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## IN DEFENSE OF DETERRENCE

*Andrew F. Popper\**

The civil justice system deters misconduct. It generates far-reaching and positive market effects beyond victim compensation and recovery. Civil judgments, settlements, the potential for litigation—the tort system itself—has a beneficial effect on the behavior of those who are the subject of legal action as well as others in the same or similar lines of commerce. Over the last twenty years, legal scholars have debated whether the civil justice system generally, and tort recovery in particular, generates a deterrent effect. Those who have argued for tort reform (limiting the expanse and reach of accountability in the civil justice system) contend that the tort system has failed to live up to its promise of providing meaningful deterrence. Those who oppose tort reform and defend the civil justice system argue that tort cases have a powerful effect not only on the parties, but also on others involved in similar activity. This article takes the following position: those supporting tort reform cannot wish away deterrence. To claim that punishment has no effect on other market participants is to deny our collective experience. Deterrence is a real and present virtue of the tort system. The actual or potential imposition of civil tort liability changes the behavior of others.

### I. INTRODUCTION

For families suffering the wrongful death of a loved one and victims of defective products or negligent acts—suffering brain injury, loss of a limb, the ability to reason, or the capacity to love and be loved—litigation is about more than money.<sup>1</sup> It is about

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<sup>1</sup> Daniel Hernandez, *Suit Alleges Hazing in Death*, L.A. TIMES, Sept. 24, 2002, <http://articles.latimes.com/2002/sep/24/local/me-high24> (“This is a very courageous family. They don’t want their daughter to die in vain.”); see *School’s Negligence Is Held Responsible*

more than vengeance or retribution. It is about the promise of the civil justice system.

Civil justice for plaintiffs derives from the fairness of the process, the right to have one's story told, meaningful remedy, and one additional factor: plaintiffs ask the legal system to take steps to prevent repetition of their tragedy.<sup>2</sup> Prevention of future harm is a powerful public expectation and basic motivation for those injured by wrongful acts or defective products.<sup>3</sup>

Families and victims do not want their tragedy to be a loss in vain, a hope expressed by some courts as well.<sup>4</sup> Individuals and entities brought to justice establish models for future actions producing positive incentives that lessen the probability that others will suffer the same harm they experienced.<sup>5</sup> When school athletic

*In Death of Climber*, N.Y. TIMES, Apr. 7, 1990 (regarding a \$500,000 judgment: "I'm happy to have justice done . . . [M]y son did not die in vain. . . . It isn't the money.").

<sup>2</sup> Robyn Claridy, *Family Files Lawsuit in Gregg County Jail Death*, LONGVIEW NEWS-J. (Tex.), June 9, 2011, [http://www.news-journal.com/news/local/article\\_f0adece3-b8c7-5b2a-9d3b-556a9c1a753d.html](http://www.news-journal.com/news/local/article_f0adece3-b8c7-5b2a-9d3b-556a9c1a753d.html) ("Gregg County is required to provide reasonable medical care to inmates . . . . [T]he only way any effective change was going to be made [was a lawsuit] . . . . [T]here was no other way to get justice for Amy, or any of the other inmates that are suffering."); see Matt Kakley, *Lawsuit Filed in Explosion*, SUN CHRON. (Mass.), Jan. 5, 2011, <http://www.thesunchronicle.com/articles/2011/01/05/news/8640123.txt> (The decedent's brother commented: "[w]e hope that Billy did not die in vain . . . . We do not want any other families to suffer [a] nightmarish experience . . . like this.").

<sup>3</sup> See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1150 (1992) (stating that "compensating innocent victims for injury and deterring behavior that presents risks that exceed their social value" are among the most prominent social purposes of tort law).

<sup>4</sup> *Urseth v. City of Dayton*, 680 F. Supp. 1150, 1160 (S.D. Ohio 1987) (rejecting the defenses raised in a wrongful death case against the City of Dayton). There, the court held that "[t]o do otherwise will be to risk another James Urseth case, another tragedy which will, while proclaiming loud and clear that the community has learned nothing from the death of James Urseth, serve as proof positive that he died needlessly and in vain." *Id.* *Wheat v. United States*, 630 F. Supp. 699, 721 (W.D. Tex. 1986), *aff'd in part, rev'd in part*, 860 F.2d 1256 (5th Cir. 1988) ("Should the United States fail to correct the procedures that negligently caused the untimely death of Shilla Wheat . . . then Shilla Wheat suffered and died in vain."); *Care and Protection of Sharlene*, 840 N.E.2d 918, 930 (Mass. 2006) ("If Sharlene's case helps other children to escape their misery, her short life will not have been in vain.").

<sup>5</sup> *Wyeth v. Levine*, 555 U.S. 555, 578 (2009) (finding that one form of Food and Drug Administration ("FDA") approval was not preemptive, the Court held: "In keeping with Congress' decision not to pre-empt common-law tort suits, it appears that the FDA traditionally regarded state law as a complementary form of drug regulation."); *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 761 (S.D.N.Y. 1994) ("It must be recognized that state tort actions, although clearly imperfect, remain a powerful incentive for improving product safety."); Jean Macchiaroli Eggen, *The Mature Product Preemption Doctrine: The Unitary Standard and the Paradox of Consumer Protection*, 60 CASE W. RES. L. REV. 95, 114 (2009) ("Tort litigation provides an incentive to manufacturers to conduct substantial safety follow-ups on their products on the market."); Mary J. Davis, *The Case Against Preemption: Vaccines & Uncertainty*, 8 IND. HEALTH L. REV. 291, 314 (2011) (stating that the "tort litigation system provides the incentive for drug manufacturers" to secure better information); Philip G. Peters, Jr., *Resuscitating Hospital Enterprise Liability*, 73 MO. L. REV.

programs fail to protect a student<sup>6</sup> or an infant's breathing monitor fails,<sup>7</sup> i.e., when avoidable disaster strikes, we look to the legal system for recognition of harm—and for the hope that future losses can be avoided.

In a contractarian model of the legal system, a party who harmed another would simply pay for it.<sup>8</sup> The tort system is not primarily contractarian.<sup>9</sup> It is about fault and responsibility, obligation and foresight, carried out with the hope that civil justice produces a result that acknowledges plaintiff's losses and limits the possibility of a repetition of plaintiff's tragedy. It is about deterrence.

The nature of a legal proceeding or judgment affects the deterrent impact of that action. The civil justice system reflects a remarkably complex array of procedures, judgments, and other legal actions. A punitive damage award is likely to have a more immediate deterrent effect than a simple negligence case with modest compensatory damages.<sup>10</sup> Cases that result in an articulation of clear norms or principles will have more of a deterrent effect than those that do not.<sup>11</sup>

Each case in a common law system creates the potential for normative articulation and deterrent impact. The force of a clear judicial determination of liability is undeniable. Similarly situated entities assess such findings and either reconfigure their action or

369, 369–70 (2008) (“Adoption of enterprise liability would align the incentives of tort law with the goals of modern patient safety advocates . . .”).

