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Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski

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The common-law joint and several liability doctrine applies when more than one person tortiously causes a specific injury. The doctrine allows the injured plaintiff to recover the full amount of damages arising from the injury (reduced by his comparative responsibility for the injury) from any one or any combination of the persons who tortiously caused the injury, but he cannot recover in the aggregate more than the full amount of damages.[1]

In the last few years, defendants' organizations and their allies, taking advantage of public concern over the latest insurance crisis, have persuaded many state legislatures to eliminate or, more commonly, to modify the joint and several liability doctrine.[2] The defense advocates' major arguments against the joint and several liability doctrine are that:

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[1] *See* Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1141-42 & n.1 (1988).

[2] *See id.* at 1165-68 & nn.74 & 76-93; *see also* N.J. STAT. ANN. §§ 18A:11-6, 59:9-3.1 (Supp. 1988) (proportionate several liability for public entities and interschool associations and their employees); *id.* § 2A:15-5.3 (proportionate several liability for all damages if comparative responsibility is 20% or less and for noneconomic damages only if comparative responsibility is greater than 20% but less than 60%; exception for negligence involving toxic or hazardous substances). In some of these states, the literal statutory language may be insufficient to achieve the apparently intended result. For example, the New Jersey statute holds each defendant liable for "the percentage of [the] damages directly attributable to that party's negligence." *Id.* This would be 100% for each defendant, since each defendant's negligence caused the entire injury. The Illinois statute holds a defendant "severally" liable if her comparative negligence is less than 25%. ILL. ANN. STAT. ch. 110, § 2-1117 (Supp. 1987). Yet "several" liability historically has meant liability for the entire injury. *See infra* note 3.

(1) it allegedly is a recent departure from the common law, which allegedly imposed full liability for the injury on each tortfeasor only when the tortfeasors acted in concert; (2) it allegedly requires a defendant to pay for more damages than she tortiously caused or for which she was responsible and therefore makes her responsible for others' actions in addition to her own; (3) it originally arose when liability was allegedly limited to faulty (morally blameworthy) conduct, yet today it is applied to "deep pocket" defendants who allegedly "have done nothing wrong" and who thus are required to provide "social insurance" for others' wrongful behavior; and (4) it allegedly is inconsistent with modern regimes of comparative responsibility.[3]

In an Article in last year's volume of the *U.C. Davis Law Review*, I criticized the defense advocates' arguments against the joint and several liability doctrine[4] and provided principled arguments for its continued existence.[5] In his comment on my article in this issue of the *Law Review*, Professor Twerski attempts to rationalize the "joint tortfeasor legislative revolt."[6] With one exception,[7] he does not challenge my critique of the defense advocates' arguments, nor does he disagree with my affirmative arguments in favor of the doctrine itself. To the contrary, he acknowledges that my critique "raises perceptive and troubling questions about the fairness of the proposed legislative solutions,"[8] and he states that "[t]he formal structure of [Wright's] arguments cannot be

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[3] *See* Wright, *supra* note 1, at 1148-49 & nn.19 & 26, 1152-53 & nn.37 & 40-42. For a recent rehash of these arguments, see Pressler & Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DEN. U.L. REV. 651 (1988). Pressler and Schieffer cite an article by Wigmore to support their claim that, until recently, full liability applied only to tortfeasors acting in concert. *Id.* at 662 & n.49 (citing Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923)). Wigmore, however, was discussing the cases involving theoretically divisible injuries caused by successive impacts, rather than the more usual cases involving a single indivisible injury caused by multiple independent actions. In the latter cases, each tortfeasor has long been severally (separately) liable for the entire harm. The lack of "jointness" was procedural rather than substantive: the independently acting tortfeasors could not be joined in the same lawsuit. *See Product Liability: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 358-59, 363-67, 428-30 (1987) (statement of Professor David R. Smith) [hereafter *Product Liability Hearings*]; Wright, *supra* note 1, at 1148-49.

[4] Wright, *supra* note 1, at 1147-68.

[5] *Id.* at 1179-93.

[6] Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125 (1989).

[7] *See infra* text accompanying notes 33-40.

[8] Twerski, *supra* note 6, at 1127.

assailed."[9]

Foregoing any direct attack on the joint and several liability doctrine, Twerski argues that (1) legislators were not misled or confused by the defense advocates' arguments, but (2) nevertheless decided to eliminate or to modify the doctrine because it exacerbated the adverse effects of independent problems in the tort liability system — problems which could not be resolved through legislative action.[10] While I admire his imaginative effort to construct a *post hoc* rationalization for the "legislative revolt," I believe that the evidence fails to support him on either point.

