexisNexis 2005) (establishing guidelines for courts in determining whether an award is excessive).

143. *See* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. (forthcoming 2007) (discussing the importance of the judge's gatekeeping function in "protect[ing] lay jury fact finders against unreliable scientific expert testimony" and the "inconsistenc[ies] in the application of expert testimony standards that have emerged in recent years").

144. See *infra* notes 158 to 167 and accompanying text for a discussion of the impact of science and technology on tort claims involving prenatal injuries.

a. Reliability of Evidence

An example of the type of evidentiary rules that have become outdated given scientific advancements is the exclusionary rule regarding seat belt use discussed above.[145] Although the seat belt rule was an ornament on the Christmas tree of rules used to modify the effect of contributory negligence, there was doubt as to the effectiveness of wearing a seat belt to prevent or reduce injury. The seat belt was "a relatively new safety device,"[146] and, as some courts pointed out, many cars were not outfitted with seat belts.[147]

Much has changed since then. "While at one time it was not incorrect to deem seat belt effectiveness 'at best speculative,' such a characterization is no longer supportable."[148] The development of technology and compelling safety statistics led some courts to abandon this exclusionary rule. One court expressly stated that its decision to break from this precedent reflected that public consensus had evolved since the rule was initiated: "'The social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence.'"[149] Indeed, now that science shows seat belts save lives, they are mandatory equipment in all cars, and many states require their use.[150] In addition, virtually no one declines to use a seat belt "in reliance" on old case law that deems non-use to be inadmissible in tort cases.[151]

As noted earlier, however, most states continue to exclude such evidence. The old cases which embraced that result should be overruled in accordance with this neutral principle of stare decisis.

b. Ability to Show Causation

In toxic tort litigation, scientific and medical issues related to causation are not cut-and-dried. In assessing the admissibility and weight accorded to experts' testimony, under both *Frye v. United States*[152] and *Daubert v. Merrell Dow*

145. See *supra* notes 74 to 76 and accompanying text for a discussion of the impact of comparative negligence on the seat belt rule.

146. Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. Super. Ct. 1967); *see also* Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867, 870 (W.D. Pa. 1975) (noting public hesitancy to wear seat belts due to fear or uncertainty about their effectiveness); McCord v. Green, 362 A.2d 720, 723 (D.C. 1976) (questioning the effectiveness and safety of seat belts); Hampton v. State Highway Comm'n, 498 P.2d 236, 249 (Kan. 1972) (citing the public's concerns about wearing seat belts); Miller v. Miller, 160 S.E.2d 65, 69 (N.C. 1968) (noting public uncertainty about the effectiveness and safety of seat belts).

147. *See Lipscomb*, 226 A.2d at 917–18.

148. Michelle R. Mangrum, Note, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968, 978 (1985) (quoting J. Murray Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 615 (1967)).

149. *See, e.g.*, *Miller*, 160 S.E.2d at 69 (quoting John W. Roethe, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 297 (1967)).

150. *See generally* Mangrum, *supra* note 148, at 975–79 (discussing the benefits of seat belt usage and state seat belt laws).

151. *See generally id.* at 980 (discussing why people choose not to wear seat belts).

152. 293 F. 1013 (D.C. Cir. 1923).

Pharmaceuticals, Inc.[153] courts should act as "gatekeepers" for determining "the reliability of particular scientific evidence" on which judicial decisions can be based.[154]

One scientific tool that many courts have begun to accept is the epidemiological study, which looks at patterns of diseases in the human population and determines the relevant risk of developing a condition as the result of being exposed to a particular substance.[155] Accordingly, epidemiologists help determine the likelihood that a disease, which can occur from several sources, can be linked to the allegations against a particular defendant. Over the past two decades, courts have stressed the significance of epidemiology in toxic torts cases.[156] Where consistent, significant, and clear epidemiology exists, courts have begun scrutinizing and, when appropriate, rejecting expert opinions that contradict those studies.[157]

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153. 509 U.S. 579 (1993).

154. *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 26 (2003) (quoting People v. Kelly, 549 P.2d 1240, 1245 (Cal. 1976)).

155. For a general discussion of the principles of epidemiology and its use in the courtroom, see MARCIA ANGELL, SCIENCE ON TRIAL 99–106 (1996) and Bert Black, James A. Jacobson, Edward W. Madeira, Jr. & Andrew See, *Guide to Epidemiology*, *in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE *FJC MANUAL* (Bert Black & Patrick W. Lee eds., 1997).

156. Norris v. Baxter Healthcare Corp., 397 F.3d 878, 882 (10th Cir. 2005) ("[E]pidemiology is the best evidence of general causation in a toxic tort case."); Chambers v. Exxon Corp., 81 F. Supp. 2d 661, 664 (M.D. La. 2000) ("[I]n a [benzene] case such as this, the most conclusive type of evidence of causation is epidemiological evidence." (citing Brock v. Merrell Dow Pharm., Inc., 874 F.2d 307, 311–13 (5th Cir. 1989))); *In re* Breast Implant Litig., 11 F. Supp. 2d 1217, 1224 (D. Colo. 1998) ("The most important evidence relied upon by scientists to determine whether an agent (such as breast implants) cause disease is controlled epidemiologic studies." (internal quotation marks omitted)); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1403 (D. Or. 1996) ("The existence or nonexistence of relevant epidemiology can be a significant factor in proving general causation in toxic tort cases." (citing *Daubert*, 43 F.3d at 1320–21; *Brock*, 874 F.2d at 311–13)); Conde v. Velsicol Chem. Corp., 804 F. Supp. 972, 1025–26 (S.D. Ohio 1992) ("Epidemiologic studies are the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease." (citation omitted)).

157. *See, e.g.*, *Norris*, 397 F.3d at 882, 885–86 ("This is not a case where there is no epidemiology. It is a case where the body of epidemiology largely finds no association between silicone breast implants and immune system diseases. . . . We are unable to find a single case in which differential diagnosis that is flatly contrary to *all* of the available epidemiological evidence is both admissible and sufficient to defeat a defendant's motion for summary judgment."); Allison v. McGhan Med. Corp., 184 F.3d 1300, 1316 (11th Cir. 1999) ("[Plaintiffs'] proffered conclusions . . . were out of sync with the conclusions in the overwhelming majority of the epidemiological studies presented to the court."); Allen v. Penn. Eng'g Corp., 102 F.3d 194, 197 (5th Cir. 1996) (explaining that numerous reputable epidemiological studies contradicted the plaintiffs' theory); *Chambers*, 81 F. Supp. 2d at 665 (causation claim contradicted by "a number of scientifically performed studies which demonstrate no association between" benzene and CML); Brooks v. Stone Architecture, P.A., 934 So. 2d 350, 355 (Miss. Ct. App. 2006) (finding that the plaintiffs' expert testimony was not based on sufficient scientific facts); DeMeyer v. Advantage Auto, 797 N.Y.S.2d 743, 752 (App. Div. 2005) (finding that plaintiffs must show that their expert testimony is based on scientifically reliable data); *In re* Toxic Substances Cases, No. A.D. 03-319, 2006 WL 2404008, at *3 (Pa. Ct. Com. Pl. Aug. 17, 2006) ("[B]ackground or ambient exposure is simply not sufficient to allow experts to causally attribute asbestos-related disease to it."); Letter Opinion in Response to Motion to Strike Expert Testimony, *In re* Asbestos Litig., Cause No. 2004-03964 (Tex. Dist. Ct. Jan. 20, 2004) (finding that the equivocal nature of the testimony of

c. Detection of Injury

Scientific development also can be a useful tool in detecting injury, though in this area of the law it is important for the judge to assure that the science is being used to extend principles of tort law, not undermine them. Consider the "all but universal change" in the common law rule that tort claims would not be allowed for a prenatal injury.[158] Early cases denying such claims were predicated on the belief that the fetus had no separate existence from its mother,[159] difficulty in tracing the causal connection, associated likelihood of unfounded claims,[160] and problems with speculative-at-best damages.[161]

This universal common law rule which blocked claims for prenatal injury began to erode in 1946 with *Bonbrest v. Kotz*,[162] a medical malpractice case involving a plaintiff who alleged a child had sustained injuries when removed from her mother's womb.[163] The court rejected a blanket rule against recovery for prenatal injury and instead found that a jury should be able to hear evidence of causation:

> [H]ere we find a willingness to face the facts of life rather than a myopic and specious resort to precedent to avoid attachment of responsibility where it ought to attach and to permit idiocy, imbecility, paralysis, loss of function, and like residuals of another's negligence to be locked in the limbo of uncompensable wrong, because of a legal fiction, long outmoded. . . . The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884.[164]

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plaintiff's expert epidemiologist and physician was insufficiently reliable to meet the plaintiff's burden of proof).

158. RESTATEMENT (SECOND) OF TORTS § 869 cmt. a (1977); *see* Smith v. Brennan, 157 A.2d 497, 504–05 (N.J. 1960) (finding that changes in medical science and law warrant repudiation of the common law rule against recovery for prenatal injuries); Barbara E. Lingle, Comment, *Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?*, 44 ARK. L. REV. 465, 468 (1991) ("Recognizing the injustice of this rule, courts eventually allowed a cause of action for prenatal injuries to viable fetuses who died *in utero*.").