<sup>6</sup> Mark Konkol, *Ex-prep Football Player Sues Over 1999 Hazing; Ex-teammates, Coach Named*, CHI. SUN-TIMES, June 30, 2009, at 14. A high school football player filed a lawsuit after being sodomized by his teammates with a broomstick and a banana as part of a violent hazing ritual. *Id.* “[M]ore than money . . . the goal of the lawsuit is to make sure ‘this will not happen again . . .’” *Id.*

<sup>7</sup> Neil Steinberg, *Hospital Added to Suit in Baby's Death*, CHI. SUN-TIMES, Sept. 8, 1993, at 14 (“Christ Hospital and Medical Center announced . . . it is ‘making every conceivable effort to make certain an infant electrocution will not happen again,’ as the hospital was added to a lawsuit filed by the parents of a newborn who died there last month.”).

<sup>8</sup> See generally Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533 (2009) (describing the basic contours of a tort law system based on a contractarian model).

<sup>9</sup> See generally *id.* (arguing that although somewhat oversimplified, contract deals with enforcement of agreement between private actors while tort produced both remedy and de facto regulation); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1341 (2009) (exploring and critiquing the tort/contract distinction).

<sup>10</sup> See, e.g., Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 464 (2004); James Andreoni et al., *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 AM. ECON. REV. 893, 894 (2003).

<sup>11</sup> *Smith v. Wade*, 461 U.S. 30, 50 (1983) (“[M]ost officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages. . . . [T]he conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance.”).

behavior (a deterrent response) or choose not to do so and, thereby, risk downstream liability.<sup>12</sup> Frankly, it is hard to conceive of a healthy economic model where rational actors ignore clear warning signs and thus render themselves vulnerable to sanctions or punishment.<sup>13</sup> Recognizing that different types of cases and outcomes are likely to produce varied responses by nonparties is by no means an indication of the lack of deterrent effect.<sup>14</sup>

It is a fair guess that the pointed and at times bellicose nature of the tort reform debate has made it more dangerous to speak realistically about deterrence.<sup>15</sup> Perhaps those supporting tort reform's gross limitation of accountability are concerned that acknowledging a powerful deterrent effect in a particular case would undercut the baseline assumptions of tort reform. Similarly, for consumer advocates and those who litigate on behalf of plaintiffs and oppose tort reform, acknowledgement that certain cases have little or no deterrent effect could be seen as undercutting their anti-tort reform position.<sup>16</sup> Thus, it should come as no surprise that there is no single comprehensive juried study that looks broadly at

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<sup>12</sup> See Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1604 (2002) (describing the argument that "tort law deters unsafe behavior in a comprehensive and systematic way" used by pro-deterrence torts theorists).

<sup>13</sup> Governmental entities may be less affected by tort judgments than private sector entities. See Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 462 (2010) ("[T]here is reason to believe that governments are not responsive to financial deterrence in the same way as private entities."); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 213 (1997) ("The dual purposes of imposing such damages—punishment and deterrence—do not as readily apply to the government qua government as they do to a private actor.").

<sup>14</sup> Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 425–27 (1994) (arguing that while deterrent effect varies based on the area of tort law and other factors, the notion that deterrence is a "real" and intended consequence of the civil justice system is valid); see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 292 (1987).

<sup>15</sup> See, e.g., John A. Albers, *State of Confusion: Substantive and Procedural Due Process with Regard to Punitive Damages after TXO Production Corp. v. Alliance Resources Corp.*, 26 U. TOL. L. REV. 159, 203 (1994) (characterizing tort reform as a "bitter turf war between plaintiffs' attorneys and corporate America"); Michael King, *Fiddling While Texas Burns*, AUSTIN CHRON., Mar. 28, 2003, <http://www.austinchronicle.com/news/2003-03-28/151857/> (reporting that tort reform debates in Texas legislature consisted of "increasingly angry exchanges" and were "long and bitter"); Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 42, 46–48; Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 34–35 (2002).

<sup>16</sup> See generally Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 450–59 (2011) (noting a variety of claims and arguments on both sides of the deterrence debate and citing to jurisprudence bolstering both sides of the discussion).

the deterrent effect of tort law.<sup>17</sup> Instead, the literature consists of well-researched position papers, testimony, opinions, and scholarly articles of academicians of every stripe as well as those of practitioners, economists, and others.<sup>18</sup>

This article references a number of those works on deterrence and tort law and concludes that the tort system is fully defensible as a primary deterrent mechanism. It is not a perfect system. Not every case deters. In the aggregate, however, the civil justice system provides a powerful and continuous messaging device that positively affects the safety and efficiency of goods and services.

## II. NORMATIVE FUNCTION AND MARKET MESSAGING: THE CORE OF DETERRENCE

The debate regarding deterrence can be distilled down to messaging. A tort case can communicate a normative message, an avoidance message, or a message affirming current practices.<sup>19</sup> To deny that judicial decisions provide a valuable deterrent effect is to deny the historic role of the judiciary, not just as a matter of civil justice but as a primary and fundamental source of behavioral norms.<sup>20</sup> Part of the task of the judiciary is to be a solid and objective voice of reason and reasonability, articulating standards that are just, even when they go against the grain in a business or an entire industry.<sup>21</sup> “Courts must in the end say what is required; there are precautions so imperative that even their universal

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<sup>17</sup> See Mello & Brennan, *supra* note 12, at 1604 (stating that “empirical evidence of deterrence is indeed difficult to come by”).

<sup>18</sup> See generally JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ’S CASES AND MATERIALS ON TORTS 511–19 (9th ed. 1994) (referencing several examples of considerations and questions taken into account by judges, academicians, legislator, and other important “players” in the debate over the deterrent effect of tort law).

<sup>19</sup> University of Oxford Law Professor P.S. Atiyah, who is generally grouped with pro tort reform scholars, noted that: “American tort law [can be seen] as the major means for setting norms and standards . . . . [T]ort law is a response to the demands of a society in which there are many grievances not regarded as the responsibility of governments to redress.” P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1018 (1987).

<sup>20</sup> See, e.g., Bd. of Cnty. Comm’rs of Garrett Cnty. v. Bell Atlantic-Md., Inc., 695 A.2d 171, 174 (Md. 1997). In this case, when county contractors severed Bell’s underground cable, Bell sued for damages. *Id.* The Court found for Bell and used the case to caution others involved in excavation to exercise caution. *Id.* at 183–84 (“This case should serve as *fair warning to anyone* contemplating excavation.” (emphasis added)). “Fair warning to anyone” is deterrence. *Id.*

<sup>21</sup> See *id.* at 179–81, 183 (explaining the obligations of an excavator under the utility statute and the requirements needed to establish negligence).

disregard will not excuse their omission.”<sup>22</sup>

It does not seem controversial to assert that the articulation of standards or norms has a positive influence on behavior and deters future misconduct.<sup>23</sup> “[T]he threat of tort liability has the capacity to deter broadly . . . .”<sup>24</sup> To argue that the prospect of civil liability has little or no effect on future behavior collides with a common understanding of how we react to the potential of punishment.<sup>25</sup> “Certainly the threat of tort liability is commonly considered to have a substantial effect on behavior.”<sup>26</sup> While there is literature suggesting that conventional views of sanction, censure, and punishment are in need of study,<sup>27</sup> there is nothing to challenge the common sense notion that humans learn by example or that people tailor behavior to minimize sanction.