I. Legislators' Understanding of the Basic Issues

Twerski summarizes the debate as follows. The defense advocates supposedly argue that joint and several liability is unfair because it requires a defendant to pay more than the "proportional [fault] share" of the harm that she caused.[11] I supposedly argue that (1) liability should be based on "causal responsibility (which is not divisible)" as opposed to "fault apportionment (which is divisible)," so that the negligent de-

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[9] *Id.* at 1145. Twerski does note one point of disagreement. I argue that a plaintiff's contributory negligence, being only self-endangering, merely reduces or, if it is sufficiently great, eliminates the plaintiff's corrective-justice claim against each tortfeasor for the full amount of the injury that was tortiously caused by the tortfeasor. The plaintiff's self-endangering behavior does not generate any corrective-justice claim by the tortfeasors against the plaintiff, since by definition it neither endangered nor caused harm to them. Thus, from the corrective-justice perspective, the tortfeasors, each of whom is liable for the full amount of the plaintiff's reduced corrective-justice claim, have equitable claims for contribution amongst themselves but not against the plaintiff. *See* Wright, *supra* note 1, at 1182-83 & n.145, 1191-92 & nn. 167-68.

Twerski questions the distinction between self-endangering and other-endangering behavior, noting that behavior which endangers oneself often also endangers others. Twerski, *supra* note 6, at 1127 n.9. Yet the other-endangering quality of *X*'s conduct is relevant only when *X* is being sued as a *defendant* for harm that she caused to others — only then does it give rise to a corrective-justice claim against *X*. When *X* is suing as the *plaintiff* for harm that she suffered, only the self-endangering quality of her conduct is relevant. Although both claims may arise from the same accident, they are independent claims that require separate analysis. The distinction between self-endangering and other-endangering behavior has long been recognized in practice: a more lenient, subjective standard of care is applied to the former, while a much stricter, objective standard of care is applied to the latter. *See* Wright, *supra* note 1, at 1157 & n.52.

Even if the plaintiff's negligence were deemed analytically equivalent to the defendants' negligence, the maximum supportable change to joint and several liability would be to reallocate uncollectible shares among all the negligent parties. *See id.* at 1190-91.

[10] Twerski, *supra* note 6, at 1127, 1129-33.

[11] *Id.* at 1128, 1130.

fendants "who are causally responsible" rather than the innocent plaintiff "who is not" should "bear the loss caused by an insolvent defendant"; and (2) legislatures failed to perceive this distinction between fault and causation.[12] Twerski asserts that legislators were well aware of the "fairness to the plaintiff" argument and balanced it against the "fairness to the defendants" argument to reach various compromise solutions.[13]

Contrary to Twerski's description, however, the defense advocates' basic argument has not been that it is unfair to hold a defendant liable for more than a proportionate share of the entire harm, even though she tortiously caused the entire harm. Instead, the defense advocates have hammered away on the argument that joint and several liability requires a defendant to pay for more damage than she tortiously caused or for which she is responsible, and thus makes her responsible for others' tortious actions in addition to her own. This assertion was the principal defense argument in the materials that I canvassed for my initial article,[14] and it is the principal defense argument in the materials that Twerski cites. Because of space limitations (and to avoid reader boredom), I will focus on the recent attempt to eliminate joint and several liability in Maine; the arguments have been the same in every other jurisdiction.[15]

The defense advocates in Maine argued as follows:

> It has been said: "What pure comparative negligence does is hold a person fully responsible for his/her acts to the full extent to which they caused injury. That is justice." The proposed option [replacing joint and several liability with proportionate several liability] achieves such justice, yet also insures that tortfeasors will not be held responsible beyond the extent to which they caused injury, in other words, for the extent to which someone else has caused injury. . . . The injustice of a 10% negligent defendant paying 100% of a damage award will be eliminated.
> . . . Any negligence attributable to [a settling tortfeasor] will be assessed to

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[12] *Id.* at 1127-28, 1129-30.

[13] *Id.* at 1127, 1129-30.

[14] *See* sources cited in Wright, *supra* note 1, at 1152-53 & nn.37 & 40, 1188 n.161.

