

# Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law

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## *Table of Contents*

I. Introduction .....	559
II. The Role of Substantive Law in Denying Plaintiffs Access to Juries.....	568

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A.	The Expansion of Jury Access in Tort Law.....	571
B.	Tort Doctrines that Deny Plaintiffs Access to Juries .....	573
1.	The Choice Between Contributory Negligence and Comparative Fault.....	574
2.	Limited Duty Rules in Premises Liability Cases .....	575
3.	Other No-Duty and Limited-Duty Rules.....	578
4.	Limitations on the Liability of Charitable Institutions .....	580
5.	Standards Governing the Qualifications of Scientific Experts.....	582
III.	Possible Explanations for Variations in Tort Law Affecting Jury Access.....	586
A.	Race and Income Inequality: The Perception that “Bronx Juries” Redistribute Wealth.....	588
1.	The Legal Community’s Perceptions of African-American and Low-Income Jurors .....	588
2.	Comparing the Impact of Race on Welfare Reform.....	590
3.	The Actual Impact of African-American and Low-Income Jurors .....	594
B.	Keeping Cases from African-American Juries in the Post-Civil Rights-Era South: The Impact of Regional History.....	596
1.	Regional Differences in Mid-Nineteenth Century Common Law.....	597
2.	The Emergence of Pro-Business Southern Politics.....	598
3.	The Long History of Racial Exclusion from Southern Juries.....	600
4.	Resistance to “Judicial Activism” .....	605
C.	The Political Leanings of State Governments .....	606
IV.	Testing the Effects of Race, Income Inequality, Regional History, and State Politics on a State’s Degree of Jury Access Denial .....	610
A.	Quantifying the Jury Access Denial Factors for Seventeen States.....	612

B. Ranking the States' Degrees of Difficulty for Plaintiffs to Reach the Jury .....	614
C. The Effect of a High Degree of Income Inequality in a State's Leading Municipalities.....	617
D. The Effect of High Percentages of African-Americans in a State's Leading Municipalities .....	618
E. The Effect of a State's History as Part of the South.....	620
F. Interactions Among the Variables of Income Inequality, Race, and Region.....	620
G. The Effects of Politics and Ideology .....	623
V. Conclusion.....	626
Appendix .....	631
A. The Choice Between Contributory Negligence and Comparative Fault .....	631
B. Limited-Duty Rules in Premises Liability Cases .....	631
C. Other No-Duty and Limited-Duty Doctrines .....	632
D. Standards for Admissibility of Expert Testimony .....	634
E. Limitations on the Liability of Charitable Institutions .....	634
Appendix A-Table 2: Assessment of Jury Denial Indices .....	635
Appendix B-Table 3: Values of Key Study Variables.....	637

### I. Introduction

The image of the disproportionately African-American and poor urban jury redistributing wealth has dominated the political debate surrounding the tort system for the past generation. Peter Huber, a leading spokesperson for the tort reform movement in its early years, argued that “[i]f the new tort system cannot find a careless defendant after an accident, it will often settle for a merely wealthy one.”<sup>1</sup> In *The Bonfire of the Vanities*, novelist Tom

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1. See PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 12 (1988) (asserting further that juries are “committed to running a generous sort of charity”); see also *Sidle v. Majors*, 341 N.E.2d 763, 771 (Ind. 1976) (acknowledging “the ‘Robin Hood’ proclivity of juries” and noting

Wolfe characterized any jury in Bronx County, New York as a “vehicle for redistributing the wealth,”<sup>2</sup> and, in the process, coined the term “Bronx jury.” In the real world, Frank Popoff, then President and CEO of Dow Chemical Company, angrily argued that the jury was all black after it returned a \$75 million dollar punitive damage verdict against his company.<sup>3</sup>

This Article examines how judicial and legislative *perceptions* that race and income inequality affect jury deliberations impact the *substance of a state’s articulated rules governing tort law*.<sup>4</sup> Our focus is not on whether the racial composition or degree of income inequality within the population from which the jury pool is drawn in fact affects jury determinations of either liability or damages.<sup>5</sup> Instead, we examine whether appellate courts, consciously or subconsciously fearing that urban juries will be unfair to businesses and insured defendants, strike preemptively to prevent tort cases from ever reaching juries.<sup>6</sup> We also consider whether a state’s history as part of the South and the political leanings of its government affect whether its substantive law makes it more difficult for plaintiffs to reach the jury.<sup>7</sup>

Beginning in the mid-1960s, American tort law shifted dramatically in a pro-plaintiff direction.<sup>8</sup> The common element

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that “[t]he tendency to take from the rich and give to the needy is as American as apple pie”).

2. TOM WOLFE, *THE BONFIRE OF THE VANITIES* 406 (Picador 2008) (1987); see also Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 784 (1996) (arguing that “the only institutions in America where people of color have the power to make immediate wealth redistribution decisions are urban governments and juries”).

3. See MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 286–87 (1996) (pointing out that after making this statement, Popoff immediately had to backtrack to avoid accusations of racism).

4. See *infra* Part III (identifying and discussing factors that commonly decide which states follow traditional tort doctrines restricting liability in personal injury cases).

5. See *infra* notes 182–185 and accompanying text (discussing how demographics impact the way juries make decisions).

6. See *infra* Part IV (describing how the Jury Access Denial Index (JADI) is used to evaluate the appellate courts of various states).

7. See *infra* Part IV.B (noting that in many instances, Southern courts appear to be more inclined to prevent cases from reaching juries).

8. See Robert L. Rabin, *Judge Jack Weinstein and the World of Tort: Institutional and Historical Perspectives*, 64 DEPAUL L. REV. 641, 641 (2015)

among the many changes that occurred during the following two decades was that they enabled personal injury victims to have their cases decided by juries rather than dismissed by trial judges. Although these changes were pervasive, they were not uniform among the states. Some states, notably California,<sup>9</sup> often were bellwethers of pro-plaintiff changes in tort law, while other states, particularly some in the South, failed to join the trend. These pro-plaintiff changes exhausted themselves in the late 1980s when they were checked by pro-defendant “tort reform” enacted by state legislatures facing intense political backlash from businesses and insurance companies.<sup>10</sup>

We begin with the hypothesis that judges and state legislators often believe that juries with a substantial percentage of African-American or low-income jurors are more inclined to find for personal injury victims and award them higher damages and that these perceptions have led them to adopt rules making

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It is conventional wisdom that tort law entered a new era . . . around 1960 . . . cut[ting] across virtually all categories of liability for unintentional injury. These developments included recognition of new and expansive duties of . . . care in personal injury claims for landowner liability . . . and eroded existing defenses (contributory negligence . . .) and immunities . . . .

See also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 27 (2d ed. 2014) (“It is probably fair to say that tort law expanded the rights of injured persons during much of the 20th century at various rates of expansion up until around 1980 or perhaps a little earlier.” (footnote omitted)). Most often, these changes resulted from judicial decisions. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1242 (Cal. 1975) (adopting pure comparative fault); *Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973) (holding that “we no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors”). But in a number of instances, the pro-plaintiff changes came from legislative action. See, e.g., 735 ILL. COMP. STAT. 5/2-1116 (c) (2014) (adopting modified comparative liability); N.J. STAT. § 2A:22A-5 (2015) (establishing dramshop liability).

9. See Peter H. Schuck, *Introduction to TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 1, 19 (Peter H. Schuck ed., 1991) (describing “the California, New Jersey, and New York courts” as “being in the vanguard” as they “imposed new, more expansive duties to protect or avoid harm to others”).

10. See Joseph Sanders & Craig Joyce, “Off to the Races”: *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 210–11 (1990) (reporting that “the great majority of states . . . enacted tort reform legislation between 1985 and 1988 . . . in response to an insurance crisis”).

it more difficult for plaintiffs to have their cases decided by juries.<sup>11</sup>

We further examine whether a state's history as part of the slaveholding South, a factor obviously linked with race, correlates with a higher degree of denying personal injury plaintiffs access to juries.<sup>12</sup> Southern states typically have adopted more conservative policies on any number of issues, not just those that disadvantage personal injury plaintiffs.<sup>13</sup> For example, economist Paul Krugman noted that it was mostly formerly slaveholding Southern states that refused, under the Affordable Care Act, to expand Medicaid to "provide major benefits to millions of their citizens, pour billions into their economies, and help support their health-care providers," all on the federal government's tab.<sup>14</sup> He asked, "Is America doomed to live forever politically in the shadow of slavery?"<sup>15</sup> We ask the same question in the context of tort law.

During the period extending from the mid-1960s through the mid-1980s, Southern judges often refused to adopt pro-plaintiff doctrines in tort law that would have made it easier for plaintiffs to have their cases decided by the jury.<sup>16</sup> They apparently feared that Southern blacks, many only recently registered to vote and serving as jurors in significant numbers for the first time, would seek to redistribute wealth or retaliate for historic, and often continuing, mistreatment.<sup>17</sup> Accordingly, we assess the effect that

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11. See *infra* Part III.A (reporting that, even today, many trial lawyers are convinced that black juries are pro-plaintiff).

12. See *infra* Part III.B (explaining that both Southern courts and businesses feared black jurors would use their power in the court to strike back at those whom they felt oppressed them).

13. See Paul Krugman, Opinion, *Slavery's Long Shadow*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/22/opinion/paul-krugman-slaverys-long-shadow.html> (last visited Apr. 13, 2016) (noting that Southern whites have had very strong Republican leanings ever since the Nixon administration) (on file with the Washington and Lee Law Review).

14. *Id.*

15. *Id.*

16. See *infra* Part III.B (explaining how a mixture of Southern suspicion of African-American jurors, together with the South's pro-business politics of the 1960s, influenced courts not to adopt increasingly pro-plaintiff tort doctrines that prevailed elsewhere).

17. See *infra* Part III.A.1 (stating that even today, many attorneys still view black jurors as potential social wealth redistributors).

being a Southern state has on tort law because of its interactions with race and income inequality.<sup>18</sup>

We also explore a possible correlation between the political leanings of a state's government and the extent to which its tort law makes it difficult for the plaintiff to have her case decided by the jury.<sup>19</sup> Tort law has become highly politicized in the last generation.<sup>20</sup> Conservatives attack "out of control" juries that imperil American businesses, and they promote pro-business "tort reform."<sup>21</sup> In contrast, liberals see the tort system as a means of holding corporations accountable for their harmful conduct.<sup>22</sup> Hence, it is plausible to assume that conservative-leaning states impose more obstacles to the plaintiff reaching the jury than do liberal-leaning states.<sup>23</sup>

The tort law of seventeen states provides the basis for our comparisons.<sup>24</sup> In order to test for correlations between the extent that a state denies personal injury plaintiffs the opportunity to

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18. See *infra* Part IV.C, E & F (describing how the authors discovered a strong association between Southern states whose largest cities include high percentages of African-American residents and tort law doctrines making it difficult for plaintiffs' cases to reach the jury).

19. See *infra* Parts III.C & IV.G (describing possible correlation between political conservatism and anti-jury doctrines and finding such a correlation in 1980 but not in 2010).

20. See *infra* notes 250–258 and accompanying text (discussing tort reform).

21. See Robert A. Levy, *Do's and Don'ts of Tort Reform*, CATO INST. (May 2005), <http://www.cato.org/publications/commentary/dos-donts-tort-reform> (last visited Apr. 13, 2016) (listing awards such as a \$145 billion punitive damages verdict as being an example of tort abuse) (on file with the Washington and Lee Law Review).

22. See Brendan Fischer, *Justice Denied: 71 ALEC Bills in 2013 Make It Harder to Hold Corporations Accountable for Causing Injury or Death*, PR WATCH (July 10, 2013, 7:31 AM), <http://www.prwatch.org/news/2013/07/12172/justice-denied-71-alec-bills-2013-make-it-harder-to-hold-corporations-accountable-ca#sthash.Kj90WwvY.dpuf> (last visited Apr. 13, 2016) (arguing that tort liability is necessary to prevent dangerous corporate actions, citing the quintessential example of a crib manufacturer ignoring safety guidelines) (on file with the Washington and Lee Law Review).

23. See *infra* Part III.B.2 (noting that the transition of Southern states from Democratic leaning to Republican-leaning in the last half of the twentieth century corresponds with the persistence of doctrines making it more difficult for personal injury plaintiffs to have their cases heard by juries).

24. See *infra* notes 266–268 and accompanying text (discussing selection of states used for comparative study).

have their cases decided by the jury and each of the factors of race, income inequality, history as a part of the South, or the political leanings of state governments, or any combination thereof, we constructed a numerical index, the Jury Access Denial Index (“JADI”).<sup>25</sup> Each state’s JADI quantifies the extent to which the tort law of that state impedes a plaintiff’s access to the jury compared with the tort law of other states.

Determining each state’s JADI in turn required two steps. First, we selected five sets of legal issues that are important in determining which personal injury cases survive the legal gauntlet and move forward for jury deliberations. We asked a panel of twelve experienced and highly regarded judges and practitioners to assess how important each of these factors is in comparison to each other in order to assign each its appropriate weight in determining the Jury Access Denial Index.<sup>26</sup> Second, we researched the law on each of these issues in each of the seventeen states.<sup>27</sup> We then multiplied our quantitative assessment of the extent to which each state continued to adhere to an older doctrine, such as contributory negligence as a total bar to recovery, and the weight assigned to such a factor by the panelists experienced in tort litigation. We totaled these products for each of the five sets of issues for a particular state to determine that state’s JADI. Using each state’s JADI, we conclude in Part IV.B by ranking the states in order of the degree to which each state’s substantive law doctrines impedes a personal injury plaintiff’s ability to have her case decided by the jury.<sup>28</sup>

Our next step was to perform a multivariate analysis with the four variables of income inequality, race, region, and the

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25. See *infra* Part IV.A (explaining the various criteria behind the JADI index).

26. See *infra* note 264 and accompanying text (explaining the selection of an equal number of judges, plaintiffs’ attorneys, and defense attorneys).

27. See *infra* Appendix A (describing the research procedures).

28. See *infra* note 269 and accompanying text (noting that the JADI measures only the impact of substantive law doctrines in preventing cases from reaching the jury and not judicial tendencies in ruling on such matters).



political ideology of each state's government.<sup>29</sup> The results confirm at least two of our hypotheses.<sup>30</sup>

First, a clear positive relationship exists between the percentage of African-Americans in a state's largest cities and its continuing acceptance of doctrines that impede the plaintiff's access to the jury.<sup>31</sup> This relationship is both statistically and substantively significant, and independent of any effects resulting from either the degree of income inequality present in the state's large urban areas or the region of the country in which the state lies.<sup>32</sup>

Second, a state's geographic location within the South yields the most powerful effect on the extent to which the state denies jury access to tort plaintiffs; again, this correlation is both statistically and substantively significant.<sup>33</sup> This finding is not surprising because during the late 1960s through the mid-1980s, when most other states adopted changes to tort law that increased plaintiffs' access to juries, appellate courts in the South often failed to join the trend.<sup>34</sup>

Our analysis of whether the other two variables, income inequality and political ideology, affect a state's tort law yields less clear results.<sup>35</sup> Our findings suggest a weak positive association between the degree of income inequality within a state's largest cities and the degree to which its tort law makes it difficult for plaintiffs in personal injury cases to have their cases

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29. See *infra* Part IV.B (recording how the authors chose seventeen states that varied in terms of racial demographics, Southern history, politics, and common ideologies to provide a complete and diverse analysis).

30. See *infra* Part IV.D (testing for correlation between a state's tort law doctrines and a high percentage of African-Americans in its largest cities); see also *infra* Part IV.E (looking for correlations between the JADI score of a particular state and its history as part of the South).

31. See *infra* Part IV.D.

32. See *infra* Part IV.C (expounding upon how the Gini coefficient was used to determine income inequality).

33. See *infra* Part IV.E (illustrating this conclusion).

34. See *infra* Appendix A, tbl.3 (reporting that during the mid-1900s, Southern courts often retained judicial doctrines making it more difficult for plaintiffs to have their cases heard by juries).

35. See *infra* Part IV.F (explaining that findings of associations from bivariate analyses should not be over-interpreted because of complex interactions with other variables).

decided by juries.<sup>36</sup> Surprisingly, however, the correlation is not statistically significant.<sup>37</sup>

Finally, our analysis suggests that the relationship between the political leanings of a state's government and its degree of jury-access denial is somewhat complicated.<sup>38</sup> On one hand, as anticipated, we found a positive correlation between the extent to which a state's tort law impeded a plaintiff's access to the jury and its level of political conservatism in 1980—at the end of the period when most courts had moved tort law in a decidedly pro-plaintiff direction.<sup>39</sup> On the other hand, when we tested the relationship between political conservatism and jury-access denial in 2010, the association has actually reversed: a state's level of conservatism is now correlated with easier access to the jury.<sup>40</sup> This can be partially explained by the fact that tort law has remained comparatively stable since the mid-1980s, while the political leanings of state governments have often changed dramatically. Even accounting for these changes, however, we conclude that race and region are far better predictors of a state's JADI than is political ideology.<sup>41</sup>

Part II considers the role of substantive legal doctrines in determining whether the personal injury victim is able to have her case decided by the jury.<sup>42</sup> Subpart A describes the expansion of jury access for plaintiffs that was concentrated in the two decades between the mid-1960s and the mid-1980s.<sup>43</sup> Subpart B

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36. See *infra* note 278 and accompanying text (analyzing the data on income inequality).

37. See *infra* note 277 and accompanying text (analyzing the connection between jury awards and income inequality and concluding no statistically significant relationship).

38. See *infra* Part IV.G (discussing the complications when analyzing JADI and political orientations of state governments).

39. See *infra* note 283 and accompanying text (noting that Figure 5 shows that in 1980, more liberal states generally had adopted tort doctrines making it easier for plaintiffs to have their cases reach juries).

40. See *infra* note 284 and accompanying text (observing that by 2010, liberal political leanings of state governments were associated with a greater prevalence of anti-jury tort doctrines).

41. See *infra* Part IV.G (explaining that a correlation between JADI and political ideology was expected, but only a confusing and inconsistent association was found).

42. *Infra* Part II.

43. *Infra* Part II.A.

then identifies five sets of substantive rules that traditionally kept plaintiffs' cases from juries and continue to do so in a minority of states: (1) contributory negligence as a total bar to recovery; (2) limited duty rules in premises liability cases; (3) no duty or limited duty rules in other contexts; (4) rules limiting the liability of charitable institutions; and (5) restrictive rules governing the admissibility of expert scientific testimony.<sup>44</sup>

In Part III, we review several variables that scholars, practitioners, or judges have identified as affecting the development of tort law.<sup>45</sup> Subpart A describes the widely held belief among practitioners and some scholars that African-American jurors favor plaintiffs in personal injury litigation, both in determining liability and in assessing damages.<sup>46</sup> The Subpart also covers the often overlapping topic of whether low-income jurors tend to favor plaintiffs and redistribute wealth in tort litigation.<sup>47</sup> Subpart B explores the reasons why the substantive law in states that were once a part of the segregated South potentially poses more obstacles to personal injury plaintiffs seeking to have their cases decided by juries than does the law in other regions of the country.<sup>48</sup> Finally, Subpart C considers a possible alternative explanation, that the substantive law rules we identified may be most closely correlated with the political leanings of a state's governmental leaders.<sup>49</sup>

Part IV describes our methodology for testing the hypotheses that we derived from the analysis previously presented, as well as the results of our analysis.<sup>50</sup> Subpart A explains the process for developing a Jury Access Denial Index that quantifies the extent to which any particular state's law creates obstacles for the personal injury plaintiff to have her case decided by the jury instead of having it dismissed by the trial court judge.<sup>51</sup> Subpart

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44. *Infra* Part II.B.

45. *Infra* Part III.

46. *Infra* Part III.A.

47. *Infra* Part III.A.

48. *Infra* Part III.B.

49. *Infra* Part III.C.

50. *Infra* Part IV.

51. *Infra* Part IV.A.

B describes how we selected the seventeen states whose tort law we studied.<sup>52</sup> We then rank the seventeen states in terms of their JADIs, that is, the degree to which the law of each state creates substantive law obstacles to the plaintiff having her case decided by the jury.<sup>53</sup>

The later Subparts of Part IV evaluate whether there are statistically significant correlations between the extent to which each state's law impedes access to the jury and the factors, previously described in Part II, that may affect the extent of jury access denial.<sup>54</sup> In Subpart C, we evaluate whether a state's JADI is correlated with the degree of income inequality within a state's largest municipalities.<sup>55</sup> Subpart D considers whether a state's JADI is correlated with the percentage of African-Americans in the populations of the state's largest cities.<sup>56</sup> In Subpart E, we test the possible impact of a state's history as part of the South.<sup>57</sup> In Subpart F, we evaluate possible interactions among the variables of race, income inequality, and regional history in affecting its JADI.<sup>58</sup> Finally, Subpart G considers whether the political ideology of a state's government and its voters is correlated with a state's JADI.<sup>59</sup>

In Part V, we conclude and briefly address the normative implications of our findings.<sup>60</sup>

## *II. The Role of Substantive Law in Denying Plaintiffs Access to Juries*

The most important issue in the practice of personal injury law is how difficult it is for plaintiffs to have their cases heard by

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52. *Infra* Part IV.B.

53. *Infra* Part IV.B.

54. *Infra* Part IV.G.

55. *Infra* Part IV.C.

56. *Infra* Part IV.D.

57. *Infra* Part IV.E.

58. *Infra* Part IV.F.

59. *Infra* Part IV.G.

60. *Infra* Part V.

juries.<sup>61</sup> Judges and attorneys assume that juries will favor injured victims and not defendants—typically either businesses or other insured defendants.<sup>62</sup> Most tort claims are resolved out of court through the settlement process,<sup>63</sup> but the perceptions of

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61. See generally HARRY SHULMAN ET AL., *LAW OF TORTS: CASES AND MATERIALS* (6th ed. 2015)

[I]n most cases, the lawyer for the plaintiff wants the case to be heard and decided by the jury. . . . Conversely, the lawyer representing the defendant wants to prevent the jury from deciding the case. Accordingly, much of the tort litigation process can be understood as the struggle between the plaintiff's attorney and defense counsel as to whether the case will be decided by the jury or whether instead it will be decided by the judge "as a matter of law."

Cf. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1738 (2012) (describing impact of court's decision taking case from jury through granting of summary judgment motion on settlement value). As early as the mid-nineteenth century, a New York trial court judge explicitly addressed the issue:

We can not shut our eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There, is therefore, a manifest propriety in withdrawing from the consideration of the jury, those cases in which the plaintiff fails to show a right of recovery . . . .

*Haring v. New York & E.R. Co.*, 13 Barb. 9, 15–16 (N.Y. Gen. Term 1852).

62. See, e.g., 2 FRED LANE, *GOLDSTEIN TRIAL TECHNIQUE* § 9:2 (3d ed. 2014) (advising that "[t]he 'little guy' usually has an advantage with a jury . . . against a corporation, a prominent or wealthy person, a railroad, or an insurance company"). But see LYNN LANGTON & THOMAS H. COHEN, NCJ-223851, *CIVIL BENCH AND JURY TRIALS IN STATE COURTS*, 2005, at 3–4 (rev. ed. 2009), <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> (reporting that a comprehensive study by the U.S. Department of Justice shows that the plaintiffs won in only 51.3% of all tort cases).

63. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 129 (2009) (finding a settlement rate in a sample of tort cases in federal courts to be 87.2%); Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 40 (2002) (finding "settlement rates for some type of cases—such as torts—exceeding 90 percent").

counsel for the parties as to whether a case will reach the jury is certainly an important determinant of settlement value.<sup>64</sup>

In this Part, we identify five sets of substantive law doctrines<sup>65</sup> that affect whether the trial judge will grant either a motion for a summary judgment or a motion for a directed verdict, removing the case from the purview of the jury. Even earlier in the litigation process, plaintiff's counsel in a personal injury case, almost always compensated on a contingent fee basis,<sup>66</sup> generally declines to accept a case when the facts suggest that the case is unlikely to make it to the jury.

Factors other than the content of substantive law, notably state or even local judicial practice, significantly affect the probability that the trial judge will dismiss cases,<sup>67</sup> but our focus is only on substantive legal principles that play important roles in dismissing tort cases. Before identifying doctrines that deny the tort plaintiff access to the jury, we begin by tracing how most states moved, during the period of the mid-1960s through the mid-1980s, toward making it easier for tort plaintiffs to have their cases decided by juries.

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64. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) ("The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes.").

65. One of the issues, the admissibility of expert testimony, is really a matter of evidence law rather than tort law, but substantially impacts whether the tort case is heard by the jury. See *infra* notes 129–147 and accompanying text (explaining the standards for qualifying experts).

66. See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 n.1 (1998) (reporting that in "personal injury cases . . . research shows that virtually all plaintiffs pay their lawyers on a contingency basis").

67. See, e.g., Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 902 (2007) (acknowledging that variations in "circuit law, local rules, and case-management practices . . . and judicial philosophies . . . across the districts" influence the variations in summary judgment filing and grant rates across those districts).