In discussing the potential of tort liability within a family unit, where courts have been hesitant to intervene, Professor Benjamin Shmueli observed that “[t]ort law sends the message—both to the specific tortfeasor and to potential tortfeasors—that there are certain values that society is not willing to compromise. Imposing liability warns the tortfeasor that if the behavior exhibited . . . is not consistent with societal values, there will be appropriate legal sanctions.”<sup>28</sup> Those sanctions establish both lowest common denominator standards as well as signaling to others the most basic

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<sup>22</sup> The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (citing *Wabash R. Co. v. McDaniels*, 107 U.S. 454, 459–61 (1882); *Tex. & Pac. Ry. Co. v. Beyhmer*, 189 U.S. 468, 470 (1903); *Shandrew v. Chi., St. Paul, M. & O. Ry. Co.*, 142 F. 320, 324–25 (8th Cir. 1905); *Maynard v. Buck*, 100 Mass. 40 (1868)).

<sup>23</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4–7, 58, 161–62 (1987) (explaining that tort judgments deter future misconduct).

<sup>24</sup> Aaron Katz, *A “Moving Bar” Approach to Assessing the Admissibility of Expert Causation Testimony*, 57 CLEV. ST. L. REV. 579, 625 (2009).

<sup>25</sup> C.B. FERSTER & B.F. SKINNER, *SCHEDULES OF REINFORCEMENT* 7–11 (Julie S. Vargas ed., 1957); see generally B.F. SKINNER, *ABOUT BEHAVIORISM* 53, 68–71 (1974) (claiming rational beings act to avoid pain or punishment).

<sup>26</sup> Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1733 (1996) (recognizing that the motivations and actions of individuals within a corporation create a set of behavioral variables distinct from the overall corporate response to risk-taking behavior).

<sup>27</sup> See Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CALIF. L. REV. 1281, 1286–88 (2003) (challenging and testing the applicability of game theory to punishment); see, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 209–26 (2003) (studying the philosophical underpinnings of punishment—mostly criminal—and questioning the interrelationship with deterrence); see generally PHILIP BEAN, *PUNISHMENT: A PHILOSOPHICAL AND CRIMINOLOGICAL INQUIRY* (1981) (contemplating the interrelationship between punishment, deterrence, and retribution).

<sup>28</sup> Benjamin Shmueli, *Tort Litigation Between Spouses: Let’s Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 208 (2010).

levels of acceptable and unacceptable conduct.

The norms generated in torts cases can have an impact by defining a baseline for tolerable conduct in the workplace and academic settings, complementing the regulatory enforcement mechanisms extant in the field of sexual harassment.<sup>29</sup> While one might argue that family members or certain workers are not fully informed of standards that evolve in a common law context (notwithstanding the historic presumption of knowledge of those standards),<sup>30</sup> private and public employers and educational institutions are more likely aware of and responsive to the potential for liability,<sup>31</sup> i.e., the deterrent effect of tort law.

Professor John C.P. Goldberg notes that beyond providing compensation to those who are injured, “the most obvious function tort might play is to send a message to powerful actors that they must give due consideration to the well-being of others. Tort cases can also foster public dialogue and debate about social problems, particularly problems related to the use and abuse of power.”<sup>32</sup> Abuse of power is arguably at the heart of workplace or academic

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<sup>29</sup> See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 363 (1990) (stating that establishing a cause of action in tort for harassment sends an unmistakable normative message).

<sup>30</sup> The notion that the tort system informs behavior is both central to this article and not compromised by the fact that not every person “knows the law.” One assumption in this article, however, is that most of those responsible for making critical choices in the production of goods and services do have a working understanding of basic legal norms. The idea that every person is presumed to know the law is aspirational. See *United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986). However, there is little question that the goal of knowledge of legal standards or norms is founded on solid ground and that an individual claim of ignorance is not, for the most part, a defense. See, e.g., *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886) (“The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. . . . Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions . . . .”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 153 (1881); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 127–29 (1997) (exploring the theoretical premises and problems with the collective assumption of the legal knowledge principle); Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses*, 61 NOTRE DAME L. REV. 167, 218 (1986) (“The notion that everyone is presumed to know the law, which is based on the maxim that ignorance of the law is no excuse, has become a fundamental tenet of this country’s legal system.” (footnote omitted)).

<sup>31</sup> See *Atkins v. Parker*, 472 U.S. 115, 130 (1985) (“The claim that petitioners had a . . . right to better notice . . . is without merit. All citizens are presumptively charged with knowledge of the law . . . .” (citation omitted)); *Jones v. Local 4B, Graphic Arts Int’l Union*, 595 F. Supp. 792, 795 (D.D.C. 1984) (“[W]hile Union officers are fiduciaries . . . they have a greater responsibility to obey the law. Union officers are the same as private employers, and, are presumed to know the law.”); *People v. Snyder*, 652 P.2d 42, 44 (Cal. 1982).

<sup>32</sup> John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 326 (2011) (footnote omitted).



harassment cases.<sup>33</sup>

The impact or quantum force of messaging—the deterrent value—is difficult to calculate. As noted earlier, deterrent effect is driven by the nature of the legal proceeding. It is also affected by the notoriety of the misconduct, the resulting damages, and commonality of the product or practice underlying the case—the event to be deterred. On the matter of force or effect, Professor Stephen Gilles comments: “My fundamental conclusion is that modern American negligence law regulates activity levels to a considerably greater extent than has previously been recognized.”<sup>34</sup> While there is little to quantify that effect, there is simply no credible juried study that establishes the absence of that effect.<sup>35</sup>

It is perfectly consistent with overall assessments of human behavior<sup>36</sup> “that a liability determination will affect future cases.”<sup>37</sup> The proposition is simple: “[d]amage awards modify future behavior indirectly by providing disincentives for future conduct that is unduly risky.”<sup>38</sup> To assume otherwise is to assume some level of widespread masochism at the individual and corporate level—and that is nonsensical.

Civil tort judgments establish standards, tolerance levels, and articulate valuable norms. While one might assert that effective articulation of norms requires a clarity and certainty<sup>39</sup> not uniformly present in tort cases, the capacity to articulate norms, and for those norms to have a powerful force, seems clear.<sup>40</sup>

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<sup>33</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 90 (1979); but see Laura M. Sullivan, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather Than Power Dynamics*, 3 WM. & MARY J. WOMEN & L. 329, 329 (1997).

<sup>34</sup> Stephen G. Gilles, *Rule-based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 320 (1992).

<sup>35</sup> See Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 LAW & POL’Y 67, 80–84 (1984) (surveying literature on the expense of car accidents); Schwartz, *supra* note 14, at 377–78 (showing there is empirical data to suggest that tort cases have a deterrent effect); Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL’Y & L. 139, 157 (2005) (stating that the “empirical evidence of tort law’s deterrence is hazy”).

<sup>36</sup> See FERSTER & SKINNER, *supra* note 25, at 7–11.

<sup>37</sup> Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 198 (1998).

<sup>38</sup> Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 685 (2008).

<sup>39</sup> While broad juried studies are nonexistent, there is a comprehensive study on the question of uncertainty and deterrence finding that “uncertainty with regard to either the size of a sanction or the probability of detection increases deterrence.” Baker et al., *supra* note 10, at 464.

