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LAW & ECONOMICS AND TORT LAW: A SURVEY OF SCHOLARLY OPINION

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INTRODUCTION

Recent litigation brought against cigarette manufacturers,¹ software companies over potential year 2000 computer problems,² and a fast food restaurant for serving coffee that was allegedly too hot³ reminds us of the importance and dynamic nature of tort law in the United States. Judging from ongoing coverage by newspapers and television, tort law is newsworthy. Yet, as with other legal issues, it is within the covers of law reviews and specialty journals in economics that much of the debate over the social utility of various tort rules and their reform takes place. In that debate law and economics exercises great influence. "Ever since the 1970s, the modern movement in economic analysis has been in full swing. That analysis has highlighted the deterrence function of tort law. Indeed, even in the works of mainstream scholars, deterrence has now assumed the role of a primary rationale for tort liability

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¹ See Michael Zweig, *I'm Not a Smoker: So Why Do I Care?*, NAT'L. L.J., Sept. 21, 1998, at A25 (describing cigarette manufacturers as relatively easy targets).

² See Christopher Simon, *Threat of Computer Glitch in 2000 Has Lawyers Seeing Dollar Signs*, WALL. ST. J., Nov. 6, 1997, at B12 (discussing the possibility of massive litigation over the year 2000 computer problem).

³ See *Greene v. Boddie-Noell Enters.*, 966 F. Supp. 416, 417-18 & n.1 (W.D. Va. 1997) (discussing the "McDonalds' coffee case").

rules."⁴ One example of this influence is the impact of economic analysis of tort law on the revision of the Restatement of Torts (Second) sections on products liability.⁵

In spite of the significance of tort law and the economic analysis of it, the general public, practicing attorneys, and legislators often know little about the findings and informed opinions of those scholars specializing in law and economics. The purpose of this Article is neither to review contemporary issues surrounding tort law,⁶ nor to gauge the extent of the influence of specialists in law and economics; our purpose is to address whether a consensus exists among these scholars about a few fundamental doctrines of tort law. Because efficiency is a major concern in the field of law and economics, each proposition raises an issue of efficiency about a tort rule. We thus framed ten propositions about how efficiently tort rules achieve their purposes.

In the following section we present our results as a whole. Next we discuss the results individually, offering brief resumes of the debates that inspired the particular questions. Finally, we offer some general conclusions based on the results taken together.

DISCUSSION

As part of a larger survey conducted during the summer of 1996,⁷ we sent questionnaires to members of the American Law and Eco-

⁴ Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378 (1994) (footnote omitted); see Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 677 (1985) ("The most influential mode of torts analysis in recent decades has treated liability as a mechanism for social engineering in the sense that accident losses should be allocated to particular parties in order to induce efficient cost-minimizing behavior by similarly situated actors.").

⁵ See James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 L. & HIST. REV. 275, 322 (1997) (noting that the revisions are viewed as a move towards negligence).

⁶ In particular, we do not address alternative conceptual theories of tort law, such as corrective justice. See, e.g., Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1, 1-2 (1993) (comparing corrective justice to "[i]nstrumental accounts of tort law" and describing major works in corrective justice theory). Such issues would be appropriate to a survey of law professors, lawyers, or judges generally, but not to a survey of law and economics scholars about how they perceive the world. We also do not address challenges by economists to the fundamental structure of welfare economics, such as the General Theory of Second Best. See, e.g., Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3, 6 (1998) (describing the failure of mainstream law and economics analysis to take second-best issues into account).

⁷ See Robert Whaples, Andrew P. Morriss, & John C. Moorhouse, *What Should Lawyers Know About Economics?*, 48 J. LEGAL EDUC. 120 (1998) [hereinafter Whaples et al.].

nomics Association (ALEA).⁸ We received useable responses to 16.2% of the 389 surveys we mailed out. Respondents were asked to classify themselves as legal scholars (on the basis of their having a law degree), as economists (on the basis of their having a Ph.D. in economics), or as both (on the basis of their having a law degree and a Ph.D. in economics). Next they were asked to note whether they agreed with each of ten propositions about tort law, using a five point scale in which 1 equals "strongly disagree" and 5 equals "strongly agree."⁹ The percentage of those surveyed who responded to each proposition and the total distribution of responses for each proposition are reported. In addition, we calculated the average numerical scores for each of the three groups of scholars: legal scholars (Law), economists (Econ), and those with training in both (Law/Econ), for each proposition. We estimated t-statistics for each statement, to test for statistically significant differences in the *mean scores* of the three groups, and chi-square tests, to determine if there are statistically significant differences in the *distribution of responses* for each proposition within each group.¹⁰ The results are presented in the Table.

For eight of the ten propositions there are no differences in the responses of legal scholars, economists, and those who are trained in both disciplines. Differences among the groups for two of the propositions, (4 and 9), are discussed below.¹¹

⁸ AMERICAN LAW AND ECONOMICS ASSOCIATION, 1993-1994 DIRECTORY OF MEMBERS AND FOREIGN AFFILIATES (1993).

⁹ We also asked other questions. Some of those results are reported in Whaples et al., *supra* note 7; others will be the subject of future work.

¹⁰ See MORRIS H. DEGROOT, PROBABILITY AND STATISTICS 486-91, 520-45 (2d ed. 1989), for a more complete discussion of the t-test and the chi-square test used in this study.

¹¹ See *infra* notes 52-55 and accompanying text (discussing the results for Proposition 4); *infra* notes 124-26 and accompanying text (discussing the results for Proposition 9).

TABLE

*Responses*¹²**1. No fault automobile insurance is efficient.**

Strongly Disagree 21% 32% 20% 23% 4% Strongly Agree
 Percent Responding: 89%
 Average: 2.55 Law¹³: 2.51 Econ¹⁴: 2.67 Law/Econ¹⁵: 2.40

2. Contributory negligence is more efficient at producing optimal behavior than comparative negligence.

Strongly Disagree 7% 32% 37% 19% 6% Strongly Agree
 Percent Responding: 86%
 Average: 2.83 Law: 2.76 Econ: 3.13 Law/Econ: 2.40

3. Liability rules are inefficient in the face of risk averse behavior.

Strongly Disagree 24% 40% 30% 4% 2% Strongly Agree
 Percent Responding: 79%
 Average: 2.20 Law: 2.16 Econ: 2.29 Law/Econ: 2.20

4. The standard of care under a negligence rule does not induce an optimal level of activity.

Strongly Disagree 11% 38% 23% 15% 12% Strongly Agree
 Percent Responding: 84%
 Average: 2.81 Law: 2.90 Econ: 2.33¹⁶ Law/Econ: 3.60

5. Joint and several liability in product liability cases is efficient.

Strongly Disagree 18% 33% 20% 27% 2% Strongly Agree
 Percent Responding: 87%
 Average: 2.62 Law: 2.72 Econ: 2.29 Law/Econ: 1.80

¹² The instructions read, "Please note whether you agree or disagree with these statements." Because of rounding, the percentages may not add up to 100%.

¹³ Law: Those with a law degree and no Ph.D. in economics, N = 38.

¹⁴ Econ: Those with Ph.D. in economics and no law degree, N = 20.

¹⁵ Law/Econ: Those with a Ph.D. in economics and a law degree, N = 5.

¹⁶ Statistically different from the Law group's responses at the 5 percent level.

6. Holding Good Samaritans liable for negligence in rescue attempts would be inefficient.

Strongly Disagree 2% 9% 22% 50% 17% Strongly Agree

Percent Responding: 86%

Average: 3.70 Law: 3.56 Econ: 4.00 Law/Econ: 3.60

7. Product Liability law is more efficiently handled at the state rather than at the federal level.

Strongly Disagree 13% 30% 21% 25% 11% Strongly Agree

Percent Responding: 84%

Average: 2.91 Law: 2.89 Econ: 2.94 Law/Econ: 3.00

8. Limiting punitive damages to three times actual damages would be more efficient than the current procedure.

Strongly Disagree 9% 16% 11% 45% 20% Strongly Agree

Percent Responding: 89%

Average: 3.50 Law: 3.41 Econ: 3.88 Law/Econ: 3.50

9. Allowing injurers to deduct the proceeds of injured victims' insurance from the damages injurers must pay would be efficient.