*A. The Expansion of Jury Access in Tort Law*

During the classical era of tort law,<sup>68</sup> extending from the late nineteenth century into the mid-twentieth century, judges frequently articulated specific rules that enabled them to decide cases as a matter of law without submitting them to the jury. Oliver Wendell Holmes, Jr., the most influential torts theorist of the late nineteenth and early twentieth century, reasoned that “[i]f . . . the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, . . . it ought to be possible . . . to formulate these standards . . . and . . . to do so must . . . be the business of the court.”<sup>69</sup> Professor (later Judge and then Justice) Holmes continued, “A judge . . . ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. . . . [T]he sphere in which he is able to rule without taking their opinion at all should be continually growing.”<sup>70</sup> Edward White, in his history of American tort law, writes that “[a]s a judge, Holmes enjoyed taking negligence cases away from the jury.”<sup>71</sup>

The rule-based approach of Holmes and his contemporaries came under attack by the legal realist movement during the period beginning in the 1920s and lasting into the 1950s.<sup>72</sup> As Harry Shulman and Fleming James, Jr., realist editors of a

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68. We refer to the classical era of tort law as the period beginning with the emergence of negligence “as a comprehensive principle of tort law . . . that came to dominate tort law,” and extended, with ebbs and flows, until the period of the mid-1960s. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 13 (expanded ed. 2003) (describing how it was during the classical era of tort law that Holmes first “isolate[ed] . . . negligence as a comprehensive principle of tort law”).

69. OLIVER W. HOLMES, JR., *THE COMMON LAW* 111, 124 (Little, Brown, and Co. 1923) (1881).

70. *Id.* at 124; see also *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927) (Holmes, J.) (“It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.”).

71. WHITE, *supra* note 68, at 58 (summarizing this perspective and stating that “[i]t was not difficult for scientists to see the subversive effect of jury determinations on the theoretical integrity of tort law”).

72. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, 1, 14–17, 229–30 (1986) (describing the origins, growth, and development of the legal realist movement).

leading torts casebook explained, the focus of tort law is “not so much with rule or doctrine as with problems in human relations,”<sup>73</sup> a characterization suggesting an increased role for the jury.<sup>74</sup> However, judges and scholars continued to crave “order and coherence in the law.”<sup>75</sup> During the post-World War II period, judges remained institutionally conservative and largely preserved the rules of an earlier era that denied plaintiffs access to juries.<sup>76</sup> William Prosser, probably the most influential torts scholar of his generation, served as the reporter for the Second Restatement of Torts and as the author of an influential treatise, a leading casebook, and numerous articles.<sup>77</sup> Despite Prosser’s post-realist recognition of the importance of policy, the core of his work was that he “classified and simplified doctrine.”<sup>78</sup> In other words, his tort scholarship helped perpetuate the rule-based

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73. HARRY SCHULMAN & FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS*, at vii (1942).

74. Cf. Elizabeth G. Thornburg, *Mandatory Arbitration Clauses and Personal Injury Claims*, 67 L. & CONTEMP. PROB. 253, (2004) (describing “the jury’s role as enunciator of behavioral norms”); Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2409 (1990) (concluding that “most tort verdicts are . . . based on a consensus . . . [by] juries [that] normally include a cross section or normative viewpoints”).

75. WHITE, *supra* note 68, at 91.

76. See *id.* at 167 (“The renewed sense among postwar legal scholars that in a modern interdependent society even small changes in the law had the potential to generate large and unforeseen ripples proved to be a deterrent strong enough to hold back sweeping proposals for reform of common law negligence.”); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MARKING AND APPLICATION OF LAW* 568–69 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (listing advantages of stare decisis as (1) helping people plan their lives based on established law, (2) establishing “fair and efficient adjudication,” and (3) building “public confidence in the judiciary”); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in *id.* at i, iii (stating that *The Legal Process* “provided the name, the agenda, and much of the analytical structure for a generation of legal thoughts . . . that became deeply entrenched . . . in the 1950s and for some time thereafter”).

77. See Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 579–80 (describing Prosser’s contributions as Reporter of the Restatement (Second) of Torts, as author of a leading treatise and influential articles, and as editor of the leading casebook).

78. WHITE, *supra* note 68, at 177.



regime of tort law that Holmes had pioneered and, in the process, Prosser enabled judges to continue to dismiss cases.<sup>79</sup>

During the period of the late-1960s through the mid-1980s, the dam that Holmes and Prosser had constructed broke, and most courts began submitting far more cases to juries.<sup>80</sup> Judge Guido Calabresi, one of the most influential torts theorists of this new era, explained: “[T]he so-called Holmes view—that standards of conduct ought increasingly to be fixed by the court for the sake of certainty—has been largely rejected . . . . The tendency has been away from fixed standards and towards enlarging the sphere of the jury.”<sup>81</sup> However, “the tendency” described by Judge Calabresi is manifested in some states far more than in others.<sup>82</sup>

### *B. Tort Doctrines that Deny Plaintiffs Access to Juries*

In the remainder of this Part, we describe five sets of rules that have played a gate-keeping function in preventing personal injury plaintiffs from having their cases decided by juries.<sup>83</sup> These examples certainly do not comprise the entire set of legal doctrines that may prevent plaintiffs from having their cases heard by juries. Rather, we selected them because of their importance in denying plaintiffs access to juries and because virtually every state has considered each of these issues and taken a position on them.<sup>84</sup> At the same time, in an effort to

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79. See *id.* (explaining how Prosser merely sought to facilitate efficiency in the current regime, rather than actual reforms).

80. See *Liriano v. Hobart Corp.*, 170 F.3d 264, 268 (2d Cir. 1999) (describing the “secular decline of the Holmes position” and the fact that the New York judiciary has adopted the opposing Knowlton viewpoint).

81. *Id.* (quoting *Nuckoles v. F.W. Woolworth Co.*, 372 F.2d 286, 289 (4th Cir. 1967)).

82. See *infra* Part IV.B (explaining that not all states have moved to the same extent towards providing more access to jury trials; hence the JADI studies and their relevancy to this topic).

83. See *infra* Parts II.B.1–5 (identifying the five sets of rules as (1) contributory negligence and comparative fault, (2) premises liability limited duty rules, (3) other no-duty and limited-duty rules, (4) charitable institution liability, and (5) scientific expert qualification standards).

84. See, e.g., *infra* Part II.B.1 (explaining that the doctrine of contributory negligence as a complete bar used to be nearly universal across the fifty states, but now is very limited after most states decided to alter their existing tort laws on the issue).

accurately reflect the extent of jury access denial of each state's comprehensive tort law considered as a package, we also attempted to identify categories of issues that affected various tort specialties. For example, on one hand, contributory negligence often plays an important role in denying plaintiffs access to juries in automobile and premises slip-and-fall cases, but far less frequently in medical malpractice cases.<sup>85</sup> On the other hand, the qualifications required to qualify a scientist or engineer to testify as an expert witness typically is critical to whether or not the jury decides the case in the areas of products liability and medical malpractice, but is of much less significance in enabling cases to be considered by juries in most automobile and premises liability cases.<sup>86</sup> Similarly, when we selected the plaintiffs' attorneys and defense counsel who assisted us in quantifying the relative importance of the five sets of jury-access-denial doctrines, we also considered both their current practice specialties and their past experiences with other types of tort cases.

### *1. The Choice Between Contributory Negligence and Comparative Fault*

At least until the late 1960s, virtually all jurisdictions followed the rule that any contributory negligence on the part of the plaintiff barred her action against the defendant.<sup>87</sup> Today, that rule prevails in only four states and the District of Columbia.<sup>88</sup> The change from contributory negligence as a total

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85. See Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1222 (1994) (noting that "[a]utomobile cases may involve contributory negligence, which is not claimed as often in malpractice cases").

86. See *id.* (observing that "[m]edical malpractice lawyers tend to . . . invest heavily in experts, whereas generalist lawyers who often call few or no experts litigate automobile cases"); see also *infra* notes 129–131 and accompanying text (explaining how judges accustomed to expert testimony on liability are quicker to dismiss cases when the plaintiffs lack experts).

87. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.01 (5th ed. 2010) (reporting that in 1950, forty-five states followed the rule that contributory negligence was a total bar to recovery).

88. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 17 cmt. a, rptrs' note (AM. LAW INST. 2000).

bar to plaintiff's recovery to a comparative fault standard, under which plaintiff's recovery is reduced but not eliminated by any fault on the plaintiff's part,<sup>89</sup> is widely acknowledged to have been "among this generation's most important tort law developments."<sup>90</sup>

The most important consequence of the change to comparative fault is that the jury decides far more negligence cases.<sup>91</sup> Under the older rule of contributory negligence, trial judges frequently kept cases from going to the jury by either granting the defendant's motion for a summary judgment before trial, or, more often, its motion for a directed verdict at trial on the grounds that the plaintiff had been contributorily negligent as a matter of law and therefore the plaintiff was not entitled to recover.<sup>92</sup>

## 2. Limited Duty Rules in Premises Liability Cases

During the first two-thirds of the twentieth century, at least three separate sets of limited-duty and no-duty rules affected the outcomes of litigation brought by those tortiously injured while visitors to the defendant's premises. In some states, these

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89. See Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 708–09 (2014) (stating that under the pure form of comparative fault, the plaintiff's recovery is determined by multiplying her or his damages by the defendant's percentage of fault; but under modified comparative fault, a plaintiff who is more than or equally at fault than the defendant recovers nothing).

90. Andrew R. Klein, *Comparative Fault and Fraud*, 48 ARIZ. L. REV. 983, 983 (2006).

91. See Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 1042 (2003) ("Comparative fault was meant to decrease the role of judges and give more cases to the jury . . . and it undoubtedly has done so.").

92. See Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 169 (1946) (describing contributory negligence as "an ingenious device which gave the court almost complete freedom to accept or reject jury participation at its pleasure"); Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A. J. 1005, 1007 (1957) ("[T]he common-law rule of contributory negligence performs a necessary function as a 'check and balance' on the American jury."); Gregory D. Smith, *Contributory Negligence as a Matter of Law: The Last Vestiges*, 23 TORT & INS. L.J. 674, 677–78 (1987) (describing the decline of the once widespread practice of ruling "contributory negligence as a matter of law").

doctrines that made it easier for judges to keep cases away from the jury remain largely intact, while in other states, they have been largely eliminated.<sup>93</sup>

Traditionally, the first limitation on the liability of the land possessor was that his liability depended upon whether the plaintiff was an invitee,<sup>94</sup> a licensee,<sup>95</sup> or a trespasser.<sup>96</sup> Only an invitee was owed the general standard of reasonable care under the circumstances.<sup>97</sup> Courts in nineteenth-century England originally created the limitations on the duty of care owed by land possessors to licensees and trespassers “to disgorge the jury of some of its power by . . . allowing the judge to take the case from the jury.”<sup>98</sup> Just as courts today fear that African-American and low-income jurors identify with victims more than they do with businesses and other defendants, nineteenth-century courts were concerned that “juries were comprised mainly of potential land entrants who most likely would act to protect the community at large and thereby rein in the landowner’s sovereign power over his land.”<sup>99</sup> The trial judge was able to dismiss cases in which the land possessor’s conduct, while arguably unreasonable, did not satisfy the more stringent requirements of liability owed to a

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93. See *infra* Appendix A, tbl.2 (noting the entries for each of the seventeen states under the category of “Limited or No-Duty Rules in Premises Cases”).

94. See RESTATEMENT (SECOND) OF TORTS § 332 (AM. LAW INST. 1965) (defining an invitee as someone who enters onto land either “for a purpose directly connected with business dealings with the possessor of that land” or “as a member of the public for a purpose for which the land is held open to the public”).

95. See *id.* § 330 (defining a “licensee [as] a person who is privileged to enter or remain on land only by virtue of the possessor’s consent” and listing “social guests,” among others).

96. See *id.* § 329 (defining a trespasser as someone “who enters or remains upon land . . . of another without . . . privilege . . . [or] consent”).

97. See FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 27.12 (3d ed. 2008) (“The occupier’s duty to the invitee is one of due care in all circumstances.”).

98. See *Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C. 1998) (abolishing the distinction in duty of care owed to invitees and licensees); see also Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 18 (1981) (stating that “the formal status rules . . . have kept many cases from juries”).

99. *Freeland*, 507 S.E.2d at 887; see also Norman S. Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 LAW Q. REV. 182, 189 (1953).

licensee.<sup>100</sup> Many jurisdictions, however, shifted their positions on this issue during the late 1960s through the mid-1980s and now apply a general negligence standard to both invitees and licensees, thereby making it easier for licensees to have their cases decided by juries.<sup>101</sup>

The second limitation on the liability of landowners under common law was that, traditionally, a landlord, with a few specific exceptions, was not liable to a visitor to his land who sustained injuries while visiting the leased premises.<sup>102</sup> Unless there was evidence that the injury of the visitor to the leased premises fell into an exception, the trial judge dismissed the case.<sup>103</sup> In some states, the limitation on the landlord's liability for an injury occurring to a visitor to the leased premises has been reduced or eliminated.<sup>104</sup> As a result, visitors injured on leased premises are more likely to have their cases decided by juries than their counterparts in states following the traditional rules.<sup>105</sup>

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100. See HARPER, JAMES & GRAY, *supra* note 97, §§ 27.9–27.10 (stating that the land occupier “need not inspect the premises to discover defects or other dangerous conditions” and detailing other ways in which the standard of care owed is less than that of a reasonable person).

101. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 51 cmt. a, rptrs’ note (AM. LAW INST. 2012) (identifying twenty-four states as having made the change between 1965 and 1985).

102. See HARPER, JAMES & GRAY, *supra* note 97, § 27.16 (describing the landlord’s duty under the doctrine as “very limited”); RESTATEMENT (SECOND) OF TORTS § 355 (AM. LAW INST. 1965) (providing that “a lessor of land is not subject to liability to . . . others upon the land . . . for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession”).

103. The most important exceptions to the doctrine included situations in which the landlord knew of concealed defects and failed to disclose them, knew that the premises would be open to the public, failed to comply with an agreement to repair a hazard, or where the injury occurred on common premises. See HARPER, JAMES & GRAY, *supra* note 97, § 27.16 (noting that unless the landlord’s actions fell into one of the noted exceptions to the open and obvious hazard doctrine, he was generally considered not liable for any injury incurred due to a lack of due care).

104. See *id.* (describing the law that traditionally provided that “the tenant . . . was therefore traditionally considered alone liable to visitors for injuries . . . [as] rapidly changing”).

105. See *id.* (stating that under the traditional rule, the tenant of leased premises maintains exclusive possession over the property, which excuses the landlord from liability toward injured visitors).

The third limitation is that historically, land possessors were not liable when visitors on land were injured by an “open and obvious” hazard.<sup>106</sup> If the evidence proved that the risk was open and obvious to the reasonable person, the court took the case away from the jury and ruled for the defendant as a matter of law.<sup>107</sup> Many courts have moved away from this position and now hold that “the fact that a dangerous condition is open and obvious . . . does not pretermit the land possessor’s liability.”<sup>108</sup> Rather, the open and obvious nature of the risk bears upon whether the defendant exercised reasonable care, most often a question to be decided by the jury.<sup>109</sup>

### 3. Other No-Duty and Limited-Duty Rules

In innumerable factual situations other than those arising in premises liability, courts take cases from juries by holding that the defendant owes the plaintiff either no duty of care or a limited duty of care.<sup>110</sup> They reason that judges, not juries, should decide whether a duty is owed because the decision is one resting on policy that “will be the same in every case” and not on evidence regarding the facts of a particular case.<sup>111</sup> Courts vary

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106. See *id.* § 27.9 (stating that land possessor “owes the licensee no duty of precaution if the danger is perfectly obvious”).

107. See, e.g., *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898) (ruling that a land possessor had no duty to warn licensee of an open coal hole).

108. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 51 cmt. k (AM. LAW INST. 2012).

109. See *Broussard v. State*, 113 So.3d 175, 185 (La. 2013) (“[T]he fact-finder . . . determines . . . whether those risks pose an open and obvious hazard . . . [and] whether defendant has breached a duty . . . by failing to discover, obviate, or warn of a defect . . .”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 51 cmt. k (requiring land possessors “to take reasonable precautions for known or obvious dangers when the possessor ‘should anticipate the harm despite such knowledge or obviousness’” and extending the duty to all entrants except flagrant trespassers (citation omitted)).

110. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(b) (“In exceptional cases . . . in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).

111. See *id.* § 7 cmt. a (“When liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty.

considerably in the extent to which they are willing to employ the “no duty” rubric to prevent cases from reaching the jury.<sup>112</sup> However, the Third Restatement of Torts explicitly admonishes courts not to use no-duty analysis excessively: “When no . . . categorical considerations apply and reasonable minds could differ . . . courts should not use duty and no-duty determinations to substitute their evaluation for that of the jury.”<sup>113</sup>

In considering the effect of no-duty rules on a state’s Jury Access Denial Index, we examine three subsets of such rules on which virtually all states have taken clear positions, but these positions often conflict with one another. First, we consider dramshop liability; that is, whether someone who sells intoxicating beverages to a third party who then harms someone, owes a duty of care to the victim.<sup>114</sup> A substantial majority of states recognize such liability.<sup>115</sup> Among the states that do not recognize liability, a few explicitly hold that no duty is owed.<sup>116</sup> However, most courts that hold for the defendant find as a matter

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No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.”).

112. Compare, e.g., *Duvall v. Goldin*, 362 N.W.2d 275, 279 (Mich. Ct. App. 1984) (holding that a physician owed a duty of care to a third party when “failure to diagnose or properly treat an epileptic condition may create a risk of harm to a third party”), with, e.g., *Medina v. Hochberg*, 987 N.E.2d 1206, 1213 (Mass. 2013) (holding that “a physician does not owe a duty to nonpatients to warn his or her patients of the dangers of driving posed by a patient’s underlying medical condition”).

113. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. i (finding that “[c]ourts sometimes inaptly express this result in terms of duty” when “reasonable minds could differ about the application of the negligence standard to a particular category of recurring facts”).

114. See *Dram Shop Civil Liability and Criminal Penalty State Statutes*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/dram-shop-liability-state-statutes.aspx> (last updated June 14, 2013) (last visited Apr. 21, 2016) (describing dramshop liability as holding liquor sellers “liable for selling or serving alcohol to individuals who cause injuries or death as a result of their intoxication”) (on file with the Washington and Lee Law Review).

115. See *id.* (listing dramshop liability statutes in thirty states); see also *infra* Appendix A, tbl.2 and accompanying notes (describing the position of the courts of each of the seventeen states surveyed in our analysis).

116. See, e.g., *Warr v. JMGM Grp., LLC*, 70 A.3d 347, 364 (Md. 2013) (deciding that tavern operator owes no duty to the parent of a child killed by patron of tavern).

of law that the plaintiff's harm does not lie within the scope of risk created by the defendant's conduct or that the defendant's actions were not a proximate cause of the plaintiff's injury.<sup>117</sup> For our analysis, this classic distinction does not matter; either ground for dismissal prevents the jury from deciding the case.

The second subcategory of no-duty rules is whether a mental health provider owes a duty of care to a person harmed by his patient after the therapist has knowledge or should have knowledge of the risk posed by his patient.<sup>118</sup> The third and final subcategory of no-duty rules is whether a state owes a duty of care to a person injured or killed by a probationer or parolee when state authorities have been negligent in releasing or supervising him.<sup>119</sup>

#### 4. *Limitations on the Liability of Charitable Institutions*

Alongside the transition from contributory negligence, the total or partial abrogation of immunities is regarded as one of the most important pro-plaintiff changes in tort law during the last half of the twentieth century.<sup>120</sup> The abrogation of sovereign

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117. See Julia A. Harden, Comment, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 230–33, 233 n.64 (1987) (listing cases from states concluding that “the proximate cause of the injury is drinking the liquor, not selling it”).

118. Compare *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976) (“When a therapist determines . . . that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.”), with *Nasser v. Parker*, 455 S.E.2d 502, 506 (Va. 1995) (ruling that the defendant therapist had no duty to warn murdered plaintiff of danger posed by ex-boyfriend patient who had earlier threatened to kill plaintiff); see also *infra* Appendix A, tbl.2 (identifying the positions of the courts of each of the seventeen states surveyed in our analysis).

119. Compare *Taggart v. State*, 822 P.2d 243, 257 (Wash. 1992) (concluding that “parole officers have a duty to protect [third parties] from reasonably foreseeable dangers engendered by parolees’ dangerous propensities”), with *Fox v. Custis*, 372 S.E.2d 373, 375–76 (Va. 1974) (finding that the defendant state parole officers owed no duty to victims of crimes committed by parolee); see also *infra* Appendix A (detailing the position of the courts of each of the seventeen states surveyed in our analysis).

120. See SHULMAN ET AL., *supra* note 61, at 507 (noting that “the trend toward total or partial abrogation of . . . immunities during the latter decades of



immunity,<sup>121</sup> family immunities,<sup>122</sup> and charitable immunities<sup>123</sup> enabled more injured victims to have their cases heard by the jury. In our analysis, we focus on limitations on the traditional immunity of charitable institutions for two reasons. First, considerable variations exist regarding the law governing liability of charitable institutions, thereby facilitating cross-state comparisons.<sup>124</sup> Second, the liability of charitable institutions has important real-world litigation consequences because of the extent to which once-immune defendants such as charitable hospitals<sup>125</sup> and even religious institutions<sup>126</sup> have now become important targets of litigation. These changes to charitable immunity began earlier in the twentieth century and continued into the 1990s, but again they were concentrated during the period of the late 1960s through the mid-1980s.<sup>127</sup>

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the twentieth century ranks among the more striking changes in twentieth century tort law”).

121. See DOBBS, HAYDEN & BUBLICK, *supra* note 8, § 261 (describing change from total sovereign immunity to “limited immunities” for governments and their officials; further stating that “it is now usually accepted that government . . . should be obliged to make good on the losses it causes by misconduct”).

122. See *id.* §§ 279–280 (discussing the partial or total elimination of family immunities, including interspousal and parental immunities).

123. See *id.* § 282 (covering partial or total elimination of the immunities of charitable institutions).

124. See *infra* Part IV.G (explaining that many states have various reasons for differences in laws governing charitable institutions and other limiting factors, often citing reasons such as *stare decisis*); see also *infra* Appendix A, tbl.2.

125. See Stephen H. Price, *The Sinking of the “Captain of the Ship”*, 10 J. LEGAL MED. 323, 348 (1989) (describing increasing litigation against hospitals in the wake of the abrogation of charitable immunity).

126. See Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 240 (2000) (explaining that “actions specifically against religious entities and individuals . . . appear to be on the rise”).

127. See Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R. 4th 517 (2005) (listing decisions abolishing charitable immunity from forty-eight states along with their dates).

### 5. Standards Governing the Qualifications of Scientific Experts

The legal standard for establishing the qualifications of scientific experts in tort cases is often critical to the plaintiff's ability to have her case heard by the jury.<sup>128</sup> Medical and financial experts have always been important in helping the jury assess *damages* in automobile and other routine tort cases, but during the past generation, experts have become increasingly important in determining *liability* in medical malpractice,<sup>129</sup> products liability,<sup>130</sup> and toxic tort cases.<sup>131</sup> In such cases, if a plaintiff lacks an expert the court deems qualified to testify regarding causation or other prerequisites for liability, the trial judge dismisses the case by granting either a summary judgment before trial or a directed verdict during trial, thus preventing the submission of the case to the jury.<sup>132</sup>

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128. See Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 754 (1998) (stating that “especially in toxic tort cases, . . . [the] exclusion of an expert on admissibility grounds is usually tantamount to a dismissal on insufficiency grounds”).

129. See David E. Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U. L. REV. 158, 162 (1966) (explaining that “in an overwhelming majority of malpractice actions expert testimony is the *sine qua non* of plaintiff's case”).

130. See generally DAVID G. OWEN, PRODUCTS LIABILITY LAW § 6.3 (3d ed. 2014) (describing the importance of expert testimony in proving defectiveness and causation in products liability cases).

131. See Leslie A. Lunney, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103, 105 (1994) (“In toxic tort cases, expert testimony plays a crucial role, because it would be difficult for a plaintiff to satisfy his or her burden of proof regarding causation without the specialized knowledge and opinion of an expert.”).

132. See e.g., *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1315 (9th Cir. 1995), *on remand from* 509 U.S. 579 (1993) (affirming for a second time the district court's granting of “summary judgment based on its exclusion of plaintiffs' expert testimony”); *Am. & Foreign Ins. Co. v. GE*, 45 F.3d 135, 136 (6th Cir. 1995) (affirming “lower court's decision to exclude portions of the expert's testimony [and] to direct a verdict in favor of [defendant]”); *Lessard v. Caterpillar Inc.*, 737 N.Y.S.2d 191 (App. Div. 2002) (holding that “[t]he court properly granted defendant's motion for a directed verdict, given the inability of plaintiff to establish a prima facie case of design defect in the absence of expert testimony”); Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 TORT TRIAL & INS. PRAC. L.J. 895, 912 (2007) (stating that “if proffered expert testimony being relied upon by the plaintiff to establish a *prima facie* case is excluded . . . , the plaintiff would be unable to defeat a motion for summary

To determine how restrictive states are in qualifying scientific experts to testify in tort cases, we measured the extent to which states adopted holdings in the 1990s that made it more difficult to qualify scientific experts as a response to a perceived lack of rigor in screening experts during the 1970s and the 1980s.<sup>133</sup> In 1975, the standard for the admissibility of expert testimony in the federal courts moved in a decidedly pro-plaintiff direction with the adoption of Federal Rule of Evidence 702.<sup>134</sup> Most states soon adopted similar rules.<sup>135</sup> Many trial court judges saw the new rules as an invitation to allow virtually any self-described expert to testify.<sup>136</sup>

Reacting against a perceived onslaught of “junk science,”<sup>137</sup> in 1992 the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>138</sup> interpreted the new federal rule. The Court called upon federal judges to assume “a gatekeeping role . . . [that] on occasion will prevent the jury from learning of

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judgment brought by the defendant”); Georgene M. Vairo, “Through the Prism: Summary Judgment After the Trilogy,” ALI-ABA Course Materials: Civil Practice and Litigation Techniques in Federal and State Courts (2005) (describing how the tighter standards for the admissibility of scientific evidence after the Supreme Court’s ruling in *Daubert* “often leads to the approval of a defendant’s motion for summary judgment”).