[15] *See, e.g.*, WISCONSIN COMM'R OF INS., FINAL REPORT OF THE SPECIAL TASK FORCE ON PROPERTY AND CASUALTY INSURANCE 19 (Aug. 1986), which stated:

> [A]bolishing joint and several liability for [noneconomic] damages would require defendants responsible for causing noneconomic injuries to pay the noneconomic damages. This should alleviate some concerns that wealthy defendants too often get saddled with paying . . . noneconomic damages when [they] did not cause the noneconomic injuries. The task force felt that joint and several liability should remain for economic damages to assure the victim of full compensation for economic injuries.

Id.

> the named defendant [under joint and several liability]. The judgment, therefore, does not truly reflect the defendant's fault, resulting in his compensating the plaintiff for someone else's negligence.[16]
> Pure [proportionate] several liability restores rational assessments of fault. Defendants are held responsible only for the damages they have caused, and plaintiffs may join all responsible parties in an attempt to get full compensation.[17]

Of course, under proportionate several liability the injured plaintiff is responsible for more than his proportionate fault if one or more tortfeasors is insolvent or otherwise unavailable. Nevertheless, the defense advocates insist that any compromise proposal, such as reallocating the uncollectible shares among the solvent responsible parties or retaining joint and several liability for economic damages only, is unjust since the solvent defendant is made to pay "more than his portion of damages."[18] The compromise proposals allegedly are based on the plaintiff's need for speedy compensation,[19] rather than on any principle of responsibility:

> If we are to achieve a true fault based system of responsibility, pure [proportionate] several liability is essential. The various modified systems are only a partial solution to the injustice inherent in joint and several liability. . . . The advantage of these methods is that the plaintiff is guaranteed [sic] full recovery. To achieve this, however, defendants must act as insurers for the actions of others, over whom they exercise no control.[20]

The major premise underlying these defense arguments is that joint and several liability results in a defendant's being held liable for more

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[16] MAINE LIABILITY CRISIS ALLIANCE, RESPONSE TO DRAFT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE, Appendix B: Joint and Several Liability, at A-3 (October 1987) (footnotes omitted) (restating arguments previously made to the Commission).

[17] *Id.* at A-7. Similar arguments occur repeatedly throughout the appendix.

[18] *Id.* at A-5.

[19] *Id.* at A-4, A-6.

[20] *Id.* at A-6. The defense advocates also argued that proportionate several liability results in greater deterrence and is cheaper to administer than joint and several liability. *Id.* at A-7. Neither argument is correct. Efficient deterrence will occur only if each tortfeasor is potentially liable for the full amount of the injury caused by her negligence. *See* Wright, *supra* note 1, at 1170-77. Yet proportionate several liability, unlike joint and several liability, guarantees that each tortfeasor will only be liable for part of the injury that she tortiously caused if there is a prospect of multiple tortfeasors. Both rules involve comparable administrative costs, since both require determinations of comparative responsibility and multiple actions to obtain full apportionment. The difference is that under proportionate several liability the injured plaintiff bears the expense, delay, and risk of apportionment, while under joint and several liability the defendants bear those costs. *Id.* at 1185-86, 1189-90.

than she tortiously caused, or being held responsible for the actions of others rather than her own actions. If this premise were actually true, joint and several liability would indeed be unfair. However, as I tried to explain in my earlier Article, this premise is patently false.[21] Joint and several liability applies only to injuries for which the defendant herself is fully responsible. She is fully responsible for some injury only if her tortious behavior was an actual and proximate cause of the entire injury. Her full responsibility is not diminished if some other person's tortious behavior was also an actual and proximate cause of the entire injury; rather he also is fully responsible for the entire injury. She is not "fifty percent negligent" or "fifty percent responsible."[22] Rather, each of them, having tortiously caused the entire injury, is 100% negligent and 100% responsible.

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[21] *See* Wright, *supra* note 1, at 1152-53, 1160-64, 1182-83, 1186-93. A recent article relies heavily on this invalid premise. The authors erroneously assume that under joint and several liability negligent defendants are held liable not only for damages caused by their own actions ("fractional share" liability), but also for damages caused by others ("unitary share" liability), and they argue that such joint "unitary share" liability rather than several "fractional share" liability is necessary to achieve efficient results. *See* Kornhauser & Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 833, 841-42, 846, 851, 855-56 (1989). The authors also incorrectly assume that tortfeasors are liable for injuries caused by their activity as a whole ("full liability"), rather than only those injuries caused by the tortious aspect of their conduct ("partial liability"). *See id.* at 837-40; *cf.* Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1759-74 (1985) (tortfeasors are only liable for injuries caused by the tortious aspect of their conduct).