Strongly Disagree 27% 38% 21% 13% 2% Strongly Agree

Percent Responding: 89%

Average: 2.25 Law: 1.91 Econ: 2.76¹⁷ Law/Econ: 2.80¹⁸

Chi-square=8.74

10. Permitting attorneys to charge contingent fees is inefficient.

Strongly Disagree 23% 57% 15% 5% 0% Strongly Agree

Percent Responding: 95%

Average: 2.02 Law: 2.17 Econ: 1.78 Law/Econ: 1.80

¹⁷ Statistically different from the Law group's responses at the 1 percent level.

¹⁸ Statistically different from the Law group's responses at the 10 percent level.

NO FAULT AUTO INSURANCE

During the 1960s and 1970s "no-fault" insurance plans, primarily for automobile accidents, became a popular reform of the tort system.¹⁹ Plans with significant "no-fault" components continue to be proposed for automobile accidents²⁰ and for other areas, such as medical malpractice.²¹

Under a "no-fault" scheme, the injured party is compensated by his insurance company without regard to fault and his ability to bring suit against the tortfeasor is limited.²² Thus, the distinguishing features of no-fault schemes are: (1) their substitution of first-party insurance for third-party insurance; (2) their limitation of recovery to purely pecuniary losses; and (3) their limitation on the ability to bring tort suits.²³ Existing no-fault systems differ in many details, such as whether they preserve tort claims for injuries above a threshold, but all include these features.²⁴

There are two significant economic issues surrounding no-fault schemes. First, by substituting first-party insurance for tort claims, no-fault schemes eliminate the deterrent function of the tort system, emphasizing instead the compensation function.²⁵ Second, by replacing litigation with insurance payments, no-fault schemes provide (at least) theoretically lower administrative costs.²⁶ The efficiency of no-fault insurance thus turns on how one compares the efficiency losses imposed by the loss of the deterrent function of the tort system against the gains from lowering administrative costs.

¹⁹ See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 623 (1985) (discussing the impact of no-fault plans on tort law).

²⁰ See, e.g., Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016, 1026 (1993) (proposing a requirement that insurers offer consumers a choice of traditional fault-based policies and no-fault policies); Andrew Tobias, *Letters to the Editor, Lawyers Are Going to Hate This*, WALL ST. J., July 28, 1998, at A19 (arguing for mandatory offering of no-fault insurance that includes exclusion of pain and suffering awards).

²¹ See Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908, 911 (1993) (noting that the increase in malpractice claims and premiums has led to serious consideration of no-fault systems).

²² See Sonja Stenger, Note, *No-Fault Personal Injury Automobile Insurance: The Quebec and New York Experiences and a Proposal for California*, 14 HASTINGS INT'L & COMP. L. REV. 505, 508-09 (1991) (defining no-fault compensation plans).

²³ See Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1107 (1993) (distinguishing no-fault insurance from common law tort systems).

²⁴ See *id.* (setting forth the basic elements of no-fault insurance).

²⁵ See, e.g., Sugarman, *supra* note 19, at 559-60 (discussing the arguments for preserving tort law).

²⁶ See *id.* at 625 (describing the administrative inefficiency and high costs of the tort system as appalling to reformers).

Some data exists to assist in this evaluation. Quebec, New Zealand, and various American states have experimented with no-fault schemes for decades,²⁷ although interpretation of the results of their experiments varies.²⁸ The standard law and economics analysis of the issue focused on this tradeoff and resolved it in favor of deterrence.²⁹

Given the lack of an empirical resolution of the tradeoffs between deterrence and compensation and disagreement over the magnitude of administrative costs, it is not too surprising that there was no strong consensus among respondents about whether “[n]o fault automobile insurance is efficient.”³⁰ Nonetheless, almost twice as many, (53%), disagreed at least somewhat with the proposition as agreed, at least somewhat, (27%), with the proposition.³¹ The responses were similar for all three groups—while there are differences of opinions within group classifications, there are no differences in the average opinions across groups.³² The results thus provide some indication that the deterrent function of the tort system remains relatively important for law and economics scholars compared to the compensation function.

COMPARATIVE VS. CONTRIBUTORY NEGLIGENCE

One of the most sweeping changes in tort law during the twentieth century was the shift from contributory negligence to comparative negligence. “In 1900, the basic rule of tort liability in every state was negligence with a defense of contributory negligence. As of 1986, all but six states and the District of Columbia had switched to a comparative negligence standard.”³³ Somewhat surprisingly, this shift “was not preceded by pervasive support in the scholarly

²⁷ See STEPHEN J. CARROLL & JAMES S. KAKALIK, NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE 1, 1 (1991) (addressing the question “[w]hat would happen to costs and injury compensation if a state adopted a no-fault insurance plan?”); Michael J. Trebilcock, *Incentive Issues in the Design of 'No-Fault' Compensation Systems*, 39 U. TORONTO L.J. 19, 27-33 (1989) (examining the no-fault schemes of various states and countries).

²⁸ Compare Arlen, *supra* note 23, at 1112-13 (citing evidence from Quebec to support the claim that a no-fault plan will raise expected accident costs), with Stenger, *supra* note 22, at 528 (describing the Quebec system as “admirable” based on review of the same evidence).

²⁹ See Hackney, *supra* note 5, at 319-20 (discussing the analytical change in focus from compensation to deterrence).

³⁰ Tbl., Proposition 1.

³¹ See *id.*

³² See *id.*

³³ Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1067 (1986) (footnote omitted).

literature on tort liability.³⁴ Almost as striking as the doctrinal shift is the change in the consensus in law and economics scholarship. Until the mid-1980s, most law and economics scholarship found the contributory negligence rule efficient while finding that the comparative negligence rule was not.³⁵ From the mid-1980s on, comparative negligence enjoyed a stunning growth in support in the scholarly literature. The subject therefore struck us as particularly appropriate for our survey.

Both contributory and comparative negligence are defenses to liability rather than theories of liability. Under contributory negligence, when a plaintiff's negligence contributes to an accident, the plaintiff is barred from recovery.³⁶ Under comparative negligence, on the other hand, a plaintiff's recovery is reduced but generally not entirely barred by his negligence.³⁷

The original case for contributory negligence appeared in a 1973 article by John Prather Brown³⁸ and received support from informal analyses by Guido Calabresi and Richard Posner.³⁹ The focus of these analyses was on the optimal sharing of care taking between

³⁴ *Id.* at 1068.

³⁵ See Daniel Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. LEGAL STUD. 119, 119 (1991) ("Until recently the standard teaching in law and economics was that a doctrine of comparative negligence was inferior to the common-law rule that treated an injured party's contributory negligence as an absolute bar to tort recovery."); Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 J. LEGAL STUD. 375, 375 (1987) ("Until recently it has been thought that a negligence rule (with or without a contributory negligence defense) is economically efficient while a comparative negligence rule is not.").

³⁶ Although a pure form of the rule would bar recovery even where the plaintiff's negligence is slight, a variety of other tort doctrines mitigated the harsher aspects of the rule. See Cooter & Ulen, *supra* note 33, at 1072-73 (discussing the various devices used to restrict the scope of the contributory negligence rule).

³⁷ Comparative negligence rules take two main forms. Under a pure comparative negligence rule, the parties divide liability in proportion to their negligence—a plaintiff who was 55% negligent, for example, would receive only 45% of his damages from the defendant, while a plaintiff who was 25% negligent would receive only 75% of his damages from the defendant. See Christopher Curran, *The Spread of the Comparative Negligence Rule in the United States*, 12 INT'L REV. L. & ECON. 317, 317 (1992). The second major form modifies this split by requiring that the defendant's negligence meet some threshold, often 50%, before the defendant is liable at all. See *id.* at 319. Thus in our first example (plaintiff 55% negligent), the plaintiff would receive nothing under this form of the rule, while in our second example (plaintiff 25% negligent), the outcome would be the same under either rule.

³⁸ See John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973) (analyzing various economic theories).