133. See *infra* Part II.A.5 (discussing how holdings like *Daubert* greatly restricted the admissibility of expert witnesses).

134. See FED. R. EVID. 702 (explaining that expert opinions are admissible as long as they meet four qualitative criteria).

135. See Heather G. Hamilton, Note, *The Movement From Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS J. 201, 209 (1998) (“As of January 1, 1995, only seven states had not adopted Rule 702.”).

136. See, e.g., *Chaulk v. Volkswagen of Am., Inc.*, 808 F.2d 639, 642, 644 (7th Cir. 1986) (Posner, J., dissenting) (criticizing the growing prevalence of expert witnesses for fields of knowledge that do not require expert testimony and their unreliable testimony).

137. See OWEN, *supra* note 130, § 6.3 (describing how during the 1970s and 1980s, “courts and commentators . . . increasingly decried a perceived growth in abuses of expert testimony—of ‘junk science’ run amok”); see also DEPT. OF JUST., REP. OF THE TORT POL’Y WORKING GROUP ON THE CAUSES, EXTENT & POL’Y IMPLICATIONS OF THE CURRENT CRISIS IN INS. AVAILABILITY & AFFORDABILITY 35 (1986) (indicating that “noncredible scientific or medical testimony, studies or opinions . . . commonly referred to as ‘junk science’ . . . has led to a deep and growing cynicism about the ability of tort law to deal with difficult scientific and medical concepts in a principled and rational way”).

138. 509 U.S. 579 (1993).

authentic insights and innovations.”<sup>139</sup> Federal trial judges were told to “make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and . . . can be applied to the facts in issue.”<sup>140</sup> In making these determinations, courts were to consider whether the expert’s theory or technique had been tested, the reliability of a procedure and its potential rate of error, whether the technique had been subjected to peer evaluation and published, and whether it was generally accepted in the scientific community.<sup>141</sup>

A majority of states proceeded to adopt the *Daubert* standard for the admissibility of expert testimony or some variant of it, while a minority continued to follow<sup>142</sup> some variant of the standard established in *Frye v. United States*.<sup>143</sup> The *Frye* test for admissibility is whether a newly developed form of science or technology is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”<sup>144</sup>

Despite hints in the *Daubert* opinion itself that the Supreme Court intended to liberalize the admission of scientific testimony,<sup>145</sup> by 2005, Professors Edward Cheng and Albert Yoon concluded that in the federal courts:

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139. *Id.* at 597.

140. *Id.* at 592–93.

141. *See id.* at 593–94 (noting that the Court did not “presume to set out a definitive checklist or test”). In its subsequent opinion in *General Electric Co. v. Joiner*, the Court further strengthened the trial court’s gate-keeping function when it held that appellate courts would review trial court decisions only under the comparatively lax “abuse of discretion” standard. *See* 522 U.S. 136, 145 (1997) (“We hold, therefore, that abuse of discretion is the proper standard by which to review a district court’s decision to admit or exclude scientific evidence.”).

142. *See* OWEN, *supra* note 130, at n.82 (“As of 2002, roughly fifteen states still purport to follow *Frye*.”).

143. 293 F. 1013 (D.C. 1923).

144. *Id.* at 1014.

145. The Court described *Frye* as establishing an “austere standard” and emphasized that its new standard was “a flexible one.” *Id.* at 594. It also emphasized that “[g]eneral acceptance” is not a necessary precondition to the admissibility of scientific evidence.” *Id.* at 597; *see also Joiner*, 522 U.S. at 142 (following *Daubert* and observing that “the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*”).

*Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely. . . . The resulting effects of *Daubert* have been decidedly pro-defendant. In the civil context, *Daubert* has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries.<sup>146</sup>

Most other observers agree that *Daubert* is more restrictive than *Frye* in allowing an expert's testimony to be heard by the jury.<sup>147</sup> In other words, the adoption of the *Daubert* standard by most state courts in the early 1990s is yet another means of denying plaintiffs access to juries.

In Table 2 in Appendix A, we briefly identify each of the seventeen states' respective positions on the issues described in this Subpart.<sup>148</sup>

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146. Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472–73 (2005) (footnote omitted). However, the authors attempted to indirectly “measure the effect of *Frye* versus *Daubert*” by comparing the rates at which tort defendants sought to remove their cases from New York courts (continuing to follow *Frye*) to federal courts (following *Daubert*) with the rates that similar defendants in Connecticut (following *Daubert*) removed to federal courts. *Id.* at 482, 485. They found “that a state’s choice of scientific admissibility standard does not have a statistically significant effect on removal rates.” *Id.* at 503. They concluded that “[t]his finding may support the broader theory that a state’s adoption of *Frye* or *Daubert* makes no difference in practice.” *Id.*

147. Professor Lucinda Finley writes:

Those who predicted that trial judges would flex their gatekeeper muscles to exclude vast quantities of plaintiffs’ proposed expert causation opinion testimony in products liability cases have turned out to be right. The post-*Daubert* era can fairly be described as the period of “strict scrutiny” of science by non-scientifically trained judges.

Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 341 (2000); see also, e.g., Joseph Sanders, Shari S. Diamond & Neil Vidmar, *Legal Perceptions of Science and Expert Knowledge*, 8 PSYCHOL., PUB. POL’Y & L. 139, 141 n.13 (2002) (concluding that “in practice the *Daubert* test has been more restrictive than *Frye*”).

148. *Infra* Appendix A, tbl.2.

*III. Possible Explanations for Variations in Tort Law Affecting  
Jury Access*

In this Part, we discuss the factors that we identify as the ones most likely to affect the extent to which a state continues to follow the substantive law doctrines that once denied personal injury plaintiffs access to the jury in almost all jurisdictions but continue to be followed in only a minority of states. In Part IV, we empirically test whether there is a correlation between any of these variables and the extent to which a state continues to employ these jury-access-denial doctrines.<sup>149</sup>

In Subpart A of this Part, we discuss whether perceptions among judges and legislators that predominantly African-American and low-income urban juries will be biased in favor of personal injury plaintiffs results in policymakers adopting doctrines that deny plaintiffs access to juries.<sup>150</sup> In Subpart B, we consider whether a state's history as part of the South affects the extent to which it has adopted changes to its substantive law that have helped personal injury plaintiffs to have their cases decided by the jury.<sup>151</sup> We initially examined this factor because we recognized that tort law in the South more often appears to impede the plaintiff's access to the jury than does the substantive law in other states.<sup>152</sup> As but one example, we noted that all five jurisdictions that retain contributory negligence as a total bar to the plaintiff's recovery lie below the Mason–Dixon Line.<sup>153</sup> Finally, in Subpart C, we consider a possible alternative explanation for why some states continue to follow anti-jury doctrines more than others, namely, that politically liberal states might be expected to be more flexible in

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149. *Infra* Part IV.

150. Because previous research on the effects of these two separate and distinct variables often considers them together, we consider both race and income inequality in Part A. However, our own empirical testing considers each individually, *see infra* Part IV.C (income inequality) & Part IV.D (race), before testing for interactions among the variables. *Infra* Part IV.F.

151. *Infra* Part III.B.

152. *Infra* Appendix A, tbl.1.

153. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 8, § 220 (noting that Alabama, the District of Columbia, Maryland, North Carolina, and Virginia are the last remaining jurisdictions to retain contributory negligence); *see also infra* Appendix A, tbl.2 (listing the JADI assessments).

allowing personal injury plaintiffs to have their cases decided by juries.<sup>154</sup>

We recognize that in any particular state, idiosyncratic factors, such as the presence of an unusually effective tort reform lobbyist, can affect the extent to which that state denies jury access.<sup>155</sup> Moreover, while we cannot exclude the possibility of correlations with other variables for which we do not test,<sup>156</sup> our review of the existing literature, as well as our own

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154. *Infra* Part III.C.

155. Shortly after William Prosser advocated for a comparative negligence bill in the California legislature in 1953, in a letter to his mother he described the efforts of insurance and industry lobbyists that caused the bill to fail:

The association [the California State Bar Association] was quite confident that it would get the bill through. There were eleven votes on the senate committee, and they thought they had seven of them nailed down, with hopes of an eighth. In the meantime, however, a defendants' lobby, manned and financed by the liability insurance companies and the railroads, had moved in to kill the bill. I was told by one friendly member of the assembly committee that it was the heaviest drive that any lobby had put on in the last four years, with more money spent on entertaining the members of the committees and the like, than anyone remembered for quite a while. In addition there were phone calls and telegrams from people over the state, mostly good clients of the legislators—the bill came before the judiciary committee, all of whom are lawyers. The result was that the vote went 6 to 5 against the bill in the senate committee. . . . It is licked for this session. I am getting pretty well acquainted with the committees, and also getting a liberal education on how we are governed.

Letter from William L. Prosser to Zerelda Ann Huckleby Prosser (May 3, 1953) (on file with the Washington and Lee Law Review). We express our thanks to Professor Christopher J. Robinette for providing us with access to the letter. *See also* Gifford & Robinette, *supra* note 89, at 702 (describing efforts of lobbyists representing business and insurance interests to prevent enactment of comparative fault legislation).

156. A few of the variables that might be tested for correlation with a state's Jury Access Denial Index include (a) the rate of unionization between 1965 and 1985; (b) the prevalence of various types of businesses within a state; (c) whether appellate judges are elected or appointed; and (d) the percentage of African-American voters disenfranchised in 1965. We considered studying a correlation between the date when an African-American justice joined each state's supreme court and the state's JADI. However, a quick perusal of data suggested no association. *See First Black Judges on the State Supreme Courts*, BALLOTPEdia, [http://ballotpedia.org/First\\_black\\_judges\\_on\\_the\\_state\\_supreme\\_courts](http://ballotpedia.org/First_black_judges_on_the_state_supreme_courts) (last visited Mar. 7, 2016) (providing a history of African-American judges on state supreme courts) (on file with the Washington and Lee Law Review).

understanding of tort law, informed the selection of the variables we tested.

*A. Race and Income Inequality: The Perception that “Bronx Juries” Redistribute Wealth*

*1. The Legal Community’s Perceptions of African-American and Low-Income Jurors*

Judges and lawyers typically believe that the racial and socio-economic composition of the jury affects trial outcomes.<sup>157</sup> That being the case, we hypothesize that judges and legislators of states where the leading and most visible legal centers include a high percentage of African-American or low-income jurors may continue to follow the traditional tort doctrines that impede the ability of tort plaintiffs to have their cases “reach” (be considered by) juries. It is the widely held *perceptions* among judges and legislators regarding the decision-making of African-American and low-income jurors—and *not actual differences* between trial outcomes at the hands of disproportionately poor and African-American urban juries and those elsewhere—that lead to more restrictions on jury access.

Professors Marvin Zalman and Olga Tsoudis interviewed seventy-nine attorneys following trials in which they participated regarding what juror characteristics they looked for during the voir dire process.<sup>158</sup> They found that the attorneys believed “that blacks are more sympathetic to civil plaintiffs because they are more often subject to unfairness.”<sup>159</sup> One plaintiff’s attorney acknowledged his biases during voir dire: “Do I look at race?—yes—absolutely. . . . Women and blacks—those people have been

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157. See, e.g., *infra* note 160 and accompanying text (reporting a study that found that attorneys have attempted to structure the jury to include jurors who have traditionally been discriminated against).

158. See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 187–88 (2005) (noting that the questions asked were both “narrowly focused and open ended”).

159. *Id.* at 304.



hammered all their lives.”<sup>160</sup> Another study found that defense attorneys use peremptory challenges to exclude twice as many potential black jurors as do plaintiffs’ attorneys.<sup>161</sup>

The intuition that African-American and poor jurors will favor plaintiffs when they decide the issue of liability and when they assess damages is a logical one given the experiences of dispossessed groups in American society. Frank McClellan, an African-American scholar and plaintiff’s attorney, writes that “[e]xpressing their perceptions of justice through awards in serious personal injury cases is one of the few opportunities that most people of color have to . . . send a message to corporations and other powerful social players.”<sup>162</sup> In a similar vein, Eric Helland and Alexander Tabarrok conclude their analysis of the effects of race and poverty on damages awards by hypothesizing: “Given the different life experiences of poor black and Hispanic jury members, . . . the decisions of such jurors about justice . . . could differ significantly from those of other jurors.”<sup>163</sup> From one perspective, the distinctive predilections of African-American and low-income jurors as they approach the liability issue can be seen as a concrete and legitimate manifestation of the jury’s role in reflecting community values.<sup>164</sup> From the other perspective, corporate officials and defense

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160. *Id.* Another plaintiff’s attorney participating in the study observed that “African-Americans . . . are more generous in damage awards. They tend to support the underdog.” *Id.*

161. See John Clark et al., *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 tbl.1 (2007) (finding that 24% of the jurors excused by defense attorneys in civil cases were African-American, compared with 12% of the jurors excused by plaintiffs’ attorneys). For more on the use of peremptory challenges to exclude African-American jurors specifically in the South, see *infra* notes 220–228 and accompanying text.

162. McClellan, *supra* note 2, at 785.

163. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence in Three Data Sets*, 32 J. LEGAL STUD. 27, 52 (2003).

164. See Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1382 (2012) (characterizing the jury award as “a way that the community sends a message about how bad the wrong or injury is” and opining that “this is an important part of helping constitute a community—meting out justice . . . [as] a way of articulating a community’s values”).

counsel fear that African-American and low-income jurors may seek to retaliate for past or present grievances.<sup>165</sup>

Judges and legislators also fear that urban juries containing significant numbers of African-American and low-income jurors are predisposed to render larger damage awards. Professor McClellan describes the urban jury as a rare opportunity for dispossessed jurors “to make an immediate economic impact in favor of an injured member of the community.”<sup>166</sup> A New York defense attorney put it more pejoratively when he stated that “[t]he Bronx civil jury is the greatest tool of wealth redistribution since the Red Army.”<sup>167</sup> In fact, the evidence regarding whether juries with greater numbers of African-Americans and the poor award higher damages than their whiter and more affluent counterparts is inconclusive.<sup>168</sup> At the same time, however, many judges and legislators assume that the stronger sensitivity of African-American and low-income jurors to injustice and their often less-than-positive encounters with businesses and professionals lead them to award higher damages to personal injury victims, regardless of the victim’s race or socioeconomic status.<sup>169</sup>

## 2. Comparing the Impact of Race on Welfare Reform

It does not appear that any scholar has previously examined the impact that the racial attitudes of judges or legislators have on the development of tort law, or even whether there is an association between racial demographics and the substance of a

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165. See, e.g., *id.* at 1340 (discussing the civil jury’s role as a check on corporate and government power).

166. McClellan, *supra* note 2, at 785.

167. Noeleen Walder, *Strauss-Kahn Accuser May Sue in Friendly Bronx*, REUTERS (Aug. 4, 2011), <http://www.reuters.com/article/2011/08/04/us-strausskahn-civilsuit-bronx-idUSTRE77379D20110804> (last visited Mar. 7, 2016) (on file with the Washington and Lee Law Review).

168. See *infra* notes 184–185 and accompanying text (discussing the effect of a population’s racial composition on a plaintiff’s success).

169. See, e.g., Valerie P. Hans, *What’s It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 955 (2014) (arguing that corporations should be held to higher levels of responsibility than individuals and should thus be required to pay a greater amount of damages).

state's tort law.<sup>170</sup> However, during the era when most states moved toward greater jury access for injured plaintiffs, scholars and courts frequently saw victim compensation or loss distribution as a central goal of tort law.<sup>171</sup> As such, tort law was increasingly seen as a close cousin of other more traditional forms of state welfare.<sup>172</sup> Tort law compensated one particular group of those in need, victims of tortious conduct; at the same time, the states' social welfare programs financially assisted other residents in need, including victims of injury and disease, disability, or old age.<sup>173</sup>

Even though many tort scholars now believe that the justification for the tort system lies in achieving goals of

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170. A handful of studies consider the impact of race on individual tort cases. *See, e.g.*, AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 29, 30 fig.3.2 (1985) (listing, by race, awards for plaintiffs and penalties against defendants). Professor McClellan has speculated on the ways in which race affects tort cases. *See* McClellan, *supra* note 2, at 772 (hypothesizing "that the race problem impacts on every aspect of a tort claim"). He recognizes the importance of the allocation of power between judges and juries: "Enhancing the power of the judiciary in tort cases and minimizing the power of the jury represent a tremendous shift in political power, a shift which should not be taken lightly." *Id.* at 790. Ultimately, Professor McClellan calls for the kind of empirical analysis that we present: "One issue which warrants study is whether people of color will be adversely affected if tort reform allocates more power to judges and less power to juries. In communities that are racially diverse, the answer is most likely yes." *Id.* at 792.

171. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 27–28 (1970) (describing the importance of spreading accident losses and shifting them to "deep pockets" as a means of reducing "the real societal costs of accidents").

172. *See, e.g.*, Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 725–26 (2003) (observing that "[t]he tort and social welfare systems both serve to protect people from harm through the provision of financial payments after a harm has occurred" and noting that "in the context of mass tort litigation, the tort system increasingly draws on social welfare principles"); Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 952–81 (2006) (tracing the origins of the loss distribution objective in American tort law to workers' compensation legislation and even further back to German and English social welfare legislation).

173. *See* Gifford, *supra* note 172, at 951 (noting that the United States did not enact welfare systems comparable to those of Germany and England until the 1930s).

“corrective justice” or “civil recourse,”<sup>174</sup> critics continue to characterize it as a means of loss distribution. For example, when later-President George W. Bush ran for Governor of Texas in 1994, his “four-issue strategy” included both welfare reform and tort reform.<sup>175</sup> As Professor Philip G. Peters, Jr. observed, for voters “seeking to reinvigorate ‘traditional’ social values, . . . tort reform may closely resemble welfare reform, each ending an era of unearned giveaways.”<sup>176</sup>

Insofar as the tort system is viewed as a parallel to a state’s social welfare policy, as it often was during the last decades of the twentieth century, extensive research by social scientists on how a state’s racial demographics affected its welfare reform initiatives during that period<sup>177</sup> may shed light on how those demographics impacted the development of tort law during the same period of time. The research finds that states with higher percentages of African-Americans on government assistance offer lower benefits than other states, even when the analysis is controlled for other economic and demographic factors,<sup>178</sup> as well

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174. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1138 (2007) (characterizing tort law as “a law of wrongs and redress”).

175. See Anne E. Kornblut, *Revisiting '00 Part of Strategy for Bush in '04*, BOS. GLOBE (May 23, 2004), [http://www.boston.com/news/nation/articles/2004/05/23/revisiting\\_00\\_part\\_of\\_strategy\\_for\\_bush\\_in\\_04/?page=ful](http://www.boston.com/news/nation/articles/2004/05/23/revisiting_00_part_of_strategy_for_bush_in_04/?page=ful) (last visited Feb. 16, 2016) (noting that the other two issues were education and crime reform) (on file with the Washington and Lee Law Review).

176. Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1485–86 (2007).

177. See generally RACE AND THE POLITICS OF WELFARE REFORM (Sanford F. Schram, Joe Soss & Richard C. Fording eds., 2003) (collecting studies discussing the relationship between race and welfare reform).

178. See, e.g., Richard C. Fording, “Laboratories of Democracy” or Symbolic Politics?: *The Racial Origins of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 177, at 78, 93 (reporting that “race is an important factor in welfare policy-making” and that “the percentage of the AFDC caseload that is black proves to be the strongest and most consistent predictor of the adoption of work requirements, time limits, and state efforts to regulate ‘irresponsible’ behavior” (emphasis in the original)); Harrell R. Rodgers, Jr. & Kent L. Tedin, *State TANF Spending: Predictors of State Tax Effort to Support Welfare Reform*, 23 REV. POL’Y RES. 745, 758 (2006) (“[O]ur analysis reveals that states with larger black populations tend to keep [welfare] spending low.”).

as for ideological and partisan variables.<sup>179</sup> Other studies have found that the larger the percentage of African-Americans in a state's population, the smaller the welfare benefits.<sup>180</sup>

Dr. Martin Johnson attributes the impact of racial demographics on welfare reform to the threat posed by African-Americans to the power structure controlled by the white population:

In the contemporary South . . . larger minority populations appear to be associated with antiminority hostility and less desirable policies for those minorities, such as stricter voter registration laws. Further, these feelings of threat appear to be exacerbated by economics: as economic conditions in a community worsen, members of the racial or ethnic majority grow less supportive or tolerant of the minority due to their financial insecurity.<sup>181</sup>

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179. See, e.g., Robert D. Brown, *Party Cleavages and Welfare Effort in the American States*, 89 AM. POL. SCI. REV. 23, 30 (1995) (noting that “[a]s the black portion of the state population increases, welfare effort is diminished” even when controlling for “party elite liberalism and the nature of party cleavages”); Christopher Howard, *The American Welfare State, or States?*, 52 POL. RES. Q. 421, 437 (1999) (noting that Democratic Party strength did not have an effect on AFDC benefits).

180. See, e.g., MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 176 (1999) (finding that studies “that have included some measure of the racial mix of a state’s poverty population have consistently found race to be a significant influence on state-level AFDC policy”); Martin Johnson, *Racial Context, Public Attitudes, and Welfare Effort in the American States*, in *RACE AND THE POLITICS OF WELFARE REFORM*, *supra* note 177, at 161 (“A one-standard-deviation increase in a state’s African American population is associated with a decrease in welfare spending by about one-fifth of a standard deviation.”); Brown, *supra* note 179, at 30 (noting that “[a]s the black portion of the state population increases, welfare effort is diminished”); Gerald C. Wright, Jr., *Racism and Welfare Policy in America*, 57 SOC. SCI. Q. 718, 726 tbl.3 (1977) (“For the hypothesis concerning the effects of racial variables we find supporting evidence with high negative correlations of AFDC payments with percent black . . .”).

181. See also Johnson, *supra* note 180, at 153 (“[T]he total effect of increased diversity on racial attitudes is a reduction of support among whites for racial integration, consistent with the group threat hypothesis.”); James M. Glaser, *Back to the Black Belt: Racial Environment and White Racial Attitudes in the South*, 56 J. POL. 21, 40 (1994) (concluding that “[r]esistance to racial change . . . is a response to the possibility that whites stand to lose something valued to blacks”); Ryan D. King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish*, 85 SOC. FORCES 1255, 1274 (2007) (concluding that “perceptions of African Americans as

This “group threat” hypothesis possibly has even stronger implications for how whites perceive the presence of large numbers of African-Americans within the population from which members of juries are drawn in civil cases. The substantial presence of African-American jurors, believed to be more prone to redistribute wealth in cases in which the resources of businesses or insurance companies are at stake, poses what they believe to be a genuine threat to the economic well-being of the power structure.

### *3. The Actual Impact of African-American and Low-Income Jurors*

In spite of the widely held beliefs that low-income and African-American urban juries reach different decisions from juries in suburban and rural areas, the evidence is far less conclusive than most practitioners, judges, legislators, and members of the public believe. Issa Kohler-Hausmann, Professor of law and sociology at Yale, found no statistically significant correlation between the chance of prevailing on the liability issue and any of the following three variables: the income inequality of the local population from which the jury is drawn, the percentage of the population living below the poverty line, and the percentage of persons of color.<sup>182</sup> However, her study showed that

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threatening to economic resources [is] a salient predictor that helps explain why demographic change influences punitive beliefs”).

182. See Issa Kohler-Hausmann, *Community Characteristics and Tort Law: The Importance of County Demographic Composition and Inequality to Tort Trial Outcomes*, 8 J. EMPIRICAL LEGAL STUD. 413, 435 (2011) (discussing data showing the effects of various racial, ethnic, and socioeconomic statuses in the makeup of juries); see also Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 306 (1999) (finding that jurors of color are more likely to find for the plaintiff than white jurors, but cautioning that the variables of race, education, and income are significantly inter-correlated). *But see* Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors’ Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 BEHAV. SCI. & L. 127, 143 (1994) (finding that minority mock jurors were significantly more likely to favor plaintiffs in a product liability case than white jurors); Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1853 (2002) (finding that higher county poverty rates were

a county's poverty rate and level of income inequality are associated with the amounts of damage awards, but that the racial composition of the local population is not.<sup>183</sup>

Other studies find that the racial compositions of populations from which juries are drawn correlate with neither a greater likelihood of the plaintiff prevailing nor larger damage awards. As Theodore Eisenberg and Martin Wells bluntly concluded: "In tort cases, jury trial awards and plaintiff success rates do not consistently increase significantly with black population percentage."<sup>184</sup> Interestingly, however, Helland and Tabarrok found that race and poverty interact synergistically to increase the size of jury awards: "Awards increase dramatically with black poverty rates."<sup>185</sup>

Our objective is not to choose sides in this debate, mostly between judges and practitioners on one side and scholars on the other,<sup>186</sup> as to whether the racial or socioeconomic characteristics

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correlated with increased likelihood of liability verdicts in tort claims in state courts, but not in federal courts); Mary R. Rose & Neil Vidmar, *The Bronx "Bronx Jury": A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1896 (2002) (showing that plaintiffs had a greater chance of success in product liability and medical malpractice cases in Bronx County than in more affluent adjoining New York state counties).