159. *See, e.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (1884) (stating that the court was unaware of any case "that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb"), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967); Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) ("Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life . . . ."), *overruled by* Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953).

160. *See* RESTATEMENT (SECOND) OF TORTS app. § 869, at 80 (1982) (citing cases on the difficulty of proving causation); DOBBS, THE LAW OF TORTS, *supra* note 79, § 288, at 781.

161. RESTATEMENT (SECOND) OF TORTS § 869 cmt. a (1977).

162. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

163. *Id.* at 139.

164. *Id.* at 142, 143.

Since *Bonbrest*, courts "universally [have held] that no one is to be denied compensation for injury merely because the harm was inflicted before that person's birth," whether the harm occurred pre- or post-viability.[165] For similar reasons, the law has also developed with respect to wrongful death claims for the loss of a fetus or child injured before birth. "An overwhelming majority of jurisdictions [now permit a wrongful death] action for prenatal injuries when they were inflicted on a viable fetus who was subsequently born alive."[166] In addition, "[m]ost courts . . . now recognize that an action lies for wrongful death of a stillborn infant or of a fetus not born alive, at least where injury occurred when the fetus was viable."[167]

In a related set of cases, courts have recognized a restricted cause of action for "wrongful birth,"[168] which is a cause of action available to parents when negligent medical treatment deprives them of the option to terminate a pregnancy to avoid the birth of a child with birth defects. Before the Supreme Court's recognition in *Roe v. Wade*[169] that women have the constitutional right to choose to terminate a pregnancy,[170] courts generally did not recognize actions for emotional distress damages and the cost of caring for a child with birth defects against a doctor whose negligent diagnosis or treatment of the mother allegedly led to the birth defects.[171] After *Roe*, many courts reversed course.[172] As the New Jersey Supreme Court explained, "Prevailing policy considerations, which included a reluctance to acknowledge the availability of abortions and the mother's right to choose to terminate her pregnancy, prevented the [earlier] Court from awarding damages to a woman for not having an abortion."[173]

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165. DOBBS, THE LAW OF TORTS, *supra* note 79, § 288, at 781.

166. PROSSER, WADE & SCHWARTZ 11th ed., *supra* note 104, at 468; *see also* RESTATEMENT (SECOND) OF TORTS app. § 869 at 79 (1977) (stating that "[t]here now appears to be no American jurisdiction with a decision still standing refusing recovery" and citing supporting cases).

167. DOBBS, THE LAW OF TORTS, *supra* note 79, § 288, at 782.

168. *See, e.g.*, Smith v. Cote, 513 A.2d 341, 345–46 (N.H. 1986) (supporting parents' action for wrongful birth with analysis of how such suits were fostered by scientific advances in the detection of fetal abnormalities and pregnancy risk factors, and the U.S. Supreme Court's decision in *Roe v. Wade*); Procanik *ex rel.* Procanik v. Cillo, 478 A.2d 755, 760, 761 (N.J. 1984) (recognizing that parents may recover extraordinary expenses associated with raising a child with birth defects (citing Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981)); *see also* PROSSER, WADE & SCHWARTZ 11th ed., *supra* note 104, at 464–79 (discussing wrongful birth causes of action).

169. 410 U.S. 113 (1973).

170. *Id.* at 153.

171. *See, e.g.*, Gleitman v. Cosgrove, 227 A.2d 689, 691–93 (N.J. 1967) (holding that an infant plaintiff injured in the womb as a result of the negligence of his mother's doctors' failure to diagnose her rubella could recover extraordinary medical expenses but not general damages for emotional distress or "impaired childhood"), *abrogated by* Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979).

172. *See* DOBBS, THE LAW OF TORTS, *supra* note 79, § 291, at 792 (citations omitted).

173. *Procanik*, 478 A.2d at 759 (N.J. 1984); *see also Berman*, 404 A.2d at 14 ("'substantial [public] policy reasons' precluded the judicial allowance of tort damages 'for the denial of the opportunity to take an embryonic life'" (quoting *Gleitman*, 227 A.2d at 693)).

d. Science Should Not Undermine Tort Law Principles

The challenge for judges is to ensure science is not used as an excuse to undermine tort law. For example, through x-rays, CAT scans, blood tests, and other mechanisms, science may be able to detect changes at the cellular and, potentially, subclinical levels.[174] In the field of toxic torts, such changes may occur after exposure but provide no indication that the person will develop an injury. Thus, the enhanced ability to detect these changes does not alter when a cause of action may arise; the tort law principle is that a plaintiff must have an injury and damages to have a cause of action.

Many of the courts addressing the issue of when a person exposed to a particular substance has a cause of action have held that physically unimpaired claimants do not have legally compensable claims. *Simmons v. Pacor, Inc.*, a frequently cited Pennsylvania Supreme Court case, involved several plaintiffs who were exposed to asbestos for a number of years and developed asymptomatic internal markings from that exposure.[175] The court held that such "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action" because "no physical injury has been established that necessitates the awarding of damages."[176] Individuals with such conditions "lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring."[177] Many federal and state courts have concurred.[178]

Similarly, the Georgia Court of Appeals affirmed a directed verdict for the defense when plaintiffs exposed to pesticides could not point to any injuries, even though they had elevated levels of chemicals in their blood.[179] The court held that "[a]bsent any indication that the presence of these metabolites had caused or would eventually cause actual disease, pain, or impairment of some kind, this testimony must be considered insufficient to support an award of actual damages in any amount."[180] Likewise, a federal district court, interpreting North Carolina law,

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174. *See, e.g.*, Simmons v. Pacor, Inc., 674 A.2d 232, 233–34 (Pa. 1996) (discussing whether an asymptomatic plaintiff whose chest x-ray showed biological changes had a cause of action).

175. *Id.*

176. *Id.* at 237.

177. *Id.* at 236.

178. *See, e.g.*, *In re* Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("Plaintiffs must show a compensable harm."); *In re* Mass. Asbestos Cases, 639 F. Supp. 1, 2 (D. Mass. 1985) (holding that injury does not occur at the time of exposure); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31 (Ariz. Ct. App. 1987) (declining to "allow recovery for injuries before any disease becomes manifest"); *In re* Asbestos Litig. Leary Trial Group, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763, at *1 (Del. Super. Ct. June 14, 1994), *rev'd on other grounds sub nom.* Mancari v. A.C. & S., Inc., 670 A.2d 1339 (Del. 1995); Bernier v. Raymark Indus., Inc., 516 A.2d 534, 542 (Me. 1986) ("There is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury."); Owens-Illinois v. Armstrong, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991) (declining to award damages "absent evidence . . . [of] a loss or detriment"), *aff'd in part, rev'd in part on other grounds*, 684 A.2d 47 (Md. 1991).

179. Boyd v. Orkin Exterminating Co., Inc., 381 S.E.2d 295, 297 (Ga. Ct. App. 1989), *overruled by* Hanna v. McWilliams, 446 S.E.2d 741 (Ga. 1994).

180. *Id.* at 298.

found that plaintiffs who allege exposure to chemicals emanating from a plant must show "a disease or a clinical injury" to have a cognizable claim because there is "no foundation whatsoever" for recovering damages for subclinical injuries.[181]

The common rationale for these decisions is that tort law exists to compensate individuals for actual harm—harm that results in pain or some objective manifestation of injury that people can see, touch, or feel. While fundamental principles of tort law would deem tortious certain conduct that caused a minor burn or external scar, the same principles, when focused on sound public policy, would lead to the conclusion that asymptomatic internal markings with no accompanying pain or impairment, even if scientific advancements allow those marking to be identified, do not create tortious conduct.

From a practical perspective, these decisions provide clarity in the law, as plaintiffs know when the statute of limitations begins to run[182] and defendants will not be forced to pay significant verdicts and settlements to those who are not sick and likely will never be sick.[183] Limited assets will be preserved to pay those who are truly sick. The requirement that a plaintiff have an injury and damages also cuts down on opportunities for fraud and other types of litigation abuse.[184]

Advances in science and technology provide a proper neutral principle to prevent the arbitrary application of stare decisis.

5. *Slaying the Paper Tiger—Previous Decisions That Have So Chipped Away at a Tort Law Rule to Render It Superfluous May Support Abandonment of the Rule in Its Entirety*

Prudent jurists have carefully overturned precedent when previous courts had chipped away at that precedent to such an extent that it no longer had any meaning. At some point, the distinguishing cases created a distinction without a difference. Esteemed judges such as Benjamin Cardozo and Roger Traynor have used these opportunities to wipe the slate clean and provide clarity and predictability in law through straightforward and well-reasoned opinions.

In *MacPherson v. Buick Motor Co.*,[185] Judge Cardozo put the final nail in the coffin of the privity rule for negligence cases against product manufacturers.[186] Under the privity rule, a customer could not seek damages from the manufacturer for a defective product because the customer purchased the product from a retailer,

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181. Carroll v. Litton Sys., Inc., No. B-C-88-253, 1990 WL 312969, at *47–48 (W.D.N.C. 1990).