³⁹ See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 279-81 (1970) (analyzing comparative negligence); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 39-40 (1972) (analyzing contributory negligence). For an account of the intellectual history of the analyses see Cooter & Ulen, *supra* note 33, at 1079.

injurers and tortfeasors.⁴⁰ The second wave of law and economics scholarship found that comparative negligence is generally not inefficient compared to contributory negligence, largely because it incorporated more sophisticated understandings of how the comparative negligence rule operates.⁴¹ Importantly, the increased sophistication of the second wave of scholarship is reflected in many cases in the greater degree of qualification of its conclusions—these scholars did not find that comparative negligence is always more efficient, but took steps to identify the conditions under which comparative negligence is efficient relative to contributory negligence.⁴² Thus one might find evidence of a “strong view” of the efficiency of either rule (one is always more efficient than the other) or of a “weak view” (circumstances dictate which is more efficient).

For Proposition 2, 39% of respondents disagreed that contributory negligence is more efficient than comparative negligence in producing optimal behavior, while 25% agreed with the proposition.⁴³ Thirty-seven percent were neutral.⁴⁴ These results suggest that a substantial number of law and economics scholars either do not accept the validity of the strong view of the efficiency of either rule, or find that the conditions under which comparative negligence’s efficiency advantages exist are not widespread in practice. They also suggest that the lessons of the second wave of scholarship have largely been accepted.

⁴⁰ See David Haddock & Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49, 54 (1985) (comparing the views of Calabresi, Brown, and Posner regarding the caretaking duties of defendants and plaintiffs).

⁴¹ See Cooter & Ulen, *supra* note 33, at 1080 (noting that Brown concluded comparative negligence was inefficient “because his model of comparative negligence was flawed”); Haddock & Curran, *supra* note 40, at 63 (“With a relatively minor (but realistic) relaxation of Brown’s assumptions, even Brown’s version of comparative negligence . . . is efficient.”).

⁴² See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 294 (1987) (stating “no persuasive theoretical argument[] supports one over the other”); Cooter & Ulen, *supra* note 33, at 1070 (“This Article argues that comparative negligence is efficient under a certain set of circumstances.”); Haddock & Curran, *supra* note 40, at 66 (“The significance of all this undoubtedly would be enhanced if we could truthfully remark, ‘We have established beyond reasonable doubt that a legal defense of comparative negligence is not less efficient than one of contributory negligence!’”); Rubinfeld, *supra* note 35, at 393 (“[A]ny firm conclusion about the merits of a comparative negligence rule must take into account the costs of litigation.”).

⁴³ See Tbl., Proposition 2.

⁴⁴ See *id.*

RISK AVERSION AND EFFICIENT TORT RULES

For simplicity's sake, many economic models of tort rules (and indeed economic models generally) include the assumption that the parties are risk neutral.⁴⁵ However, individuals are often not risk neutral. Although more complex models often incorporate risk-aversion and although the assumption of risk neutrality is not always critical to the results, the existence of non-risk-neutral behavior is the source of some critics of law and economics scholarship's conclusions about tort law.⁴⁶ For example, in each law and economics class taught by one of the authors, a few students have tenaciously seized on the assumption of risk neutrality as fundamentally undermining the law and economics analysis of accident law, and indeed the validity of the application of economics to law.

Law and economics scholarship is not as simplistic as its critics often assume. Theoretical and empirical studies in economics dealing with insurance and diversification as methods to reduce risk, for example, show that risk averse individuals are induced by liability rules to exhibit the same optimal behavior as risk neutral individuals.⁴⁷ We decided, therefore, to ask about the impact of risk-aversion on the efficiency of liability rules, expecting a strong consensus that the existence of risk aversion alone would not undermine the efficiency of liability rules. We were not disappointed: 64% of those responding disagreed with Proposition 3 that liability rules are inefficient in the face of risk averse behavior and only 6% agreed.⁴⁸

NEGLIGENCE AND OPTIMAL ACTIVITY LEVELS

One of the important insights produced by law and economics scholarship, particularly that of Professor Steven Shavell, is that

⁴⁵ See, e.g., SHAVELL, *supra* note 42, at 6 (describing reasons for assuming risk neutrality in the first part of the book).

⁴⁶ See, e.g., Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK U. L. REV. 629, 633 (1997) (arguing that the risk-neutrality incorporated into the reasonable man standard tends to reflect male attitudes toward risk rather than female attitudes and proposing a "reasonable risk-averse person" standard as an alternative); Latin, *supra* note 4, at 745 ("Precisely because people respond differently to diverse risks, no single liability theory or alternative compensation system can achieve efficient results in all circumstances.")

⁴⁷ It is beyond the scope of this Article to discuss the economics of decision making under conditions of uncertainty and risk. For a more complete discussion, defining attitudes toward risk and developing the implications of such attitudes for the exercise of due care, see SHAVELL, *supra* note 42, at 206-15.

⁴⁸ See Tbl., Proposition 3.

both the level of care and the level of activity of a potential injurer must be considered.⁴⁹ When courts correctly identify the optimal level of care under negligence, potential injurers will indeed take optimal care to avoid accidents.⁵⁰ Because injurers escape liability by acting in accordance with the court-mandated level of care, however, “[t]hey will therefore not have a reason to consider the effect that engaging in their activity has on accident losses. Consequently, injurers will be led to choose excessive activity levels.”⁵¹ As far as we know, no one has challenged this result. We thus expected to find a consensus agreeing with the statement.

Overall, 49% disagreed with the statement that a negligence standard does not induce an optimal level of activity and 27% agreed.⁵² However, on the basis of the average group response for Proposition 4, legal scholars and those with degrees in both law and economics came closer to the accepted economic argument than did surveyed economists.⁵³ This was one of only two cases where we found that the difference between economists and the other groups was statistically significant.⁵⁴

Both the level of disagreement and the difference among groups on such a straightforward proposition surprised us. The answer may be that the issue requires more knowledge of the details of the negligence rule than those without a law degree (or at least extensive exposure to law) typically possess. Although like many important insights, the importance of activity levels seems straightforward when presented, the original insight was far from obvious. Moreover, much of the law and economics literature has focused on comparing the levels of care induced by various liability rules.⁵⁵ Whatever the reason, the lack of consensus here suggests that law and economics scholarship is far from monolithic even with respect to basic analytical issues.

⁴⁹ See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2-3 (1980) (articulating this issue for the first time).

⁵⁰ See SHAVELL, *supra* note 42, at 8. That potential injurers will take the level of care selected by courts if it is the socially optimal level can be seen by considering their alternatives. First, there would be no point to taking additional care above the level selected by the court, since by taking the court-specified level the potential injurer obtains legal immunity for any harm. See *id.* Second, if injurers took less than the specified level, they would be liable (since they would be negligent). See *id.*

⁵¹ *Id.* at 23-24.

⁵² See Tbl., Proposition 4.

⁵³ See *id.*

⁵⁴ See *infra* notes 124-26 and accompanying text (discussing the results for Proposition 9).

⁵⁵ See, e.g., SHAVELL, *supra* note 42, at 6-32 (discussing levels of care within a variety of liability rules).

JOINT AND SEVERAL LIABILITY

The doctrine of joint and several liability permits a winning plaintiff to recover from any combination of joint tortfeasors, from one to all of those sued, subject only to the constraint that she not collect more than court awarded damages.⁵⁶ More than thirty states have taken steps to limit the doctrine as part of tort reform efforts.⁵⁷

The economic analysis of the doctrine focuses on two issues. First, the justification for the doctrine is its usefulness in ensuring that individual tortfeasors are not underdeterred by the prospect that they will pay only a portion of the damages.⁵⁸ Second, the doctrine imposes additional administrative costs by, among other things, increasing the number of defendants.⁵⁹ Thus, for example, Landes and Posner argue that while the doctrine of joint and several liability is efficient, in the sense that it provides an *ex ante* incentive for each joint tortfeasor to exercise due care, nevertheless the rule, when combined in practice with contribution (whereby some tortfeasors may be required to indemnify other tortfeasors), entails relatively high administrative costs.⁶⁰

Other economic analyses have undercut some of the traditional claims to efficiency based on preventing underdeterrence. Professor Kathryn Spier, for example, notes that "the excessive value that the plaintiff derives from settlement will induce the defendants to overinvest in precautions *ex ante*."⁶¹ The doctrine may thus lead to overdeterrence, rather than preventing the reverse. Moreover, if plaintiffs pursue the defendants with deep pockets but not the ones with shallow pockets, this will cause an inefficiency, by driving up

⁵⁶ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 191 (1987) (describing the principle legal categories that control liability in the joint and multiple tortfeasor context).