183. Compare Kohler-Hausmann, *supra* note 182, at 435 (noting that "neither blacks nor Hispanic population rates emerge as statistically significant predictors of the level of damages awarded to a plaintiff"), with Helland & Tabarrok, *supra* note 163, at 34 (finding that "[t]he data show[ed] a marked increase in award by poverty rate"); see also Geressy v. Dig. Equip. Corp., 980 F. Supp. 640, 656–57 (E.D.N.Y. 1997) (Weinstein, J.) (noting that "[i]t is curious that awards for pain and suffering on one side of the East River are uniformly two and three times higher than on the other" (quoting Baumgarten v. Slavin, No. 9018/84, slip op. at 3 (N.Y. Sup. Ct. May 6, 1997))), *aff'd in part sub nom.* Madden v. Dig. Equip. Corp., 152 F.3d 919 (2d Cir. 1998).

184. Eisenberg & Wells, *supra* note 182, at 1869; see also Diamond et al., *supra* note 182, at 303–06 (concluding that the correlation between race and verdict is inconclusive because of interactions with education and income levels). *But cf.* Eisenberg & Wells, *supra* note 182, at 1843 (reporting that "[a]ccurately or inaccurately, rightly or wrongly, lawyers rely on stereotypical views about jurors and counties in assessing cases and the reactions of prospective juries").

185. See Helland & Tabarrok, *supra* note 163, at 46, 52 ("[A] 1-percentage-point increase in black poverty rates increases awards by approximately 3–10 percent on average . . . [F]orum shopping or careful *voir dire* could raise awards by 30–100 percent . . . [Awards] also appear to increase with Hispanic poverty rates . . .").

186. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992) ("It is helpful

of the juror population affect trial outcomes. Instead, our hypothesis is that the *perceptions* of judges and legislators that juries with higher percentages of African-American or low-income jurors in a state's largest cities will lead them to continue to follow traditional tort doctrines that keep plaintiffs from reaching juries.

*B. Keeping Cases from African-American Juries in the Post-Civil Rights-Era South: The Impact of Regional History*

Twenty-first century social scientists acknowledge “the ongoing distinctiveness of the South . . . even as the economic and cultural integration of the region has eroded many of these differences.”<sup>187</sup> We define “the South” as that part of the country where slaveholding was legal and prevalent in 1860 and where de jure segregation was frequently practiced at least until the 1950s.<sup>188</sup> The traditional role of race in Southern life plays a primary part in this distinctiveness,<sup>189</sup> but does not totally explain the differences.

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to separate two sources of opinions about differences between judge and jury trials. Lay and professional perceptions about jury behavior are one source. Recent insights of scholars supply the other.”).

187. Dan T. Carter, *More Than Race: Conservatism in the White South Since V.O. Key Jr.*, in UNLOCKING V.O. KEY JR.: “SOUTHERN POLITICS” FOR THE TWENTY-FIRST CENTURY 129, 149 (Angie Maxwell & Todd G. Shields eds., 2011); *see also* EARL BLACK & MERLE BLACK, *POLITICS AND SOCIETY IN THE SOUTH* vii (1987) (“Although the South has experienced tremendous change in recent decades, it remains the most distinctive American region.”).

188. The states that we regard as part of the South are identical to those identified by a leading book covering the history of the South during the last century. *Preface to THE AMERICAN SOUTH IN THE TWENTIETH CENTURY* ix (Craig S. Pascoe, Karen Trahan Leathem & Andy Ambrose eds., 2005). Dr. Pascoe and his co-editors reason:

For the purpose of visualizing the South as a distinct region, the editors . . . consider the eleven states that seceded from the Union—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Other border or nearby states, such as Missouri, Kentucky, Oklahoma, Maryland, and West Virginia, should also be included insofar as they are affected by the [same] specific forces and shaping influences . . .

*Id.* at xiv.

189. *See infra* notes 207–238 and accompanying text (analyzing the racial differences between juries in Northern and Southern states historically).



*1. Regional Differences in Mid-Nineteenth Century Common Law*

The South's distinctive development of the common law governing personal injuries began as early as the mid-nineteenth century, a time when the South's racial caste system played a dominant role in structuring the law. According to Professor Howard Schweber, Northern judges during this period threw out the highly specific categories and rules embedded in the property-based English writ system and replaced them with broadly stated negligence principles more favorable to the development of railroad technology.<sup>190</sup> During the same period, argues Professor Schweber, Southern courts were not yet confronting the new wave of injuries caused by railroads.<sup>191</sup> Instead, their common law continued for several decades to focus on specific rights and obligations arising from the classification of different groups of people, which was designed to perpetuate the slaveholding and largely agrarian economy.<sup>192</sup> Professor Schweber concludes that even by the 1870s, when Southern courts began to adopt general negligence principles from their Northern counterparts, "[t]he fundamental ideological elements of antebellum southern legal thought remained the same," including "preservation of . . . traditional English common law categories."<sup>193</sup> Because the common law is based on precedent, these mid-nineteenth century differences between the North and South, with their origins in the South's slaveholding plantation economy, may still affect the extent to which a state's common

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190. See HOWARD SCHWEBER, *THE CREATION OF AMERICAN COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP* 80, 146 (2004) (arguing that the changes in the common law "signaled the complete jettisoning of the old, property rights-based analysis of duties" and that "[the new common law of the North] was . . . defined in terms of a common duty to further technological progress"); see also *generally id.* at 63–146 (covering cases involving property damage and injuries to persons, and providing a comparison to Northern states).

191. See *id.* at 147, 157–59 (observing that "Virginia was dominated by an established set of interests opposed to the transformative power of railroad expansion" and describing the comparatively slow development of railroads in the state).

192. See *id.* at 147–258 (discussing, among other topics, an in-depth coverage of Virginia history).

193. *Id.* at 204.

law is rule-based. Specific, rather than general, legal rules<sup>194</sup> are more likely to operate in the South today, thus making it more difficult for a plaintiff to have her case decided by a jury in the South than elsewhere in the country.

## 2. *The Emergence of Pro-Business Southern Politics*

In his classic 1950 analysis of the political structure of the South, V.O. Key, Jr. contended that the South was dominated by conservative white elites in areas where African-Americans represented a substantial portion of the population.<sup>195</sup> These elites feared a coalition of African-Americans, who constituted a majority in many “black belt”<sup>196</sup> areas of the South, and less affluent whites who had been heavily influenced by populism and were perceived as a threat by large property owners.<sup>197</sup> To maintain political control, these elite property owners exacerbated racial tensions among whites fearful of black rule in order to divide those who otherwise might be allied by populist economic interests.<sup>198</sup>

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194. See *supra* notes 93–118 and accompanying text (identifying no-duty and limited duty rules); see also Appendix A, tbl.2 and accompanying notes (cataloging the often continuing acceptance of these doctrines by Southern states).

195. See V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 5–6 (1950) (noting that whites preferentially shaped Southern politics to maintain their rule in “black belts”).

196. See *id.* at 5 (describing “the southern black belts” as “those counties and sections of the southern states where [African-Americans] constitute a substantial proportion of the population”).

197. See *id.* at 6 (noting that black belt whites clashed with the populist uprisings of the 1890s); see also GERALD H. GAITHER, BLACKS AND THE POPULIST MOVEMENT: BALLOTS AND BIGOTRY IN THE NEW SOUTH (rev. ed. 2005) (describing how “[t]he racial prejudices of the poor whites were courted . . . to divest them of any thought of organizing around any ideology except white supremacy. Race was expected to be a stronger deterrent than any proposed class coalition based on economics”).

198. See KEY, *supra* note 195, at 8 (“Everywhere the plantation counties were most intense in their opposition to Negro voting; they raised a deafening hue and cry about the dangers to white supremacy implicit in a Negro balance of power.”); see also *id.* at 652, 655 (contending that in areas that were majority African-American, “whites feared the possibility of Negro control of city, county, and other local governments”).

During the first half of the twentieth century, the largely agrarian property owners in these black belt areas found that their economic interests overlapped with those of the business community.<sup>199</sup> By the 1960s, the South began to vigorously recruit businesses from other parts of the country,<sup>200</sup> and the owners and managers of the newly relocated businesses found economic and political allies in the preexisting Southern aristocracy.<sup>201</sup> Further, middle-class white voters, often driven by conservative religious beliefs<sup>202</sup> or by their perceptions that liberal Democrats favored doing too much for African-Americans, enthusiastically joined this conservative coalition.<sup>203</sup> As a result, the once solid Democratic South now favors the Republican

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199. See *id.* at 553 (finding that as early as the 1890s, “[t]he planter found new allies in the growing industrial and financial classes”); GAITHER, *supra* note 197, at 181 (describing how “[a]s a result of . . . racial cleavages developed or exacerbated . . . [in Louisiana], blacks and not the Bourbons had become the common enemy”).

200. See David L. Carlton, *Smokestack-Chasing and Its Discontents: Southern Development Strategy in the Twentieth Century*, in THE AMERICAN SOUTH IN THE TWENTIETH CENTURY, *supra* note 188, at 122 (“The strategy of ‘smokestack chasing’—drawing in outside entrepreneurs . . . has done much to transform the region, especially in the years since World War II.”).

201. See BLACK & BLACK, *supra* note 187, at 48, 314 (finding that “[a]s the twentieth century has proceeded, state power structures have been augmented by new producers of wealth emerging from industrialization” and “the mass base of many southern Republican parties consist of transplanted Yankees and Midwesterners”).

202. See *id.* at 213 (observing that “[i]ndividual responsibility is a major theme in southern Protestant culture . . . one that few natives could have escaped in childhood” and “‘Ask God for help in your work,’ goes a Protestant prayer, but ‘do not ask Him to do it for you’”).

203. See Larry M. Bartels, *What’s the Matter with What’s the Matter with Kansas?*, 1 Q.J. POL. SCI. 201, 211 (2006) (reviewing THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS? (2000)) (“The overall decline in Democratic support among voters in [the] white working class over the past half-century is *entirely* attributable to the demise of the Solid South as a bastion of Democratic allegiance.”). Bartels also argues that “dramatic action on civil rights issues by national Democratic leaders in the early 1960s precipitated a momentous electoral shift among white southerners, eventually replacing [a] . . . Democratic majority with a . . . Republican majority.” *Id.*; see also Alexander P. Lamis, *The Emergence of a Two-Party System*, in THE AMERICAN SOUTH IN THE TWENTIETH CENTURY, *supra* note 188, at 225, 229 (explaining that because integrationist efforts by Democratic leaders led to the collapse of the one-party Democratic South, “[t]he Republican Party’s growth was propelled in these early years by . . . white southern resentment against the Kennedy-Johnson-Humphrey national Democratic integrationists”).

Party.<sup>204</sup> This new coalition that emerged simultaneously with the transformation of tort law elsewhere in the country is committed to checking pro-plaintiff judges inclined to allow juries to hear cases against businesses and insured defendants.<sup>205</sup>

### 3. *The Long History of Racial Exclusion from Southern Juries*

Most obviously, the South's distinctive racial history contributed to its greater fear of juries with substantial numbers of African-American jurors. It was during the period between the mid-1960s and the mid-1980s that Southern business and political leaders, for the first time since Reconstruction, had reason to fear the impact of juries including substantial African-American representation.<sup>206</sup>

The fact that Southern white leaders worried about how African-Americans would act as jurors is best corroborated by their century-long efforts to keep African-Americans from participating as jurors. While it is true that African-Americans also were underrepresented in juries in Northern states,<sup>207</sup> efforts to exclude them from juries in the South appear to have been more harsh, widespread, and sustained. In the immediate aftermath of the Civil War, integrated juries became a "common sight" in a number of Southern states,<sup>208</sup> and in 1879, the U.S. Supreme Court held that a West Virginia statute that excluded

204. See generally Lamis, *supra* note 203 ("The second factor propelling the Republican Party in the South revolved around conservative economic issues tied to a restrictive view of the role of government . . . [and] it was now possible for southern conservatives to build a Republican Party along the lines of those in, for example, Pennsylvania or Ohio.").

205. See, e.g., *Litigation Abuse Reform Act of 1986: Hearing on S. 2038 and S. 2046 Before the S. Comm. on the Judiciary*, 99th Cong. 129 (1986) (statement of Sen. Mitch McConnell) (introducing bill and describing "the dramatic increase in the number of lawsuits filed . . . [and] the latest multimillion-dollar verdict").

206. See, e.g., Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 88 (1990) (arguing that after 1965 all-white juries could legally reign in most states until the Supreme Court's decision in *Baston v. Kentucky*, 476 U.S. 79 (1986)).

207. See *id.* at 92 (finding that during the period of 1965 through 1985, "the northern trial jury resemble[d] the all-white jury of the South").

208. See *id.* at 50, 62 ("By 1870, the integrated jury was a common sight in [certain Southern states].").

African-American citizens from participation as jurors violated the Equal Protection Clause.<sup>209</sup> Southern states quickly found ways to circumvent the holding.<sup>210</sup> In some instances, the names of African-Americans legally required to be included within the lists from which jury panels were drawn were printed on differently colored paper.<sup>211</sup> In Mississippi, jury commissioners selected jurors from among those of “good intelligence, fair character, and sound judgment,”<sup>212</sup> language they interpreted to exclude African-Americans.<sup>213</sup> Even when states used voter registration rolls as a starting point from which to select a jury panel, African-Americans and the poor were excluded from voting by poll taxes and requirements that the voter be able to explain provisions of the state constitution, again administered in a highly discriminatory manner.<sup>214</sup> By the first decade of the twentieth century, few African-Americans had served on juries in

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209. See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (concluding that excluding black jurors amounted to a “denial of the equal protection of the laws”). *But see* *Gibson v. Mississippi*, 162 U.S. 565, 589 (1896) (reasoning that nothing prevented a state “legislature from providing . . . that persons selected for jury service should possess good intelligence, sound judgment, and fair character”).

210. See Colbert, *supra* note 206, at 75 (noting that “[b]eginning in the early 1880s, the former confederate states developed and implemented strategies to disenfranchise blacks and to prevent them from sitting as jurors”).

211. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 72 (2007) (“White jurors’ names were printed on white tickets, while black jurors’ names appeared on yellow tickets, making it easier to determine the race of prospective jurors.”).

212. *Smith v. Mississippi*, 162 U.S. 592, 592 (1896) (quotation omitted); *see also Gibson*, 162 U.S. at 565 (selecting jurors of “good intelligence, sound judgment, and fair character”).

213. See Colbert, *supra* note 206, at 76–77 (noting that the Court in *Williams v. Mississippi*, 170 U.S. 213 (1898), “rebuked the defendant’s argument that the state had administered the jury . . . in an evil and discriminatory manner”); EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 10 (2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf> (“Theoretically valid but vague requirements for jury service were applied in practice to mean ‘no blacks allowed.’”); *see also infra* notes 234–238 and accompanying text (further discussing the use of a system involving “key men,” jury commissioners, or elected state officials to exclude African-American and poor jurors).

214. See Colbert, *supra* note 206, at 76 (noting that the “constitutional requirements limited voting and jury duty to citizens who could pay a poll tax, who had never been convicted of any larceny-related offenses, who could read and write, and who understood all sections of the state constitution”).

the South, even in counties where they dramatically outnumbered white residents.<sup>215</sup>

The tide began to shift against the most blatant means of excluding African-American jurors with the Supreme Court's 1935 decision in *Norris v. Alabama*.<sup>216</sup> Although African-Americans were 18% of the county's population, some of whom were college graduates, no one could remember an African-American serving on a jury.<sup>217</sup> The Supreme Court found "it impossible to accept . . . [the] sweeping characterization" of the jury commissioner that there was not a single African-American in the county "who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character, and sound judgment."<sup>218</sup>

In the following decades, prosecutors in criminal cases and defense counsel in personal injury cases relied heavily on peremptory challenges to keep African-Americans off juries in all regions of the United States, but particularly in the South.<sup>219</sup> Nonetheless, the Supreme Court, as late as 1965 in *Swain v. Alabama*,<sup>220</sup> sanctioned the prosecutor's use of peremptory challenges to exclude all African-American jurors in criminal cases.<sup>221</sup> However, during the next twenty years, it became

215. See GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253–72 (1910) (describing the experiences of clerks in the South with black jurors). For example, 6,800 white persons and 8,000 African-Americans resided in one North Carolina county, but a county clerk observed that "very few Negroes serve on the juries . . . for the reasons that they are an illiterate race and moral character not what it should be." *Id.* at 265.

216. See generally *Norris v. Alabama*, 294 U.S. 587 (1935) (deciding the appeal arising out of the infamous "Scottsboro Boys" case where the petitioner and eight other young African-American men were accused, and convicted by the jury, of raping two white women); see also N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1335–37 (2004) (discussing the *Scottsboro* cases).

217. *Norris*, 294 U.S. at 599.

218. *Id.* at 598–99.

219. See *infra* notes 220–228 and accompanying text (discussing the use of peremptory challenges).

220. See 380 U.S. 202, 221 (1965) ("[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

221. See *id.* (discussing the use of peremptory challenges).

gradually more evident that the Supreme Court would eventually prevent counsel from systematically using peremptory challenges to remove African-American jurors.<sup>222</sup> This, of course, was precisely the period of time when Southern supreme courts rejected the changes in the law making it easier for plaintiffs to gain access to juries that courts elsewhere in the country were adopting.<sup>223</sup>

Eventually, in 1986, the Supreme Court in *Batson v. Kentucky*<sup>224</sup> made it far easier to prove that the exclusion of African-Americans from the jury constituted a violation of an African-American defendant's constitutional rights.<sup>225</sup> In *Batson*, the Court emphasized that the criminal defendant himself was African-American,<sup>226</sup> but in 1991 in *Powers v. Ohio*,<sup>227</sup> the Court held "that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."<sup>228</sup> Presumably, the Supreme Court recognized that studies have shown that African-American jurors are more

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222. In the two decades following *Swain*, a number of federal and state appellate courts in regions of the country other than the South held that a criminal defendant could demonstrate an equal protection violation by proving that the prosecutor used peremptory challenges to exclude African-American jurors *in the defendant's particular case* and need not overcome the far more burdensome requirement that the prosecutor systematically excluded African-American jurors across a range of cases. *See Batson*, 476 U.S. at 82 n.1 (listing cases). At the same time, federal and state courts in the South predominantly rejected this more manageable standard. *See id.* (same).

223. *See id.* (listing cases where Southern state courts rejected these changes).

224. *See* 476 U.S. at 96–97 (holding that once an African-American criminal defendant proved that the prosecutor had removed African-Americans from the jury venire and "circumstances raise an inference" that these peremptory challenges were race-based, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors").

225. *See id.* at 96–97 (listing cases).

226. *See id.* at 96 (providing the standards for showing prima facie discrimination in the venire selection context).

227. 499 U.S. 400 (1991).

228. *Id.* at 402. Despite *Batson* and *Powell*, strong evidence supports the notion that African-Americans continue to be significantly underrepresented in criminal juries, particularly in the South. *See, e.g.,* EQUAL JUST. INITIATIVE, *supra* note 213, at 14 (concluding that "peremptory strikes are used to exclude African Americans . . . from jury service at high rates . . . , particularly in the South").

inclined to vote for acquittal in criminal cases,<sup>229</sup> just as most participants in the civil justice system believe that African-American jurors favor tort plaintiffs. Most critically for our purposes, during the same term as *Powers* was decided, the Supreme Court held in *Edmonson v. Leesville Concrete Co.*<sup>230</sup> that a party in *civil* litigation was entitled to have his case heard by a jury in which the other party had not excluded jurors on the basis of race.<sup>231</sup> *Edmondson*, of course, was decided after Southern courts disproportionately failed to follow those courts elsewhere in the country that had already adopted substantive principles governing tort cases that made it easier for plaintiffs to have their cases heard by the jury.<sup>232</sup> After *Edmondson* opened the doors to substantially greater African-American participation on Southern juries, principles of outmoded substantive tort law became principal bulwarks to prevent personal injury plaintiffs from having their cases heard by the jury.<sup>233</sup>

In the midst of the period when states other than those in the South were changing their law to enable personal injury plaintiffs to have their cases decided by juries, Professor Jon M. Van Dyke published his definitive account of jury selection processes in the various states.<sup>234</sup> Professor Van Dyke found that twelve of the sixteen states in the South permitted local “jury commissioners” or elected officials to exercise discretion in selecting the members of the jury venire.<sup>235</sup> At that time, only four Southern states and the District of Columbia selected the members of their jury

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229. See Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 377 (2004) (reporting that African-American jurors are statistically more likely to vote to acquit in criminal trials).

230. 500 U.S. 614 (1991).

231. See *id.* at 616 (holding that, in civil cases, “race-based exclusion violates the equal protection rights of the challenged jurors”).

232. See, e.g., *supra* notes 230–231 and accompanying text (discussing the *Edmonson* case).

233. See *infra* tbl.1 (showing that Southern states disproportionately pose the greatest obstacles to the plaintiff having his case heard by the jury); Appendix A, tbl.2 (showing disproportionately anti-plaintiff tort doctrines in Southern states).

234. See generally JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* (1977).

235. See *id.* at 87 (“In the South, [some states] . . . have statutes that permit local jury commissioners to exercise a great deal of discretion in choosing jurors.”); see also *id.* app. A at 258–62.



panels randomly from voter registration lists.<sup>236</sup> In contrast, the overwhelming majority of states that were not a part of the South selected their prospective juries randomly from voter registration lists. The use of jury commissioners in Southern states enabled them “to select persons they know, namely, the ‘established’ members of the community.”<sup>237</sup> The desired and expected result, of course, was that both African-Americans and poor whites continued to be underrepresented on Southern juries. According to Professor Van Dyke’s findings in 1977—during the era of great transformation in tort law—“the surveys from the southern states . . . show that blacks are not filling the percentage of seats on the juries that their population warrants.”<sup>238</sup>

#### 4. Resistance to “Judicial Activism”

The distinctive racial and economic histories of the South led its political and business leaders of the region in the 1970s and 1980s to distrust both “activist” judges and newly empowered African-American jurors. To many leaders of Southern politics and business, the courts elsewhere in the country that changed tort law during the late 1960s through the mid-1980s were dominated by policy-driven “judicial activists.”<sup>239</sup> As such, the more pro-plaintiff tort decisions from these courts evoked the critics’ then-recent response to what they perceived as the judicial activism of the Warren Court and other federal courts in

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236. See *id.* at 258–62 (discussing the discretion granted to jury commissioners).

237. *Id.* at 87.

238. *Id.* at 30.

239. See William M. McCormick, *The American Tort System: A Time to Rebalance the Scales of Justice*, in 52 VITAL SPEECHES OF THE DAY 267, 269 (1986) (noting that “the enormous changes in legal doctrine” had occurred “without much public debate or even notice”); cf. Irvin Molotsky, *Reagan Reiterates Support for Liability Suit Limits*, N.Y. TIMES (May 31, 1986), <http://www.nytimes.com/1986/05/31/us/reagan-reiterates-support-for-liability-suit-limits.html> (last visited Jan. 19, 2016) (quoting Reagan administration Attorney General Edwin Meese: “What some of the liberal attorneys and liberal judges did to criminal law in the 1960’s and 70’s, they are now, in the 1980’s, trying to do to civil law”) (on file with the Washington and Lee Law Review). McCormick served as CEO of North Carolina-based Fireman’s Fund Insurance. McCormick, *supra* note 239, at 267.

dismantling de jure segregation in the South.<sup>240</sup> Further, new-fangled tort doctrines that focused on the policy consequences of torts decisions, instead of on the moral responsibilities of tort plaintiffs and defendants,<sup>241</sup> sounded out of tune in the South where religious values focused on “a moral outlook grounded in the Bible”; principles that were beginning to reshape Southern conservative politics.<sup>242</sup> These factors contributed to the decisions of Southern courts and legislatures to decline to join the trend in substantive tort law sweeping the nation that allowed more personal injury cases to be heard by juries.

### *C. The Political Leanings of State Governments*

The American civil justice system has become highly politicized since the 1970s, and perhaps it always has been.<sup>243</sup> Plaintiffs’ lawyers are traditionally in tune politically with Democrats and liberals, and businesses and insurances

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240. For example, James J. Kilpatrick, a Virginia-based newspaper columnist read throughout the country, described the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), in this manner: “In May of 1954, that inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men . . . rewrote the fundamental law of this land to suit their own gauzy concepts of sociology.” *Court Order Gets Varied Reaction from Region’s Newspapers*, SOUTHERN SCH. NEWS, June 8, 1955, at 8; see also Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 487 (2005) (describing how “critics assailed *Brown v. Board of Education* as unprincipled judicial activism . . . indulging in sociology”).