<sup>40</sup> See LANDES & POSNER, *supra* note 23, at 11 (“[T]here is widespread agreement that the imposition of tort liability on professionals . . . and on business and other enterprises does

Regarding toxic tort cases, Anthony Z. Roisman and others assessed the potential for liability determinations to deter others from engaging in misconduct.<sup>41</sup> They note that there are “critics [who claim] the latency and uncertainty associated with toxic tort cases causes companies to undervalue the potential tort claims against them, and therefore the threat of tort liability is not likely to deter unsafe behavior. Despite its convincing ring, this argument does not hold up.”<sup>42</sup> The authors then demonstrate that the opposite is true—tort liability changes the behavior of others.<sup>43</sup>

The efficiency derived from avoiding litigation and stimulating behavior that is less likely to cause harm is hardly controversial.<sup>44</sup> Judge Richard Posner recognized this effect: “If . . . the benefits in accident avoidance exceed the cost of prevention, society is better off if those costs are incurred and the accident averted [by adopting] precautions in order to avoid a greater cost in tort judgments.”<sup>45</sup> While one might challenge the speed and precision of this calculation for certain individual decisions, e.g., the choice to drive home after having three or four drinks, it is a fundamental tenet of basic tort law that the potential for liability influences choices made by those in commerce responsible for the design and delivery of goods and services.<sup>46</sup>

There are those who have argued that even if there is a deterrent effect, liability insurance dilutes the effect and constitutes a moral hazard.<sup>47</sup> Were insurance free to the insured, premiums unaffected

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affect behavior, does deter—some think too much!” (footnote omitted)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25–26 (5th ed. 1984) (commenting on the “prophylactic” nature of tort law).

<sup>41</sup> See Anthony Z. Roisman et al., *Preserving Justice: Defending Toxic Tort Litigation*, 15 FORDHAM ENVTL. L. REV. 191, 194 (2004).

<sup>42</sup> *Id.* at 222.

<sup>43</sup> *See id.*

<sup>44</sup> See, e.g., *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. Dist. Ct. App. 1985); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

<sup>45</sup> Posner, *supra* note 44, at 33.

<sup>46</sup> See *Escala v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) (“[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.”). See also John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973) (“Experience seems to demonstrate that if a manufacturer knows he will be held liable for injuries inflicted by his product, that product will be safer than if he understands that he can avoid liability by demonstrating the exercise of due care.”).

<sup>47</sup> See Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91, 93 (1996) (questioning whether liability insurance dissipates the “deterrent force that the tort system possesses” (footnote omitted)); see generally Kenneth S. Abraham & Lance Liebman, *Private Insurance*,

by civil judgments, and the history of American tort law to reflect that the presence of insurance increases the likelihood of misconduct, the argument might merit consideration. However, none of those things are even vaguely true. Noting the absence of abundant empirical study, William Landes and Richard Posner draw the following conclusion: “[W]hat empirical evidence there is indicates that tort law deters, even where . . . liability insurance is widespread.”<sup>48</sup>

In those areas where tort judgments are modest or norms are as yet to be developed, the lack of such decisions may be the reason misconduct occurred. Commenting on problems in transatlantic capital markets, Mark Brewer and others noted that “many members of the industry behaved . . . recklessly and greater mechanisms of deterrence could have prevented at least some of the pain being felt now.”<sup>49</sup> Along similar lines, Professor Gilles noted that were some of the recently erected barriers to tort judgments removed, “it would send a powerful message reinforcing the deterrent and corrective-justice goals of tort law. Individuals would in effect be told that torts are treated as serious wrongs for which personal responsibility is the norm, not the exception.”<sup>50</sup>

If one denies the deterrent effect of tort law, presumably one also denies an essential purpose of the civil justice system: the promotion of safety. While generalizations about fundamental purpose may add little to the debate, one is hard pressed to find a credible argument asserting that tort law does not promote public safety.<sup>51</sup> In judicial opinions, the assertion can be made as a

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*Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 77, 88 (1993) (calling for the development of a more coherent compensation system); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1524 (1987) (contending that the insurance crisis is a figment of expanding modern tort liability); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313, 336–55 (1990) (“[T]ort law’s deterrence objective is ‘severely, perhaps fatally undermined’ by the prevalence of insurance”).

<sup>48</sup> LANDES & POSNER, *supra* note 23, at 10.

<sup>49</sup> Mark K. Brewer et al., *Reconsidering Disclosure and Liability in the Transatlantic Capital Markets*, 9 DEPAUL BUS. & COM. L.J. 257, 286 (2011) (quoting Aaron Unterman, *Innovative Destruction—Structured Finance and Credit Market Reform in the Bubble Era*, 5 HASTINGS BUS. L.J. 53, 80 (2009)).

<sup>50</sup> Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH & LEE L. REV. 603, 679 (2006).

<sup>51</sup> See *Gantes v. Kason Corp.*, 679 A.2d 106, 111 (N.J. 1996) (“The goal of deterrence . . . is especially important in the field of products-liability law.” (citations omitted)); Anita Johnson, *Products Liability “Reform”: A Hazard to Consumers*, 56 N.C. L. REV. 677, 692 (1978) (“The breadth and flexibility of the common law have permitted it to effectively discipline the harmful effects of technology.”); Marc S. Moller & Paul Indig, *Products Liability Law Revisited: A Realistic Perspective*, 31 TORT & INS. L.J. 879, 881 (1996) (“[P]erhaps as a result of the products liability movement of the 1960s and early 1970s, most American consumer

contrast to contract law: “[t]ort law promotes public safety, while warranty law protects expectations.”<sup>52</sup> At the state court level, “[c]ontract law protects the expectation that the parties will receive the benefits of their bargain . . . while tort law promotes safety and protects personal and property rights by imposing a baseline duty of care.”<sup>53</sup>

The operating assumption of courts is not just that they will be there to provide a neutral accounting-like function to compensate an injured party, but that they will be sending a message heard clearly by those engaged in similar market practices. To think otherwise is to assert that judges do not consider the broader ramifications of their decisions—and that is a very unsafe assumption.<sup>54</sup>

### III. PUNITIVE DAMAGES

To the extent there is a debate regarding the deterrent effect of tort law,<sup>55</sup> it is difficult to see how that debate has any traction when it comes to punitive damages. Punitive damages are awarded to punish outrageous conduct and “deter [defendants] and others . . . from similar conduct in the future.”<sup>56</sup> The dual goal of punishment and deterrence is hardly controversial. “[P]unitive damages serve as a warning and example to deter others . . . . [They are an] incentive to avoid tortious conduct.”<sup>57</sup> Punitive damages are often linked with other sanctions, for example liability under the Civil Rights Act, where “deterrence is a primary, and common, purpose of both [Section] 1983 liability and punitive damages . . . . In [some] cases, punitive damages may be the only significant remedy . . . and their spectre may be the only credible deterrent against

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products are the safest available in the world.”).

<sup>52</sup> *First Nat’l Bank of Boston v. Une*, No. 87-C1083, 1988 WL 130050, at \*5 (N.D. Ill. Nov. 23, 1988) (memorandum opinion and order).

<sup>53</sup> *Valley Forge Ins. Co. v. Sam’s Plumbing, LLC*, 207 P.3d 765, 767 (Ariz. Ct. App. 2009).

<sup>54</sup> Though separation of powers concerns make clear that judges are not to “legislate from the bench,” it is fallacious to conclude that judges decide cases in isolation without considering the ramifications of their actions. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1986) (supporting the notion that judges consider the ramifications of their decisions).

<sup>55</sup> Compare George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 5 (1987), William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1, 16–23 (1980) (claiming that individuals are not deterred by the prospect of liability), and Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 558–59 (1985), with *Smith v. Wade*, 461 U.S. 30, 54 (1983), and RESTATEMENT (SECOND) OF TORTS § 908 (1979).

<sup>56</sup> RESTATEMENT (SECOND) OF TORTS § 908.