⁵⁷ See Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, 14 *YALE L. & POL'Y REV.* 371, 379 (1996) (stating that the "practical consequence of this legislation is to place the risk of tortfeasor insolvency on the plaintiff instead of other tortfeasors").

⁵⁸ See LANDES & POSNER, *supra* note 56, at 193 (distinguishing between *ex ante* and *ex post* for purposes of economic efficiency).

⁵⁹ See *id.* at 201 (concluding that no contribution is the cheapest theory to administer).

⁶⁰ See *id.* at 190-227 (analyzing the distribution of liability between multiple tortfeasors); John C. Moorhouse, *Joint Torts and Interfirm Contracting*, 20 *ATLANTIC ECON. J.* 10 (1992) (presenting a model which analyzes the level of tortfeasor activity and illustrates the transaction costs of interfirm contracting).

⁶¹ Kathryn E. Spier, *A Note on Joint and Several Liability: Insolvency, Settlement, and Incentives*, 23 *J. LEGAL STUD.* 559, 560 (1994).

the cost for more efficient firms (who got their deep pockets because they are more efficient) and encouraging more efficient firms to produce less, while less efficient firms produce more.

Fairness issues have also been used to critique the doctrine.⁶² Because the *ex post* damages collected need not be in proportion to the degree of negligence, the doctrine strikes some individuals as unfair. A classic example is pursuit of a defendant with deep pockets, even though she is only tangentially involved, because it increases the likelihood of recovering damages.

Because much of the policy argument over the doctrine concerned products liability, we focused on that area in formulating our question. A slight majority, 51%, disagreed with Proposition 5 that joint and several liability for product liability is efficient.⁶³ Twenty-nine percent agreed with the statement and 20% were neutral.⁶⁴ (While no strong consensus emerged, there were no differences among the three groups of scholars on this issue.)⁶⁵ The most likely explanation for these results is relatively widespread acceptance of Landes and Posner's basic point concerning administrative costs.⁶⁶ This interpretation fits with the responses to other survey items, suggesting that law and economics scholars see the legal system as imposing relatively high administrative costs.

GOOD SAMARITAN LAWS

Common law legal systems, in contrast to civilian European legal systems, do not generally require individuals to rescue others.⁶⁷ Commentators have debated both the morality and efficiency of this rule, and numerous alternatives, for decades, without producing a consensus in either direction.⁶⁸ Economic analysis of the issue has

⁶² See, e.g., Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 314 (1990) (noting "fairness arguments have dominated the joint and several liability debate"); John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 193 (1986) (noting that joint and several liability has been attacked as "intrinsically unfair since it allows the plaintiff to pick out a single defendant, often designated as "Mr. Deep Pocket").

⁶³ See Tbl., Proposition 5.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See LANDES & POSNER, *supra* note 56, at 201-02.

⁶⁷ See Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 316-17 (1997) (noting "that there is no general, nonstatutory duty to rescue").

⁶⁸ See John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS.

centered on William M. Landes and Richard A. Posner's landmark 1978 article, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*.⁶⁹ The area continues to inspire scholarship.⁷⁰

In part because this lack of theoretical consensus made formulating a clear question testing potential differences among the surveyed groups difficult, if not impossible,⁷¹ we opted to ask our respondents about a sub-issue: whether liability for acts of negligence by those who do engage in rescue attempts, or Good Samaritans, would be inefficient. This question was prompted by three things. First, many states provide for such immunity through "Good Samaritan" statutes.⁷² Second, although first year law students are commonly tormented by hypotheticals concerning the wisdom of imposing a duty to rescue infants toddling in front of speeding trucks on those who could attempt a rescue at no danger to themselves, such cases make up a small minority of actual rescue opinions.⁷³ Far more common are cases concerning "failures to aid or protect individuals in peril [by] . . . public institutions, businesses, or professionals who have failed to protect an injured individual from the person who most 'directly' caused the harm."⁷⁴ Third, Landes and Posner address the issue at the end of their landmark article, in one of the few sections not subject to subse-

L. REV. 867, 867 ("For more than eighty years, commentators have argued about whether courts should require one to act affirmatively to protect a stranger in peril.")

⁶⁹ William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

⁷⁰ See, e.g., Ian Ayres, *A Theoretical Fox Meets Empirical Hedgehogs: Competing Approaches to Accident Economics*, 82 NW. U. L. REV. 837 (1988) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)); Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141, 142 (1995) (arguing that a duty to rescue is efficient).

⁷¹ The debate suggests that Landes and Posner were over-optimistic when they began their 1978 article by asserting that:

Economics can contribute to the understanding of rescue law by demonstrating the intellectual unity of the rescue problem, by clarifying legal analysis of rescue through imparting meaning to important but nebulous legal concepts such as "officialness" and "unjust enrichment," and by showing that the major doctrines and case outcomes related to rescue have been shaped by a concern with promoting economic efficiency.

Landes & Posner, *supra* note 69, at 85.

⁷² See, e.g., ALA. CODE § 6-5-332 (1975) (excluding certain qualified professionals from liability arising from the administration of good faith emergency aid or care).

⁷³ See Adler, *supra* note 68, at 868.

⁷⁴ *Id.*

quent extensive attacks,⁷⁵ indicating some potential degree of consensus.

As Landes and Posner note, Good Samaritan statutes are puzzling from an economic standpoint. The principal beneficiary is the physician who, as we have seen, is entitled to his ordinary fee when he renders assistance in an emergency (no Good Samaritan, he), a fee that includes his malpractice insurance premium. Perhaps these statutes are to be explained—as so much legislation is to be explained, including other legislation affecting physicians—by the political power of the beneficiaries rather than by the community's interest in promoting efficiency.⁷⁶

This same logic applies to other Good Samaritans as well—even those who are not doctors charging their patients fees should be liable for negligence if we put the negligence deterrent function of tort law first.

Based on this analysis, we expected to find a strong consensus in favor of negligence liability for Good Samaritans. What we found was almost exactly the opposite. Sixty-seven percent of respondents thought that it is inefficient to hold Good Samaritans liable for negligent rescue.⁷⁷ Only 11% disagreed.⁷⁸ (On this issue there were no significant differences among the three groups of scholars.)⁷⁹

Our best explanation for this result is that our respondents found that the need to encourage rescues trumped the deterrence of negligence, possibly because of the relatively broad way the question was phrased. (In addition, the question did not directly refer to the Good Samaritan statutes.) This in turn suggests that a question aimed at uncovering views of the efficiency of the requirement of Good Samaritan behavior might find that the recent “revisionist” law and economics scholarship supporting such a rule⁸⁰ has made a significant impression on the profession. The results also suggest that the deterrence function of tort law is not widely accepted as the sole function of tort law, at least in some areas.

⁷⁵ See Landes & Posner, *supra* note 69, at 127-28 (discussing the approach of relaxing liability of rescuers).

⁷⁶ *Id.* at 127.

⁷⁷ See Tbl., Proposition 6.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See, e.g., Hasen, *supra* note 70, at 142 (rejecting Landes and Posner's conclusions of inefficiency and asserting that an enforced duty to rescue is efficient).