182. *See* Taylor v. Owens-Corning Fiberglas Corp., 666 A.2d 681, 688 (Pa. Super. Ct. 1995); White v. Owens-Corning Fiberglas Corp., 668 A.2d 136, 146 (Pa. Super. Ct. 1995).

183. *See generally* Victor E. Schwartz, Mark A. Behrens & Phil S. Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC., No. 1, at 61 (2005) ("To state a claim in a bankruptcy proceeding, an asbestos claimant should have to demonstrate physical injury or functional impairment caused by asbestos exposure.").

184. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005); Fred Krutz & Jennifer R. Devery, *In the Wake of Silica MDL 1553*, 4 MEALEY'S LITIG. REP.: SILICA, Jan. 2006, at 18, 20; Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96.

185. 111 N.E. 1050 (N.Y. 1916).

186. *Id.* at 1053.

not the manufacturer.[187] In *MacPherson*, the plaintiff bought a car from a dealer and was injured when one of the wheels broke.[188] Judge Cardozo permitted the customer to seek recovery from the manufacturer, recognizing that a string of cases, when taken together, created a new "definition of the duty of a manufacturer which enables us to measure this defendant's liability."[189] The "foundations of this branch of the law," Cardozo wrote, were laid in *Thomas v. Winchester*,[190] where a person was injured from the manufacturer's negligent mislabeling of a poison.[191] Because the poison would "likely . . . injure any one who gets it," the court created an exception to the privity rule for inherently dangerous products.[192]

Judge Cardozo observed that over the past decades, several courts similarly distinguished their cases from the privity rule.[193] He cited *Devlin v. Smith*,[194] where a defendant who built a scaffold for a painter was sued after the painter's workers were injured. The defendant knew the scaffold would be used by workmen and therefore, "owed them a duty, irrespective of his contract" with the painter.[195] In *Statler v. Ray Manufacturing Co.*,[196] the manufacturer of a large coffee urn was subject to liability for injuries restaurant workers received when the urn exploded because it "was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source for great danger to many people if not carefully and properly constructed."[197] "What is true of the coffee urn is equally true of bottles of aerated water," "a builder who constructed a defective building," "the manufacturer of a [defective] elevator," and the maker of "a defective rope."[198]

Judge Cardozo concluded that the principle of *Thomas v. Winchester* was no longer "limited to poisons, explosives, and . . . things which in their normal operation are implements of destruction."[199] He stated that where there is "no break in the chain of cause and effect[,] . . . the presence of a known danger, attendant upon a known use, makes vigilance a duty."[200] He did caution, however, that this principle, "[l]ike most attempts at comprehensive definition . . . may involve errors

187. *See* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) (holding that a negligent manufacturer was not subject to liability for a defective product when the injured victim was not the person who purchased the product).

188. *MacPherson*, 111 N.E. at 1051.

189. *Id.* at 1053.

190. 6 N.Y. 397 (1852).

191. *MacPherson*, 111 N.E. at 1051 (citing *Thomas*, 6 N.Y. at 398).

192. *Id.*

193. *Id.* at 1052.

194. 89 N.Y. 470 (1882).

195. *MacPherson*, 111 N.E. at 1053 (discussing *Devlin*).

196. 88 N.E. 1063 (N.Y. 1909).

197. *MacPherson*, 111 N.E. at 1052 (quoting *Statler*, 88 N.E. 1063 (N.Y. 1909)).

198. *Id.* (citing Torgesen v. Schultz, 84 N.E. 956 (N.Y. 1908) (water bottles); Burke v. Ireland, 50 N.Y.S. 369, 369 (App. Div. 1898) (building); Kahner v. Otis Elevator Co., 89 N.Y.S. 185, 185 (App. Div. 1909) (elevator); Davies v. Pelham Hod Elevating Co., 20 N.Y.S. 523, 523 (Gen. Term 1892) (rope)).

199. *Id.* at 1053.

200. *Id.*

of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualifications may be called for as they are applied to varying conditions, are the tests and standards of our law."[201] As a result of this case, injured plaintiffs may recover against negligent manufacturers regardless of any contractual relationship.

In *Greenman v. Yuba Power Products, Inc.*,[202] Justice Traynor expressly removed products liability from the ambit of contract law, abandoning the doctrine's foundation in express or implied warranty theories, so that privity was no longer necessary for strict liability in tort law to apply to any injury caused by a defective product.[203] In doing so, he observed that many courts already held manufacturers "strictly liable in tort when an article [it] places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury."[204] He cited examples for products ranging from bottles to insect spray, automobiles, and hair dye.[205] Justice Traynor wrote that the holdings from these decisions "make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."[206] He then articulated the broader rule that to establish liability, a plaintiff need only prove that "he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."[207]

The Michigan Supreme Court in *Prentis v. Yale Manufacturing Co.*[208] recognized that "strict" products liability did not work as well with cases based on failure to warn or defective design as it worked with cases based on mismanufactured products.[209] The Michigan court painstakingly reviewed precedent and demonstrated that while the term "strict liability" was sometimes used in design and warning cases, in hindsight, courts did not apply strict liability in those areas.[210] The court also showed that there were sound public policy reasons not to do so, such as recognizing the delibrate nature of design decisions and encouraging safer design.[211] Other courts recognizing that the "strict" liability rule in design and warning cases was a "paper tiger" restricted its actual application to

201. *Id.*
202. 377 P.2d 897 (Cal. 1962).
203. *Id.* at 901.
204. *Id.* at 900.
205. *Id.* at 900–01.
206. *Id.* at 901.
207. *Id.*
208. 365 N.W.2d 176 (Mich. 1984).
209. *Id.* at 182.
210. *Id.* at 182–84 ("Although many courts have insisted that the risk-utility tests they are applying are not negligence tests . . . [t]he underlying negligence calculus is inescapable." (citations omitted)).
211. *Id.* at 185.

mismanufactured products.[212] The *Restatement (Third) of Torts* in turn recognized this reality when it was published in 1998.[213]

Similarly, the California Supreme Court held in *Brown v. Superior Court*[214] that it was inappropriate to apply strict liability to warning defects in pharmaceutical cases because it could deter production of new and needed pharmaceuticals.[215] Several courts have followed *Brown*, particularly in light of the fact that the federal Food and Drug Administration specifically approves the design and warning labels for each pharmaceutical.[216] Comparable modifications to strict products liability law have been made for raw materials suppliers—they are not subject to liability for harm caused by warning or design defects of the end product because they do not have control over the end product.[217]

At some point, the use of "distinctions" of a precedent, which is the preferred method for departing from precedent, should give way to a recognition that the precedent is no longer valid.

6. *Unintended Consequences of Previous Departures from Precedent May Require Revisiting and Correcting Earlier Rulings*

When courts break from precedent, even with the best of intentions, the new rule could have unintended consequences in its real life application. The rationale for the decision may have been correct, but the court may not have narrowly tailored the change to effectuate only that underlying public policy, or the adverse consequences may have been unforeseeable. Through hindsight, courts can assess the solutions constructed by their predecessors and, where the practical results are inconsistent with tort law principles, they should revisit earlier decisions and adjust them accordingly.

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212. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744–753 (1996); *see also* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 704 (1992) ("From the vantage point of the law's maturity, gained by its awkward, fitful, and ultimately unsuccessful effort to make sense out of a broad doctrine of strict products liability, fault's true position at the center of tort law is becoming clearer by the day.").

213. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998); *see also* RESTATEMENT (SECOND) OF TORTS § 402(a) (1968) (holding the seller of a defective product liable for harm resulting from the product despite the exercise of "all possible care").

214. 751 P.2d 470 (Cal. 1988).

215. *Id.* at 477, 479.

216. *See* Victor E. Schwartz & Phil Goldberg, *A Prescription for Drug Liability and Regulation*, 58 OKLA. L. REV. 135, 137 (2005) (noting that some courts "have concluded that there can be no design or warning defect when the FDA has approved a drug's specific design and warnings").