241. The California Supreme Court often led the movement toward more expansive liability and explained its changes to the common law by citing policy implications. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980) (justifying the adoption of market share liability on the basis of loss distribution and loss minimization).

242. See Charles Reagan Wilson, *Making the South: Religion in a Twentieth-Century Region*, in THE AMERICAN SOUTH IN THE TWENTIETH CENTURY, *supra* note 188, at 210, 213 (concluding that “leading denominations were among the region’s most powerful institutions, parts of an establishment whose members had close ties to other leaders in politics, economics, and education”).

243. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND 177–78 (1949) (claiming that the fact “[t]hat the defendant is a wealthy corporation and the plaintiff is a poor boy . . . often determine[s] who will win or lose”); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 365–66 (3d ed. 2005) (noting that discontent with the tort system began as early as the mid-nineteenth century).

companies are aligned with Republicans and conservatives. In this Subpart we consider the possible role played by the political leanings of state governments.

Plaintiffs' trial lawyers, like Democratic Party activists and other liberals, perceive that they are fighting for the "little guy." As Sara Parikh and Bryant Garth observe in their study of the emergence of the plaintiffs' bar in Chicago, plaintiffs' lawyers "alignment with the Democratic Party (the party of 'ordinary people') reinforces their identity as underdogs fighting on behalf of those who cannot help themselves."<sup>244</sup> Liberals also see the jury as an important democratic institution, responding to abuses of powerful actors including both the government<sup>245</sup> and corporations and other businesses.<sup>246</sup> In contrast, conservatives and Republicans view tort law as yet another vehicle that interferes with the operation of the free enterprise system.<sup>247</sup>

These relationships echo the historical demographic patterns of attorneys representing each party in tort litigation. Following World War II, corporate law firms "recruited almost exclusively from a WASP establishment legitimated with degrees from Ivy League schools,"<sup>248</sup> by nature a conservative group, and most often Republican. Those with working-class or immigrant backgrounds, on the other hand, generally attended local law

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244. Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 L. & SOC. INQUIRY 269, 300 (2005).

245. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) ("The will of the state . . . imposed on a reluctant community . . . find[s] the same obstacle in the local jury that formerly confronted kings and ministers.").

246. See, e.g., ROGER CHAPMAN & JAMES CIMENT, *CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES* 672 (2d ed. 2015) (stating that liberal, consumer interest groups "argue that liability lawsuits are a means to hold injury-causing parties accountable").

247. See, e.g., *Excessive Litigation's Impact on America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 8 (2013) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) (testifying that "a prosperous free enterprise economy . . . depends on a tort system that is . . . free of meritless litigation and excessive damage awards").

248. Parikh & Garth, *supra* note 244, at 275.

schools, often worked with the Democratic Party machine, and many eventually became plaintiffs' attorneys.<sup>249</sup>

Following the period from the late 1960s through the mid-1980s when courts in most jurisdictions adopted a variety of changes to the common law that benefited plaintiffs, insurance companies and businesses responded vigorously by promoting a wide variety of tort reform measures that limited liability. This further politicized the tort system. As would be expected, conservatives and Republicans most often supported the tort reform measures, while Democrats and liberals opposed them.<sup>250</sup> In 1994, tort reform became a key component of Republican Congressman Newt Gingrich's "Contract with America."<sup>251</sup> Today, the current Republican Platform identifies "Reducing Costs Through Tort Reform" as one example of "Renewing American Values."<sup>252</sup> Conversely, the platform of the nation's largest state Democratic Party, California, states that "our civil justice system has come under concerted attack by corporations shielding themselves from civil liability for wrongful conduct by using their money and power to deny everyday people fair access to the courts."<sup>253</sup> The Party promises to "[t]rust juries to determine the appropriate level of compensation for a prevailing plaintiff in a lawsuit."<sup>254</sup> Thus, by the late 1980s, the identification of Republican conservatives as anti-plaintiff and anti-jury became even more firmly established, and Democrats and liberals were

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249. *See id.* at 275–77 (discussing the development and composition of the plaintiffs' bar).

250. *See id.* at 285 (describing how a law revision commission could address issues of tort reform while avoiding political controversy).

251. *See* Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700 (1995) (discussing the tort reform proposals included in the Contract with America).

252. *See Republican Platform: Renewing American Values*, REPUBLICAN NAT'L COMMISSION, <https://www.gop.com/platform/renewing-american-values/> (last visited Mar. 13, 2016) (stating a commitment to "aggressively pursuing tort reform legislation") (on file with the Washington and Lee Law Review); *see also Report of Permanent Committee on Platform and Resolutions*, REPUBLICAN PARTY OF TEX. 10 (2014), <http://www.texasgop.org/wp-content/uploads/2014/06/2014-Platform-Final.pdf> (supporting the "continuation of common sense tort reform").

253. *2014 Platform*, CAL. DEMOCRATIC PARTY 5 (2014), <http://www.cadem.org/our-california/platform/body/2014-Platform-3.11.141.pdf>.

254. *Id.* at 5.

even more closely aligned with the idea that personal injury plaintiffs should be entitled to have their cases heard by juries.

As can be expected, the pro-plaintiff leanings of Democrats and liberals led to greater financial backing from plaintiffs' attorneys. Conversely, businesses and insurance companies contribute far more heavily to Republicans. This, in turn, strengthened the polarization of the two parties on tort issues. For example, during the 2014 election cycle, the American Association for Justice, the trade organization of plaintiffs' attorneys, contributed more than \$2 million to Democratic candidates for Congress, but less than \$100,000 to Republican candidates.<sup>255</sup> At the same time, the U.S. Chamber of Commerce spent over \$25 million on campaign advertisements promoting Republican congressional candidates and a mere \$375,300 on advertisements promoting Democratic candidates.<sup>256</sup>

In addition to these substantial contributions by lawyers and repeat players in the civil justice system to legislators, both groups also made substantial contributions to judicial races. According to the National Center for State Courts (NCSC), between 1980 and 1986, near the end of the period in which tort law became decidedly more pro-plaintiff, campaign contributions to candidates in contested appellate court races in Texas increased 250%.<sup>257</sup> These contributions came largely from tort reform groups, businesses, and organizations of plaintiffs' lawyers, each with a stake in the tort system.<sup>258</sup>

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255. *American Ass'n for Justice: Recipients*, CTR. FOR RESPONSIVE POL., [www.opensecrets.org/orgs/toprecips.php?id=D000000065&cycle=2014](http://www.opensecrets.org/orgs/toprecips.php?id=D000000065&cycle=2014) (last visited Mar. 13, 2016) (on file with the Washington and Lee Law Review).

256. *US Chamber of Commerce: Summary*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/orgs/summary.php?id=D000019798> (last visited Mar. 13, 2016) (on file with the Washington and Lee Law Review).

257. *Judicial Campaigns and Elections: Texas*, NAT'L CTR. FOR STATE COURTS, [www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state=TX](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=TX) (last visited Mar. 13, 2016) (on file with the Washington and Lee Law Review).

258. *See id.* (reporting that of the amounts contributed to "the seven winning candidates for the Texas Supreme Court . . . more than 40% was contributed by parties or lawyers with cases before the court or by contributors linked to those parties. . ."). Furthermore, "[i]n the early 1980s, plaintiff lawyers were the largest contributors to Texas judicial candidates, but in the late 1980s and 1990s, they were replaced by civil defense attorneys, doctors, insurance companies, and other business interests." *Id.*

The espoused values of the Democratic Party, the often common demographic origins of both its supporters and the plaintiffs' bar, and the plaintiffs' bar's large campaign contributions to the Democratic Party all would lead one to hypothesize that in states in which Democrats predominate, tort law would allow injured plaintiffs a better chance of having their cases heard by the jury. In contrast, one would assume that in those states where Republicans dominate, the corresponding but sharply contrasting factors would make it more difficult for plaintiffs to have their cases reach the jury.

*IV. Testing the Effects of Race, Income Inequality, Regional History, and State Politics on a State's Degree of Jury Access Denial*

To compare the extent to which each state's substantive law governing tort cases impedes the plaintiff's ability to have her case decided by the jury, we calculated a quantifiable Jury Access Denial Index (JADI) for each state. Subpart A of this Part describes how we calculated each state's JADI. In Subpart B, we rank the respective degrees of difficulty for the plaintiff to have her case decided by the jury in each of seventeen states.

Once the JADI is available for each state, it then becomes possible to test for correlations between each state's JADI and the various factors previously discussed in Part III. Appendix B, Table 3, indicates, for each of the seventeen states tested, its JADI and the quantifiable indices for each of the key variables from the state, including income inequality in its largest cities, the percentage of African-Americans in these cities, whether or not the state was a part of the historic South, and the political leanings of the state government.<sup>259</sup>

Multivariate analysis of variance (ANOVA) was the technique of choice to test the impact of these variables. It is a technique well adapted to models with various levels of measurement. In the present case, the JADI is at the interval level, a truly numeric variable, whereas region is a nominal dichotomy simply divided into the South and states that were not

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259. See *infra* Appendix B, tbl.3 (Values of Key Study Variables).

a part of the historic South.<sup>260</sup> As will become apparent, there are complex interconnections among the model variables. In such situations, there is a premium on tests that allow for statistical controls to identify separate effects and test for the effects of combinations of variables, technically termed “interaction effects.” ANOVA offers these capabilities.<sup>261</sup>

Given the exploratory nature of the present study, analysis commenced by dichotomizing the key independent variables. For the analysis of each variable, we divided states into those where the major urban areas are characterized by a high degree of income inequality and those with a low degree of income inequality; those with cities with a high percentage of African-American residents and those with a low percentage of African-American residents; and finally, those states that were a part of the traditional South and those that were not.

In Subpart C, we test the possible effect of a high degree of income inequality in a state’s leading municipalities on its degree of acceptance of substantive law doctrines that deny plaintiffs access to juries. Subpart D tests for a possible correlation between a high percentage of African-Americans in a state’s leading municipalities and its Jury Access Denial Index. In Subpart E, we test for a possible correlation between a state’s history as part of the South and a high JADI. Subpart F examines multivariate relations among income inequality, race, and region in affecting a state’s JADI. Finally, in Subpart G, we consider as an alternative explanation that a state’s JADI is affected by its liberal or conservative political leanings.

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260. See *supra* note 188 and accompanying text (listing the states regarded as part of the South).

261. ANOVA is conducted by calculating  $F$ , which is the ratio of estimated variance between separate samples to the estimated variance within the samples. If  $F$  is sufficiently high, it indicates that the variable being evaluated has a significant effect. The F-statistic is considered sufficiently high when the statistical probability value ( $p$ ) is extremely low. The p-value represents the percentage probability that the difference in response values is produced by chance or random errors. For example, a  $p < 0.05$  means that the probability that the difference of the means for two categories due to chance is less than 5%, the standard for statistical significance.

*A. Quantifying the Jury Access Denial Factors for Seventeen States*

Each state's JADI is based on a weighted sum of ratings reflecting the extent to which the state continues to follow five older doctrines, or sets of doctrines, that pose obstacles to the plaintiff's ability to have her case decided by the jury.

We begin by assigning a score to each state on each issue ranging from 5—representing the greatest impact in denying access to juries—to 0—representing little or no impact in denying access to juries. In other words, on any particular issue, if a state continues to follow the traditional doctrine that denies the plaintiff access to the jury, we assigned a score of 5. On the other hand, if the state now totally rejects traditional doctrines in any of the five categories that prevent the plaintiff from reaching the jury, we assigned a score of 0. In some of the categories, we assigned scores between 0 and 5 because states adopted intermediate positions or, in a handful of instances, ambiguous rules. Finally, we more frequently assigned intermediate scores to states on the categories of “limited-duty rules in premises liability cases” and “other no-duty and limited-duty rules,” because a state's score for each of these categories included a combination of values derived from the state's positions on multiple issues.<sup>262</sup> Appendix A provides detailed explanations for how we assigned a state's score on each issue.<sup>263</sup>

Obviously, some of the traditional doctrines that blocked the plaintiff's access to the jury had greater impact measured across the entire universe of personal injury tort cases than did others. To assist us in weighting the relative importance of the five issues, we called upon a panel of twelve experienced and racially diverse judges and attorneys who are highly regarded by their peers. This group included four judges, four plaintiffs' attorneys with varying specialties in tort law, and four defense attorneys with varying specialties.<sup>264</sup> Each respondent was asked to assess

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262. However, we were consistent in evaluating each category on a 0 to 5 scale. Within the last two categories, each sub-issue was assigned a number of points reflecting its relative impact on denying jury access compared to the other sub-issues within the same category. *Infra* Appendix A.

263. *Infra* Appendix A, tbl.2 and accompanying footnotes.

264. See *supra* Author's Footnote \* for a list of the experts we surveyed.



the relative importance of state-to-state variations in the five categories of legal doctrines described in the previous Subpart in determining how easy or how difficult it is for plaintiffs in the aggregate, ranging across all types of tort cases, to get their cases to the jury. The respondents were instructed that they should consider not only judicial dismissals at the motion for summary judgment and directed verdict stages, but also how these doctrines affect plaintiff counsel's initial decision to accept a client's case. We asked each survey respondent to allocate 100 points among the five sets of legal doctrines reflecting the relative importance of each, so that an issue that he or she believed is twice as important as another issue should be allocated twice as many points. The mean points allocated for each of the five categories of legal issues by the twelve respondents follow:

- |  |                              |
|--|------------------------------|
| 1. The Choice Between Contributory Negligence and Comparative Fault: | 35.42 points. <sup>265</sup> |
| 2. Limited Duty Rules in Premises Liability Cases:                   | 12.50 points.                |
| 3. Other No-Duty and Limited-Duty Rules:                             | 20.83 points.                |
| 4. Limitations on the Liability of Charitable Institutions:          | 11.25 points.                |
| 5. Standards Governing the Admissibility of Expert Testimony:        | 20.83 points.                |

We then multiplied the score for each issue in a particular state by the weighting factor assigned by our panel of experienced judges, plaintiffs' attorneys, and defense counsel. For example, because our survey respondents assessed the choice between contributory negligence and comparative fault as having the greatest impact and assigned it a mean score of 35.42 points out of 100 possible points, we multiplied each state's score reflecting the extent to which its law on the issue of how plaintiff's own negligence affects her recovery—the 0 to 5 scale—by the weighting factor of 35.42.

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<sup>265</sup>. As a result of the rounding process, the mean total points allocated are 100.83.

Finally, after we determined the weighted anti-jury score for each issue in a particular state, we summed these five weighted anti-jury scores to determine the state's JADI.

*B. Ranking the States' Degrees of Difficulty for Plaintiffs to Reach the Jury*

We selected seventeen states for our study that are diverse in terms of the following criteria: (1) the racial demographics of the state's largest cities; (2) a state's history as part of the traditional South; and (3) the state's political and ideological leanings. For example, in eight of our states, the population of each state's largest cities is more than 30% African-American; in the remaining nine states, it is less than 30%.<sup>266</sup> Eight of the states were part of the traditional South,<sup>267</sup> while the remaining states were not. In 1980, near the end of the period of time when massive change was taking place in many states making it easier for plaintiffs to have their cases decided by the jury, slightly more than half of our states were politically conservative.<sup>268</sup>

After determining the JADIs for each of the seventeen states using the methodology described in the preceding Subpart, we ranked the states from the highest JADI to the lowest.<sup>269</sup>

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266. *Infra* Appendix B, tbl.3.

267. *Infra* Appendix B, tbl.3.

268. *Infra* Appendix B, tbl.3.

269. Again, we stress that our index measures only the impact of substantive law principles applied in tort cases in posing obstacles that prevent the plaintiff's case from being decided by the jury and does not necessarily reflect unarticulated tendencies of state court judges in deciding whether to grant summary judgments and directed verdicts. Further, our measure of the anti-plaintiff and anti-jury impact of substantive law doctrines says nothing about whether juries themselves are biased in favor of either plaintiffs or defendants.

**Table 1. Ranking States by Jury Access Denial Index**

	<b>State</b>	<b>Jury Access Denial Index</b>
	<i>Maximum possible points</i>	<i>500</i>
1.	Virginia	492.90
2.	Maryland	378.34
3.	Alabama	377.50
4.	North Carolina	335.38
5.	South Carolina	265.82
6.	Texas	265.82
7.	New Jersey	234.75
8.	Massachusetts	227.07
9.	Indiana	220.82
10.	Michigan	190.61
11.	Arizona	174.98
12.	Kentucky	166.65
13.	Kansas	137.49
14.	Florida	83.32
15.	Illinois	81.25
16.	California	52.08
17.	Washington	50.00

Our rankings do not align with the U.S. Chamber of Commerce “State Liability Systems Ranking Study.”<sup>270</sup> The substantive law governing whether a personal injury plaintiff is able to have her case heard by the jury plays only a marginal role in the Chamber’s rankings.<sup>271</sup> Instead, the Chamber survey respondents, consisting largely of corporate counsel and other business leaders, identified “biased or partial juries/judges” as by far the most important factor in their ratings.<sup>272</sup> Not surprisingly, this leads to the apparent anomaly that the Chamber ratings and our JADI scores have a crude negative association.<sup>273</sup> However, this apparent discrepancy can be easily explained. When

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270. See generally U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIAB. SYSTEM SURVEY: LAWSUIT CLIMATE, RANKING THE STATES (2012), [https://www.uschamber.com/sites/default/files/documents/files/lr\\_FinalWeb\\_PD F.pdf](https://www.uschamber.com/sites/default/files/documents/files/lr_FinalWeb_PD_F.pdf).

271. See *id.* at 3 (identifying “limits on discovery,” “elimination of unnecessary lawsuits,” and “fairness and impartiality [of judges and jurors] as more important factors than “tort reform”).

272. *Id.* at 3–4. Fully a third of the respondents mentioned this as an important factor. *Id.* at 3. The report continues that the “next tier” of reasons proffered by survey respondents “includes corrupt/unfair system (9%), a slow process (9%), anti-business/anti-corporate environment (8%), unreasonable rulings/verdicts (6%), incompetent juries/judges (5%), and excessive damages awards (5%).” *Id.* at 3–4.

273. We compared the Chamber’s litigation climate ratings (where a higher number is more pro-business) with our Jury Access Denial Index scores (where a higher number makes it more difficult for the plaintiff to reach the jury and therefore favors defendants—usually businesses and others covered by insurance). Because we compared only seventeen states, it was not possible to convincingly determine whether the correlation between the two sets of scores was positive or negative. We categorized each state as a “high” or “low” jury access denial state on the basis of whether its Jury Access Denial Index was greater than or less than the median score for all seventeen states. Similarly, we classified each state as a “high” or “low” on the basis of the U.S. Chamber of Commerce’s liability systems rankings. In twelve of the seventeen cases, a state with a high rating on one of the variables received a low rating on the other variable:

	Low Chamber Liability Rating	High Chamber Liability Rating
Low Jury Access Denial Index	3 states	6 states
High Jury Access Denial Index	6 states	3 states

This indicates that states with higher Chamber Liability Ratings have lower JADIs and vice versa.

appellate judges and legislators perceive that juries and trial judges are biased, the most prevalent factor cited in the Chamber survey, they are more inclined to leave in place older substantive law doctrines that make it more difficult for the plaintiff to have her case decided by the jury. The message to policymakers here is that substantive principles of tort law play only a modest role in determining the business community's perception of the liability climate.

*C. The Effect of a High Degree of Income Inequality in a State's Leading Municipalities*

To determine the effect of income inequality on a state's JADI, we investigated the association between the JADI and the Gini coefficient in the state's largest municipalities. The Gini coefficient is the most widely accepted measure of income inequality among economists and other social scientists.<sup>274</sup> A society where all income was distributed entirely equally would have a Gini coefficient equal to zero.<sup>275</sup> A totally unequal society, where a single person earned all the income, would have a Gini coefficient of one.<sup>276</sup>

Rather than looking at the extent of income inequality within an entire state, we focused only on the Gini coefficient within a state's largest municipalities. Publicity about "out-of-control juries" focuses on urban juries, not those in suburban and rural areas. In some states, a single city, such as Boston, dominates the images that judges and legislators have about urban juries. In other states, policymakers' conceptions of urban jury behavior are likely to be based on juries in a number of large cities, such as, in Florida, Miami, Tampa, Orlando, Jacksonville, and St. Petersburg. Accordingly, in some states we compared the state's JADI with the level of income inequality in only a single

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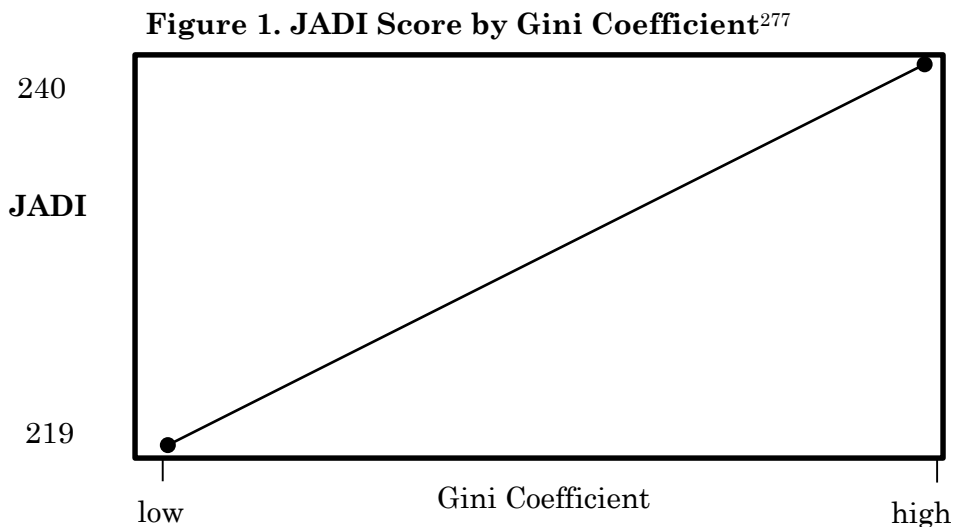
274. See generally AMARTYA SEN & JAMES FOSTER, ON ECONOMIC INEQUALITY 30 (1973) (explaining the Gini coefficient and describing it as "very widely used to represent the extent of inequality"); David Kamin, *Reducing Poverty, Not Inequality: What Changes in the Tax System Can Achieve*, 66 TAX L. REV. 593, 599–600 (2013) (explaining how the Gini coefficient is calculated).

275. See Kamin, *supra* note 274, at 600 (noting that the coefficient equals zero because the Lorenz curve follows the line of equality).

276. *Id.*

dominant urban center; in others, we compared the JADI with the levels of income inequality in a number of large urban legal centers.

We began by dividing the Gini coefficients of the cities into those that were above the median and those below the median and determining the mean JADI for each group. Figure 1 displays the effect of the dichotomized Gini score on the state JADIs shown in Table 1. The upward-trending line suggests a positive association, with higher inequality areas showing a higher JADI (right-hand dot) than lower inequality areas (left-hand dot). However, this difference is not statistically significant.



*D. The Effect of High Percentages of African-Americans in a State's Leading Municipalities*

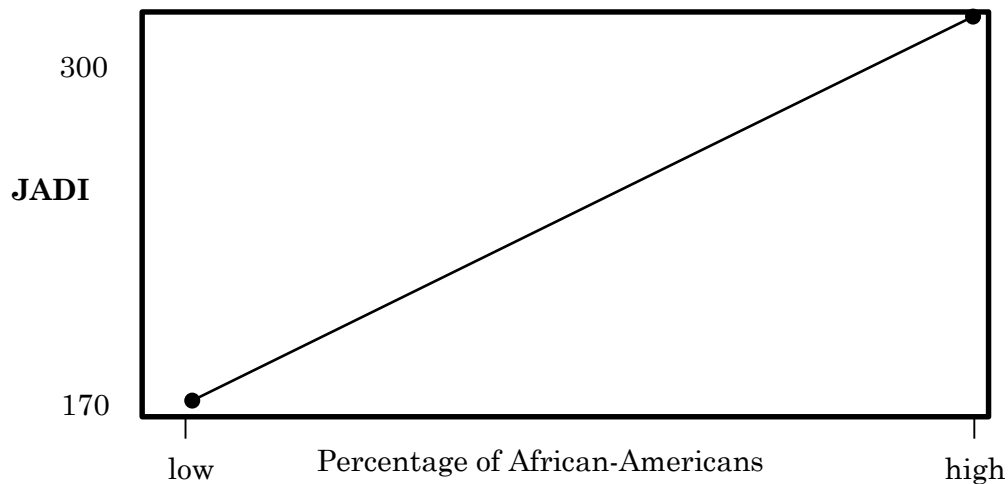
We then tested the association between a high or low percentage of African-Americans in a state's largest municipalities and a state's JADI score. Our analysis paralleled the approach used with the Gini coefficients. We divided the cities into two groups: those where the percentage of the population that was African-American was above the median for all the cities we studied and those where the percentage was

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277.  $F = 0.249, p = \text{n.s.}$

below the median. We then determined the mean JADI for each group. Figure 2 displays a rapidly rising line slope signifying much higher JADIs for states in which the largest cities include a higher percentage of African-American residents. This result is statistically significant. Also, the difference in the two means represented by the dots is nearly 120 JADI points, which would suggest substantive significance as well.<sup>278</sup>

**Figure 2. JADI Score by Percentage of African-Americans in Largest Cities<sup>279</sup>**



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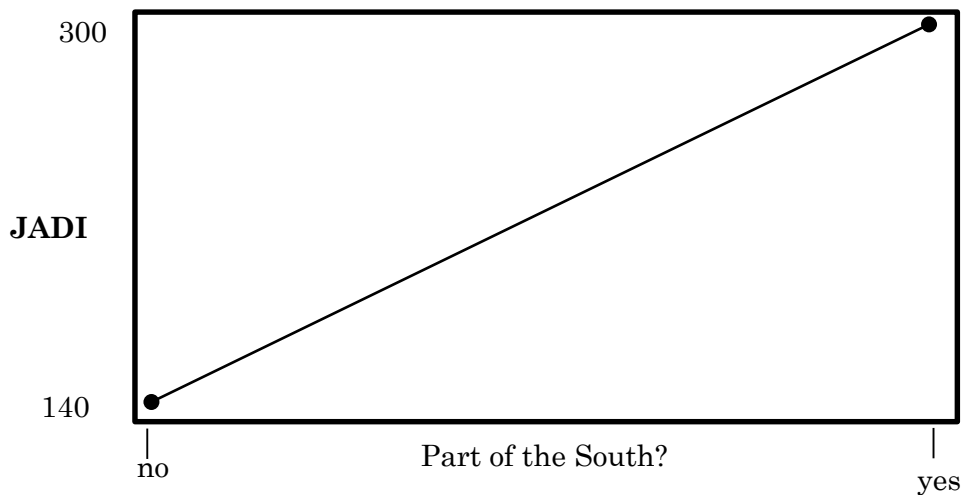
278. See HUBERT M. BLALOCK, JR., *SOCIAL STATISTICS* 299–303 (rev. 2d ed. 1979) (explaining that substantive significance describes the quantity of the effect of one variable on the other). In other words, a higher percentage of African-Americans in the population is likely to have a large or substantial effect on JADI scores.