<sup>57</sup> *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. Dist. Ct. App. 1985).

constitutionally abhorrent behavior.”<sup>58</sup> In any lucid discussion of punitive damages, the basic goals of punishment and deterrence are presumed.

Early in the tort reform debate, Jane Mallor and Barry Roberts surveyed punitive damages and concluded that “[i]nflicting punishment for past acts . . . tends also to control future behavior . . . . [O]thers in a similar position will wish to avoid the unpleasant consequences of such acts in the future. Punishment, therefore, cannot be separated from deterrence.”<sup>59</sup> Stated another way, punitive damages raise the cost of misconduct.<sup>60</sup> A rational actor avoids costs that do not contribute to profitability or efficiency. In that sense, the potential for imposition of punitive damages plays an extraordinarily powerful prospective role.<sup>61</sup>

While there are those who assert that the paucity of empirical data on the impact of punitive damages suggests an absence of deterrence,<sup>62</sup> there is no lack of clarity on the part of the United States Supreme Court regarding the deterrent role of punitive damages. They “are imposed for purposes of . . . deterrence.”<sup>63</sup> They are properly imposed to serve “legitimate interests in punishing unlawful conduct and deterring its repetition.”<sup>64</sup> The goal is to “serve a broader function; they are aimed at deterrence.”<sup>65</sup> Though there have been several Supreme Court cases raising

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<sup>58</sup> *Larez v. City of Los Angeles*, 946 F.2d 630, 648–49 (9th Cir. 1991) (affirming an award of \$170,000 in punitive damages against former Los Angeles Police Chief Daryl Gates); see *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). In a challenge to an allegedly wrongful search, the Court counseled reliance on tort liability, noting, inter alia, “civil liability is an effective deterrent.” *Id.*; see also *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994) (“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”).

<sup>59</sup> Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980).

<sup>60</sup> See Leslie E. John, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CALIF. L. REV. 2033, 2053 (1986) (arguing that punitive damage awards have a deterrent effect on others).

<sup>61</sup> See Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 68–69 (1992) (arguing that punitive damage awards are successful deterrents).

<sup>62</sup> See, e.g., Jerry L. Mashaw, *A Comment on Causation, Law Reform, and Guerilla Warfare*, 73 GEO. L.J. 1393, 1394 (1985) (“[I]t is extremely difficult to find any empirical evidence that the tort system produces deterrence”).

<sup>63</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (citations omitted).

<sup>64</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (citations omitted).

<sup>65</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (stating that punitive damages may be imposed as a deterrent). See also *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (“This Court has long made clear that ‘[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.’”) (quoting *BMW of N. Am., Inc.*, 517 U.S. at 568)).

punitive damage issues in recent years, the deterrent effect has not been questioned.<sup>66</sup>

One of the few empirical works done on punitive damages, referenced by Professor Michael Rustad, involves a study undertaken by A.T. Kearney Associates, a consulting firm that attempted to assess the impact of punitive damage awards on business behavior.<sup>67</sup> The study finds that of the more than five hundred companies assessed, all respond at some level to punitive damages, with just under half responding fairly aggressively.<sup>68</sup>

The threat of a large sanction has a powerful influence on behavior.<sup>69</sup> In fact, there is a concern that the insufficiency of damages in some cases will have an under-deterrent effect.<sup>70</sup> In a recent article touching in part on punitive damages, the authors note that “potential defendants surely do not ignore the possibility of large damage awards and may accordingly change their behavior as a result of such awards. Thus, tort damage awards can exert a regulatory effect, (i.e., deterrence or promotion of certain behaviors) similar to statutory and regulatory law.”<sup>71</sup> While there may be controversy in the field regarding punitive damages,<sup>72</sup> it seems safe to say that their deterrent effect cannot be seriously questioned.

#### IV. DETERRENCE DENIERS: THE OPPOSING POINT OF VIEW

While the term *deniers* may seem somewhat harsh, it is applied to those who reject beliefs or theories accepted commonly as true.<sup>73</sup>

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<sup>66</sup> See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Philip Morris USA*, 549 U.S. at 346; *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

<sup>67</sup> Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 795 (1997).

<sup>68</sup> See *id.*

<sup>69</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1557 (1999) (an expansive liability rule, e.g., enterprise liability, has a strong and positive effect on those engaged in or contemplating dangerous or injurious behavior).

<sup>70</sup> See, e.g., Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 695, 703 (2005).

<sup>71</sup> Christina E. Wells et al., *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793, 803 (2011) (footnote omitted).

<sup>72</sup> See, e.g., Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297 (2005); see, e.g., generally Neil Vidmar & Matthew W. Wolfe, *Punitive Damages*, 5 ANN. REV. L. & SOC. SCI. 179 (2009) (discussing the controversial nature of punitive damages); Rachel D. Trickett, Comment, *Punitive Damages: The Controversy Continues*, 89 OR. L. REV. 1475 (2011).

<sup>73</sup> *Deniers Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/deniers> (last visited Jan. 5, 2012). This term has been used for those who deny evolution, the Holocaust, climate change, science, or the moon landing. In the context of this article, it refers to those who deny that tort judgments have a deterrent effect on others.

About twenty-five years ago, scholarship began to appear suggesting that the tort system was problematic.<sup>74</sup> The system, it was argued, did not achieve the goal of deterrence, but rather served solely to compensate injured individuals.<sup>75</sup> These proposals urged comprehensive reform<sup>76</sup> or even abolition of the tort system.<sup>77</sup> Individuals and businesses, or so went the argument, are simply not deterred by the prospect of civil liability and tort.<sup>78</sup> These arguments were supported by highly regarded scholars who took the position that the psychological avoidance response associated with punishment was not evident in the civil justice system.<sup>79</sup>

Part of this attack was based on the fact that "it is extremely difficult to find any empirical evidence that the tort system produces deterrence."<sup>80</sup> Naturally, the scholarship does not acknowledge that it is extremely difficult to find any evidence whatsoever that the tort system fails to deter.

More recent scholarship that adopts the deniers' point of view suggests that "awareness of legal liability does not always deter undesirable behavior. In some situations, it does not make any difference in a reasonable actor's decision making process, and in other cases, it may successfully deter overly risky conduct."<sup>81</sup> Other commentators have argued that deterrence fails because "sanctions are perceived as weak, [and norms do] not clearly articulate what conduct will be punished."<sup>82</sup>

Some commentators note that tort damages generally and punitive damages specifically have a limited effect on corporations and publicly traded companies because the damage award fails to affect the individual decision-makers but instead punishes

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<sup>74</sup> See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 70–72, 224–27 (1988); Priest, *supra* note 55, at 1, 5; Sugarman, *supra* note 55, at 555, 558.

<sup>75</sup> See, e.g., Paul Zador & Adrian Lund, *Re-Analyses of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226, 234–41 (1986).

<sup>76</sup> See Priest, *supra* note 55, at 5.

<sup>77</sup> See Sugarman, *supra* note 55, at 558.

<sup>78</sup> See Rodgers, Jr., *supra* note 55, at 16–23; David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1142–43 (2000) (challenging the impact of uncertainty); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 288–99 (1998).

<sup>79</sup> See, e.g., Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 117–18 (1993); Frank A. Sloan et al., *Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving*, 38 J.L. & ECON. 49, 72 (1995).

<sup>80</sup> Mashaw, *supra* note 62, at 1394.

<sup>81</sup> Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195, 221 (2004).