217. *See, e.g.*, *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 996 F. Supp. 1110, 1112–13 (N.D. Ala. 1997) (dismissing suppliers of silicone from lawsuits alleging harm from silicone breast implants); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a (1998) ("Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing."); David A. Fischer, *Product Liability: A Commentary on the Liability of Suppliers of Component Parts and Raw Materials*, 53 S.C. L. REV. 1137, 1139 (2002) (noting that the majority of courts justifiably refuse to hold suppliers liable, but suggesting that in certain situations liability may be appropriate).

a. Departure from the Line Drawing for Recovery for Emotional Harm

The expansion of tort law to allow for certain emotional harms has been one of the most significant departures from tort law precedent over the last century. Under the traditional rule, courts denied emotional harms arising from risks or harms to others.[218] Over the past few decades, many states departed from that rule and adopted a "zone of danger" test, under which only close family members who were also in harm's way could recover emotional damages from witnessing injury to a loved one.[219] The reason for the zone of danger requirement, which draws an inherently arbitrary line, is that liability would be limitless if all those who are affected by the death of a family member could seek compensation.[220] Instead, the zone of danger test allows recovery for emotional shock in the rare situation that an individual personally and contemporaneously witnessed a traumatic event involving a close family member and also was herself personally at risk of injury, but does not extend recovery for the emotional loss common to what others feel when they learn of a loved one's death.[221]

In 1968, the California Supreme Court abandoned the zone of danger test so that a mother and sister could recover for their emotional harms in witnessing the accident of their daughter and sister, respectively, even though they were not at risk of harm themselves.[222] The court determined that the defendant should have reasonably foreseen that hitting and killing a child would result in emotional distress to her mother and sister.[223] This reasonable foreseeability test would be applied on a case-by-case basis, allowing courts to consider multiple factors including whether the plaintiff was located near the accident, whether the plaintiff observed the accident, and whether the plaintiff and victim were closely related.[224]

Two decades later, the California Supreme Court recognized that lower courts had applied the foreseeability test in ways it did not intend, stating that in some cases, "[l]ittle consideration ha[d] been given in post-*Dillon* decisions to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create and towards which these decisions have moved."[225] Through the wisdom of hindsight, the court found liability under its earlier formulation "'is endless because foreseeability, like light, travels indefinitely in a

218. *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 514 (Cal.1963) (holding that liability may not be "predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person"), *overruled by* Dillon v. Legg, 441 P.2d 912, 921–25 (Cal. 1968) (en banc) (adopting a foreseeability test).

219. *See* DOBBS, THE LAW OF TORTS, *supra* note 79, § 309, at 839–41.

220. *See id.* § 309, at 839.

221. *See id.* § 309, at 840.

222. *Dillon*, 441 P.2d at 915.

223. *Id.* at 921.

224. *Id.* at 920.

225. Thing v. La Chusa, 771 P.2d 814, 821 (Cal. 1989) (en banc).

vacuum.'"[226] The court then retreated, limiting recovery for emotional harms to third parties who are closely related to the victim, contemporaneously observe the injury-producing event, and suffer a reaction beyond that which would be anticipated in a disinterested witness.[227] Thus, it returned to a "clear rule under which liability may be determined."[228]

b. Immunity from Tort Claims

Courts also have significantly reduced the types of parties that are immune from tort litigation and the nature of those immunities. Historically, for example, municipalities, public schools, and utility providers were immune from tort liability.[229] While the underlying principle of this tort rule in England was to honor the divine rights of kings, courts in the United States adhered to these rights in order to protect public funds.[230] Immunities also were given among interfamilial relations and to religious institutions and charities.[231] Many state courts, citing the "rotten foundation"[232] upon which such immunities were founded, abandoned the immunities because they interfered with the central premise of tort law that wronged persons should be compensated for their injuries by those who are responsible for the negligence or the negligence of their agents.[233]

The relaxation of charitable immunity, a common law doctrine that protected religious and other such institutions from tort suits, provides an example of an overly broad departure from stare decisis having unintended consequences.[234] By

226. *Id.* at 823 (quoting Newton v. Kaiser Hosp., 288 Cal. Rptr. 890, 893 (Ct. App. 1986)).

227. *Thing*, 771 P.2d at 815 (holding that a plaintiff who did not witness an automobile striking and injuring her child could not recover for the emotional distress she suffered when she later arrived at the accident scene).

228. *Id.* at 827.

229. *See, e.g.*, Haney v. City of Lexington, 386 S.W.2d 738, 739–41 (Ky. Ct. App. 1964) (examining the abandonment of common law immunity applicable to municipalities).

230. *See, e.g.*, Thomas v. Broadlands Cmty. Consol. Sch. Dist. No. 201, 109 N.E.2d 636, 640 (Ill. App. Ct. 1952) ("The only justifiable reason for the immunity of quasi-municipal corporations from suit for tort is the sound and unobjectionable one that it is the public policy to protect public funds and public property . . . .").

231. *See, e.g.*, LeMay v. Trinity Lutheran Church, 450 S.W.2d 297, 297 (Ark. 1970) (church); Williams v. Jefferson Hosp. Ass'n, 442 S.W.2d 243, 245 (Ark. 1969) ("charitable hospitals" and a "multitude of similar charitable organizations"); Foldi v. Jeffries, 461 A.2d 1145, 1152 (N.J. 1983) (parental immunity).

232. Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 94 (Ill. 1959) (quoting Barker v. City of Sante Fe, 136 P.2d 480, 482 (N.M. 1943)) (abolishing common law immunity of public schools).

233. Weinberg v. Dinger, 524 A.2d 366, 379–80 (N.J. 1987) (abandoning immunity provided to private water utilities for failure to maintain adequate water pressure at fire hydrants on a prospective basis).

234. PROSSER, WADE & SCHWARTZ 11th ed., *supra* note 104, at 636 n.1 (charitable immunity originated in England and, up to 1942, was followed in all but two or three American courts).

the late 1930s, at least forty states had adopted the charitable immunity doctrine[235] in order to encourage altruistic behavior,[236] assure that contributions would be used as intended rather than for legal costs,[237] and assuage concerns that tort awards would bankrupt charitable institutions.[238] In the 1940s, however, when liability insurance became more popular and widely available, courts began to abrogate the charitable immunity doctrine.[239] Some of the cases included automobile and church bus accidents.[240] The courts decided that the need for a seriously injured person to recover damages outweighed the need to protect charities in an era when charities

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235. *See* Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1384 (1987) [hereinafter *The Quality of Mercy*] (citing Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 971 (1979)).

236. Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969) (en banc) (describing the fear that "purses of donors would be closed and the funds of charity depleted if these institutions were not granted immunity").

237. The concept of charitable immunity first arose in the English courts, primarily under the justification that using charitable funds to pay for tort damages would be against a donor's intentions. *See* Feoffees of Heriot's Hosp. v. Ross, (1846) 8 Eng. Rep. 1508, 1510 (H.L.) ("To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."), *overruled by* Mersey Docks & Harbor Trs. v. Gibbs, (1866) 11 Eng. Rep. 1500, 1515 (H.L.) (holding trustees liable for damages caused to a dock by employees' negligence); *see also* Duncan v. Findlater, (1839) 7 Eng. Rep. 934, 939 (H.L.) (stating in dictum that trustees were not liable for the negligence of persons not shown to be their servants), *overruled by Mersey Docks*, 11 Eng. Rep. at 1515; Holliday v. Parish of St. Leonard, (1861) 142 Eng. Rep. 769, 774 (C.P.) (holding that trustees were not liable for negligence of employees), *overruled by Mersey Docks*, 11 Eng. Rep. at 1515. While English courts held that trust funds could not be subject to tort judgments, the courts did not go so far as to create a blanket charitable immunity rule. *See The Quality of Mercy*, *supra* note 235, at 1383 n.9.

238. U.S. courts adopted the English justification for charitable immunity and added other justifications for the doctrine. *See, e.g.*, Hearns v. Waterbury Hosp., 33 A. 595, 604 (Conn. 1895) (holding that a church was not liable for torts committed by its employees under the doctrine of respondeat superior since it did not profit from their services); Vermillion v. Woman's Coll. of Due W., 104 S.C. 197, 201, 88 S.E. 649, 650 (1916) (noting that a public policy requiring charities to pay tort judgments would adversely impact their monies for charitable activities); *see also* RESTATEMENT (SECOND) OF TORTS § 895E cmt. c (1979) (enumerating justifications for the immunity); Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R. 4TH 517, 522–25 (1983) (providing a background discussion on cases recognizing the doctrine of charitable immunity).

239. President of Georgetown Coll. v. Hughes, 130 F.2d 810, 823–24 (D.C. Cir. 1942); Wendt v. Servite Fathers, 76 N.E.2d 342, 349 (Ill. App. Ct. 1947); *Abernathy*, 446 S.W.2d at 603; Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 871 (Ohio 1984); *see also* Avellone v. St. John's Hosp., 135 N.E.2d 410, 416–17 (Ohio 1956) (abrogating common law immunity for nonprofit hospitals); RESTATEMENT (SECOND) OF TORTS § 895E cmt. c.5 (1979) (noting that justifications for the charitable immunity doctrine "fail when the charity can insure against liability"); *see The Quality of Mercy*, *supra* note 235, at 1395.