FEDERALISM AND PRODUCT LIABILITY LAW

Tort law in the United States has traditionally been "built on the bedrock of state common law."⁸¹ Diversity in tort law among states produced "an ongoing dialogue among the state judiciaries on the landscape of liability law,"⁸² and, in the case of products liability law, substantial differences in doctrine.⁸³ One reaction to those differences was the inclusion in the 1996 Republican Contract with America of a proposal to federalize product liability law.⁸⁴ Further, as Professor Robert Rabin notes, "[t]he tort regime is perceived in some quarters as a system out of control; or, at a minimum, a system rife with the ambiguity intrinsic to decentralized, multiple sources of liability rules. As a result, the impulse for uniform limitations is not likely to disappear in the near future."⁸⁵

There are two primary economic arguments in favor of a national products liability regime. First, proponents often argue that states engage in a "race to the bottom" with respect to products liability doctrines. Because most products cases pit an in-state plaintiff against an out-of-state manufacturer, proponents of national regulation argue, states will select rules that inefficiently allow their residents to impose costs that reduce employment and product availability nationally. This argument is frequently associated with former West Virginia Supreme Court Chief Justice Richard Neely, who not only articulated it in his book *The Product Liability Mess*,⁸⁶ but also relied on it in adopting the crashworthiness doctrine in *Blankenship v. General Motors Corp.*⁸⁷ The second argument is

⁸¹ Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997).

⁸² *Id.*

⁸³ *See id.* at 9 (discussing the various differences among the states). Professor Rabin argues that many of these doctrinal differences are ultimately not significant and that legislative damage caps are more significant. *See id.* at 15-16.

⁸⁴ *See* Common Sense Product Liability Reform Act of 1995, H.R. 956, 104th Cong. § 103 (1995) (attempting to supersede state law to the extent it applies to an issue covered by the title).

⁸⁵ Rabin, *supra* note 81, at 5.

⁸⁶ RICHARD NEELY, *THE PRODUCT LIABILITY MESS* (1988) (emphasizing the social structures from which liability law emerges); *see* Williams Powers, Jr., *Some Pitfalls of Federal Tort Reform Legislation*, 38 ARIZ. L. REV. 909, 910 (1996) (expressing skepticism and suspicion about federal tort reform legislation).

⁸⁷ 406 S.E.2d 781 (W. Va. 1991). Neely wrote that West Virginia is a small rural state with .66 percent of the population of the United States. Although some members of this Court have reservations about the wisdom of many aspects of tort law, as a court we are utterly powerless to make the *overall* tort system for cases arising in interstate commerce more rational: Nothing that we do will have any impact whatsoever on the set of economic trade-offs that occur in the *national*

that the patchwork of state product liability rules puts American manufacturers at a competitive disadvantage compared to foreign firms.⁸⁸ This argument appears less significant, if only because any firm selling in the United States would face similar costs, limiting the disadvantage to American firms in competition with firms not selling in the United States.

The appropriateness of national product liability standards is not obvious from the standpoint of economic theory. On the one hand, competition among jurisdictions is a principle likely to tug at economists' heart strings (yes, they exist). On the other hand, however, the "race to the bottom" rationale is also firmly entrenched in economics.⁸⁹ As a result, we did not expect a strong consensus when we asked our respondents to evaluate the proposition that "Product Liability law is more efficiently handled at the state rather than at the federal level."⁹⁰

We were not surprised by the results. Respondents were evenly divided, but not along professional lines, over Proposition 7.⁹¹ Lack of consensus however, is not the same as lack of significance. Here the lack of consensus provides some evidence to refute the charge that law and economics is merely an intellectual fig leaf for large corporate interests. Federalizing product liability law is an issue on which ideological lines are clearly drawn and where theory can provide support for either result. If law and economics were merely a mask for corporate interests, one would expect opportunistic reasoning to decide the question. It clearly did not in this case.

economy. And, ironically, trying unilaterally to make the American tort system more rational through being uniquely responsible in West Virginia will only punish our residents severely without, in any regard, improving the system for anyone else In light of the fact that all of our sister states have adopted a cause of action for lack of crashworthiness, General Motors is *already* collecting a product liability premium every time it sells a car anywhere in the world, including West Virginia. West Virginians, then, are already paying the product liability insurance premium when they buy a General Motors car, so this Court would be both foolish and irresponsible if we held that while West Virginians must pay the premiums, West Virginians can't collect the insurance after they're injured.

Id. at 783-85 (footnotes and citation omitted).

⁸⁸ See Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. L. & POL'Y REV. 121, 124-25 (1996) (summarizing and rejecting this argument).

⁸⁹ See *supra* notes 86-87 and accompanying text (discussing the "race to the bottom" argument). But see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211-12 (1992) (providing a skeptical analysis of the reality of the "race to the bottom" in the environmental regulation area).

⁹⁰ Tbl., Proposition 7.

⁹¹ See *id.*

PUNITIVE DAMAGES CAPS

As law and economics scholars Professors A. Mitchell Polinsky and Steven Shavell note, "[o]ne of the more controversial features of the American legal system is the imposition of punitive damages."⁹²

As a recent law review article summarizing the debate put it:

Ostensibly "skyrocketing" punitive damage awards have been cited as the cause of U.S. company failures and the source of a competitive disadvantage to U.S. firms in global markets. Growing punitive damage awards also may exacerbate the proliferation of socially costly nuisance suits, through which litigants purportedly intimidate opponents by threatening spurious claims for damages of menacing proportions.⁹³

Supporters counter that punitive damages are rarely awarded, and that the amounts are usually modest.⁹⁴ In addition, supporters argue that "punitive damages can improve the behavior of both individuals and businesses by supplementing the law enforcement efforts of district attorneys and attorneys general."⁹⁵

The legal issues surrounding punitive damages are complex, and the decisions of the U.S. Supreme Court can be described, at best, as challenging to interpret.⁹⁶ Legal theory and case law also offer what one author summed up as a grab bag of reasons for punitive damages, including compensating victims, deterrence, and retribution.⁹⁷ The economic analysis of punitive damages, however, turns

⁹² A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 870, 870 (1998).

⁹³ Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 251 (1997) (footnotes omitted).

⁹⁴ See *id.* at 257 (noting a study that "found punitive damages awarded in only six percent of plaintiff victories").

⁹⁵ *Id.* at 258.

⁹⁶ See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting) (indicating that the Court's opinions "provide no real guidance at all").

⁹⁷ See David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 792 (1996) (discussing scholarly work from the deterrence model of tort liability rules).

largely on their role in creating incentives for proper behavior,⁹⁸ an insight Polinsky and Shavell trace back to Jeremy Bentham.⁹⁹

In essence, if the chance of escaping liability (because a case is not brought, because of an erroneous verdict, or for some other reason) exists, the damages a tortfeasor faces must be discounted. Suppose, for example, a potential tortfeasor is considering an action that could cause a victim an injury costing \$100,000 but earn the tortfeasor \$75,000. If the chances of a finding of liability are only 50%, the damages the potential tortfeasor will consider from the action will be only \$50,000 ($\$100,000 \times .5$), and the socially inefficient action will be taken.¹⁰⁰ If the potential tortfeasor must also consider a \$100,000 punitive damage award if it is found liable, then its expected damages from the action will be \$100,000 ($\$100,000$ compensatory damages $\times .5$ plus $\$100,000$ punitive damages $\times .5 = \$100,000$ total damages) and the socially efficient result will be reached since the potential gain of \$75,000 is less than the expected damages.

The economic point of punitive damages is thus, in large part, to compensate for the imperfections in the legal system that diminish a potential tortfeasor's expected damages.¹⁰¹ Despite the heterogeneity of reasoning on the subject, this deterrent rationale "is probably the most universal rationale."¹⁰²

In the real world, of course, the issue is complicated by a number of factors. If juries or judges are unable, for example, to estimate a defendant's chances of erroneously escaping liability, they are also unlikely to be able to impose the proper amount of punitive damages.¹⁰³ If punitive damages are reduced to an essentially random sum, they will not serve the purpose of promoting efficient decision

⁹⁸ After our survey, the *Journal of Legal Studies* published an article by a group of law and economics scholars analyzing data on punitive damage awards and a reply by A. Mitchell Polinsky disputing their interpretation. See Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663 (1997); see also Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989) (arguing for predictability with respect to punitive damage awards).

⁹⁹ See Polinsky & Shavell, *supra* note 92, at 876 n.12 (citing Jeremy Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 401-02 (John Bowring ed., Russell & Russell Inc. 1962) (1838-1843)).

¹⁰⁰ See Polinsky & Shavell, *supra* note 92, at 874-75 for a detailed discussion of this point.

¹⁰¹ See *id.* (discussing the proper level of total damages to impose upon a tortfeasor).

¹⁰² Partlett, *supra* note 97, at 795.