The authors state that previous analyses assume "fixed share" (equal division) apportionment rather than "proportional share" (comparative responsibility) apportionment. Kornhauser & Revesz, *supra*, at 842-43. They further assert that my analysis of the efficiency of various apportionment schemes did "not expand upon the theoretical work of Landes & Posner," *id.* at 832 n.5, and that I did not address "partial liability" and "fractional share" rules, *id.* at 851 n.73. In my analysis, I dealt only with "partial liability" rules, since "full liability" rules do not and should not exist. I expanded Landes and Posner's analysis to cover full and proportionate several ("fractional share") liability as well as joint liability without contribution and joint liability with any form of contribution, including proportionate shares as well as equal shares. I criticized Landes and Posner's conclusion that joint and several liability without contribution is the most efficient allocation method. I demonstrated that there is no efficient allocation method if more than one party is subject to strict liability. I also demonstrated, contrary to Kornhauser and Revesz's analysis, that each of these allocation methods is efficient in a static semi-ideal world but that none is efficient in the real world or in a dynamic semi-ideal world. *See* Wright, *supra* note 1, at 1170-77.

[22] As David Smith has observed, such statements make as much sense as saying that someone is "fifty per cent pregnant." *See Product Liability Hearings*, *supra* note 3, at 370-71, 373 n.9, 427, 429 (statement of Professor David R. Smith).

If she pays all the damages, she has an equitable claim against the other tortfeasor for contribution (reimbursement for fifty percent of the damages) based on their comparative responsibility. If she cannot obtain contribution from him because he is insolvent or otherwise unavailable, this does not mean that she is being held liable for more than she tortiously caused, for more than she is responsible, for the other's tortious actions, or for his portion of the damages. Whether or not she can obtain contribution, she is liable to the plaintiff for the full amount of damages that she tortiously caused. Her paying all the damages fulfills her own responsibility to the plaintiff; it is not a shifting to her of the insolvent tortfeasor's responsibility.

Her bearing all the damages is unfair only in the context of her equitable claim against the other tortfeasor for contribution, which is secondary to the plaintiff's independent corrective-justice claim against each tortfeasor for full compensation for the injury that each of them tortiously caused. This subordination remains true even if there were ninety-nine other tortfeasors, each equally culpable yet insolvent. Although her *comparative* responsibility would be "minimal" (one percent), she continues to be *fully* (100%) responsible to the plaintiff. Otherwise, victims would be subject to a perverse "tortfest," in which the more tortfeasors there were, the less the victim could recover from any particular tortfeasor, even though each tortfeasor was a tortious cause of the victim's entire injury.[23]

As the above discussion indicates, my argument is not, as Twerski states, that liability should be based on "causal responsibility" rather than on "fault apportionment," or that the negligent defendants "who are causally responsible" rather than the innocent plaintiff "who is not" should "bear the loss caused by an insolvent defendant."[24] The plaintiff as well as each tortfeasor was a cause of the injury: it would not have occurred if the plaintiff had not been present. But only the negligent defendants, by tortiously causing harm to another, were tortfeasors, and each tortfeasor is responsible for the full amount of harm that she tortiously caused.[25] Each tortfeasor's fault or responsibility can be *compared* to calculate contribution claims among the

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[23] *See id.* at 361, 371-72.

[24] *See* Twerski, *supra* note 6, at 1128, 1129.

[25] *See supra* note 9. On the rare occasions in which defense advocates have been challenged on their assertions that defendants are being held liable for more damages than they tortiously caused, the defense advocates have been quite uncomfortable. *See, e.g.*, *Product Liability Hearings*, *supra* note 3, at 488-90 (exchange between Rep. Florio and Alfred W. Cortese, Jr.).

tortfeasors, but it cannot be diminished or "apportioned" when the plaintiff's corrective-justice claim against each tortfeasor is at issue. Any tortfeasor who pays all the plaintiff's damages is shouldering her own responsibility by paying for the loss that she tortiously caused; she is not being held responsible for the actions of some insolvent tortfeasor.