240. *See, e.g.*, Malloy v. Fong, 232 P.2d 241, 247 (Cal. 1951) (en banc) (holding a church liable for injuries that a boy attending vacation Bible school at the church incurred in an automobile accident that was caused by the negligence of the church's agents in transporting the boy from the church to a playground).

could readily shift the risk of tort payments to insurance companies.[241] The trend toward state court abrogation of complete charitable immunity accelerated after the American Law Institute's *Restatement (Second) of Torts* took the position in § 895E that "[o]ne engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability."[242]

Again, the repeal of charitable immunity was motivated by traditional tort cases, such as when a person was injured after slipping in a cathedral or by a negligently driven church vehicle.[243] But many unanticipated issues have since arisen.[244] For example, in many jurisdictions, cases abrogating immunity involved injuries where insurance was clearly available,[245] yet the new liability exposure that stemmed from changes in the law was not confined to those situations. Wholesale

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241. *See The Quality of Mercy*, *supra* note 235, at 1395–96. A similar set of consequences unfolded in the collapse of family immunities, particularly between a parent and a child. While the collapse of parent-child immunity may have been due in part to the changing views of society, leading to the understanding that children are possessed of individual rights, it also coincided with an increase in the availability of liability insurance and the resulting decrease in the financial strain a child's lawsuit placed on the family. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 508–09 (1982). The rationale of the parent-child immunity was to preserve family tranquility by protecting it from the financial loss of lawsuits. *Id.* at 502–04 (discussing factors that discredit the family tranquility rationale for parent-child immunity). The courts became willing to reassess the scope of the immunity as the existence of liability insurance further undermined its rationale. *See, e.g.*, Sorensen v. Sorensen, 339 N.E.2d 907, 913–14 (Mass. 1975) ("when insurance is involved, the action between parent and child is not truly adversary."). The availability of liability insurance lead to the "interpretation, distinction and exception" of the immunity by judicial decisions and statutes and an eventual "whittl[ing] away" of the immunity. Falco v. Pados, 282 A.2d 351, 354 (Pa. 1971).

As insurance became more widely available, the parent-child immunity was also abrogated in the context of automobile accidents. *See* Hollister, *supra*, at 510 n.141 (providing a breakdown of state cases by jurisdiction that have abrogated the immunity with respect to automobile accidents). There was a belief that drivers and passengers would be covered under automobile insurance policies, shielding the parent from having to pay the damages. *Id.* at 511 n.143 (citing Hebel v. Hebel, 435 P.2d 3, 15 (Alaska 1967)). There was also a recognition that it was socially unwise to deny a claim and leave a potential victim stranded. *Id.* at 511 n.142 (citing DEL. CODE ANN. tit. 21, §§ 2118, 2904 (2005); MONT. CODE ANN. § 61-6-301(1)(a)–(b) (2005)). No thought was given to suits involving the duty a parent owes to a child, such as whether the parent had to provide the child with a basic education or with a superior education. Courts continue to wrestle with these difficult problems.

242. RESTATEMENT (SECOND) OF TORTS, § 895E (1979). By the early 1980s, thirty-three jurisdictions had abrogated the charitable immunity doctrine, either in whole or in part. *See The Quality of Mercy*, *supra* note 235, at 1385 ("sixteen of the thirty-three had abandoned it altogether." (citing Fairchild, *supra* note 238, at 522–25)).

243. *See, e.g.*, *President of Georgetown Coll.*, 130 F.2d at 817–18 (discussing charitable immunity in the context of negligence and simple torts and noting charitable immunity cases include actions arising out of "driving an ambulance or a truck on the streets" or "running an elevator or pushing a cart in the corridors of the hospital").

244. *See, e.g.*, *id.*, (noting "the tendency of immunity to foster neglect and of liability to induce care and caution"); *Abernathy*, 446 S.W.2d at 603 ("[T]he day has arrived when these institutions must acknowledge the injustice of denying compensation to a person injured as a result of their negligence or the negligence of their agents or employees.").

245. *See, e.g.*, Noel v. Menninger Found., 267 P.2d 934, 936–37, 943 (Kan. 1954) (abrogating immunity in truck accident case where hospital allowed mentally ill patient to cross the street); Flagiello v. Pa. Hosp., 208 A.2d 193, 194, 208 (Pa. 1965) (abrogating immunity in a slip-and-fall case).

departure from charitable immunity led to new and unanticipated questions regarding the scope of a charitable institution's duty, including whether a religious institution has a duty to protect or rescue its members from the wrongful acts of other members or from intentional wrongdoing, such as child abuse.[246] Accordingly, the Maine Supreme Court has scaled back its abrogation of charitable immunity and distinguished the duty of charitable institutions from that of for-profit companies.[247] "The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to 'both unlimited liability and liability out of all proportion to culpability.'"[248]

Courts that similarly rejected parent-child immunities in the context of automobile accidents have begun to better understand the practical consequences of those decisions.[249] For example, many courts have modified their initial rulings to make clear that children cannot recover for discipline and emotional harms associated with normal parental discretion.[250]

c. Punitive Damages

Other examples of courts correcting for unintended consequences of their previous departures from stare decisis can be seen in the development of the law of punitive damages. In the late 1960s, American courts began to depart radically from

246. *See, e.g.*, Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839, 847 (Me. 1999) (asserting that there is no duty for a religious institution to protect members from each other). Other courts have agreed that allowing suits for breach of fiduciary duty in cases involving sexual abuse by clergy members would place courts "'on the slippery slope and is an unnecessary venture, since existing laws . . . provide adequate protection for society's interests.'" H.R.B. v. J.L.G., 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (quoting Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991)); *see also* Teadt v. St. John's Evangelical Lutheran Church, 603 N.W.2d 816 (Mich. Ct. App. 1999).

> To apply these [fiduciary] principles to the case before us, where no financial transactions are involved, it appears [the pastor's] duty would be to act in a way that would benefit plaintiff emotionally, if she reposed faith, confidence, and trust and relied on his judgment and advice. Such a duty is impossible to define and has far-reaching implications. We refuse to impose such a duty.

Id. at 823.

247. *See Bryan R.*, 738 A.2d at 845–48.

248. *Id.* at 847 (quoting Cameron v. Pepin, 610 A.2d 279, 283 (Me. 1992)).

249. *See, e.g.*, Nocktonick v. Nocktonick, 611 P.2d 135, 141 (Kan. 1980) (holding that an unemancipated minor may recover from a parent for injuries caused by the parent's negligent operation of a motor vehicle and listing states that have adopted a similar position); Transamerica Ins. Co. v. Royle, 656 P.2d 820, 824 (Mont. 1983) (holding insurance provision that excluded coverage for any person related to the insured by blood or adoption was invalid because parent-child immunity had been abrogated in actions involving a parent's negligent operation of motor vehicle).

250. *See, e.g.*, Wagner v. Smith, 340 N.W.2d 255, 256 (Iowa 1983) (stating that while the court abrogated the absolute parental immunity doctrine in tort cases two years previously, it would not permit liability in areas of parental authority and discretion).

the historical intentional tort moorings of punitive damages.[251] "Reckless disregard" became a popular standard for punitive damages liability.[252] A number of states utilize a triple "trigger"—punitive damages can be awarded if the defendant engaged in either willful, wanton, or gross misconduct. The triple trigger approach gave plaintiffs three separate paths to obtain punitive damages. In some states, even "gross negligence" could support a punitive damages award.[253]

In practice, these changes impacted both the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded.[254] Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically"[255] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[256]

To restore punitive damages to their intended proportions, courts have modified the common law in several ways. For example, jurisdictions such as Maryland changed the conduct standard so that a defendant must act with actual malice to be subject to punitive damages.[257] A large number of courts and legislatures changed their evidentiary standard from preponderance of the evidence to "clear and convincing" in order to return to the quasi-criminal nature of punitive damages.[258] In addition, many courts allow defendants to request a bifurcated trial so that

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251. *See, e.g.*, Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 415 (Ct. App. 1967) (affirming a punitive damages award against a drug manufacturer where the evidence supported that the drug manufacturer acted in reckless disregard of the risks to users of the drug).

252. *See, e.g.*, UTAH CODE ANN. § 78-18-1(1)(a) (2002) (providing basis for punitive damages determined by malice, intentional fraud, or reckless indifference toward, and a disregard of, the rights of others).

253. *See, e.g.*, Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988).

254. *See* Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975) (awarding $125,000 in compensatory damages, $50,000 in attorneys' fees, and $100,000 in punitive damages); *Toole*, 60 Cal. Rptr. at 403 (awarding $175,000 in compensatory damages and $500,000 in punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636, 638 (Ill. App. Ct. 1969) (awarding $920,000 in compensatory damages and $10,000 in punitive damages), *aff'd*, 263 N.E.2d 103, 109 (Ill. 1970).

255. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

256. John Calvin Jeffries, Jr., Commentary, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); *see* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).

257. *See* Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 652 (Md. 1992); *see also* Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 938 (D.C. 1995) (holding that the plaintiff must demonstrate with clear and convincing evidence that the defendant's conduct was egregious and malicious).

258. *See e.g.*, Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996) (en banc) (holding that "evidence must meet the clear and convincing standard").

evidence relevant to only punitive damages cannot unduly influence a jury's determination on fault and compensation.[259]

7. *The Last Domino to Fall—A Preference for Uniformity and Consistency in Tort Law May Favor Abandoning Tort Law Doctrines that Persist in Some Jurisdictions Despite Their Near Universal Abandonment in Sister States*

Most tort law develops in state courts, thus reflecting a decentralized system where states can establish the law to reflect the values and nature of their own communities. For example, certain activities that may be defined as a public nuisance in a densely populated state may be perfectly acceptable in more rural states. But, tort law does not develop independently in each jurisdiction. In some areas of law, such as product liability, there is a benefit to general national uniformity: substantive balkanization of tort law can create choice of law problems and complicate the decision-making of national and international corporations.[260] For this reason, particularly in instances of first impression, state courts often take stock of how other courts have applied tort law principles in comparable situations. For issues in which national uniformity is a concern, courts should consider changing precedent when most other courts have done the same, particularly when they have followed one of the aforementioned principles in arriving at the change.