¹⁰³ Polinsky and Shavell's article, published after our survey was conducted, argues that "courts and juries often will be able to obtain enough information about the likelihood of escaping liability to apply the theory reasonably well." Polinsky & Shavell, *supra* note 92, at 875.

making by potential tortfeasors. Moreover, because the legal system (inexplicably) has not yet fully internalized the insights of law and economics theory, unrelated considerations, such as the wealth of the defendant or the reprehensibility of the defendant's conduct, continue to play a role in punitive damage awards.¹⁰⁴

One of the most common reforms proposed for punitive damages is the imposition of a cap on the amount of punitive damages that can be imposed in a single case.¹⁰⁵ Some such caps use fixed amounts,¹⁰⁶ while others use multipliers of the compensatory damages as well.¹⁰⁷ Either strategy uncouples the amount of punitive damages from the efficiency calculation described above since there is no evidence that any particular absolute cap or multiplier is a uniformly appropriate adjustment.¹⁰⁸

Because of the prominence of this type of reform and because it directly challenges the efficiency justification for punitive damages, we therefore asked whether "[l]imiting punitive damages to three times actual damages would be more efficient than the current procedure."¹⁰⁹ Those surveyed expressed definite opinions on the subject: only 11% were neutral, while a sizable majority, 65%, agreed.¹¹⁰ (The remaining 25% disagreed.)¹¹¹

Why does such a large majority of law and economics scholars support such a limit on punitive damage awards? We can, of

¹⁰⁴ See *id.* at 905-14 (rejecting such factors). But see Salbu, *supra* note 93, at 300 (endorsing such factors on non-economic grounds).

¹⁰⁵ See RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO THE LAW AND PRACTICE (1991) for a comprehensive guide to limits on punitive damages.

¹⁰⁶ See, e.g., Common Sense Product Liability Reform Act of 1995, H.R. 956, 104th Cong. § 201 (1995) (proposing a limit of three times the amount of economic damages or \$250,000, whichever is greater, for punitive damages). The act was passed as part of the Contract with America and vetoed by President Clinton. See 142 CONG. REC. H4757 (daily ed. May 9, 1996) (statement of Mr. Hyde).

¹⁰⁷ See Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 200-01 (1994) (discussing multipliers). Note that Polinsky and Shavell also speak in terms of multipliers, but they support use of a multiplier of compensatory damages calculated for each case based on the probability of an erroneous escape from liability. See Polinsky & Shavell, *supra* note 92, at 889-90 (discussing the "total damages multiplier").

¹⁰⁸ See Salbu, *supra* note 93, at 299-300 ("Viewed objectively, statutory caps make little sense . . . [punitives] bear[] no logical proportional relationship to the amount of the compensatory damages award."). Indeed, Judge Posner suggests that exactly the opposite relationship is appropriate. Answering the question of whether it would make sense to have punitive damages be the inverse of compensatory damages, Posner says "[t]he smaller the compensatory damages, the less incentive the victim has to sue, and the greater therefore the need for punitive damages to create an incentive to sue, and thus to deter the wrongful conduct." RICHARD A. POSNER, TEACHER'S MANUAL TO ECONOMIC ANALYSIS OF LAW 31 (5th ed. 1997).

¹⁰⁹ Tbl., Proposition 8.

¹¹⁰ See *id.*

¹¹¹ See *id.*

course, only speculate, but we think the key to the results lies in the comparative nature of the question. Current punitive damages law is correctly viewed as chaotic. The issue was prominently featured in the news during recent years, in part because of high profile attempts to persuade the U.S. Supreme Court to restrict punitive damage awards.¹¹² Comparing the triple multiplier to current procedures thus likely gave the multiplier an advantage and fits with the results elsewhere that suggest that law and economics scholars believe that the legal system imposes relatively high administrative costs.¹¹³ Critics of law and economics, on the other hand, are likely to read the results as confirmation of a pro-corporate bias. These results read together with others,¹¹⁴ however, make us skeptical of this interpretation.

COLLATERAL SOURCE RULE

“The collateral source rule provides in general that compensation received from a third party will not diminish recovery against a wrongdoer.”¹¹⁵ The rule has long been a part of American jurisprudence, with some scholars dating it at least to the 1854 admiralty case of *The Propeller Monticello v. Mollison*.¹¹⁶ Whatever its actual origin, it certainly predates the explicit consideration of efficiency by policymakers or judges. It also presents policymakers with a choice between allowing a “windfall” to the plaintiff or to the defendant in a tort case. To illustrate, consider an automobile accident case in which the victim loses his foot in the accident. The plaintiff arguably receives a “double” recovery if he gets both the proceeds of his insurance policy and tort damages for the loss of his foot.¹¹⁷ On

¹¹² See Marcia Coyle, *Punitives at Issue, Yet Again: Justices Examine Either 'Mirage' or 'Crisis'*, NAT'L L.J., Mar. 29, 1993, at 1 (discussing *TXO Production Corp. v. Alliance Resources Inc.*, which presented the issue of excessive punitive damage awards framed within constitutional arguments before the Supreme Court).

¹¹³ See *supra* notes 63-66 and accompanying text (discussing the results from Proposition 5).

¹¹⁴ See *supra* notes 90-91 and accompanying text (discussing the results from Proposition 7); *infra* notes 146-49 and accompanying text (discussing the results from Proposition 10).

¹¹⁵ *Hubbard Broad., Inc. v. Loescher*, 291 N.W.2d 216, 222 (Minn. 1980).

¹¹⁶ 58 U.S. (17 How.) 152 (1854). This opinion claimed to be merely restating existing law. See *id.* at 155. But see Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 526-28 (1991) (offering an alternative account of the rise of the rule).

¹¹⁷ We say “arguably” because many commentators contend that tort damages cannot fully compensate for losses of this kind. See Douglas A. Kahn, *Taxation of Damages After Schleier—Where Are We and Where Do We Go From Here?*, 15 QLR 305, 316 (1995) (stating “dollar damages that a victim receives are not truly substitutes for what was lost”); Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for*

the other hand, the negligent driver will receive a windfall if she finds she must pay less because she had the foresight to injure an insured individual.

Courts and commentators advance two major justifications for the collateral source rule: tortfeasors must pay the full costs of their actions (either to promote deterrence or for punitive reasons) and injured parties should receive the benefits of their contracts.¹¹⁸ The rule has recently come under attack, both in courts and in legislatures.¹¹⁹ Criticisms of the rule center on the costs to insurers of providing "double" recoveries for plaintiffs who are also compensated through the tort system and on rejection of the deterrence rationale for the tort system.¹²⁰ Additionally, a leading treatise suggests that the real function of the rule is to assist plaintiffs' attorneys in financing lawsuits, since deducting insurance proceeds or government benefits from damages would reduce the size of the contingency fees available.¹²¹

The theoretical efficiency rationale for allowing "double" recovery seems relatively airtight. A victim's purchase of insurance or receipt of government benefits is logically unrelated to a potential tortfeasor's conduct. Encouraging efficient behavior by potential tortfeasors therefore requires that they pay the full cost of their behavior. Moreover, when the issue of inducing the efficient level of a potentially injurious activity is considered as well as the level of accident prevention, the case is even stronger. As Professor Steven Shavell has demonstrated, the tort system often fails to adequately consider the appropriateness of the level of a potential tortfeasor's activity.¹²² Damages based on failure to engage in the efficient level of accident prevention alone are therefore likely to under-deter po-

Practical Application, 47 CASE W. RES. L. REV. 1075, 1078 (1997) (stating "money cannot truly compensate for physical injuries or pain incurred").

¹¹⁸ See Jacobsen, *supra* note 116, at 528 (stating that these two propositions generally encompass the most widely accepted rationales for the collateral source rule); see also Saine, *supra* note 117, at 1078 (identifying the same two propositions as bases for the collateral source rule).

¹¹⁹ See 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 25.22, at 650 n.7 (2d. ed. 1986 & Supp. 1998) (summarizing modifications to the traditional version of the rule).

¹²⁰ See Saine, *supra* note 117, at 1080 (discussing the insurance industry's arguments against the collateral source rule).