279.  $F = 11.686, p = .001$ .

*E. The Effect of a State's History as Part of the South*

Figure 3 displays the most dramatic result thus far. States in the South manifest a much higher average JADI than other states, about 151 points, which translates into a clearly statistically significant difference.

**Figure 3. JADI Score by Region**<sup>280</sup>



*F. Interactions Among the Variables of Income Inequality, Race, and Region*

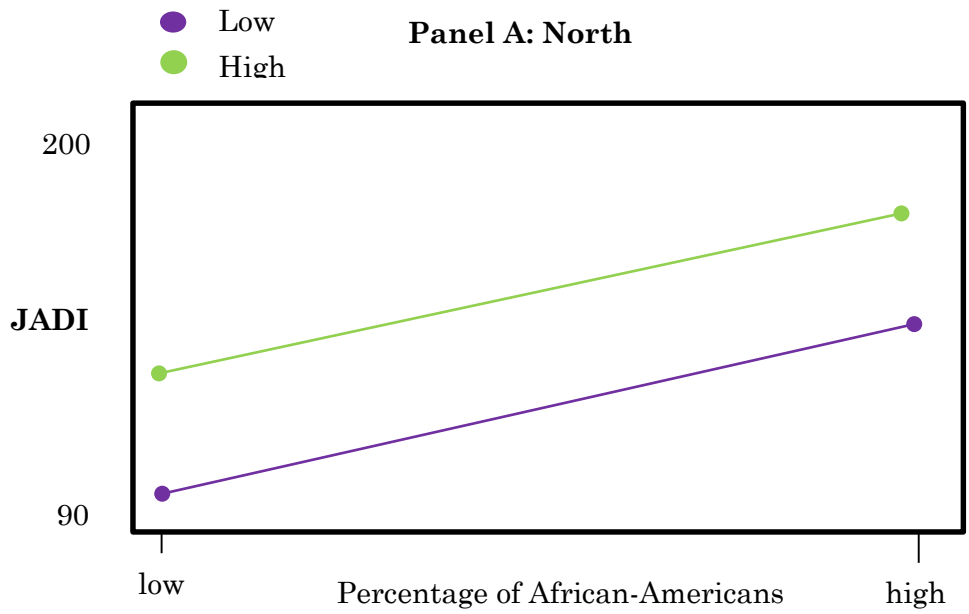
No matter how dramatic the correlations between a state's JADI and either the racial composition of its largest cities or its role as part of the historic South, neither of these bivariate analyses should be over-interpreted because of the complex interconnections among the variables.

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280.  $F = 20.606, p < .001$ .



Figure 4. JADI Score by Percentage of African-Americans in Largest Cities<sup>281</sup>



281. For Region,  $F = 21.583$ ,  $p < .001$ . For percent African-American,  $F = 6.535$ ,  $p = .014$ . For Gini Coefficient,  $F = 0.752$ ,  $p = \text{n.s.}$

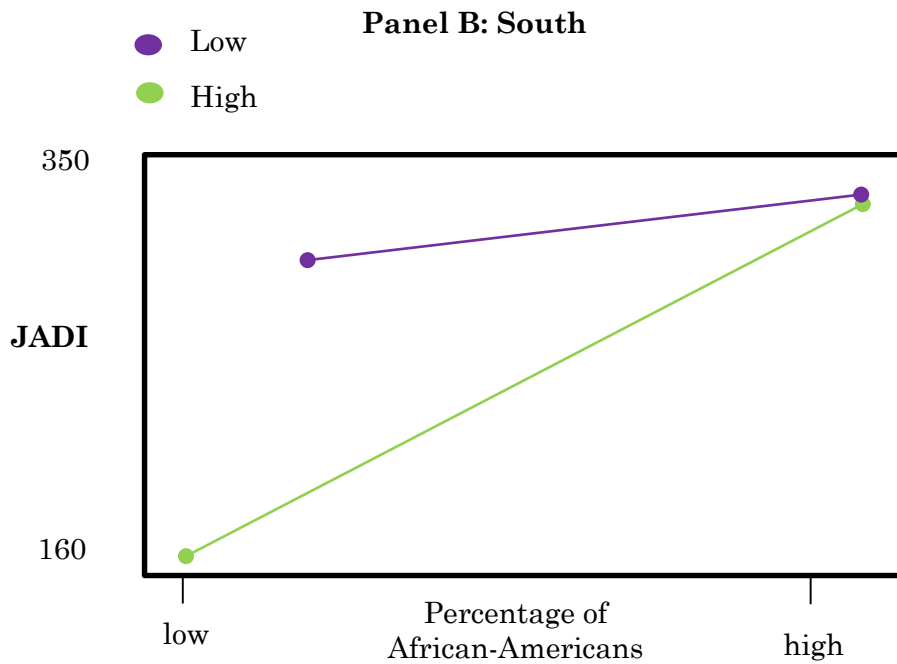


Figure 4 justifies this reticence. Panel 4A displays the effect of the percentage of African-Americans in a state's largest cities on the JADI for states that are not a part of the South. The lower, purple line represents those cities with a Gini coefficient less than the median, that is, a low degree of income inequality. The upper, green line represents cities with a high Gini coefficient. The parallel paths of these lines indicates that in states that are not part of the South, a higher percentage of African-Americans in the largest cities is associated with higher mean JADIs (represented by the higher dots to the right) regardless of whether there is a low or a high degree of income inequality.

Panel 4B, for Southern states, shows that the right-hand dot is only slightly higher than the one at the left for the low-Gini coefficient condition, the purple line, but the rise for the high Gini line, the green line representing a high degree of income inequality, is more pronounced. Nevertheless, the main upward effect of percentage African-American persists for the Southern states.

The ANOVA statistical breakdown of the data displayed in Figure 4 yields three major conclusions. First, in multivariate comparison with these three variables, the Gini coefficient—extent of income inequality—shows no significant separate effect. Second, net of the other two independent variables, region—whether a state was part of the historic South or not—exerts the most powerful separate effect. Third and finally, the percentage of African-Americans in a state’s largest cities exerts a significant effect on a state’s JADI score independently of region and income inequality.

### *G. The Effects of Politics and Ideology*

To compare our jury access denial scores with the politics or ideology of the state, we use the “NOMINATE measure of state government ideology,” originally developed by political scientists William D. Berry, Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson<sup>282</sup> and widely accepted among government and political science scholars. We compared each state’s NOMINATE

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282. The NOMINATE scores measure the liberal/conservative slant of each state’s elected officials. See generally William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327 (1998); see also William D. Berry et al., *Measuring Citizen and Government Ideology in the U.S. States: A Re-appraisal*, 10 ST. POL. & POL’Y Q. 117, 117 (2010) (explaining how these “ideology indicators” help to assess both the impact of public opinion and the policy preferences of elected officials). The scores begin with ratings of a state’s members of Congress based on their votes on a variety of issues and then assumes that the ideological positions of state officials—the governor and members of the state legislature—mirror the ideological positions of the members of a state’s congressional delegation from the same party. *Id.* at 118, 120.

In the 2010 indices used in this Article, William D. Berry and his colleagues employed new input values, termed NOMINATE “common space” scores, which assessed a broader array of congressional votes than the previous indices based on interest-group ratings. *Id.* at 117. The authors report that the new input measures yield more accurate results. *Id.*; see also Richard C. Fording, Updated and Revised Citizen and Government Ideology Measures Through 2010 (Sept. 12, 2012) (providing NOMINATE values used in our study) (on file with authors); Richard C. Fording, *State Ideology Data*, <https://rcfording.wordpress.com/state-ideology-data/> (last visited Feb. 17, 2016) (follow “Excel format” hyperlink under “Updated Measures of Citizen and Government Ideology (last updated Mar. 19, 2005)” to download data through 2013) (on file with the Washington and Lee Law Review).

index for both 1980 and 2010 with its JADI. We hypothesized that the 1980 measure of political ideology would be associated with a state's JADI because 1980 was near the end of the period that the law of most states was changing substantially in a direction allowing plaintiffs to have their cases decided by juries. We also wanted to see whether an association existed between a state's JADI and the current political ideology of its government.

**Figure 5. JADI Score by 1980 NOMINATE Score<sup>283</sup>**

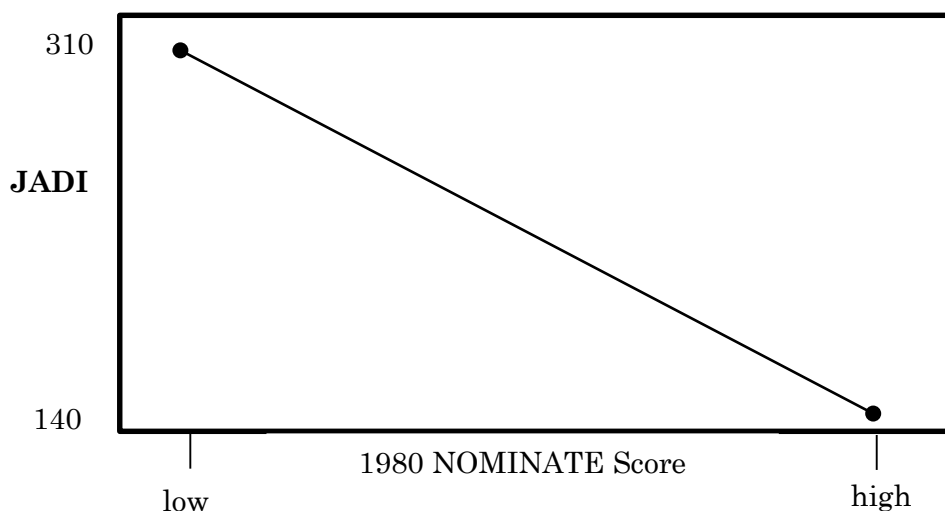
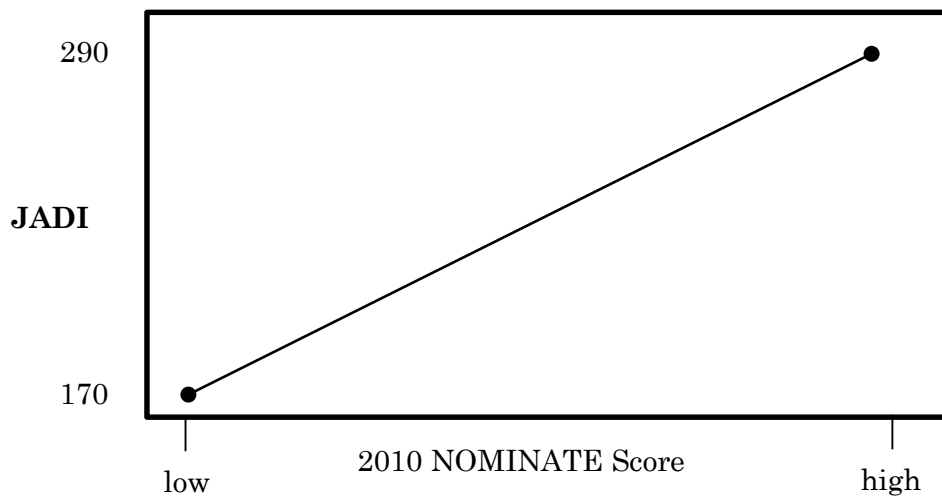


Figure 5 shows that 1980 NOMINATE scores, reflecting the degree of liberalism among the leaders of state government, are strongly negatively related to JADI scores. This effect is statistically and substantively significant. The average JADI score is about 160 points lower when the 1980 NOMINATE scores are high. Although the multivariate analyses are not shown here, these effects persist even if the other two variables, the percentage of African-Americans residing in a state's largest cities and whether or not the state is part of the South, are incorporated in the analyses. In other words, as we anticipated, higher levels of liberalism in 1980 are associated with state legal doctrines that make it easier for the tort plaintiff to have her case decided by the jury.

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283.  $F = 24.931, p < .001$ .

**Figure 6. JADI Score by 2010 NOMINATE Score**<sup>284</sup>

Surprisingly, however, the 2010 NOMINATE scores are *strongly positively* related to the JADI scores. In other words, states with more liberal government leaders in 2010 tend to follow tort doctrines that make it more difficult for plaintiffs to have their cases decided by juries. This effect is statistically and substantively significant. The more liberal half of the states (high 2010 NOMINATE indices) scored an average of more than 100 JADI points higher than did the more conservative half of the states (low 2010 NOMINATE indices). The switch from the association between liberal political leanings among state governments and easier jury access for plaintiffs in 1980 to the opposite result in 2010 persists even when multivariate analyses incorporate the effects resulting from both the percentage of African-American populations in the states' largest cities and whether or not the state is a part of the South.

The fact that there is a negative association in 1980 and a strong positive association in 2010 appears to be inconsistent and confusing. Although we cannot totally explain this result, we offer the following observations. For most of the categories of legal issues we evaluated, the strong movement to allow juries to

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284.  $F = 8.974, p = .004$ .

decide more cases was already ending by the 1980s. Hence, we believe that the NOMINATE scores from 1980, and the resulting negative association between political liberalism and JADI scores, is the more relevant comparison. In most instances, if a state had not moved toward a more jury-accessible position by the mid-1980s, it was unlikely to make the change by 2010. However, during the same time period, the political leanings of government leaders in many states shifted significantly, albeit in inconsistent directions.<sup>285</sup> Stare decisis prevents shifts in the common law from fluctuating as suddenly as the political leanings of government leaders.<sup>286</sup> Even with these factors in mind, the strongly positive association between political liberalism and higher JADI scores is not one we expected. It reinforces our conclusions that it is race and region of the country, not political ideology, that primarily affect a state's JADI.

### V. Conclusion

Even in the twenty-first century, supreme courts in a number of states with substantial percentages of African-Americans in their largest cities, particularly those in the South, continue to follow outmoded substantive doctrines of tort law that make it more difficult for personal injury plaintiffs to have their cases decided by juries. These tort doctrines are but the latest iteration of various means used by courts during the past 150 years to keep African-Americans from participating as jurors in personal injury cases. Most courts discarded these doctrines during the period extending from the mid-1960s through the mid-1980s, during the same era when many trial

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285. See Fording, *supra* note 282 (charting each state's NOMINATE score from 1960 to 2014). For example, the nominate scores became greater, representing a move toward a more liberal electorate, from 1980 to 2010, for Illinois (from 50.05 to 85.78) and Virginia (from 44.62 to 57.60), but Florida's NOMINATE scores become significantly less (71.07 to 16.82), representing a shift in a conservative direction.

286. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3–5 (1982) (describing “the incremental nature of common law adjudication”); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 25 (1921) (characterizing the judicial process as “gradual” and analogizing it to a “moving glacier. It goes on inch by inch. Its effects must be measured by decades and even centuries”).

judges for the first time encountered juries that included significant numbers of African-American jurors. However, in a minority of predominantly Southern states, appellate court judges and sometimes state legislators apparently feared that the Bronx jury, or more accurately the Birmingham jury or the Baltimore jury, would redistribute wealth or exact retaliation against businesses for past racial and economic grievances.

Twenty-first century state supreme court justices are not going to admit that they continue to follow doctrines in order to keep juries with substantial numbers of African-American or low-income jurors from deciding personal injury cases. Hence, we have been able to prove only strong correlations between a state's substantive law that makes it difficult for personal injury plaintiffs to have their cases decided by the jury and the factors of race and being a part of the South, not causation. Nonetheless, these strong correlations, particularly when coupled with the historical treatment of African-Americans, most egregiously in the South, suggest that these intertwined factors explain the continuing observance of doctrines discarded a generation ago by the overwhelming majority of other courts.<sup>287</sup>

Further, we obviously cannot ascertain whether the continuing application of outmoded doctrines that restrict plaintiffs' access to juries that include significant numbers of African-Americans is conscious and by design or instead represents manifestations of deeply imbedded but unconscious racial or class bias. Yet, as described at various points in this Article, business leaders, defense counsel, and even some judges and legislators have sometimes been quite transparent in identifying their concerns that urban juries with African-American and low-income jurors are likely to be unfairly generous to plaintiffs.

When courts and legislatures today refuse to reconsider anti-plaintiff doctrines such as contributory negligence, restrictive rules governing the admissibility of expert testimony,

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287. For example, the only four states that continue to follow the doctrine of contributory negligence as a total bar to recovery are states located in the traditional South where the population of its leading municipalities, with few exceptions, is more than 35% African-American. *Infra* Appendix B, tbl.3. Furthermore, of the eight Southern states in our study, six of them have the highest JADIs of all states included in the study. *Supra* tbl.1.

limitations on the liability of charitable institutions, and a wide variety of “limited-duty” and “no-duty” rules, they justify their decisions with any of several reasons that on their face have nothing to do with race. They typically cite *stare decisis*, the principle that judicial lawmaking under the common law begins with the presumption that courts will follow judicial precedents from an earlier era. However, the precedents that apply to the issues we have considered were often decided in the decades immediately following the Civil Rights Era when the judgment of appellate judges in the South and elsewhere was clouded by their apprehension surrounding the then-recent prospect of substantial numbers of African-Americans serving on juries for the first time.

On other occasions, judges resisting a change in law that would place them within the modern mainstream of tort law assert that overturning anti-jury doctrines would be bad for a state’s businesses and would place them at a competitive disadvantage with businesses in nearby states.<sup>288</sup> These adjoining states, of course, are usually other Southern states.<sup>289</sup> Perhaps most commonly, supreme courts contend that any significant change in the law should be enacted by the legislature.<sup>290</sup> Legislators, in turn, assert that these matters should be left to the judiciary.<sup>291</sup> However, the question remains why this “passing the buck” attitude in both the judicial and the legislative

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288. *Cf.* Brief of the American Tort Reform Ass’n, et al. as Amici Curiae Supporting Respondents at 14, *Coleman v. Soccer Ass’n of Columbia*, 69 A.3d 1149 (Md. 2013) (Sept. Term, 2012, No. 9), <http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Coleman%20v.%20Soccer%20Association%20of%20Columbia%2C%20et%20al.%20%28NCLC%20Amicus%20Brief%29.pdf> (arguing that “the adoption of comparative fault would hurt the regional competitiveness of Maryland businesses . . . since the District of Columbia, Virginia, and North Carolina all apply the contributory negligence doctrine”).

289. *Id.*

290. *See, e.g.*, *Golden v. McCurry*, 392 So. 2d 815, 817 (Ala. 1980) (holding that “this Court . . . should, as a matter of policy, leave any change of the doctrine of contributory negligence to the legislature”); *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 623 (Va. 1986) (refusing to adopt dramshop liability and explaining, “we believe that a decision . . . to abrogate such a fundamental rule . . . is the function of the legislative . . . branch of government”).

291. *See* Gifford & Robinette, *supra* note 89, at 718 (reporting that Maryland legislators who refused to legislatively abrogate the doctrine of contributory negligence stated that “this is a matter for the courts to decide”).



branches is so much stronger in some—disproportionately Southern—states than in others.

What are the normative implications of our analysis for state supreme courts, particularly those in the South? Courts in states that are among the discrete minority that declined to throw out antiquated anti-jury substantive tort doctrines between the mid-1960s and the mid-1980s should acknowledge that these precedents are tainted by their predecessors' efforts to keep tort cases away from juries with substantial numbers of African-Americans. In a recent and provocative article, Professor Barzun argues that placing a past judicial decision in its historical context "is a legitimate . . . means of evaluating a decision's authority as a matter of precedent."<sup>292</sup> He further contends that it is proper for courts to "explain away whole lines of . . . past doctrine as a product of social, political, or economic forces."<sup>293</sup>

Considering the racially biased roots of the perpetuation of doctrines that keep tort victims from the jury would not be unprecedented. For example, when the Supreme Court declared a Chicago anti-loitering statute unconstitutional in 1999, it rejected the City's argument that the fact that such "ordinances have long existed in this country" implied that they were constitutional.<sup>294</sup> The Court turned the City's argument on its head and noted that "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery" and "had especially harmful consequences on African-American women and children."<sup>295</sup> Similarly, in *Mitchell v. Helms*,<sup>296</sup> the Court rejected an Establishment Clause challenge to the expenditure of federal funds for books and other educational supplies for schools, including religious schools. Justice Thomas, writing for the Court, explicitly "disavowe[d]" the "shameful pedigree" of the Court's past practice of considering, in its constitutional analysis, whether federal funds had aided schools that were "sectarian,"

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292. Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1631 (2013).

293. *Id.* at 1680.

294. *See* *Chicago v. Morales*, 527 U.S. 41, 59 (1999) (discussing further the vagueness of the ordinance).

295. *Id.* at 54 n.20.

296. 530 U.S. 793 (2000).

noting that the use of this term “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”<sup>297</sup>

So it is that the tort doctrines described in this Article that impede the plaintiff’s access to the jury are code for keeping tort cases from African-American juries. Past judicial decisions that followed these antiquated tort doctrines, infused with the racial biases of a past era, should not be entitled to the deference generally accorded precedents. The common law preserves the wisdom of the past.<sup>298</sup> It should not, however, perpetuate the sins of the Jim Crow era.

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297. *Id.* at 828.

298. *See, e.g.*, Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 183 (1985) (characterizing the common law as “the collective and collected wisdom amassed over decades[] of an appellate bench”).

*Appendix*

In this Appendix, we calculate the JADI for each of the seventeen states in our study.<sup>299</sup> We assign a score to each state on each issue ranging from 5, representing the greatest impact in denying access to juries, to 0, little or no impact in denying access to juries. When a state's law represents an intermediate position or is ambiguous, we exercised our judgment in assessing the anti-jury impact. Our guidelines for assessing the anti-jury impact of a state's choice on the five issues follow.

*A. The Choice Between Contributory Negligence and Comparative Fault*<sup>300</sup>

Anti-jury value assigned to contributory negligence states:	5
Anti-jury value assigned to modified comparative fault states:	1
Anti-jury value assigned to pure comparative fault states:	0

*B. Limited-Duty Rules in Premises Liability Cases*

The 5 possible points were allocated as follows:

- (1) States that continue to recognize a difference between the standard of care owed to licensees and invitees were allocated 3 points.<sup>301</sup> States that have abolished the distinction were allocated 0 points.<sup>302</sup>

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299. Alabama, Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, South Carolina, Texas, Virginia, and Washington.

300. *Compare, e.g.*, ALA. R. CIV. P. 8(e) (noting that contributory negligence is an affirmative defense barring a plaintiff from recovery), *with* KY. REV. STAT. ANN. § 411.182 (West 2015) (adopting pure comparative fault where a plaintiff's recovery is limited only by percentage of fault).

301. *See, e.g.*, McMullan v. Butler, 346 So. 2d 950, 951 (Ala. 1977) (refusing to abolish distinction between standard of care owed to invitees and to licensees).

302. *See, e.g.*, 740 ILL. COMP. STAT. 130/2 (2014) (abolishing the distinction between the duty of care owed to invitees and to licensees).

(2) States retaining the “landlord out of possession” defense or its functional equivalent were awarded 1 point.<sup>303</sup> States that have abrogated the doctrine were allocated 0 points.<sup>304</sup>

(3) States recognizing the “open and obvious danger” exception to liability as a matter of law were awarded 1 point.<sup>305</sup> States without the doctrine were allocated 0 points.<sup>306</sup>

(4) In some instances, states follow an intermediate position or a hybrid position on any of these issues. When a state follows an intermediate position on either the “landlord out of possession” issue (paragraph 2) or the “open and obvious danger” issue (paragraph 3), we assigned a value of 0.5 points.