State courts have generally accepted the rationale for national uniformity with the obvious caveat that the departure from precedent must reflect a positive change in the law. As the Massachusetts Supreme Court said, "We should be mindful of the [national] trend although our decision is not reached by a process of following the

259. *See, e.g.*, Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (requiring the bifurcation of a trial involving punitive damages upon motion by the defendant and enumerating factors relevant to determine the amount of punitive damages); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994) ("At least thirteen states now require bifurcation of trials in which punitive damages are sought.").

260. The work of organizations such as the National Conference of Commissioners on Uniform State Laws and the American Law Institute promotes clarity, uniformity, and stability in the law. In addition, the federal government may use its power to preempt state law matters to promote uniformity and consistency in matters of national concern. *See, e.g.*, Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387, 394 (1987).

crowd."[261] The Maryland Court of Appeals, that state's highest court, echoed this sentiment for its application of common law doctrines:

> In light of the revision of the Restatement Second of Contracts and those pronouncements made by the courts of some of our sister states, modification might be considered the "modern trend." That does not mean, however, that Maryland will follow the "modern trend" parade. History demonstrates that, before they join a parade as marchers, Maryland courts want to know where the parade is going.[262]

In fact, in overturning the state's interspousal immunity doctrine, the Maryland Court of Appeals determined that it should join "the many of our sister States that have already done so."[263]

Nevertheless, Massachusetts and Maryland are among the jurisdictions that have held onto "discredited" high profile legal doctrines long after their abandonment by most other states. Consider some of the topics already discussed in this Article. For example, Massachusetts still applies the implied warranty of merchantability instead of products liability law,[264] which flies in the face of a national and rational trend to have one uniform rule in products liability cases.[265] Furthermore, it is overinclusive of the law of every state to create a regime where a product manufacturer is liable "even where the product was properly designed, manufactured, or sold; conformed to industry standards; and passed regulatory muster, and even where the consumer used the product negligently."[266] Finally, it is out of step with national trends because implied warranty law does not permit an assumption of risk defense, a defense ordinarily permitted in products liability

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261. Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 561 (Mass. 1973); *see also* Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 675 n.12 (Cal. 1974) (en banc) (noting that, in applying stare decisis in various other contexts, the court has "given weight to similarly strong currents of judicial thinking in our sister states"). *But cf.* Johnson Controls, Inc. v. Employers Ins. of Wausau, 665 N.W.2d 257, 287–88 (Wis. 2003).

> [I]t is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions. This court has no apprehension about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence. But when our light is dim and fading, then this court must be prepared to make correction.

Id.

262. Holloway v. Faw, Casson & Co., 552 A.2d 1311, 1334 (Md. Ct. Spec. App. 1989) (Gilbert, C.J., dissenting) (citations omitted), *aff'd in part, rev'd in part*, 572 A.2d 510, 528 (Md. 1990).

263. Bozman v. Bozman, 830 A.2d 450, 471 (Md. 2003).

264. *See* Haglund v. Philip Morris Inc., 847 N.E.2d 315, 321 (Mass. 2006).

265. *See Introduction*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 3–4 (1998).

266. *Haglund*, 847 N.E.2d at 323.

actions in other states.[267] As recognized in the *Restatement (Third) of Torts*, implied warranty is a doctrine in contract law, not tort law, and thus courts should confine it to cases with economic loss.[268]

Sometimes rules that assist plaintiffs have little islands that resist change. Maryland, Alabama, North Carolina, Virginia, and the District of Columbia are the only jurisdictions that still adhere to contributory negligence.[269] In these states, judges have acknowledged that the theory has been discredited, but nonetheless continue to apply the doctrine.[270] The states that have preserved the contributory negligence rule find that the exceptions to the rule make it fair to plaintiffs.[271] This observation may be true because of local conditions and local juries.[272] In addition, given the broad effect of a change from contributory negligence to comparative fault on many other areas of tort law, most states have left such a transition to the legislature.[273]

It has become common for courts to recognize "a dramatic reversal in the weight of authority."[274] An example is the 1974 California case where the court abandoned precedent that a wife could not recover for loss of consortium when her husband was severely injured but did not die.[275] The court reasoned that in the sixteen years since it had affirmed this precedent, at least thirty-one jurisdictions had changed positions to allow such recovery—twenty-six by judicial decision and

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267. *See* Jett v. Ford Motor Co., 84 P.3d 219, 222 (Or. Ct. App. 2004) (stating that voluntary assumption of risk is available as a defense in a products liability action). *But see* Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1039 (Mass. 1983) (stating that Massachusetts does not recognize contributory negligence or comparative negligence as a full or partial defense in a breach of warranty action sounded in tort).

268. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).

269. *See* Johnson v. Mercedes-Benz, USA, LLC, 182 F. Supp. 2d 58, 66 n.11 (D.D.C. 2002); *Ex parte* Goldsen, 783 So. 2d 53, 56 (Ala. 2000); Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993); Nat'l Health Labs., Inc. v. Ahmadi, 596 A.2d 555, 561 (D.C. 1991); Franklin v. Morrison, 711 A.2d 177, 189 (Md. 1998); Corns v. Hall, 435 S.E.2d 88, 91 (N.C. Ct. App. 1993) (stating that the doctrine of contributory negligence cannot be abandoned in favor of the doctrine of comparative fault absent action by the general assembly or the state supreme court); Litchford v. Hancock, 352 S.E.2d 335, 338 (Va. 1987); Smith v. Va. Elec. & Power Co., 129 S.E.2d 655, 659 (Va. 1963).

270. *See* Bosley v. Alexander, 442 S.E.2d 82, 83 (N.C. Ct. App. 1994) (quoting Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953)).

271. *See generally* Jennifer J. Karangelen, *The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by* Bozman v. Bozman, 34 U. BALT. L. REV. 265, 286 (2004) (describing courts' creation of exceptions that allow plaintiffs to recover even if they are contributorily negligent).

272. *See id.* at 278 (noting that the contributory negligence doctrine creates difficulty for jurors who understand that finding the plaintiff to be even slightly at fault will bar any recovery).

273. *See infra* Part III.B.2. While state courts have concurrent authority over tort law to make the switch from contributory negligence to comparative fault, only twelve states have adopted comparative fault through judicial decision. *See* Karangelen, *supra* note 271, at 279, 286.

274. Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 673 (Cal. 1974).

275. *See Rodriguez*, 525 P.2d at 672–73, 675 (Cal. 1974) (overruling Deshotel v. Atchison, Topeka & Santa Fe Ry. Co., 328 P.2d 449 (Cal. 1958) (en banc)). The doctrine stemmed from historic notions of a woman's subservient position in the marriage relationship, which persisted despite changes in society. *Id.* at 672.

five by statute.[276] When a majority of the states no longer apply a tort law doctrine, it can be an indication that other principles of tort law have overtaken stare decisis. The remaining jurisdictions should consider following suit.

B. Principles of Stability

The first seven principles in this Article provide the gas for when judges should consider changing precedent; the next three principles provide the steering and the brakes to assure that the rulings are incremental and only affect the specific policy warranting a change in the common law. Courts must be keenly aware of the reliance interests in tort law, the institutional constraints on the judicial branch of government, and the need to keep changes narrow to avoid unintended adverse consequences.

8. Courts Should Closely Consider that Individuals, Nonprofit Organizations, and Businesses May Significantly Rely on a Tort Law Rule in Structuring Their Affairs and Deciding Where and How to Do Business

Courts repeatedly recognize that a prominent purpose of stare decisis is to encourage reliance in the law and to respect those who have conducted their affairs based on well-settled precedent. In the context of commercial and property law, courts have placed substantial emphasis on reliance interests in determining whether to follow or depart from precedent.[277] For example, the United States Supreme Court has stated that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved."[278] Departures from precedent in these areas can create havoc for business relationships that are formed in reliance on principles established by the courts.[279]

Some courts have improperly downplayed or written off the significance of reliance interests when deciding whether to follow stare decisis in tort law. For example, the Connecticut Supreme Court, in creating a new cause of action against sellers of alcohol to intoxicated patrons, stated that "'[r]arely do parties contemplate the consequences of tortious conduct, and rarely if at all will they give thought to the question of what law would be applied to govern their conduct if it were to

276. *See id.* at 673.

277. *See, e.g.*, Norwest Bank N.D., Nat'l Ass'n v. Christianson, 494 N.W.2d at 169 (N.D. 1992) (Johnson, J., concurring) (noting the "special significance" of reliance on precedent in commercial and property law); Crist v. Hunan Palace, Inc., 89 P.3d 573, 580 (Kan. 2004) (declining to overrule precedent that requires insurance companies to provide "clear language" in insurance contracts that excludes coverage of automobile accident damages and injuries "based upon negligent supervision").

278. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

279. *See Norwest*, 494 N.W.2d at 169.

result in injury.'"[280] A Kentucky appellate court offered similar reasoning in abandoning the doctrine of government immunity under allegations that a city negligently operated a public swimming pool: "It is difficult to believe a city or any of its agents ever committed a tort deliberately and in reliance upon the doctrine of governmental immunity."[281] The Kentucky court applied the new rule retroactively.[282] Other courts, while not going this far, have held that reliance interests, and the reasons for the doctrine of stare decisis generally, are less controlling in tort law than where a rule of property or contract law is involved.[283]

In many situations, however, government entities, businesses, nonprofit organizations, and individuals do rely on existing tort law in their decisionmaking. For example, while a municipality would not intentionally commit a tort in operating a public pool in reliance on its governmental immunity, it might consider its liability in deciding whether to protect against tort liability and obtain insurance for potential losses, expend public funds on employing additional lifeguards, require parental supervision at the pool, or limit pool hours. Reliance interests are also particularly important when a court considers whether to create a tort duty, expand an existing duty, or otherwise increase potential liability. If a tavern owner knows that he will be liable for unlimited damages for selling alcohol to an intoxicated person if that person causes harm to himself or to others,[284] then that owner may invest significant resources in hiring additional security, further training bartenders, having an earlier "last call," or otherwise policing its patrons.

Businesses in particular routinely examine tort liability risks and undertake preventative measures to limit their exposure, whether the business is a recreational center, ski lodge, hospital, or retail store. If businesses are unable to rely on tort law, then their attempts to conduct their activities in compliance with the law are of little worth. As Kentucky Supreme Court Justice Cooper observed:

> [T]he most significant moment in the legal profession is not when the Supreme Court renders a seminal decision. It is when a client inquires of an attorney: "These are my facts; what is your

280. *See* Craig v. Driscoll, 813 A.2d 1003, 1015 (Conn. 2003) (quoting Conway v. Wilton, 680 A.2d 242, 247 (Conn. 1996)). In *Craig*, the court overruled precedent by finding that the dram shop act provided the sole means for recovery for injuries stemming from the sale of alcohol to intoxicated individuals and created a new common law cause of action for the negligent sale of alcohol despite recognizing that its decision ran contrary to over one hundred years of case law and a statute that displaced the common law. *Id.* As the dissenting judges recognized, the court's creation of this new cause of action with unlimited damages defeated the legislative policy of the dram shop act, which relaxed the proof requirements of a negligence action while limiting damages recoverable under the act. *See id.* at 1023–24 (Sullivan, C.J., dissenting).

281. Haney v. City of Lexington, 386 S.W.2d 738, 742 (Ky. Ct. App. 1964).

282. *Id.*

283. *See, e.g.*, Kabatchnick v. Hanover-Elm Bldg. Corp., 103 N.E.2d 692, 695 (Mass. 1952) (noting that "the reasons for the doctrine of stare decisis are less strong" in property or contract cases); Falzone v. Busch, 214 A.2d 12, 17 (N.J. 1965) ("We are not dealing with property law, contract law or other fields where stability and predictability may be crucial. We are dealing with torts where there can be little, if any, justifiable reliance and where the rule of *stare decisis* is admittedly limited.").

284. *See Craig*, 813 A.2d at 1015.

> advice?" Without stability and predictability in the law, an attorney may become a skilled litigator but will never become an informed counselor. If for no other reason, therein lies the importance of stare decisis.[285]

For example, businesses with multi-state operations often rely on the tort law environments in the various states when deciding where to locate certain operations.[286] The status of tort law may have significant implications for the cost of insurance premiums or anticipated annual legal costs in defending against lawsuits that may not be viable in other states.

For these reasons, when determining whether to abandon tort law precedent, a court can and should consider the effect of such action on those who have conducted their affairs in accordance with what they believed to be the law prior to the court's decision.[287]

9. *Prudential Concerns May Favor Awaiting Legislative Intervention Where the Court Finds that Policymakers Are Better Suited to Alter or Replace a Tort Law Rule*

Though a court has the authority to alter the common law to meet needs created by changing times, it may decline to do so in recognition of the legislature's superior institutional capacity for making policy-based changes to the law. The legislative branch can hold hearings, receive public comment, engage deliberatively in policy debate, and study thoroughly all aspects of an issue and its effect on society. In contrast, courts are limited to hearing the questions before them and the evidence presented by the parties in the individual cases.

In some instances, courts have declined to break with stare decisis to alter a fundamental principle of tort law due to these prudential concerns. For example, the

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285. Matheney v. Commonwealth, 191 S.W.3d 599, 615 (Ky. 2006) (Cooper, J., dissenting).

286. *See* Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. COLL. L. REV. 393, 422–25 (2005) (discussing the attraction of businesses and doctors to Mississippi and Texas following legislative and judicial changes in tort law).

287. A state court has the judicial power to apply a decision prospectively when it finds that the decision would overrule clear past precedent on which litigants may have relied and could produce substantial inequitable results. *See, e.g.*, Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1380–83 (N.M. 1994) (supporting the principle that a state court has the ability to apply a decision prospectively); Sellers, *supra*, note 37, at 75 (noting that courts can consider only changing the law "prospectively, so as to disturb as little as possible the settled expectations of those who have relied upon the (obsolescent) law"). *But see* Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) (holding that a new rule of federal law announced in a civil case by the U.S. Supreme Court "must be given full retroactive effect"). Prospective application recognizes "'the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.'" *Id.* at 116–17 (O'Connor, J., dissenting) (quoting Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring)). Prospective applications of tort law rulings are rare, however, and may be viewed as controversial since legislative action is ordinarily presumed prospective while judicial decisions are presumed retroactive.

Wyoming Supreme Court recently declined an opportunity to abandon the common law requirement that an owner must be aware of the animal's dangerous propensities to be strictly liable for an injury resulting from a dog bite.[288] At the time of the decision, nearly half of the states had adopted some form of strict liability for dog bites and some regarded the common law rule as antiquated.[289] The Wyoming court recognized that most states that removed the scienter requirement did so by statute and that such laws vary considerably.[290] It noted that only the legislature could fashion a dog bite law that recognizes the needs associated with the state's numerous working ranch dogs, the number of dogs and dog bites in the state, the potential liability, and the availability of liability insurance.[291] Other courts have also declined to make wholesale changes in common law that can have "global effects" beyond the case before them.[292]

10. Change Must Be Incremental and Respect Fundamental Principles of Tort Law

A theme throughout the principles discussed in this Article is that departures from precedent should be measured, incremental, gradual, and narrowly tailored to meet the need for departure from the prior rule. Over the course of this country's legal history, courts have developed a broad line between prudently diverging from precedent to adhere to fundamental tort law principles and changing the law in ways that depart from the core values.

When courts make sudden or overly broad changes to tort law or otherwise diverge from traditional tort law principles, they exceed the role of judges and

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288. *See* Borns *ex rel.* Gannon v. Voss, 70 P.3d 262, 272 (Wyo. 2003).

289. *See id.* at 274 (citing Ward Miller, Annotation, *Modern Status of Rule of Absolute or Strict Liability for Dogbite*, 51 A.L.R. 4TH 446, §§ 7–9, at 475–62).

290. *See id.* at 275.

291. *See id.* The only state to adopt a strict liability rule for dog bites by judicial decision did so over the dissents of two justices, one justice arguing that "[t]his case is not the proper vehicle for such a far-reaching change in the law," Hossenlopp *ex rel.* Hossenlopp v. Cannon, 285 S.C. 367, 373, 329 S.E.2d 438, 442 (1985) (Gregory, J., concurring in part and dissenting in part), and the other justice arguing that the common law should remain in effect "until the General Assembly sees fit to liberalize it." *Id.* at 372, 329 S.E.2d at 442 (Harwell, J., concurring in part and dissenting in part). The following year, the South Carolina legislature apparently agreed when it enacted a detailed dog bite statute. *See* ACT. NO. 343, 1986 S.C. ACTS 2521 (codified at S.C. CODE ANN. § 47-3-110 (1987)); *see also* Elmore v. Ramos, 327 S.C. 507, 509–10, 489 S.E.2d 663, 664–65 (Ct. App. 1997) (noting that strict liability for dog bites is statutorily imposed in South Carolina). Other state courts have declined to adopt a strict liability rule for dog bites by judicial decision. *See, e.g.*, Gehrts v. Batteen, 620 N.W.2d 775, 779 (S.D. 2001) ("[T]he legislature is the proper place to decide such public policy issues.").

292. *See, e.g.*, Matte v. Shippee Auto, Inc., 876 A.2d 167, 172 (N.H. 2005) (finding that wholesale abrogation of the common law "independent covenants rule," which originates from feudal times and provides that a tenant's obligation to pay rent is independent of the landlord's obligation to make repairs, would be a "sudden and fundamental change" that would "seriously disrupt settled expectations among landlords and tenants," and suggesting a statutory change that would give landlords and tenants an opportunity to anticipate and adjust to the new law). Another example of courts deferring to the legislature when a change in the law will have global effects is the abandonment of contributory negligence and adoption of comparative fault. *See supra* notes 270–73 and accompanying text.

inappropriately blur the distinction between the judicial and legislative branches of government.[293] Professor Robert Reich, who served as Secretary of Labor under President Clinton, termed these types of decisions "regulation through litigation."[294] When courts regulate through litigation, they shift away from the main purpose of tort law: determining whether it is appropriate to compensate a plaintiff because of a defendant's conduct. Regulation through litigation has a different purpose: making broad public policy determinations and using the threat of massive liability exposure to change the behavior of a defendant. Regulation through litigation results in pushing a judge's legislative public policy views onto America's citizens, which is one factor that has led to the appropriate use of the label "activist" judges.