To the extent that state legislators accepted the defense advocates' argument — that joint and several liability requires a defendant to pay for more damage than she tortiously caused or for which she is responsible, and thus makes her responsible for others' tortious actions in addition to her own — the only remaining argument for joint and several liability rested on the plaintiff's need for compensation rather than on any principle of responsibility. Both the "fairness to the defendants" and the "fairness to the plaintiff" arguments were fundamentally misconceived and were weighted heavily toward defendants. When the arguments are correctly perceived, there is no place for weighing or balancing. The "fairness to the defendants" argument is a "fairness *among* the defendants" argument which applies only to contribution claims among defendants and which is secondary to the plaintiff's corrective-justice claim against each defendant for full compensation for the injury that the defendant tortiously caused.

Were state legislators confused or deceived by the defense arguments? In every instance that I have encountered, they were. In many instances, the supporters of joint and several liability played into the defense advocates' hands by relying solely on the "innocent plaintiff needs compensation" argument.[26] Infrequently, and usually briefly and obliquely, the supporters noted that each defendant tortiously caused the entire injury and thus bore full responsibility for the injury. Joint and several liability in the context of an insolvent tortfeasor almost always was viewed, incorrectly, as shifting the insolvent tortfeasor's liability or portion of damages to the solvent tortfeasor, rather than as a

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[26] *See, e.g.*, Nevada Trial Lawyers Ass'n, 1987 Press Packet, Statement on Joint and Several Liability (1987), which argued:

> The law presently does not lose sight of who the victim is in a case. The company is a "wrongdoer", it has broken the law and caused the damage. Although it may not be fair for the one company to have to pay, it is more just than to let the victims become losers once again.

Id. Twerski states that "Wright acknowledges that plaintiffs groups consistently . . . argued [that defendants with 'minuscule' comparative fault nevertheless were fully responsible since they tortiously caused the entire injury]." Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 U.C. DAVIS L. REV. 1161, 1161 (1989). As the paragraph accompanying this note should make clear, I make no such acknowledgment.

recognition of the solvent tortfeasor's independent full liability for the injury.

In Maine, for example, the Commission to Examine Problems of Tort Litigation and Liability Insurance based its majority recommendation that no change be made in the joint and several liability doctrine on the "innocent plaintiff needs compensation" rationale:

> The law of joint and several liability is a key to assuring that someone at fault, as opposed to an innocent plaintiff, bears the cost of the plaintiff's harm.
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> Maine law, in most instances, permits a liable defendant to bear responsibility for only that portion of the plaintiff's damages attributable to his fault. . . . [W]hile in a few cases a defendant may pay more than his portion of a plaintiff's damages because another defendant at fault has no assets, this result is the fairest option. A more unfair option is to have an innocent or less blameworthy plaintiff absorb the loss.[27]

The minority, which recommended that joint and several liability be abolished, responded:

> A defendant found liable for any portion of a plaintiff's injuries should compensate the plaintiff to the extent of the defendant's responsibility . . . . However, it is not fair to that defendant that he act as a "deep pocket" for a plaintiff, regardless of the defendant's actual fault, simply because that defendant has assets and another blameworthy defendant does not.[28]

The same arguments were reiterated in the debates in the Maine legislature. Some legislators tried to eliminate joint and several liability for noneconomic losses only for defendants whose comparative responsibility was less than twenty-five percent. Supporters of the joint and several liability doctrine explicitly noted their confusion over the doctrine.[29] Both sides erroneously assumed that a defendant held liable for more than her percentage of *comparative* responsibility was unfairly

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[27] MAINE STATE LEGISLATURE, DRAFT REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE 95-96 (Oct. 1, 1987).

[28] *Id.* at 96-97. The Maine Trial Lawyers Association unsuccessfully attempted to refocus the debate:

> There is a very important point which the insurance industry has tried very hard to obscure: under joint and several liability, the careless conduct of the wrongdoer must be a substantial factor in producing the consumer's injury. The industry slides past this point when it argues that it is "unfair for someone who is ten percent careless to pay the entire bill." The point is that, in almost every case, the accident would not have happened at all unless the "ten percent defendant" had been careless.

Maine Trial Lawyers Ass'n, *Maine Has an Insurance Problem — Not a Jury Problem* 38-39 (Jan. 1988) (emphasis removed).