<sup>82</sup> Sharon Hoffman & Jessica Wilen Berg, *The Suitability of IRB Liability*, 67 U. PITT. L. REV. 365, 408 (2005).

shareholders.<sup>83</sup> Another criticism is a more straightforward attack on the civil justice system itself: "It is hard to conjure up a system of accident cost control more irrational and less reflective of social values than the present tort system."<sup>84</sup> A similar critique includes the charge that whatever benefits the tort system provides, they are greatly outweighed by the costs the system imposes.<sup>85</sup>

Finally, questions are raised regarding the overall credibility of the tort system. Given the nature of the tort reform attack over the last quarter century, this criticism is not surprising. Moreover, defendants do not always accept the ultimate finding of a court, not just in terms of liability and damage, but in terms of their own behavior. Professor Donald C. Langevoort noted this phenomenon: "[L]egal standards that ask persons to act reasonably have weak deterrence power when the actor is convinced that he *is* acting reasonably."<sup>86</sup> For purposes of this article, however, while deterrence of future misconduct by an entity already found civilly liable is essential, this discussion is focused on the consequence of that finding on others who "observe" the finding.

## V. DENIERS CRITIQUED

Scanning through the section above, it would seem the deniers believe there is insufficient empirical evidence to prove the power of deterrence and that the tort system does not achieve the goals it sets out: punishment and deterrence.

It is hard to argue with the proposition that there is a lack of credible empirical evidence, in either direction, on the matter of deterrence. There is powerful empirical evidence, however, on the impact of punitive damages and the positive effect of uncertainty in those damages.<sup>87</sup> Moreover, while this field abounds with assumptions, when the deniers attack the unpredictability factor of

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<sup>83</sup> See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998) (arguing that punitive damages might not affect corporate behavior since they tend to punish shareholders, not individuals, within the defendant corporation); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1835 (1987).

<sup>84</sup> Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1317 (1980).

<sup>85</sup> See Sugarman, *supra* note 55, at 616–17.

<sup>86</sup> Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 117 (2002).

<sup>87</sup> Baker et al., *supra* note 10, at 459. Baker and others assessed separately the risk of detection and the quantum of damages and concluded, *inter alia*, that the risk of tort liability is a powerful deterrent and that reducing uncertainty of punitive damages can undercut their strong deterrent value. *Id.*



the civil justice system targeting punitive damages, they “assume without questioning that uncertainty in sanctions is undesirable.”<sup>88</sup> In fact, the data on deterrent response to punitive damages is exactly the opposite.<sup>89</sup> It is counterintuitive to claim that the potential for liability or the imposition of liability on one party has little or no effect on similarly situated entities. The challenge is to identify the change or shift in behavior by those other parties.

Consider a hypothetical finding of liability against a manufacturer in an automobile design defect case. When that happens, at least two things seem instantly true: First, all rational similarly situated entities (nonparty producers of automobiles) will make certain their products do not create or present the same or similar design feature. If so, unless one is inclined to waste assets, those problems will be corrected. Second, any nonparty company making those corrections will *not* run a product campaign based on the following advertising text: “Our vehicles were quite flawed and dangerous. We just learned about it. Sorry about that. Fear not—at least not for our new models—we have resolved the problem!” Instead, the vast majority of rational actors will respond by minimizing risk (to the benefit of the public), while not calling attention to their shortcomings. That is deterrence. It may also explain why proving post-judgment amelioration is not readily subject to empirical study.

Given the lack of empirical data, a survey was conducted for this article seeking attitudes and beliefs regarding deterrence.<sup>90</sup> The survey was sent to the in-house legal representatives in the general counsel’s office (or similarly titled office) at many of the largest businesses in the United States.<sup>91</sup> Respondents were asked to indicate their agreement or disagreement with five options pertaining to deterrence.<sup>92</sup> Respondents were promised complete

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<sup>88</sup> *Id.* at 452 (citations omitted).

<sup>89</sup> *See id.* at 446–47.

<sup>90</sup> *See* letter from Andrew F. Popper, Professor of Law, Am. Univ., Wash. Coll. of Law, to Fortune 500 companies (on file with author) (forwarding letter and survey questionnaire to Fortune 500 companies and containing respondents’ answers).

<sup>91</sup> *See id.* The recipients were picked from the most recent Fortune 500 List. *Our Annual Ranking of America’s Largest Corporations*, CNN MONEY, available at [http://money.cnn.com/magazines/fortune/fortune500/2011/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2011/full_list/) (last visited Jan. 5, 2012).

<sup>92</sup> The survey questions and summary percentile responses follow:

The operating premise of each option below is the same: you have learned a tort judgment has been entered against a competitor company or other similarly situated entity. In the case, a court found the company’s product was defectively designed.

Upon hearing the news of the judgment:

1) Our company is likely to examine methods of production regarding the affected product [or service] and, if needed, quietly take steps to make sure our products are in

anonymity.<sup>93</sup>

Although the response rate was modest (15%), while most agreed that one should not generalize about deterrence because “[i]ndividual judgments affect us in different ways,” 73% agreed that a tort judgment against a company in the same line of commerce would prompt their company “to examine methods of production regarding the affected product [or service] and, if needed, quietly take steps to make sure our products are in compliance with applicable standards.”<sup>94</sup> That is the deterrent effect the tort system promises.

Another argument raised regarding deterrence involves the concession that while there is a real deterrent effect generated by the tort system, it produces antisocial avoidance behaviors that undercut rather than enhance public safety, innovation, and efficiency.<sup>95</sup> This argument denies the efficacy of tort law and civil justice entirely.<sup>96</sup> If this is true, then all enforcement of any right or entitlement—in any field—would suffer the same fate. This is at

compliance with applicable standards. (Tort actions deter misconduct) [73% agreed or strongly agreed.]

2) The recent history of tort litigation has so many problematic and unfair judgments that we simply do not use tort cases involving other companies as a guideline. We have confidence in our products and are not affected by the misfortunes of our competitors. (Tort actions do not deter misconduct) [27% agreed or strongly agreed, 73% disagreed.]

3) To react in *any* way to such a civil tort judgment would be an affirmation of a tort system that we believe to be problematic. (We are a pro tort reform company) [47% agreed or strongly agreed.]

4) To fail to react to a civil tort judgment could be seen as an admission that we do not care about the well-being of our customers. (We are responsive to consumer needs) [60% agreed.]

5) One cannot and should not generalize about such matters. Tort judgments are, by definition, case-specific. Individual judgments affect us in different ways. (It is unsafe to generalize about the value of the tort system). [93% agreed or strongly agreed.]

See letter from Andrew F. Popper to Fortune 500 companies, *supra* note 90.

<sup>93</sup> See *id.*

<sup>94</sup> These quotations are taken from the anonymous responses to the survey.

<sup>95</sup> See Daniel R. Cahoy, *Medical Product Information Incentives and the Transparency Paradox*, 82 IND. L.J. 623, 649 (2007) (“Possible liability-avoidance measures . . . include: (1) limiting . . . clinical studies . . . ; (2) declining to engage in an independent evaluation of adverse incident[s] . . . ; (3) never initiating a postmarketing . . . study unless absolutely necessary. [Consequently], opportunities to uncover serious safety and efficacy issues could be lost, and the health care environment could become significantly riskier.” (citations omitted)).