A key problem with regulation through litigation is that it ignores the important fact that the judicial process is designed to settle disputes between individual parties, not to set national public policy agendas. Courts receive only the often limited information submitted by the litigants in an attempt to resolve a specific claim. They have no mechanism to hold public hearings, gather information from the public at large, or balance the varied interests of all affected persons, most of whom are not before the court. Yet, a single court decision, if not confined to the narrow issue before the court, can have implications such as regulating or changing how much people pay for certain items, what products they can buy, and what products may be available in the future.

Regulation through litigation can occur in favor of either plaintiffs or defendants; however, given the tendency of judges to expand tort law, there are more examples on the plaintiff's side of the ledger.[295] One fairly recent example that many states have addressed is the creation of a cause of action for medical monitoring costs in exposure cases absent any physical injury to a plaintiff. Plaintiffs in such cases seek post-exposure, pre-symptom recovery for the expense of periodic medical examinations to detect the onset of physical harm. Such cases run contrary to the fundamental tort law principle, developed over more than two hundred years, that an individual cannot recover damages without proof of a physical injury.[296] As Professors Henderson and Twerski note:

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293. *See* Renz, *supra* note 53, at 47–48 (noting that when courts arbitrarily make decisions in violation of stare decisis principles, they weaken their institutional legitimacy and authority).

294. Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A; Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22 (describing government litigation as "end runs around the democratic process").

295. It would be improper, for example, for courts to judicially create a statute of repose or limit on noneconomic damages. *But see, e.g.*, Young v. Bella, [2006] 1 S.C.R. 108 (recognizing trilogy of cases creating a court-imposed cap on non-economic damages in Canada for catastrophic personal injury cases: "'large amounts [of non-pecuniary damages] should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.'" (quoting Andrews v. Grand & Toy Alberta, Ltd., [1978] 2 S.C.R. 229; citing Thornton v. Prince George Bd. of Educ., [1978] 2 S.C.R. 267; Teno v. Arnold, [1978] 2 S.C.R. 287)).

296. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 330–33 (4th ed. 1971).

> [A]ny attempt to embrace [medical monitoring claims] within the mainstream of traditional tort law is manifestly unwise. In truth, [medical monitoring claims] constitute radical departures from longstanding norms of tort law, advanced in recent years to bludgeon a disfavored group of defendants. But the wrongdoing of a defendant, or defendants, does not justify creating legal doctrine that is substantively unfair, especially when doing so strikes mercilessly at another group of plaintiffs who, when the funds to pay damages run dry, will be denied recovery for real, rather than anticipated, ills.[297]

For some judges, the bright line physical injury rule may seem harsh, particularly when challenged by sympathetic plaintiffs; however, the rule has proven to be the best filter the courts have to distinguish between "reliable and serious claims" and "unreliable and relatively trivial claims."[298] The Supreme Court and the last four state high courts to review this issue have rejected such claims.[299]

Another recent example of courts making an unprincipled departure from stare decisis is in reaction to attempts by some states' attorneys general as well as personal injury lawyers to apply public nuisance law far outside the tort's traditional boundaries to product manufacturing.[300] Public nuisance law provides a means for governments to stop quasi-criminal conduct that is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right.[301] For example, typical public nuisance cases involve blocking public roadways, dumping sewage into public rivers, or blasting music when people are picnicking in a public park.[302]

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297. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 818 (2002).

298. Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 443–44 (1997).

299. *See id.* at 424; Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827, 829 (Ala. 2001); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 855–45 (Ky. 2002); Henry v. Dow Chem. Co., 701 N.W.2d 684, 701 (Mich. 2005); Badillo v. Am. Brands, Inc., 16 P.3d 435, 440–41 (Nev. 2001). *But see* Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145–48 (Pa. 1997) (defining the elements of common law claim for medical monitoring); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 978 (Utah 1993) (finding that the plaintiff was entitled to compensation for medical monitoring expenses); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 429 (W. Va. 1999) (formulating a standard for medical monitoring claims).

300. *See generally* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142 (Ohio 2002) (finding that a public nuisance action can be maintained in a personal injury case involving manufactured products).

301. *See* WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 643–45 (5th ed. 1984).

302. *See* RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979). Other types of public nuisance actions include interfering with public health and safety. *See* Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 637 (D.R.I. 1990). Examples include storing explosives within the city, interfering with reasonable noise levels at night, or interfering with breathable air, such as through emitting noxious odors into the public domain. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

Some courts have allowed public nuisance claims where a defendant lawfully manufactured, distributed, and sold a product, but the product by its inherent nature could interfere with the public's right to health or safety. Applying public nuisance law in this way is alluring to plaintiffs' lawyers because it circumvents the need to show a product was defective or caused the alleged injury. Invoking public nuisance law rather than products liability law may also allow plaintiffs to avoid defenses raised against them based on their own conduct as well as applicable statutes of limitation and repose. As a wise jurist observed, plaintiffs' lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."[303] A New York court recently noted:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.[304]

The most far-reaching expansion of public nuisance theory is exemplified by a Rhode Island trial court's decision to permit the state attorney general to sue former manufacturers of lead paint and pigment to clean up older homes.[305] It redefined the elements of a nuisance claim to allow the action to go forward simply due to the presence of lead paint in buildings in the state and the risk of danger to children, regardless of the reasonableness of the defendant's conduct, evidence of defect or causation of an injury, or whether the manufacturer's product was present in the home or even sold in Rhode Island.[306]

Most of the time, cases such as these remain outliers and are not followed by other courts.[307] If such lawmaking became the norm, judges could put into question the ability of the judicial branch to be proper stewards over the common law.[308]

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303. County of Johnson *ex rel.* Bd. of Educ. v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

304. People *ex rel.* Spitzer v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192, 196 (App. Div. 2003).

305. Jury Instructions, Rhode Island v. Atl. Richfield Co., C.A. No. 99-5266 (R.I. Super. Ct. Feb. 13, 2006).

306. *Id.* at 12–14 ("When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the numbers of community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm."); Peter B. Lord, *Lead-Paint Case Now in Jury's Hands*, PROVIDENCE J. BULL., Feb. 14, 2006, at B2 (describing public nuisance injury as "'*the cumulative presence* of lead pigment in paints and coatings in [or] on buildings in the state of Rhode Island'" (quoting Judge Michael A. Silverstein) (emphasis added)).

307. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 550–51 (2006) (observing that the Hawaii Supreme Court's decision in *Akau v. Olohana Corp.*, 652 P.2d 1130 (Haw. 1982) to allow a class action against a private company under public nuisance law for interfering with public trails was not followed by other courts)

308. *But see* Healey, *supra* note 2, at 107 ("[A]s long as non-precedential opinions do not undermine those values, the legitimacy of the courts will be preserved.")

VI. CONCLUSION

The doctrine of stare decisis should remain firm in tort law. When a request is made to alter an existing rule, regardless of whether the request is made by plaintiff or defense counsel, courts should be extremely wary of departing from precedent, particularly where there remains a current, reasonable basis for that precedent and parties have relied on the existing state of the law.

As this Article has shown, the stare decisis doctrine is not immutable. It can and should be overcome in a limited set of circumstances. This Article offers ten neutral principles for when and how to do so. When one or more of the principles set forth in this Article suggest that a precedent should be overruled or curbed, courts should consider doing so, tempered by how strongly a neutral principle applies and how many such principles may be applicable. For example, as discussed earlier, evidence of seat belt use in automobile accidents should be admissible when relevant. None of the reasons that supported the original rule apply today, and it would be disingenuous to suggest that people who decide not to wear a seat belt do so in reliance on existing tort rules.

In applying the neutral principles set forth in this Article, it also is of paramount importance that courts act with neutrality—a practice that has not always been followed. Historically, much of tort law has been shaped by plaintiffs' lawyers, who have suggested to courts new ways to expand liability. The seesaw of changes in tort law needs to be balanced. This Article has shown a few areas in which existing precedent that may favor plaintiffs is no longer supported by reason, science, or other principles that limit stare decisis. Precedents of those types need to be curbed just as much as those we have discussed that place unwarranted limits on the rights of plaintiffs to sue.

The springboard for modifying precedents should never be judges' own views of what they would do as legislators. A judge, for example, may believe that it is appropriate for a defendant to pay damages for future medical monitoring to a person who was exposed to a toxic substance, but is not currently injured. Most courts properly agree that this is a legislative decision. Or, a judge may believe that damages are out of control and therefore should be capped at a fixed amount. That, too, is a legislative decision.

Even within these confines, judges have ample latitude to shape and change the common law. Indeed, it is their obligation. The authors hope this Article assists courts in identifying and applying neutral principles as they work to improve tort law for current and future generations.