[29] MAINE LEGIS. REC. at H-288 (March 16, 1988) (remarks of Rep. Paradis).

being held liable for damages for which she was not responsible. However, the majority thought that the balance weighed in favor of "fairness to the innocent plaintiff" based on the plaintiff's need for full compensation, especially given the lack of any evidence that elimination or modification of joint and several liability would improve insurance availability or affordability.[30] The attempt to modify the joint and several liability doctrine failed by an overwhelming vote in the House and by a single vote in the Senate.[31]

The defense advocates failed in Maine because the issue was postponed until 1988, when the frenzy over tort reform had begun to dissipate and doubts were increasingly being voiced over the defense advocates' motivations and arguments. Tort victims in other states, burdened by the defense advocates' misleading arguments and pressure politics, have not been as fortunate.

II. Using Joint and Several Liability and Tort Victims as Whipping Boys

In any event, Twerski does not argue that joint and several liability itself is unfair or unjust. Instead, he argues that joint and several liability has been, and should be, eliminated or modified because it exacerbates the adverse effects of independent problems in the tort liability system — problems which cannot be resolved through legislative action.[32]

One of these alleged problems is that modern tort liability has moved away from its alleged historical insistence on faulty (blameworthy) conduct to such an extent that "deep pocket" defendants are now being held liable although they "have done nothing wrong" and thus are being made to provide "social insurance" for others' wrongful behavior.[33]

Although Twerski continually refers to "fault" rather than "responsibility," he does not explicitly challenge my claim that tort liability, for a very long time, has been based on moral responsibility rather than on

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[30] *See id.* at H-288 (remarks by Rep. Paradis defending joint and several liability); *id.* at H-290 (remarks by Rep. MacBride defending joint and several liability); *id.* at H-289 (remarks by Rep. Hanley opposing joint and several liability); *id.* at S-309 to -311 (March 17, 1988) (remarks by Sen. Brannigan and Sen. Black favoring joint and several liability); *id.* (remarks by Sen. Collins, Sen. Whitmore, and Sen. Dillenback opposing joint and several liability).

[31] *See id.* at H-291 (101-30 vote); *id.* at S-311 (15-14 vote, with two paired votes).

[32] Twerski, *supra* note 6, at 1132-33.

[33] *Id.* at 1128-29, 1133-40.

moral fault (blameworthy conduct).[34] He also does not challenge my assertion that much of the recent expansion in tort liability has been caused by the elimination of legal or de facto immunities that insulated manufacturers, municipalities, charities, landowners, and doctors from traditional principles of responsibility.[35] To support the "social insurance" thesis, he relies primarily on recent developments in strict products liability in certain jurisdictions and on broad assertions about unjustified findings of tortious conduct or causation.[36]

I will not attempt to justify the developments in strict products liability in every jurisdiction, with some of which I myself disagree. As I indicated in my previous article, I believe that strict products liability is intended to overcome difficulties that plaintiffs face in proving negligence, and that its basic outlines are justified by that purpose.[37] Decisions which use loss- or risk-spreading theories to go beyond this rationale can be, and have been, overturned or limited by statute or by subsequent judicial decisions, as Twerski's own citations demonstrate.[38]

I also do not claim that there are never unfounded findings of tortious conduct or causation, yet neither Twerski nor anyone else has offered evidence to indicate that this is a pervasive or even significant rather than an isolated problem. Indeed, as others have noted, most anecdotes offered by tort reform advocates turn out, on closer examination, to involve plausible findings of tortious conduct and causation.[39] In particular, both surveys and investigation of anecdotes have failed to produce evidence that "deep pocket" defendants are being held liable in

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[34] *See* Wright, *supra* note 1, at 1150-51.

[35] *See id.* at 1154-56 & nn.45 & 49; *cf.* Twerski, *supra* note 6, at 1136 & n.29 (noting "annihilation" of almost all the limited-duty rules). Contrary to Twerski's assertion, *id.* at 1136, removing immunities does not undermine notions of moral responsibility but rather reinforces them. *See* Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 37-39 (1988).

[36] *See* Twerski, *supra* note 6, at 1133-40.

[37] *See* Wright, *supra* note 1, at 1155.

[38] *See* Twerski, *supra* note 6, at 1126 n.5 (listing numerous product liability reforms that have been enacted by legislatures, including state-of-the-art defenses); *id.* at 1134 n.24 (noting that Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982), was substantially limited by the shift to an *ex ante* negligence test in Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984)). Contrary to Twerski's assertion, putting the burden of proof on the defendant regarding the state of the art is not the functional equivalent of strict liability.