¹²¹ See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.10, at 584 (1973) (stating that the collateral source rule "is in fact retained . . . on the basis of its value in financing personal injury litigation").

¹²² See SHAVELL, *supra* note 42, at 25 ("The failing of the negligence rule that is under discussion can be regarded as resulting from an implicit assumption that the standard of behavior used to determine negligence is defined only in terms of care.").

tential tortfeasors from engaging in injurious activity.¹²³ Dropping the collateral source rule would, therefore, compound this underdeterrence.

As a result, this issue was one on which we expected a high level of consensus. The efficiency case for permitting collateral source recoveries is strong and the arguments against it are either not framed in efficiency terms or are premised on rejecting the deterrent function of the tort system. The results fit our prior expectation. Sixty-five percent of respondents disagreed and only 15% agreed with Proposition 9, that it would be efficient to permit injurers to deduct the proceeds of injured victims' insurance from court awarded damages.¹²⁴

Interestingly, there was a statistically significant difference in the distribution of responses among the three groups of scholars.¹²⁵ Those in Law were more likely to strongly disagree (35%) or disagree (44%) with the statement than those in the Econ group (18% strongly disagree and 24% disagree) or the Law/Econ group (none strongly disagree, 40% disagree). Legal scholars apparently recognized and appreciated the theoretical benefits of the rule more readily than those trained in economics. One explanation might be that the economists tended to give greater weight to the financing explanation over the theoretical efficiency benefits than the lawyers. Extrapolating from this admittedly thin reed and other results,¹²⁶ we might infer that lawyers tend to be more likely to believe in the appropriateness of existing legal rules than are economists.

CONTINGENCY FEES

Unlike most other Western legal systems,¹²⁷ the United States has long allowed attorneys and plaintiffs to use contingent fee arrangements in most types of cases.¹²⁸ Indeed, a prominent political

¹²³ See *id.* at 24 (noting that injurers will increase their activity level in order to raise their utility when the cost of care will not increase significantly and they will not be liable for the increased expected losses).

¹²⁴ See Tbl., Proposition 9.

¹²⁵ See *id.*

¹²⁶ See *supra* notes 63-66 and accompanying text (discussing the results from Proposition 5).

¹²⁷ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 625 (5th ed. 1998) (commenting that most countries ban contingency fees).

¹²⁸ See Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 457 (1998) (noting a study that found contingency fee ar-

scientist and law professor, University of Wisconsin Professor Herbert Kritzer, recently began a discussion of contingent fees by asserting that "[t]he contingency fee is one of the defining characteristics of civil litigation in the United States."¹²⁹ Examining the attitudes of law and economics scholars toward this central feature of the American tort system thus struck us as particularly interesting.

Although a wide variety of contingent fee arrangements are in use, the typical contract has two key characteristics: (a) the attorney receives a flat percentage of the recovery, and nothing if there is no recovery; and (b) the attorney, not the client, advances the costs of the suit, and generally does not seek reimbursement if there is no recovery.¹³⁰

Although contingent fees predate the law and economics movement, their initial justification rested on arguments that sound much like those one might read in a law and economics journal today. The most commonly expressed rationale in early cases approving contingent fee contracts was the importance of contingent fees in making justice available to those who could not otherwise afford a lawyer.¹³¹ Other courts approved of the incentive effects for attorneys, noting that an attorney whose compensation depended on winning would work harder for his client.¹³²

Almost from the beginning, opponents of contingency fee arrangements have attributed a wide range of ills to their use and proponents of tort reform have sought significant limits on the use of contingent fees. The *Wall Street Journal*, for example, labeled the contingency fee arrangement "the engine driving much of the liability explosion of recent decades" in a 1997 editorial.¹³³ (Unlike

rangements "pervasive by 1910"). Notable exceptions are divorce, lobbying, and criminal defense. See Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 372 (1998) (remarking that contingency fee arrangements in these areas are thought to "raise special problems").

¹²⁹ Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 (1998).

¹³⁰ See Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 321-22 (1998) (describing the major consequences of "No Win, No Pay" fee structures).

¹³¹ See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 241 (1998) (tracing historical support for contingency fees as a means of allowing poor persons to assert their legal rights).

¹³² See *id.* (discussing the historical arguments in favor of this proposition).

¹³³ *ABA v. Business*, WALL ST. J., Feb. 27, 1997, at A16. Tort reformers seeking to give businesses an advantage over individual plaintiffs may be mistaken in their analysis of the issue. Robert Mnookin has recently suggested that defense lawyers paid by the hour may have a sig-

some targets of tort reformers, however, critics of contingency fees seek primarily to regulate the practice, not abolish it.)¹³⁴ Critics have also highlighted the “outrageous” fees earned by lawyers in some contingent fee cases, particularly where a client gains a large settlement before trial.¹³⁵ This criticism appears to have made an impact on public opinion: polls show simultaneous recognition of the role of contingent fees in “enabling ordinary people to bring justified claims” and blame for “encouraging undesirable litigation.”¹³⁶

Defenders of contingency fees argue they provide two important benefits to plaintiffs. First, such fees solve the liquidity problem of clients who cannot afford substantial upfront legal expenses, thus assuring them of access to legal counsel and the judicial system.¹³⁷ Contingent fees improve risk sharing between client and attorney under the likely condition that the attorney faces less risk arising from a case than does the client.¹³⁸ Second, by giving an attorney a stake in the outcome of a case, contingent fees partially solve the principal-agent monitoring problem faced by clients.¹³⁹ In particular, most clients simply do not have the information or experience by which to determine whether they are receiving the quantity and quality of legal service that is in their best interests.¹⁴⁰ Clients often rely heavily on their attorneys to evaluate the case, the probability of prevailing at trial, and the adequacy of settlement offers. A contingent fee provides an incentive for the attorney to supply a

nificant advantage over plaintiffs' lawyers on contingency fee contracts in settlement negotiations. See Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 364-66 (1998) (addressing how bargaining power imbalances would be affected by eliminating the contingent fee in favor of litigation insurance with fee shifting).

¹³⁴ See Galanter, *supra* note 128, at 468 (summarizing proposed reforms recommended by the Manhattan Institute).

¹³⁵ See, e.g., LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* 22 (1994) (noting that the effective hourly rates of attorneys working on a contingency fee basis can range from one thousand dollars an hour to as high as thirty thousand dollars an hour). The only comprehensive attempt to evaluate the actual hourly earnings by lawyers under contingent fee contracts found that their hourly earnings were not much different from lawyers paid by the hour. See Kritzer, *supra* note 129, at 302 (noting that “returns from contingency fee practice are at best ‘somewhat’ better” than in hourly practice).

¹³⁶ Galanter, *supra* note 128, at 462.

¹³⁷ See POSNER, *supra* note 127, at 624 (analyzing the economics of contingent fee contracts).

¹³⁸ The attorney has a portfolio of cases at any one time. Therefore, her earnings are not determined by a single case. For every case in which she collects a low or zero contingent fees, the attorney may collect an unusually attractive fee. In short, case diversification reduces the risk an attorney faces. By contrast, a litigant may be involved in only one major civil case in a lifetime. The outcome of the case can significantly affect the client's wealth.

¹³⁹ See POSNER, *supra* note 127, at 625 (“[M]aking the lawyer's fee vary with the success of his effort is a way of giving him an incentive to do a good job.”).