<sup>96</sup> See *id.* at 648–49; see also David Dana, *When Less Liability May Mean More Precaution: The Case of Nanotechnology*, 28 UCLA J. ENVTL. L. & POL’Y 153, 158–59 n.8 (2010) (stating “liability avoidance may contribute to an absence of testing or monitoring”) (citing Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 820–21 (1997) (“[T]he manufacturing community appears to believe that safety research . . . invites, rather than wards off, litigation.”)).

odds with the most fundamental precepts of the legal system.<sup>97</sup>

The argument that the discernible consequence of a tort judgment is inefficient and antisocial behavior requires assumptions of poor management, waste, and bad faith. The deniers sell short the civil justice system, the law of torts, and the power of the marketplace. They undervalue the obvious. Sanctions change behavior. To believe otherwise is to deny the common human experience. Tort decisions have been a font of important and powerful norms.<sup>98</sup> Individuals and businesses are guided by tort decisions.<sup>99</sup> Obviously, it is not the sole force motivating personal, business, or professional decisions, but to deny that it is a critical force rings hollow. Frankly, were the tort system not so powerful, why spend such huge sums on tort reform?<sup>100</sup> Accountability can be painful.<sup>101</sup> However, defendant's pain aside, the imposition of liability changes positively the behavior of others.<sup>102</sup>

Civil justice and tort law are about more than compensation. "Tort law is both premised on and sends messages about the worth of individuals. . . . It specifically demarcates which interests are valuable."<sup>103</sup> It is a system of law that "is quintessentially normative."<sup>104</sup> The system is designed to be "reconstructive," a task not achieved by singular verdicts.<sup>105</sup>

Beyond protection of the interests of individuals through judgments, the tort system has served as a force to guide the actions of government.<sup>106</sup> Individuals, private entities, and public institutions all respond to sanctions.<sup>107</sup> Were they to do otherwise, their acts would be, by definition, irrational.<sup>108</sup>

In addition to exerting a positive effect on individuals and

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<sup>97</sup> Dana, *supra* note 96, at 157–58.

<sup>98</sup> See Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 178–79 (1992).

<sup>99</sup> See F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 445–47 (2006).

<sup>100</sup> *Id.* at 439 (detailing some of the expenditures on different tort reform initiatives).

<sup>101</sup> *Id.* at 440–41, 444.

<sup>102</sup> Levit, *supra* note 98, at 178–79.

<sup>103</sup> *Id.* at 174.

<sup>104</sup> *Id.* at 178.

<sup>105</sup> *Id.* at 179.

<sup>106</sup> See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 182–83 (1983); Charles R. Epp, *Exploring the Costs of Administrative Legalization: City Expenditures on Legal Services, 1960–1995*, 34 LAW & SOC'Y REV. 407, 413 (2000); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1664–69 (2003).

<sup>107</sup> See FERSTER & SKINNER, *supra* note 25, at 7–11.

<sup>108</sup> *Id.*

governments, the tort model supports regulatory actions, and at times, achieves goals that cannot be achieved through regulatory enforcement.<sup>109</sup> A finding of liability in a case involving corporate misconduct can have spiraling positive effects. The liability of one company “can lead companies to institute ‘preventative measures’ that deter by making misconduct more difficult or expensive for wrongdoers.”<sup>110</sup> Civil tort judgments have the effect of “inducing organizations to develop claims management capabilities” and thereby “improve safety, reduce risk, and increase compliance with external legal requirements.”<sup>111</sup> Whether that behavior changes as a consequence of social or moral obligation or because of the desire to avoid liability, the result is the same: deterrence.<sup>112</sup>

The common law of torts houses hundreds of thousands of cases decided over centuries. Some cases are known broadly and have deep and lasting consequences.<sup>113</sup> In addition, industry behavior and market response (in terms of investment value) are affected by cases that have unusual or unexpected outcomes.<sup>114</sup> Some situations that provide a basis for civil liability do not result in common law decisions—but public knowledge of the conduct and practices can be enough to change a market.<sup>115</sup> In such cases—for example, Johnson & Johnson’s Tylenol saga<sup>116</sup>—the possibility of liability coupled with regulatory enforcement produces the

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<sup>109</sup> See FIONA HAINES, CORPORATE REGULATION: BEYOND “PUNISH OR PERSUADE” 37 (1997).

<sup>110</sup> Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 693 (1997).

<sup>111</sup> Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1 (2008).

<sup>112</sup> See Catherine A. Sanderson & John M. Darley, “I Am Moral, But You Are Deterred”: *Differential Attribution About Why People Obey the Law*, 32 J. APPLIED SOC. PSYCHOL. 375, 375–80 (2002).

<sup>113</sup> Ann Taylor, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 755–63 (1994) (discussing toxic torts and the impact of the civil justice system).

<sup>114</sup> See Suresh Govindaraj et al., *Using the Event Study Methodology to Measure the Social Costs of Litigation—A Re-Examination Using Cases from the Automobile Industry*, 3 REV. L. & ECON. 341, 344 (2007).

<sup>115</sup> See, e.g., Isabel Wilkerson, *Tylenol Maker Settles in Tampering Deaths*, N.Y. TIMES, May 14, 1991, <http://www.nytimes.com/1991/05/14/us/tylenol-maker-settles-in-tampering-deaths.html>.

<sup>116</sup> Johnson & Johnson marketed the over-the-counter pain medication Extra Strength Tylenol. The product was sold in capsules. In fall of 1982, seven people were poisoned when taking the capsules, unaware that a person with criminal intention had opened the capsules and refilled them with cyanide. See *McNeilab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525, 527 (D.N.J. 1986), *aff’d*, 831 F.2d 287 (3d Cir. 1987) (“The nation was stunned when, between September 29 and October 1, 1982, seven persons in the Chicago area died after ingesting Extra Strength Tylenol capsules laced with cyanide.”).

deterrent effect that is the promise of the tort system.<sup>117</sup> The potential for tort liability pushes parties into safer modes of design and manufacturing.<sup>118</sup>

The fact is that tort law generates “directive norms” that “regulate conduct ranging from how a physician treats her patients and how a driver treats other drivers, to how a large industry monitors its emissions and how a manufacturer designs its appliances. In this important sense, tort law is also a form of public law.”<sup>119</sup>

While different schools of jurisprudence seek to characterize the tort field (normative, corrective justice, instrumentalist, and more), jurisprudential classification that explains this part of the civil justice system differs from the more basic mission of deciding whether the tort system has value beyond compensation. Simply put, “tort law is better justified as a means of deterring behavior that society deems risky and undesirable.”<sup>120</sup> One can believe in the mission of corrective justice (finding wrongdoers accountable and making whole victims) and also recognize the inevitable deterrent consequence of a civil liability judgment.<sup>121</sup>

## VI. FORESIGHT IN PERSPECTIVE

A deterrent effect occurs when market actors have the capacity to anticipate the potential of liability. This does not require a civil tort judgment. Parties are deterred from misconduct because they anticipate that undertaking an action or producing a product in a particular way could produce a basis for a finding of liability, in the event the action caused harm. This raises the question of the extent to which harm must be reasonably foreseeable.

It is safe to estimate that at least one million law students have pondered foreseeability after reading Chief Judge Cardozo’s famous

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<sup>117</sup> See generally *Tamper-Resistant Packaging Requirements for Certain Over-the-Counter Human Drug and Cosmetic Products*, 21 C.F.R. §§ 211, 314, 700 (1982); Thomas D. Dowdell et al., *The Tylenol Incident, Ensuing Regulation, and Stock Prices*, 27 J. FIN. & QUANTITATIVE ANALYSIS 283, 283–84, 292 (1992) (detailing how the Tylenol crisis caused Johnson & Johnson stock prices to tumble).