[39] Strasser, *Have "Anecdotes," Not Facts, Fueled Tort Crisis?*, NAT'L L.J., Feb. 24, 1986, at 15; *see* Sella, *The 10 Largest Jury Verdicts of 1988*, A.B.A. J., March 1989, at 45.

the absence of tortious conduct.[40]

Even if the problems that Twerski alleges were demonstrably real and significant, why not directly deal with them rather than dismantle the joint and several liability doctrine, which Twerski apparently concedes is itself fair and just? Why sacrifice tort victims in every case involving multiple defendants to mitigate problems that arise, at most, in a small percentage of cases? Twerski responds that these other problems are not amenable to legislative or judicial solution,[41] but his own citations indicate otherwise,[42] and the sacrifice issue remains unanswered. The lack of controls on judges' or juries' discretion is not due to a lack of promising approaches, but rather to a lack of interest by tort "reformers," who are interested in laws that will reduce defendants' liability rather than in true tort reform.[43]

Twerski's final argument is the most novel. First, he argues that legislators have "decided" to provide full or limited immunity to certain types of activities, not only through explicit legislative schemes such as workers' compensation and statutory governmental immunities, but also through their failure to impose substantial insurance requirements on

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[40] *See Product Liability Hearings*, *supra* note 3, at 463 (statement of Gene Kimmelman); *id.* at 479, 500-01 (remarks of Gene Kimmelman and Rep. Florio); WISCONSIN COMM'R OF INS., *supra* note 15, at 18. Similarly, contrary to Twerski, *supra* note 6, at 1140-43, very little evidence exists to suggest that "deep pocket" defendants are being held liable for disproportionate or unreasonably high noneconomic damages. *See* Wright, *supra* note 1, at 1151-52. The ISO Study that Twerski cites, *see* Twerski, *supra* note 6, at 1129 n.13, does not make that claim. Moreover, contrary to Twerski's assertion, judges frequently reduce damage awards deemed to be excessive. AMERICAN BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 13-14 (Feb. 1987); Cook, *Judges More Willing to Cut Jury Awards*, NAT'L L.J., July 20, 1987, at 3, 32.

[41] Twerski, *supra* note 6, at 1132, 1133, 1138, 1140-43.

[42] *See supra* note 38; *see also supra* note 40 (discussing judicial reduction of excessive damage awards). Several states have placed caps on noneconomic damages. *See* T. WILSON, J. ELSER, H. MOSKOWITZ, M. EDELMAN & H. DICKER, U.S. TORT REFORM — 1988, at 90, 99-102 (Oct. 1988). In both his comment and his rejoinder, Twerski ignores these examples of direct substantive law revision as well as proposed procedural reforms. *See infra* note 43 and accompanying text.

[43] *See Product Liability Hearings*, *supra* note 3, at 491-92 (remarks of Rep. Florio); WISCONSIN COMM'R OF INS., *supra* note 15, at 55, 56; Rabin, *supra* note 35, at 39-40; Wright, *supra* note 1, at 1164 n.73. Contrary to Twerski, *supra* note 6, at 1138 n.38, Rabin concludes that substantive — as opposed to procedural — tort reform is unnecessary, rather than unlikely. Rabin, *supra* note 35, at 38-39. For discussions of useful procedural reforms, see AMERICAN BAR ASS'N, *supra* note 40, at 10-20, 25-40; Rabin, *supra* note 35, at 36-43.

risky activities such as driving.[44] If Twerski is correct, why are those defendants with substantial insurance or personal assets, who engage in the same activities as the supposedly "immune" underinsured defendants, not also immunized? Second, he argues that nonimmunized tortfeasors are also intended to be beneficiaries of these "immunities," and that legislators have eliminated or modified joint and several liability to spread the costs of these "immunities" to society as a whole.[45] There is no hint of this alleged legislative rationale in any materials that I have read. Moreover, the costs are not spread to society as a whole; they are concentrated on tort victims.