¹⁴⁰ See Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996), for a discussion of the agency problems.

more nearly optimal amount of legal services. Thus a contingent fee can potentially serve the client's interest.¹⁴¹

Much of the theoretical law and economics literature on the issue, however, has developed reasons why simple linear percentage contingency fees do not properly align the lawyer's incentives with the clients'.¹⁴² Many of the solutions suggested by this literature, such as allowing outright sale of legal claims, remain illegal.¹⁴³

To summarize the state of the law and economics literature, contingent fee contracts are a solution to several significant problems with the tort system despite some major imperfections of their own. Although they provide a means to address both the risk diversification and liquidity problems for clients, contingent fee contracts suffer from serious principal-agent problems. Tort reformers' concerns about promoting excessive litigation, however, are not supported by the law and economics literature on the subject.¹⁴⁴ Indeed, the policy recommendations most likely to follow from this analysis echo Judge Posner's text. After summarizing the problems with contingency fees, Posner concludes: "Is this a reason for banning or regulating contingent fees? Surely not for banning them If anything, the existence of agency costs argues for a more radical approach—[such as] allowing the outright sale of legal claims" ¹⁴⁵

In the strongest indication of consensus among respondents to our torts questions, 80% of respondents either disagreed with or strongly disagreed with the proposition that permitting contingent fees is inefficient.¹⁴⁶ (None strongly agreed and only 5% agreed.)¹⁴⁷

¹⁴¹ This may explain why corporations rarely pay contingent fees. In house legal staff solve the monitoring problem of assessing the quality and quantity of legal services provided by outside counsel. Moreover, large firms, particularly those producing consumer products, may face lower risk because of diversification across cases. See POSNER, *supra* note 127, at 624-26 (discussing the beneficial aspects of contingency fees to clients).

¹⁴² See, e.g., Mnookin, *supra* note 133, at 364 (noting that a "central teaching" of the principal agent literature is that "no single fee arrangement can perfectly align the interests of the lawyer with the interests of the client in all circumstances"). Recent scholarship (published after our survey) in a leading law and economics journal, the *Journal of Legal Studies*, addressed some of these concerns by using economic models to determine the optimal linear contingency fee contract. See Hay, *supra* note 140, at 505-08 (attempting to identify the best contingent fee percentage for clients); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 267-71 (1997) (analyzing the optimal fee in the context of settlement).

¹⁴³ See, e.g., POSNER, *supra* note 127, at 625 (noting that tort claims are generally not "salable").

¹⁴⁴ Posner, for example, notes that contingent fees are accused of fomenting litigation and then asks "so what?" *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Tbl., Proposition 10.

This strong consensus suggests two conclusions. First, law and economics is frequently accused of being the handmaiden of big business.¹⁴⁸ Yet faced with a clear conflict between business-oriented tort reform proposals and the scholarly analysis concluding that contingent fees are an imperfect tool for remedying defects in the tort system, all three groups put the scholarly analysis above the "business" position. Although the limited nature of the proposed reforms, which tend to fall short of outlawing contingent fees altogether, makes us hesitate to read too much into the results, if law and economics were really a stalking horse for "big business," one would expect at least some equivocation here. Second, the law and economics literature makes clear that contingency fees as they exist in the real world are, at best, highly imperfect solutions to the liquidity and risk diversification problems. These imperfections did not, however, prevent the strong consensus we observe here. This suggests a strong bias in favor of freedom of contract, even where formal modeling suggests a social planner could substitute a more efficient form of contract.¹⁴⁹

CONCLUSION

What larger conclusions can be drawn from our respondents' answers? Subject to the usual considerations of sample size and such, we find several interesting results. First, there is a degree of consensus about some results, although not quite as much as we expected. In general, for five of the ten propositions, (3, 6, 8, 9 and 10), a consensus existed among scholars from the three groups: Law, Econ, and Law/Econ.¹⁵⁰

¹⁴⁷ See *id.*

¹⁴⁸ See Hackney, *supra* note 5, at 275 ("A common historical accounting for the emergence of the law and neoclassical economics movement is that it provided theoretical ammunition for right-of-center politics following the collapse of 1960s progressive politics.").

¹⁴⁹ A recent article speculating on the consequences of abolishing contingent fee contracts suggested three main changes would result: (1) "a great decrease in the number of damage claims brought in court or in any forum"; (2) "moves to simplify the procedures for pursuing claims in court and to create simpler alternatives to formal litigation"; and (3) "adjudication would atrophy and the process of obtaining compensation for injuries would become increasingly bureaucratic." Gross, *supra* note 130, at 345-46. The first and last of these would be unlikely to find favor with those who believe the tort system plays an important role in providing incentives for efficient levels of accident avoidance. See, e.g., POSNER, *supra* note 127, at 626 ("The likelier a suit is, the greater is the deterrent effect of whatever legal principle the suit would enforce . . .").

¹⁵⁰ See Tbl.

Second, in only two instances were there group differences. While a two-thirds majority disagrees with Proposition 9, there are statistically significant differences in the mean response and the distribution of responses from economists and legal scholars.¹⁵¹ However, in this case the difference is simply in the degree of disagreement, with legal scholars more likely to strongly disagree than economists are. In the case of Proposition 4, the evidence is that legal scholars hold different opinions than those held by economists.¹⁵² We thus did not find strong evidence of any professional divide between those with training in only one of the two parent disciplines.

Third, on the five questions broadly related to "tort reform" efforts, there was no consensus across questions. On Propositions 9 and 10, the consensus favored the "anti-tort reform" side; on Proposition 8 it favored the "pro-tort reform" side; and on Propositions 5 and 7 there was no consensus.¹⁵³ This suggests that critics of law and economics overstate the degree to which the movement's analysis favors business interests.

Fourth, although consensus among legal scholars and economists exists for half of the propositions, no grand consensus about common law tort rules emerges from our survey of members of the American Law and Economics Association. What is implied rather strongly is that where there are differences over tort rules, those differences are expressed within each of the professions, but do not emerge systematically between professions. That is, the differences among legal scholars in the evaluation of a particular rule tend to be mirrored in the opinions of economists. More precisely, within group differences are larger than between group differences. Consensus on half the issues coupled with the lack of an overarching consensus is broadly consistent with the notion that common law tort rules are not static but evolve to deal with changing socioeconomic conditions and values.

Fifth, there is a broad distinction within law and economics between two traditions. One, identified with William Landes and Richard Posner, makes a broad claim concerning tort law and economics: "[T]he common law of torts is best explained as if the judges . . . were trying to promote efficient resource allocation."¹⁵⁴

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ LANDES & POSNER, *supra* note 56, at 1.

The other, exemplified by the work of Steven Shavell, does not attempt to unify tort law into a body of consistent rules, but offers a means of analysis to understand the consequences of different rules.¹⁵⁵ Both approaches are clearly articulated in the two major law and economics analyses of tort law: Landes and Posner's *The Economic Structure of Tort Law* and Shavell's *Economic Analysis of Accident Law*. Overall our results suggest that Shavell's approach is more widespread among law and economics scholars since that approach is, as Ian Ayres terms it, "agnostic" on many important questions about the efficiency of tort rules.¹⁵⁶

Finally, this lack of overall consensus can be read as more than a comment on the two approaches described above. In a 1996 presentation on tort reform, Professor John Hasnas noted that tort reformers of all varieties fall victim to what Nobel economics laureate Friedrich Hayek termed "the fatal conceit."¹⁵⁷ Looking back to the tort reformers of the progressive era, Hasnas summed up their contributions:

As good "scientists," these scholars conceived of themselves as making objective observations from which they could construct a more orderly and useful representation of the way the law really was. But, as we all know, it is a very short step from systematizing to structuring, and scientific observation almost always leads to scientific engineering. And so, in an entirely natural fashion, legal scholars soon turned their attention from providing accounts of what the law was to making recommendations as to what it should be.¹⁵⁸

The intellectual strength of law and economics, and of economics more generally, is at least in part attributable to the ability to use a startlingly simple model of how the world works to provide great explanatory power. The diversity of opinion among law and economics scholars on relatively fundamental issues such as those contained in our survey suggests that it is avoiding the dangers of forgetting the complexity of the world the model seeks to explain.

¹⁵⁵ For fruitful comparisons of the two approaches, see Ayres, *supra* note 70, at 837 (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)); Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 *YALE L.J.* 799, 800 (1983) (providing "an alternative to the conventional theory of negligence law").

¹⁵⁶ Ayres, *supra* note 70, at 840.

¹⁵⁷ See 1 F.A. HAYEK, *The Fatal Conceit: The Errors of Socialism*, in *THE COLLECTED WORKS OF F.A. HAYEK* (W.W. Bartley III ed., 1988).

¹⁵⁸ John Hasnas, *What's Wrong With a Little Tort Reform?*, 32 *IDAHO L. REV.* 557, 564 (1995).

While law and economics may not provide all the answers to policy questions about tort law, it is not yet repeating the mistakes of the first tort reformers.