<sup>118</sup> See Steven Garber & Anthony G. Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 LAW & SOC’Y REV. 93, 94–95 (1999).

<sup>119</sup> Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 92–93 (1998).

<sup>120</sup> Beatrice A. Beltran, *Posner and Tort Law as Insurance*, 7 CONN. INS. L.J. 153, 162 (2000).

<sup>121</sup> Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (viewing corrective justice, deterrents, and normative articulation as relatively compatible).

opinion in the *Palsgraf* case: “The risk reasonably to be perceived defines the duty to be obeyed . . . .”<sup>122</sup> The principle articulated in *Palsgraf* is usually delivered in a first-year torts class after students contemplate the possibility of imposing liability without foreseeable risk<sup>123</sup> and the possibility of denying liability when a risk is not reasonably perceived but is somewhat proximate.<sup>124</sup>

Those pondering deterrence should not be seduced by the allure of the foreseeability/proximate cause dialogue. Unlike the single-case focus of the foreseeability discourse, the deterrence debate is not about single party liability or compensation entitlements in one case.<sup>125</sup> It is about the effect of the civil justice system generally. Market participants are deterred from potential misconduct because of cases that are on point, cases that articulate clear norms, cases that articulate fuzzy norms that, if transgressed, could get one in trouble. It is also about actions, behaviors, or products never mentioned or touched in a civil tort case where a rational actor changes behavior because of perceived risks to users and consumers. In each instance, an individual or entity anticipates or foresees some level of hazard and that anticipation becomes the force to change behavior. That qualifies torts as public law<sup>126</sup> without implicating the haunting duty of care and foreseeability questions raised by Justice Cardozo in 1928.<sup>127</sup>

Courts and commentators readily identify the potential of tort recovery as a means of curing behaviors in a particular field or practice.<sup>128</sup> In *Merten v. Nathan*, the plaintiff signed an exculpatory contract that the Supreme Court of Wisconsin found

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<sup>122</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

<sup>123</sup> See *In re Polemis*, [1921] 3 A.C. 560 (K.B.); *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. [The Wagon Mound II]*, [1967] 1 P.C. 617 (H.L.).

<sup>124</sup> See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. [The Wagon Mound]*, [1961] 1 H.L. 388 (P.C.).

<sup>125</sup> Foresight is about the capacity to anticipate risk and, hopefully, take steps to guard against the realization of that risk in order to avoid injury and, of course, litigation. The doctrine is compatible with and predicated on the notion of deterrence: the obligation to anticipate injury and the duty to guard against it is driven, in part, by the specter of tort liability.

<sup>126</sup> See Zipursky, *supra* note 119, at 92–93.

<sup>127</sup> See *Palsgraf*, 162 N.E. at 100–01; see also John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334–36 (1990).

<sup>128</sup> See, e.g., Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1561 (1992) (discussing the assignment of malpractice cases in part on the premise that malpractice litigation can deter others from similar misconduct); Jessica Michelle Westbrook, Commentary, *Resolving the Dispute Over When Attorney's Fees Should Be Awarded Under ERISA in Two Words: Plaintiff Prevails*, 53 ALA. L. REV. 1311, 1319 (2002).

unenforceable.<sup>129</sup> In imposing a regime of civil tort liability, rather than letting the matter be resolved by contract, they held that “[t]he law of torts is directed toward compensation” and that “[t]ort law also serves the ‘prophylactic’ purpose of preventing future harm; payment of damages provides a strong incentive to prevent the occurrence of harm.”<sup>130</sup>

The question of whether a suit may or may not be filed, like uncertainty in the quantum of damages, will not lessen deterrence—it may actually sharpen the deterrent effect.<sup>131</sup> The possibility of liability without precise parameters affects positively the behavior of other actors. “[The] threat of litigation and judgment . . . creates a constant pressure on . . . parties to create a mutually satisfying relationship . . . .”<sup>132</sup> This behavioral force is comprehensive. Market participants must “consider both the reasonableness of the activity to be undertaken and the reasonableness of the manner in which he engages in the conduct in question.”<sup>133</sup> These prophylactic considerations are affirmative signs that rational actors are responsive to the civil justice system. This is the positive and undeniable phenomenon of deterrence.

## VII. CONCLUSION

The goals of sanctioning wrongdoers, compensating victims, corrective justice generally, and punishment may seem dominated by financial considerations. Although the goal of “making a plaintiff whole” is essential and laudable, the simple fact is that money is not the only goal. Money approximates loss and covers expenses. It can alter financial possibilities and provide remedial potential. Justice requires more: the avoidance of similar harms, or deterrence.

In our common law legal system, new regulatory standards, complex rules, and agency guidelines are not generated every time a

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<sup>129</sup> *Merten v. Nathan*, 321 N.W.2d 173, 178 (Wis. 1982); *Bansemmer v. Smith Labs., Inc.*, No. 86-C-1313, 1988 U.S. Dist. LEXIS 16208, at \*8–9 (E.D. Wis. 1988) (“State tort law, on the other hand, compensates aggrieved persons even as it prevents future harm.”) (citations omitted).

<sup>130</sup> *Merten*, 321 N.W.2d at 177.

<sup>131</sup> *Baker et al.*, *supra* note 10, at 487 (“Perhaps the most reasonable conclusion to draw, however, is that in contexts that do not raise serious concerns of injustice and unfairness, uncertainty could indeed be manipulated in order to increase deterrence without compromising the ideals underlying legal institutions.”).

<sup>132</sup> Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1220 (1990) (citation omitted).

<sup>133</sup> Joseph A. Page, *Liability for Unreasonably and Unavoidably Unsafe Products: Does Negligence Doctrine Have a Role to Play?*, 72 CHI.-KENT L. REV. 87, 96 (1996).

harm is inflicted.<sup>134</sup> In many instances, it is the civil justice system that provides present and prospective normative force. Through the legal process, claims are filed, settlements reached, litigation is initiated, and the potential for compensation is addressed. Through precisely that process, the engine of deterrence is activated.

The written history of the human experience is replete with models of normative articulation, principles set forth with the goal of deterrence. Every major religion records its standards in some form of text.<sup>135</sup> The mythology of both literate and preliterate cultures reflects the hope that certain basic norms will guide future behavior.

The common law is far from a religious text but it articulates norms, refining them continuously, with the hope of improving the human condition. That such an elaborate, complex, phenomenally central system of justice would exist solely to provide individual compensation is inconceivable.

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<sup>134</sup> See Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 801–02 (2008) (“Regulation should only be considered where such specific evidence proves the existence, in the specific market, of a behavioral market failure that generates significant welfare costs.”); Mary J. Davis, *The Battle Over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1130 (2007) (discussing the delicate balance between state tort law and federal regulations); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 452 (2008) (discussing the role of Congress and the courts as the balance between tort law and regulation is played out in increasingly complex preemption cases).

<sup>135</sup> John Witte, Jr., *Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic*, 87 U. DET. MERCY L. REV. 565, 582 (2009) (“[A]t a certain level of abstraction, the moral laws of the Bible and common laws of the nations converge, even though they have very different origins, ends, and languages.”).