### *C. Other No-Duty and Limited-Duty Doctrines*

No-duty and limited-duty doctrines arise in a variety of contexts that are fact-specific and vary from jurisdiction to jurisdiction.<sup>307</sup> To achieve some degree of consistency, we selected three examples of no-duty rules on which most state supreme courts have taken a position:

(1) *Dramshop Liability*.<sup>308</sup> We allocated 2 points to states that do not recognize dramshop liability. If a state recognizes dramshop liability but only in tightly constricted circumstances, we allocated 1 point. If a state recognizes a

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303. See, e.g., *Frobig v. Gordon*, 881 P.2d 226, 228 (Wash. 1994) (“[T]he general rule is that a landlord is not responsible . . . for conditions which develop . . . after possession has been transferred.”).

304. See RESTATEMENT (SECOND) OF TORTS § 357 (AM. LAW INST. 1965) (“A lessor of land is subject to liability for physical harm caused to his lessee and others . . . by a condition of disrepair . . .”).

305. See, e.g., *Lorinovich v. K Mart Corp.*, 516 S.E.2d 643, 646 (N.C. Ct. App. 1999) (“When a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to the lawful visitor, notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability.”).

306. See, e.g., *Gottlieb v. Andrus*, 104 S.E.2d 743, 746 (Va. 1958) (holding that land possessor is not liable for open and obvious hazards).

307. See Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 272 (2006) (describing an “incipient trend . . . characterized by a proliferation of highly particular determinations of ‘no duty’”).

308. See, e.g., ALA. CODE § 6-5-71(a) (2015) (providing a cause of action for any “person who shall be injured” against “any person who shall, by selling, giving or otherwise disposing of to another . . . any liquors or beverages”).

more typical and expansive level of dramshop liability, we awarded 0 points.

(2) *Liability of Mental Health Provider to Third Party*.<sup>309</sup> If a state does not recognize a duty of care owed to a third party harmed by a patient of a mental health provider, we allocated up to 1.5 points. We awarded a state either 0.5 or 1.0 points if liability is possible, but only in circumstances significantly more restricted than those articulated in *Tarasoff v. Regents of the University of California*.<sup>310</sup> If the state recognizes a more typical standard for imposing liability, the state was allocated 0 points.

(3) *Liability of the State for Harm Inflicted by Probationer or Parolee*.<sup>311</sup> If a state does not recognize a duty of care owed by the state to a third party harmed by a parolee or probationer, the state was allocated up to 1.5 points. If the potential for liability is present, but significantly more restricted than in other states recognizing such liability, the state was awarded either 1.0 or 0.5 points. If the state recognizes the more typical standard for liability for the state, the state was allocated 0 points.

We allocate fewer points for the mental health provider and the parole/probation subcategories than for dramshop liability because the holdings of state courts on the first two issues often overlap and mirror each other. For each state, the point totals for paragraphs 1–3 above are summed to determine a state’s jury access denial points on the issue of “Other No Duty or Limited Duty Liability Rules.”

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309. See MICH. COMP. LAWS § 330.1946 (2015) (establishing a duty on the part of a mental health professional whose patient makes a threat “against a reasonably identifiable third person” and “has the apparent intent and ability to carry out that threat in the foreseeable future”).

310. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976) (“When a therapist determines . . . that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.”).

311. See, e.g., *Taggart v. State*, 822 P.2d 243, 257 (Wash. 1992) (“[P]arole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees’ dangerous propensities.”).

*D. Standards for Admissibility of Expert Testimony*<sup>312</sup>

We assigned each state a value of 0 to 5. A value of 5 represents the most restrictive tests for the admission of expert scientific testimony—usually states following *Daubert v. Merrell Dow Pharms., Inc.*<sup>313</sup> A value of 0 represents the least restrictive tests—usually states following *Frye v. United States*.<sup>314</sup>

*E. Limitations on the Liability of Charitable Institutions*<sup>315</sup>

A state is assigned a value of 0 if it has entirely abrogated the doctrine of charitable immunity. The more limitations a state imposes on the liability of charitable institutions, the higher the score allocated, with a maximum score of 5.

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312. Compare, e.g., *Reed v. State*, 391 A.2d 364, 372 (Md. 1978) (following *Frye*), with *State v. Bernstein*, 349 P.3d 200, 202–04 (Ariz. 2015) (applying amended Arizona Rule of Evidence 702 and the *Daubert* standard it incorporates).

313. 509 U.S. 579 (1993).

314. 293 F. 1013 (D.C. Cir. 1923).

315. See, e.g., MD. CTS. & JUD. PROC. § 5-632 (West 2015) (providing that a charitable hospital or related institution is not liable beyond the excess of its liability insurance policy as long it is insured for at least \$100,000).

Appendix A: Table 2. Assessment of Jury Denial Indices

States	Contributory/ Comparative/ Fault		Premises				No-Duty Rules				Charitable Immunity	Expert Testimony	Jury Access Denial Indices (Total weighted scores)
	Traditional or General	Landlord out-of- possession	Open and obvious hazards	Total	Dramshop liability	Parole and probation liability	Therapist liability	Total					
<i>Alabama</i> weighted	5 <sup>317</sup> 177.10	1 <sup>319</sup> 1 <sup>320</sup>	3 <sup>318</sup> 62.50	5	0 <sup>321</sup> 0 <sup>322</sup>	0 <sup>323</sup>	0	3 <sup>324</sup> 33.75	0	5 <sup>325</sup> 104.15	378		
<i>Arizona</i> weighted	0 <sup>326</sup> 0	1 <sup>328</sup> 0 <sup>329</sup>	3 <sup>327</sup> 50	4	0.5 <sup>330</sup> 0.5 <sup>331</sup>	0 <sup>332</sup>	1	0 <sup>333</sup> 0	20.83	5 <sup>334</sup> 104.15	175		
<i>California</i> weighted	0 <sup>335</sup> 0	0 <sup>337</sup> 0 <sup>338</sup>	0 <sup>336</sup> 0	0	1 <sup>339</sup> 1.5 <sup>340</sup>	0 <sup>341</sup>	2.5	0 <sup>342</sup> 0	52.08	0 <sup>343</sup> 0	52		
<i>Florida</i> weighted	0 <sup>344</sup> 0	0 <sup>346</sup> 0 <sup>347</sup>	0 <sup>345</sup> 0	0	1 <sup>348</sup> 1.5 <sup>349</sup>	1.5 <sup>350</sup>	4	0 <sup>351</sup> 0	83.32	0 <sup>352</sup> 0	83		
<i>Illinois</i> weighted	1 <sup>353</sup> 35.42	1 <sup>355</sup> 1 <sup>356</sup>	0 <sup>354</sup> 25	2	0 <sup>357</sup> 0 <sup>358</sup>	1 <sup>359</sup>	1	0 <sup>360</sup> 0	20.83	0 <sup>361</sup> 0	81		
<i>Indiana</i> weighted	1 <sup>362</sup> 35.42	1 <sup>364</sup> 0 <sup>365</sup>	3 <sup>363</sup> 50	4	0 <sup>366</sup> 1.5 <sup>367</sup>	0 <sup>368</sup>	1.5	0 <sup>369</sup> 0	31.25	5 <sup>370</sup> 104.15	221		
<i>Kansas</i> weighted	1 <sup>371</sup> 35.42	1 <sup>373</sup> 0.5 <sup>374</sup>	0 <sup>372</sup> 18.75	1.5	2 <sup>375</sup> 1.5 <sup>376</sup>	0.5 <sup>377</sup>	4	0 <sup>378</sup> 0	83.32	0 <sup>379</sup> 0	137		
<i>Kentucky</i> weighted	0 <sup>380</sup> 0	1 <sup>382</sup> 0 <sup>383</sup>	1.5 <sup>381</sup> 31.25	2.5	0 <sup>384</sup> 1.5 <sup>385</sup>	0 <sup>386</sup>	1.5	0 <sup>387</sup> 0	31.25	5 <sup>388</sup> 104.15	167		

Appendix A: Table 2. Assessment of Jury Denial Indices

States	Contributory/ Comparative Fault	Premises				No-Duty Rules				Charitable Immunity	Expert Testimony	Jury Access Denial Indices (Total weighted scores)
		Traditional or General	Landlord out-of- possession	Open and obvious hazards	Total	Dramshop liability	Parole and probation liability	Therapist liability	Total			
<i>Maryland</i> weighted	5 <sup>389</sup> 177.10	3 <sup>390</sup>	1 <sup>391</sup>	1 <sup>392</sup>	5	2 <sup>393</sup>	1.5 <sup>394</sup>	1 <sup>395</sup>	4.5	4 <sup>396</sup> 45.00	0 <sup>397</sup> 0	378
<i>Massachusetts</i> weighted	1 <sup>398</sup> 35.42	0 <sup>399</sup>	0 <sup>400</sup>	0 <sup>401</sup>	0	0 <sup>402</sup>	1.0 <sup>403</sup>	0.5 <sup>404</sup>	1.5	5 <sup>405</sup> 56.25	5 <sup>406</sup> 104.15	227
<i>Michigan</i> weighted	0.5 <sup>407</sup> 17.71	3 <sup>408</sup>	0 <sup>409</sup>	0 <sup>410</sup>	3	0 <sup>411</sup>	1.5 <sup>412</sup>	0 <sup>413</sup>	1.5	0 <sup>414</sup> 0	5 <sup>415</sup> 104.15	191
<i>New Jersey</i> weighted	1 <sup>416</sup> 35.42	0.5 <sup>417</sup>	0 <sup>418</sup>	1 <sup>419</sup>	1.5	0 <sup>420</sup>	1.5 <sup>421</sup>	0 <sup>422</sup>	1.5	4 <sup>423</sup> 45.00	5 <sup>424</sup> 104.15	235
<i>North Carolina</i> weighted	5 <sup>425</sup> 177.10	0 <sup>426</sup>	1 <sup>427</sup>	0 <sup>428</sup>	1	0 <sup>429</sup>	1 <sup>430</sup>	1.5 <sup>431</sup>	2.5	0 <sup>432</sup> 0	4.5 <sup>433</sup> 93.73	335
<i>South Carolina</i> weighted	1 <sup>434</sup> 35.42	3 <sup>435</sup>	1 <sup>436</sup>	0 <sup>437</sup>	4	0 <sup>438</sup>	1.5 <sup>439</sup>	0 <sup>440</sup>	1.5	4 <sup>441</sup> 45.00	5 <sup>442</sup> 104.15	266
<i>Texas</i> weighted	1 <sup>443</sup> 35.42	3 <sup>444</sup>	1 <sup>445</sup>	0 <sup>446</sup>	4	0 <sup>447</sup>	1.5 <sup>448</sup>	0 <sup>449</sup>	1.5	4 <sup>450</sup> 45.00	5 <sup>451</sup> 104.15	266
<i>Virginia</i> weighted	5 <sup>452</sup> 177.10	3 <sup>453</sup>	1 <sup>454</sup>	1 <sup>455</sup>	5	2 <sup>456</sup>	1.5 <sup>457</sup>	1.5 <sup>458</sup>	5	4 <sup>459</sup> 45.00	5 <sup>460</sup> 104.15	493
<i>Washington</i> weighted	0 <sup>461</sup> 0	3 <sup>462</sup>	1 <sup>463</sup>	0 <sup>464</sup>	4	0 <sup>465</sup>	0 <sup>466</sup>	0 <sup>467</sup>	0	0 <sup>468</sup> 0	0 <sup>469</sup> 0	50



Appendix B: Table 3. Values of Key Study Variables

State	Municipality	% African-American population <sup>470</sup>	Gini coefficient <sup>471</sup>	Part of the South?	1980 NOMINATE <sup>472</sup>	2010 NOMINATE <sup>473</sup>	JADI <sup>474</sup>
Alabama	Birmingham	73%	.49	Yes	60.95	37.04	378
	Mobile	51%	.47				
	Montgomery	57%	.47				
Arizona	Phoenix	7%	.46	No	36.96	0	175
	Tucson	5%	.47				
California	Los Angeles	10%	.50	No	93.79	47.73	52
	Oakland	28%	.46				
	San Diego	7%	.46				
	San Francisco	6%	.51				
	San Jose	3%	.45				
Florida	Jacksonville	31%	.46	Yes	68.80	16.82	83
	Miami	19%	.51				
	Orlando	28%	.47				
	St. Petersburg	24%	.47				
	Tampa	26%	.47				
Illinois	Chicago	33%	.49	No	47.22	83.23	81
Indiana	Indianapolis	28%	.47	No	31.23	20.54	221

Appendix B: Table 3. Values of Key Study Variables

State	Municipality	% African-American population <sup>470</sup>	Gini coefficient <sup>471</sup>	Part of the South?	1980 NOMINATE <sup>472</sup>	2010 NOMINATE <sup>473</sup>	JADI <sup>474</sup>
Kansas	Kansas City	12%	.44	No	47.36	42.57	137
	Topeka	11%	.44				
	Wichita	12%	.44				
Kentucky	Lexington	15%	.49	Yes	71.40	64.44	167
	Louisville	23%	.48				
Maryland	Baltimore	64%	.50	Yes	82.51	80.69	378
Massachusetts	Boston	24%	.52	No	87.74	91.03	227
Michigan	Detroit	83%	.48	No	62.82	70.32	191
New Jersey	Camden	48%	.45	No	82.40	49.00	235
	Elizabeth	21%	.48				
	Newark	52%	.53				
	Paterson	32%	.47				
	Trenton	52%	.48				
North Carolina	Charlotte	35%	.49	Yes	66.32	72.96	335
	Durham	41%	.46				
	Greensboro	41%	.47				
	Raleigh	24%	.44				
	Winston-Salem	35%	.48				

Appendix B: Table 3. Values of Key Study Variables

State	Municipality	% African-American population <sup>470</sup>	Gini coefficient <sup>471</sup>	Part of the South?	1980 NOMINATE <sup>472</sup>	2010 NOMINATE <sup>473</sup>	JADI <sup>474</sup>																																																								
South Carolina	Charleston	73%	.49	Yes	71.16	9.32	266																																																								
	Columbia	42%	.49					Texas	Dallas	25%	.46	Yes	33.23	13.44	266	Fort Worth	19%	.46	Houston	24%	.49	San Antonio	7%	.46					Virginia	Arlington	9%	.43	Yes	41.22	55.22	493	Hampton	50%	.41	Newport News	41%	.43	Norfolk	43%	.47	Richmond	51%	.54	Virginia Beach	20%	.41	Washington				No	79.67	81.73	50	Seattle	8%	.46	Spokane
Texas	Dallas	25%	.46	Yes	33.23	13.44	266																																																								
	Fort Worth	19%	.46																																																												
	Houston	24%	.49																																																												
	San Antonio	7%	.46																																																												
									Virginia	Arlington	9%	.43	Yes	41.22	55.22	493	Hampton	50%	.41	Newport News	41%	.43	Norfolk	43%	.47	Richmond	51%	.54		Virginia Beach	20%	.41					Washington				No	79.67	81.73	50	Seattle	8%	.46	Spokane	2%	.44	Tacoma	11%	.41										
Virginia	Arlington	9%	.43	Yes	41.22	55.22	493																																																								
	Hampton	50%	.41																																																												
	Newport News	41%	.43																																																												
	Norfolk	43%	.47																																																												
	Richmond	51%	.54																																																												
	Virginia Beach	20%	.41																																																												
Washington				No	79.67	81.73	50																																																								
	Seattle	8%	.46																																																												
	Spokane	2%	.44																																																												
	Tacoma	11%	.41																																																												

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317. See *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993) (“[T]he majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years.”); ALA. R. CIV. P. 8(c) (noting that contributory negligence is an affirmative defense).

318. See *McMullan v. Butler*, 346 So. 2d 950, 951 (Ala. 1977) (refusing to abolish the distinction between the standard of care owed to invitees and to licensees).

319. See *Allen v. Genry*, 97 So. 2d 828, 831 (Ala. Ct. App. 1957) (recognizing landlord out-of-possession doctrine with traditional exceptions, such as knowledge and concealment).

320. See *Tice v. Tice*, 361 So. 2d 1051, 1052 (Ala. 1978) (holding that the premises owner “has no duty to warn . . . of open and obvious defects . . . which the invitee is aware of, or should be aware of, in the exercise of reasonable care”).

321. See ALA. CODE § 6-5-71(a) (LexisNexis 2015) (providing for dramshop liability).

322. See *Donahoo v. State*, 479 So. 2d 1188, 1190–91 (Ala. 1985) (stating that liability would exist if the plaintiff is able to “prove that the officials knew or should have known that an aggressor might be a danger to a . . . readily identifiable victim or group of victims” (citations omitted)), *overruled in part by* *Ryan v. Hayes*, 831 So. 2d 21, 30 (Ala. 2002) (narrowing *Donahoo* rule to parole officials rather than all state officials).

323. See *Morton v. Prescott*, 564 So. 2d 913, 916 (Ala. 1990) (acknowledging the possibility of liability only where there is a “specific threat of harm to the victim or to any identifiable group of which the victim might have been a member”).

324. See *Autry v. Roebuck Park Baptist Church*, 229 So. 2d 469, 470 (Ala. 1969) (declining to dismiss action against church on charitable immunity grounds); *Ala. Baptist Hosp. Bd. v. Carter*, 145 So. 443, 445 (Ala. 1932) (declining to apply charitable immunity to a charitable hospital for a claim by a paying patient); see also ALLY W. HOWELL, 1 ALA. PERS. INJ. & TORTS § 3:20 (2014) (“In Alabama, however, the judicially created doctrine of charitable immunity is basically dead or at least in great decline.”).

325. See ALA. CODE § 12-21-160 ed.’s note (LexisNexis 2015) (adopting the *Daubert* standard with exceptions).

326. See ARIZ. REV. STAT. § 12-2505 (LexisNexis 2015) (providing for comparative fault).

327. See *Nicoletti v. Westcor, Inc.*, 639 P.2d 330, 332 (Ariz. 1982) (“The particular duty owed to the entrant on the land is defined by the entrant’s status.”).

328. See ARIZ. REV. STAT. § 33-1325 (removing landlord liability to tenant if the property is sold and the tenant is notified of the sale).

329. See *Tribe v. Shell Oil Co.*, 652 P.2d 1040, 1042 (Ariz. 1982) (rejecting the open-and-obvious hazard doctrine).

330. See *Ontiveros v. Borak*, 667 P.2d 200, 213 (Ariz. 1983) (noting that “the common law doctrine of tavern owner nonliability is abolished in Arizona”). *But*

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*see* Schwab v. Matley, 793 P.2d 1088, 1091–92 (Ariz. 1990) (stating that the jury may consider defenses of contributory negligence and assumption of risk when the victim was present when the driver consumed alcohol).

331. *See* Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1235 (Ariz. 1977) (recognizing liability only if the parole board is “grossly negligent or reckless”).

332. *See* Hamman v. Cnty. of Maricopa, 775 P.2d 1122, 1128 (Ariz. 1989) (recognizing duty of psychiatrists “to protect the foreseeable victim”).

333. *See* Ray v. Tucson Med. Ctr., 230 P.2d 220, 230 (Ariz. 1951) (“[C]haritable institutions are liable for the torts of their servants from which injury proximately results to a third person, whether stranger or patient and whether the patient is a paying or nonpaying patient.”).

334. *See* State v. Bernstein, 349 P.3d 200, 202–04 (Ariz. 2015) (applying amended Arizona Rule of Evidence 702 and the *Daubert* standard it incorporates).

335. *See* Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975) (adopting pure comparative fault).

336. *See* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (overturning traditional classification system and imposing general standard of reasonable care), *superseded in part by statute* CAL. CIV. CODE § 847 (West 2015), *as recognized in* Calvillo-Silva v. Home Grocery, 968 P.2d 65, 71–72 (Cal. 1998) (recognizing limited liability for possessors of land against an individual committing a felony on the land).

337. *See* Lopez v. Superior Court, 52 Cal. Rptr. 2d 821, 827 (Cal. Ct. App. 1996) (“[A] lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons.”).

338. *See* Martinez v. Chippewa Enters., Inc., 18 Cal. Rptr. 3d 152, 155 (Cal. Ct. App. 2004) (“[T]he obviousness of a condition does not necessarily excuse the potential duty of a landowner.”).

339. *See* CAL. CIV. CODE § 1714 (“[T]he furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication.”); CAL. BUS. & PROF. CODE § 25602.1 (West 2015) (eliminating causes of action for dramshop liability except if licensed seller or social host serves alcoholic beverages “to a person whom he or she knows, or should have known, to be under 21 years of age”), *abrogating* Vesely v. Sager, 486 P.2d 151 (Cal. 1971).

340. *See* CAL. GOV'T CODE § 845.8 (West 2015) (providing that neither the government nor a public employee is liable for injury caused by parolee); Whitcombe v. Cnty. of Yolo, 141 Cal. Rptr. 189, 200 (Cal. Ct. App. 1977) (noting that public policy supports rejecting public-employee liability for injury caused by parolee).

341. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976) (concluding that government-employed therapists must act “pursuant to the standards of their profession” or face liability for duty breaches); CAL. CIV. CODE § 43.92 (providing for liability where “the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims”).

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342. See *Malloy v. Fong*, 232 P.2d 241, 247 (Cal. 1951) (“[C]haritable corporations are liable . . . whether or not a particular plaintiff has paid for the charity received.”).

343. See *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) (following *Frye*).

344. See FLA. STAT. § 768.81(2) (2015) (codifying, with modifications, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) and providing for pure comparative fault).

345. See *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973) (eliminating distinction between duty of care owed to invitees and “licensees by invitation” and imposing a general negligence standard).

346. See *Mansur v. Eubanks*, 401 So. 2d 1328, 1330 (Fla. 1981) (“[The landlord] has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence.”).

347. See *Aaron v. Palatka Mall, LLC*, 908 So. 2d 574, 578 (Fla. Dist. Ct. App. 2005) (noting that liability depends on “whether . . . the owner or possessor should have anticipated that the dangerous condition would cause injury despite the fact it was open and obvious”).

348. See FLA. STAT. § 768.125 (2015) (establishing liability only where patron is a minor or “a person habitually addicted to . . . the use of . . . alcoholic beverages”).

349. See *Berry v. State*, 400 So. 2d 80, 85–86 (Fla. Dist. Ct. App. 1981) (concluding that the state is not liable for negligent parole decisions under the state torts claims act).

350. See *Boynton v. Burglass*, 590 So. 2d 446, 451 (Fla. Dist. Ct. App. 1991) (“[I]t would be fundamentally unfair to charge a psychiatrist with the duty to warn.”).

351. See *Nicholson v. Good Samaritan Hosp.*, 199 So. 344, 350 (Fla. 1940) (abrogating charitable immunity).

352. See *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985) (continuing to apply the *Frye* test).

353. See 735 ILL. COMP. STAT. 5/2-1116 (c) (2014) (adopting, in 1984, modified comparative fault).

354. See 740 ILL. COMP. STAT. 130/2 (abolishing, in 1983, the distinction between duty of care owed to invitee and to licensee).

355. See *Howle v. Aqua Ill., Inc.*, 978 N.E.2d 1132, 1143 (Ill. App. Ct. 2012) (acknowledging the landlord out-of-possession doctrine with exceptions).

356. See *Bucheleres v. Chi. Park Dist.*, 665 N.E.2d 826, 831–32 (Ill. 1996) (following open-and-obvious hazard doctrine).

357. See 235 ILL. COMP. STAT. 5/6-21 (providing for dramshop liability of those licensed to sell “alcoholic liquors”).

358. See *Nat’l Bank of Bloomington v. State*, 35 Ill. Ct. Cl. 37, 41 (1982) (finding state liable to estate of victim murdered by parolee through negligence of parole officer).

359. See *Eckhardt v. Kirts*, 534 N.E.2d 1339, 1344 (Ill. App. Ct. 1989) (requiring for liability that “[f]irst, the patient must make specific threat(s) of violence; second, the threat(s) must be directed at a specific and identified

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victim; and third, a direct physician-patient relationship between the doctor and the plaintiff or a special relationship between the patient and the plaintiff”).

360. See *Darling v. Charleston Cmty. Mem’l Hosp.*, 211 N.E.2d 253, 260 (Ill. 1965) (abrogating charitable immunity).

361. See *People v. Miller*, 670 N.E.2d 721, 731 (Ill. 1996) (applying *Frye*), *abrogated by In re Commitment of Simons*, 821 N.E.2d 1184, 1189–90 (Ill. 2004) (requiring de novo review of a trial court’s *Frye* analysis).

362. See IND. CODE ANN. § 34-51-2-6 (adopting modified comparative fault).

363. See *Barbre v. Indianapolis Water Co.*, 400 N.E.2d 1142, 1145 (Ind. Ct. App. 1980) (recognizing traditional distinctions of invitee, licensee, or trespasser).

364. See *Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993) (recognizing “caveat lessee” doctrine with traditional exceptions).

365. See *Smith v. Baxter*, 796 N.E.2d 242, 246 (Ind. 2003) (allowing the jury to consider liability despite open and obvious nature of hazard).