Twerski recognizes the impact on tort victims. He argues that victims' inability to recover the portion of their damages that are "immunized" will have the beneficial effect of bringing greater pressure on legislators to reexamine these immunities.[46] But why should legislators want to reexamine immunities that they supposedly chose and expanded in steps one and two? Would not defendants exert more effective pressure if joint and several liability were retained? Sacrificing joint and several liability and tort victims to bring pressure on tort immunities seems both harsh and naive, especially when not much prospect exists of modifying the immunities. In fact, at the same time that legislators were eliminating or modifying joint and several liability, they often were reenacting municipal and charitable immunities. When Twerski raised this bring-pressure-on-immunities argument at congressional hearings as a reason to eliminate or modify joint and several liability, it received no support.[47]

In sum, Twerski has failed to provide a plausible justification for the "joint tortfeasor legislative revolt." The explanation — not justification — for the "revolt" lies in the intense and effective political pressure mounted during the insurance crisis by insurance companies, businesses, and municipalities. The amazing fact is that, despite the political pressure and misleading arguments, complete elimination of joint and several liability occurred in only a few states. A deep sense of jus-

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[44] Twerski, *supra* note 6, at 1132-33, 1143-44.

[45] *Id.* at 1144.

[46] *Id.* at 1144-45. In his rejoinder, Twerski asserts that the "immunized" damages are "partially" shifted to the victim and to society. Twerski, *supra* note 26, at 1163. To the extent that the "immunized" damages are not covered by joint and several liability, they are shifted entirely to the victim, at least initially.

[47] *See Product Liability Hearings*, *supra* note 3, at 474-76, 497-98 (remarks of Rep. Florio); *id.* at 484 (remarks of Gene Kimmelman).

tice told most legislators that joint and several liability is worth preserving.[48]

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[48] Twerski asserts that his theory better explains the legislative outcomes than my so-called "confusion" theory. He asserts that state legislatures "overwhelmingly rejected" total elimination of joint and several liability and instead (a) established "minimum validation level" comparative-responsibility thresholds to guard against the alleged problem of unfounded findings of "minimal" fault and (b) abolished joint and several liability for noneconomic damages (only) to ameliorate the alleged problem of unreasonable awards of noneconomic damages. Twerski, *supra* note 26, at 1161-62. Twerski's rationalization of the legislative outcomes is contradicted, once again, by the evidence.

Only nine of the thirty-five states that eliminated or modified joint and several liability adopted the threshold approach, and each adopted a threshold higher than would be needed to handle the alleged problem of improper findings of "minuscule" or "minimal" tortious conduct: Hawaii (25% for noneconomic damages), Illinois (25%), Iowa (50%), Montana (50%), New Jersey (60% for noneconomic damages, 20% for economic damages), New York (50% for noneconomic damages), Oregon (15% for economic damages), Texas (20% if plaintiff negligent, 10% otherwise), West Virginia (25% in medical malpractice and governmental liability cases). *See* Wright, *supra* note 1, at 1166-67 & nn.79, 83-84, 87, 89; *supra* note 2.

Joint and several liability was eliminated for noneconomic damages only in four states: California and Ohio if the plaintiff was contributorily negligent, and Hawaii and New York subject to percentage thresholds. Florida and Oregon, in addition to eliminating the doctrine for almost all noneconomic damages, also limited the doctrine's applicability to economic damages. *See* Wright, *supra* note 1, at 1167 & nn.85-89.

The approaches adopted in the other states varied widely, from complete or almost complete elimination in nine states (Arizona, Colorado, Idaho, Kansas, Kentucky (discretionary), North Dakota, Utah, Wyoming (perhaps only if plaintiff was contributorily negligent), and Vermont) to substantial elimination in another seven states (Georgia (discretionary), Indiana, Louisiana, New Mexico, Nevada, Oklahoma, and Washington) to minimal elimination in one state (Maine) to caps in four states (Alaska, Louisiana, Missouri, and South Dakota) to reallocation of uncollectible shares in four states (Connecticut, Michigan, Minnesota, and Missouri). *See id.* at 1165-68 & nn.74, 76-78, 80-82, 90-93.

Many states, including many which adopted thresholds or eliminated joint and several liability for noneconomic damages only, retained joint and several liability in precisely those areas in which Twerski indicates the greatest concern about improper findings of "minimal" tortious conduct — environmental and toxic torts and products liability. In general, the statutes are riddled with exceptions. *See id.* at 1165-68 nn.74, 78-81, 83-84, 87-89, 91-93; *supra* note 2.

The overall picture, contrary to Twerski's assertion, is one of confusion and chaos, as even the defense advocates have admitted. *See* U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 77 (Mar. 1987). Twerski's rationalization does not fit the results. My analysis, which notes the varying mix of political pressure, confusion generated by misleading arguments, and a gut sense of the justice of joint and several liability, does fit the results.