366. See IND. CODE ANN. § 7.1-5-10-15.5 (West 2015) (requiring, for liability, “actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated”).

367. *Cf. Klobuchar v. Purdue Univ.*, 553 N.E.2d 169, 171 (Ind. Ct. App. 1990) (stating that “civil liability of a governmental unit may not be predicated upon a duty owed to the public generally” (quoting *State v. Flanigan*, 489 N.E.2d 1216 (Ind. Ct. App. 1986))).

368. See IND. CODE ANN. § 34-30-16-1 (West 2015) (providing for liability when a mental health patient communicates an “actual threat of physical violence . . . against a reasonably identifiable victim or victims, or evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence” against others).

369. See *Harris v. YWCA*, 237 N.E.2d 242, 245 (Ind. 1968) (“[T]he duty of this Court is to repudiate the doctrine of charitable immunity and . . . it is hereby abolished by this Court.”).

370. See *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995) (concluding that *Daubert* is not binding, but helpful in applying Indiana Rule of Evidence 702(b)).

371. See KAN. STAT. ANN. § 60-258a(a) (2014) (adopting modified comparative fault under which plaintiff cannot recover if her degree of fault is equal to or exceeds that of the combined defendants).

372. See *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994) (“[T]he duty owed by an occupier of land to licensees shall no longer be dependent upon the status of the entrant on the land.”).

373. See *Colombel v. Milan*, 952 P.2d 941, 943 (Kan. Ct. App. 1998) (“[W]hen a landlord is not in possession of the leased property, he or she has a very limited duty to the tenant or to third persons entering the land for defective conditions existing thereon.”).

374. See *Miller v. Zep Mfg. Co.*, 815 P.2d 506, 514 (Kan. 1991) (acknowledging a general open and obvious rule, but providing for an exception “if there is reason to expect an invitee will be distracted”).

375. See *Ling v. Jan's Liquors*, 703 P.2d 731, 735–36, 739 (Kan. 1985) (noting that there is no dramshop act in Kansas and concluding that there is no dramshop liability on grounds of both no duty and proximate cause).

376. See *Beck v. Kan. Adult Auth.*, 735 P.2d 222, 238 (Kan. 1987) (explaining that parole and probation decisions are discretionary acts immune from liability under the state tort claims act).

377. Compare *Boulanger v. Pol*, 900 P.2d 823, 836 (Kan. 1995) (holding that there was no duty of care owed to victim harmed by “alleged negligent release of a voluntary patient . . . [and] no duty to warn”), with *Durflinger v. Artiles*, 673 P.2d 86, 99–100 (Kan. 1983) (recognizing claim for negligent release of an involuntarily committed dangerous patient “as distinguished from negligent failure to warn persons who might be injured by the patient as a result of the release”).

378. See *Noel v. Menninger Found.*, 267 P.2d 934, 943 (Kan. 1954) (holding that “charitable institutions are liable for the torts . . . to a third person, whether stranger or patient, and whether the patient is a paying or nonpaying patient”).

379. See *State v. Heath*, 957 P.2d 449, 464 (Kan. 1998) (following *Frye*).

380. See KY. REV. STAT. ANN. § 411.182 (West 2015) (adopting, in 1988, comparative fault); see also *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984) (replacing contributory negligence with pure comparative fault).

381. See *Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992)

The injured party's status as trespasser, licensee, or invitee, is an important factor in determining whether the possessor of land has exercised reasonable care, but such status is by no means the end of the inquiry. An enlightened legal system does not reason backward from labels, to decide whether a duty of reasonable care exists. It reasons forward from circumstances, using foreseeability, the gravity of the potential harm, and the possessor's right to control his property, to decide what is reasonable conduct in the circumstances and what is negligence.

382. See *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. Ct. App. 1979) (“The landlord need not exercise even ordinary care to furnish reasonably safe premises, and he is not generally liable for injuries caused by defects therein.”).

383. See *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 907 (Ky. 2013) (“[T]he existence of an open and obvious danger does not pertain to the existence of duty. . . . [A] land possessor's general duty of care is not eliminated because of the obviousness of the danger.”).

384. See KY. REV. STAT. ANN. § 413.241 (allowing liability only where patron is a minor or where “a reasonable person under the same or similar circumstances should know that the person served is already intoxicated”).

385. See *Moore v. Commonwealth*, 846 S.W.2d 715, 716–17 (Ky. 1992) (finding no liability because the state tort claims act does not waive immunity for regulatory acts that “have no equivalent in the private sector”).

386. See KY. REV. STAT. ANN. § 202A.400 (West 2015) (establishing liability where “the patient has communicated to the mental health professional an actual threat of physical violence against a clearly identified or reasonably



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identifiable victim, or . . . an actual threat of some specific violent act [even if no particular victim is identifiable]).

387. See *Mullikin v. Jewish Hosp. Ass'n of Louisville*, 348 S.W.2d 930, 935 (Ky. 1961) (abrogating charitable immunity and eliminating distinctions between paying and nonpaying patients).

388. See *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995) (adopting *Daubert* standard), *overruled in part on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).

389. See *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1150 (Md. 2013) (maintaining contributory negligence as a bar to recovery); *Harrison v. Montgomery Cty. Bd. of Educ.*, 456 A.2d 894, 898 (Md. 1983) (“[I]t [is] the well-Sestablished law of this State that a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant’s primary negligence.”).

390. See *Bramble v. Thompson*, 287 A.2d 265, 267 (Md. 1972) (“The liability of owners of real . . . property to an individual injured on their property is dependent on . . . whether he is an invitee, licensee, or trespasser.”).

391. See *Matthews v. Amberwood Assocs. Ltd.*, 719 A.2d 119, 124 (Md. 1998) (recognizing the landlord out-of-possession doctrine with traditional exceptions).

392. See *Tennant v. Shoppers Food Warehouse Md. Corp.*, 693 A.2d 370, 374 (Md. Ct. Spec. App. 1997) (“[T]he owner or occupier of land ordinarily has no duty to warn . . . of an open, obvious, and present danger.”).

393. See *Warr v. JMGM Grp., LLC*, 70 A.3d 347, 355 (Md. 2013) (rejecting dramshop liability by stating that tavern owners have no control over individuals in the absence of a special relationship and thus owe no duty to third persons).

394. See *Lamb v. Hopkins*, 492 A.2d 1297, 1299, 1306 (Md. 1985) (concluding that probation officers owed “no duty” to victim of probationer who repeatedly drove while intoxicated in violation of conditions of probation).

395. See MD. CODE ANN. CTS. & JUD. PROC. § 5-609(b) (West 2015) (establishing liability of “mental health provider . . . [who] knew of the patient’s propensity for violence” only when “the patient indicated to the mental health care provider . . . the patient’s intention to inflict imminent physical injury upon a specified victim or group of victims”).

396. See *id.* § 5-632 (adopted 1990) (providing that a charitable hospital or related institution is not liable beyond the excess of its liability insurance policy as long it is insured for at least \$100,000); *Howard v. Bishop Byrne Council Home, Inc.*, 238 A.2d 863, 868 (Md. 1967) (declining to overturn doctrine of charitable immunity).

397. See *Reed v. State*, 391 A.2d 364, 372 (Md. 1978) (following *Frye*).

398. See MASS. GEN. LAWS ch. 231, § 85 (2015) (adopted 1969) (adopting modified comparative fault where plaintiff cannot recover if her degree of fault exceeds that of the combined defendants).

399. See *Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973) (overturning “the common law distinction between licensees and invitees and . . . creat[ing] a . . . duty of reasonable care which the occupier owes to all lawful visitors”).

400. See *Young v. Garwacki*, 402 N.E.2d 1045, 1050–51 (Mass. 1980) (“[T]he landlord is liable in negligence for defects of which he has notice, even though the defect occurs on the rented premises.”).

401. See *Dos Santos v. Coleta*, 987 N.E.2d 1187, 1192 (Mass. 2013) (explaining that “[a] landowner . . . is not relieved from remedying an open and obvious danger where [the landowner] ‘can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger’” (alteration in original) (quoting *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 151 (Mass. 2010))).

402. See *Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920, 926 (Mass. 1982) (finding tavern liable for serving alcohol to an individual who subsequently struck “a highway traveler” with a vehicle); *Adamian v. Three Sons, Inc.*, 233 N.E.2d 18, 20 (Mass. 1968) (noting that a restaurant is liable for selling alcohol to intoxicated patron).

403. See MASS. GEN. LAWS ch. 258, § 10(i) (providing for no liability against parole or probation authorities under state torts claims act except for instances of gross negligence).

404. See *id.* ch. 123, § 36B (providing for liability against mental health professionals only under highly specific circumstances).

405. See *id.* ch. 231, § 85K (limiting liability of nonprofit organization for medical malpractice claims to \$100,000 and for other claims to \$20,000, provided that the tort occurs in the course of activities not “primarily commercial”).

406. See *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994) (adopting the *Daubert* standard).

407. See MICH. COMP. LAWS § 600.2959 (providing for pure comparative fault except that plaintiff cannot recover noneconomic damages if plaintiff’s degree of fault is greater than that of the other parties); *Placek v. City of Sterling Heights*, 275 N.W.2d 511, 520 (Mich. 1979) (adopting pure comparative negligence).

408. See *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 91–92 (Mich. 2000) (following traditional classification of land visitors).

409. See *Mobil Oil Corp. v. Thorn*, 258 N.W.2d 30, 33–34 (Mich. 1977) (overturning previous case law recognizing landlord-out-of-possession doctrine).

410. See *Riddle v. McLouth Steel Prods. Corp.*, 485 N.W.2d 676, 682 (Mich. 1992) (noting that the open and obvious nature of a hazard does not preclude land possessor’s duty, and the duty owed is up to the jury).

411. See MICH. COMP. LAWS § 436.1801(3) (providing for liability of licensee serving alcohol to a minor or visibly intoxicated person where “the unlawful sale is proven to be a proximate cause” of the injury or death).

412. See *Harrison v. Dir. of Dep’t of Corr.*, 487 N.W.2d 799, 806–07 (Mich. Ct. App. 1992) (finding no duty because no special relationship existed and concluding that the parole board is not liable under state tort claims act).

413. See MICH. COMP. LAWS § 330.1946 (2015) (establishing a duty on the part of a mental health professional whose patient makes a threat “against a reasonably identifiable third person” and “has the apparent intent and ability to carry out that threat in the foreseeable future”).

414. See *Parker v. Port Huron Hosp.*, 105 N.W.2d 1, 15 (Mich. 1960) (“[C]haritable, nonprofit hospital organization[s] should no longer be held immune from liability for injuries to patients caused by the negligence of its employees.”).

415. See MICH. R. EVID. 702 (explicitly incorporating the *Daubert* standard); see also *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 408 (Mich. 2004) (recognizing incorporation of the *Daubert* standard).

416. See N.J. STAT. ANN. § 2A:15-5.1 (West 2015) (abrogating contributory negligence as a bar to recovery and adopting modified comparative negligence).

417. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 51 cmt a, rptrs’ note (AM. LAW INST. 2012) (characterizing this approach as “hybrid”); see also *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1115 (N.J. 1993) (rejecting the traditional classification approach to liability). *But see* *Robinson v. Vivirito*, 86 A.3d 119, 124 (N.J. 2014) (stating that “the existence of a duty by a landowner to exercise reasonable care to third persons is generally governed by the status of the third person—guest, invitee, or trespasser”); *Clohesy v. Food Circus Supermarkets*, 694 A.2d 1017, 1027 (N.J. 1997) (stating that the status of the land visitor supports the court’s determination of the level of care owed by the defendant).

418. See *Geringer v. Hartz Mountain Dev. Corp.*, 908 A.2d 837, 845 (N.J. Super. Ct. App. Div. 2006) (finding landlord potentially liable for negligently designed stairway within leased premises, even though tenant had primary role in constructing stairway).

419. See *Siddons v. Cook*, 887 A.2d 689, 694 (N.J. Super. Ct. App. Div. 2005) (implying that there is no duty to warn if hazard is “open and obvious”); see also *Bussie v. Bloom Org.*, No. L-3593-03, 2007 WL 1425493, at \*3 (N.J. Super. Ct. App. Div. May 16, 2007) (stating that there is no liability where danger was open and obvious).

420. See N.J. STAT. ANN. § 2A:22A-5 (establishing dramshop liability).

421. See *Coppola v. State*, 424 A.2d 858, 859–60 (N.J. Super. Ct. App. Div. 1981) (applying N.J. STAT. ANN. § 59:5-2(a), which provides no liability for parole decisions).

422. See *McIntosh v. Milano*, 403 A.2d 500, 511–12 (N.J. Super. Ct. Law Div. 1979) (“[A] psychiatrist or therapist may have a duty . . . to protect an intended or potential victim of his patient when he determines, or should determine . . . that the patient is or may present a probability of danger to that person.”).

423. See N.J. STAT. ANN. § 2A:53A-7 (West 2015) (providing immunity for nonprofit organization against claims brought by beneficiaries); *id.* § 2A:53A-8 (limiting liability of nonprofit hospital corporation to beneficiary to \$250,000).

424. See *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733, 747–48 (N.J. 1991) (holding that “a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field”).

425. See *Corns v. Hall*, 435 S.E.2d 88, 90 (N.C. Ct. App. 1993) (“The doctrine of contributory negligence has been followed in this State since 1869. . . . Comparative fault is not the law of this State.”).

426. See *Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C. 1998) (“[T]his Court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors.”).

427. See *Boyer v. Agapion*, 264 S.E.2d 364, 367–68 (N.C. Ct. App. 1980) (adopting the Second Restatement position that a landlord is liable if he knows or “has reason to know” of a hazardous condition and “has reason to expect that the tenant will not discover the condition or realize the risk” (citing RESTATEMENT (SECOND) OF PROP. § 17.1 (AM. LAW INST. 1977))).

428. See *Lorinovich v. K Mart Corp.*, 516 S.E.2d 643, 646 (N.C. Ct. App. 1999) (“When a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to the lawful visitor, notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability.”).

429. See *Hall v. Toreros, II, Inc.*, 626 S.E.2d 861, 865 (N.C. Ct. App. 2006) (noting that violation of statute “can give rise to an action for negligence against the licensee . . . by a member of the public who has been injured by the intoxicated customer” (quoting *Hutchens v. Hankins*, 303 S.E.2d 584, 593 (N.C. Ct. App. 1983))) *aff’d*, 678 S.E.2d 656 (N.C. 2009); *Estate of Mullis v. Monroe Oil Co.*, 505 S.E.2d 131, 135 (N.C. 1998) (recognizing common law negligence claim against commercial vendor based upon sale of alcohol to underage individual); *Hart v. Ivey*, 420 S.E.2d 174, 178 (N.C. 1992) (recognizing common law negligence claim against social host based upon service of alcohol to intoxicated individual).

430. See *Humphries v. N.C. Dep’t of Corrs.*, 479 S.E.2d 27, 28 (N.C. Ct. App. 1996) (noting that no duty is owed by the Department of Corrections under public duty doctrine for actions of a probationer unless there is a special relationship or a special duty).

431. See *Gregory v. Kilbride*, 565 S.E.2d 685, 692 (N.C. Ct. App. 1992) (“North Carolina does not recognize a psychiatrist’s *duty to warn* third persons.”).

432. See N.C. GEN. STAT. § 1-539.9 (2014) (abolishing charitable immunity); *Rabon v. Rowan Mem. Hosp., Inc.*, 152 S.E.2d 485, 499 (N.C. 1967) (abrogating immunity in action against charitable hospital as hospitals are profit centered).

433. See *State v. Pennington*, 393 S.E.2d 847, 852–53 (N.C. 1990) (rejecting the *Frye* standard and substituting one based on indicia of reliability specified by court).

434. See *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991) (“[A] plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant.”).

435. See *Singleton v. Sherer*, 659 S.E.2d 196, 204 (S.C. Ct. App. 2008) (applying traditional classification of visitors to land).

436. See *Jackson v. Swordfish Invs., LLC*, 620 S.E.2d 54, 56 (S.C. 2005) (continuing to recognize “traditional rule” with exceptions for “common areas” and “affirmative action”).

437. See *Callander v. Charleston Doughnut Corp.*, 406 S.E.2d 361, 362 (S.C. 1991) (indicating that a land owner may owe a duty despite the open and obvious nature of the hazard).

438. See *Tobias v. Sports Club, Inc.*, 504 S.E.2d 318, 320 (S.C. 1998) (“[O]ur alcohol control statutes do not create a first party cause of action for an intoxicated adult patron, but . . . they do permit a third party action.”).

439. See *Rayfield v. S.C. Dep’t of Corrs.*, 374 S.E.2d 910, 916–17 (S.C. 1988) (finding that the public-duty rule precluded liability of Parole Board for actions of a parolee).

440. See *Bishop v. S.C. Dep’t of Mental Health*, 502 S.E.2d 78, 82 (S.C. 1998) (recognizing duty where “defendant [is] aware or should have been aware of the specific threat made by the patient to harm a specific person”).

441. See S.C. CODE ANN. § 33-56-180 (2014) (adopted in 1994) (limiting liability to amount recoverable under South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-120 (\$300,000)), *abrogating* *Fitzer v. Greater Greenville S.C. YMCA*, 282 S.E.2d 230, 232 (S.C. 1981) (“The doctrine of charitable immunity is abolished in its entirety.”).

442. See *State v. Council*, 515 S.E.2d 508, 517–18 (S.C. 1999) (declining to adopt the *Daubert* test, but recognizing that South Carolina Rule of Evidence 702 is very similar to the corresponding federal rule); *State v. Jones*, 259 S.E.2d 120, 124 (S.C. 1979) (identifying factors to be considered by trial court in determining admissibility).

443. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001, 33.003–.004 (West 2013) (providing for modified comparative fault where plaintiff is barred from recovery if “percentage of responsibility is greater than 50 percent”).

444. See *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 660 (Tex. 1999) (Enoch, J., concurring) (stating that the “traditional classification system . . . remains the law in Texas”).

445. See *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159, 160 (Tex. 1992) (retaining the landlord out-of-possession doctrine with exceptions).

446. See *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978) (expressly abolishing the no-duty concept in the case of open and obvious hazards).

447. See *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987) (“We hold an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know patron is intoxicated.”), *superseded by statute*, TEX. ALCO. BEV. CODE ANN. §§ 2.01–03 (West 2015) (recognizing liability when patron is “obviously intoxicated” and “present[s] a clear danger to himself and others”).

448. See *Harrison v. Tex. Bd. of Pardons & Paroles*, 895 S.W.2d 807, 809 (Tex. 1995) (finding no liability under Texas torts claims act).

449. See *Williams v. Sun Valley Hosp.*, 723 S.W.2d 783, 809 (Tex. App. 1987) (accepting *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), but finding no liability “[w]here there is no allegation of a threat or danger to a readily identifiable person”); *see also* *Kerrville State Hosp. v. Clark*, 900 S.W.2d 425, 436 n.13 (Tex. App. 1995) (finding that “a threat need not be made against a *specific victim* in order for the duty to warn to be imposed”), *rev’d on other grounds*, 932 S.W.2d 582, 589 (Tex. 1996).

450. Although the Texas Supreme Court judicially abolished charitable immunity in *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971), the legislature enacted the Charitable Immunity and Liability Act, placing limits on

tort liability. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 84.001, .006 (West 2013) (limiting liability of a nonhospital charitable organization to \$500,000 and essentially limiting liability to a nonpaying hospital patient to \$500,000); see also TEX. HEALTH & SAFETY CODE § 311.0456 (West 2015) (limiting liability for noneconomic damages of nonprofit hospitals providing substantial amounts of charitable care).

451. See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (“We are persuaded by the reasoning in *Daubert*.”).

452. See *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987) (“[A]ny negligence of a plaintiff . . . will bar a recovery.”)

453. See *Appalachian Power Co. v. LaForce*, 201 S.E.2d 768, 770 (Va. 1974) (following traditional trichotomy approach).

454. See *Oliver v. Cashin*, 65 S.E.2d 571, 572–73 (Va. 1951) (recognizing the non-liability doctrine with traditional exceptions).

455. See *Gottlieb v. Andrus*, 104 S.E.2d 743, 746 (Va. 1958) (explaining that the land possessor is not liable for open and obvious hazards).

456. See *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 625 (Va. 1986) (stating that violation of a statute does not create a duty owed to a member of the public and recognizing that a common law action against supplier of intoxicating beverages fails because the supplier’s actions are not a proximate cause of the victim’s injury or death).

457. See *Fox v. Custis*, 372 S.E.2d 373, 376 (Va. 1988) (holding that state parole officers did not have control over the parolee and thus owed no duty to victims of crimes committed by parolee).

458. See *Nasser v. Parker*, 455 S.E.2d 502, 505–06 (Va. 1995) (rejecting *Tarasoff v. Regents of the University of California*).

459. See VA. CODE § 8.01-38 (2014) (allowing for liability of a hospital to the extent of its liability insurance policy with minimum limits of \$500,000 so long as the injured patient pays for the hospital’s services); *Thrasher v. Winand*, 389 S.E.2d 699, 701 (Va. 1990) (“It is a well-settled rule in Virginia that charitable institutions are immune from liability based upon claims of negligence asserted by those who accept their charitable benefits.”).

460. See *Spencer v. Commonwealth*, 393 S.E.2d 609, 621 (Va. 1990) (rejecting explicitly *Frye* and following essentially the *Daubert* test). *But cf.* *John v. Im*, 559 S.E.2d 694, 697–98 (Va. 2002) (warning that court has neither adopted nor rejected the analysis of *Daubert*).

461. See WASH. REV. CODE § 4.22.005 (2015) (adopted 1981) (providing for pure comparative fault).

462. See *Davis v. State*, 30 P.3d 460, 462 (Wash. 2001) (“[T]he duty of care a landowner owes to a person depends upon whether the person is an invitee, a licensee, or a trespasser.”).

463. See *Frobig v. Gordon*, 881 P.2d 226, 228 (Wash. 1994) (“[T]he general rule is that a landlord is not responsible . . . for conditions which develop . . . after possession has been transferred.”).

464. See *Kamla v. Space Needle Corp.*, 52 P.3d 472, 478 (Wash. 2002) (“A landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger.”).

465. See *Barrett v. Lucky Seven Saloon, Inc.*, 96 P.3d 386, 393 (Wash. 2004) (finding commercial provider of intoxicating beverages liable for injuries caused by a drunk driver).

466. See *Taggart v. State*, 822 P.2d 243, 257 (Wash. 1992) (“[P]arole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees’ dangerous propensities.”).

467. See WASH. REV. CODE § 71.05.120(2) (2015) (establishing a “duty to warn” if an individual “has communicated an actual threat of physical violence against a reasonably identifiable victim or victims” to a mental health professional); *Peterson v. State*, 671 P.2d 230, 239 (Wash. 1983) (noting that a therapist has “a duty to take reasonable precautions to protect anyone who might foreseeably be endangered” by patient).

468. See *Pierce v. Yakima Valley Mem’l Hosp. Ass’n*, 260 P.2d 765, 775 (Wash. 1953) (“[A] charitable, nonprofit hospital should no longer be held immune from liability for injuries to paying patients.”); see also *Friend v. Cove Methodist Church, Inc.*, 396 P.2d 546, 550 (Wash. 1964) (abrogating immunity “in the case of an injured nonpaying patron” and not just “in the case of an injured paying patron”).

469. See *State v. Riker*, 869 P.2d 43, 50 (Wash. 1994) (following *Frye*).

470. The percentage of African-Americans in each city is taken from 2010 U.S. Census data. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Mar. 5, 2016) (on file with the Washington and Lee Law Review). For both Louisville and Lexington, Kentucky, this information was not available using U.S. Census data. In the case of Louisville, we used countywide data, and in the case of Lexington, we used the available data from Lexington-Fayette. *Id.*

471. See *supra* note 274 and accompanying text (describing the Gini coefficient). The Gini coefficient values included in Table 3 are calculated from the U.S. Census Bureau’s 2009–2013 American Community Survey 5-Year Estimates. See Steve Batt, *Gini Index of Income Inequality for U.S. Counties*, UCONN: OUTSIDE THE NEATLINE (Jan. 28, 2014), <http://blogs.lib.uconn.edu/outsidetheneatline/2014/01/28/gini-index-of-income-inequality-for-u-s-counties/> (last visited Feb. 18, 2016) (reporting Gini coefficients for each county) (on file with the Washington and Lee Law Review). Six municipalities included in our study crossed county lines: Birmingham, Alabama; Chicago, Illinois; both Raleigh and Durham, North Carolina; and Charleston and North Charleston (combined) and Columbia, South Carolina. For each of these municipalities, we calculated a weighted mean for the Gini coefficient.

472. See generally RICHARD C. FORDING, UPDATED AND REVISED CITIZEN AND GOVERNMENT IDEOLOGY MEASURES THROUGH 2010 (Sept. 12, 2012) (providing NOMINATE values used in this study); see also *supra* notes 282–285 and accompanying text (explaining NOMINATE values and how they are calculated).

473. See Fording, *supra* note 472 (providing NOMINATE values used in this study); see also *supra* notes 282–285 and accompanying text (describing what NOMINATE values are and the process for NOMINATE calculations).

474. The JADI scores are rounded to the nearest whole number.