THE LOGIC OF LEGAL REMEDIES AND THE RELATIVE WEIGHT OF NORMS: ASSESSING THE PUBLIC INTEREST IN THE TORT REFORM DEBATE

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I. INTRODUCTION

The integrity of any analysis of legal claims depends upon accurate identification of the competing interests and legitimate comparison of the weight of those interests. The background principles of consistency and proportionality play a significant, though sometimes overlooked, role in legal rules and analysis. These concepts provide normative guidance and a framework to compare and value interests. They also reveal the relative strength of the individuals' interests and the public's interest in a particular context. For example, the principle of consistency generally means that a legal doctrine applying an objective measure of one's interest must apply a like-kind measure to all interests considered, absent some explicit and justifiable reason for varying treatment. Moreover, a comparison of the remedies invoked for violations of norms provides a key to the relative weight of norms.

Part II of this essay examines the need to identify, measure, and compare the interests at stake in any legal contest with rigorous consistency. It also notes the corollary principle of proportionality as a limiting principle that guards against foolish or destructive consistency. Part III explores the natural hierarchy among legal norms and the weight accorded various types of interests that deserve legal protection. Part IV considers the system of measurement presented by the current tort

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reform movement, exploring the failure of many proponents of tort reform to account for or accommodate the tradition of a more generous and protective measure of damages in tort law as compared with contract law. It notes the failure of proponents of tort reform to consider the traditional role of tort damages in creating compensation for victims of negligent conduct, preserving physical security of individuals and the public, and creating disincentives against negligent conduct. It also explores the failure of some proponents of tax reform to count the cost to the public interests involved, diluting the principal goals of tort law. Part V concludes that identification of both individual and collective interests and consideration of the fundamental incentives of tort law should be an integral and explicit part of the debate on tort reform.

II. THE PRINCIPLES OF CONSISTENCY AND PROPORTIONALITY

The principle of consistency requires equal assessment and measurement of competing interests. References to fair balances, such as weights, equilibrium, and other metaphors for consistency, abound in the law.[1] The ubiquitous nature of the principle of consistency does not mean, however, that all interests are equally important. Considerations of proportionality, the significance of the interests at stake, and the gravity of the potential harm to the interests lead to a natural hierarchy of legal principles.

In the context of literal measurements, inaccurate measures violate both tort and contract mandates. A fake or falsified weighing process is subject to significant punishment because it distorts the system at its base.[2] An accurate measure of weight is essential in a sale of goods, a

1. *See* Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting) (stating that "[w]hen the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused"); Libertarian Party of Me. v. Diamond, 992 F.2d 365, 370 (1st Cir. 1993) (finding that "courts have attempted a constitutional equilibrium between the legitimate constitutional interests of the States in conducting fair and orderly elections and the First Amendment rights of voters and candidates"); AVC Nederland B.V. v. Atrium Inv. P'ship., 740 F.2d 148, 154 (2d Cir. 1984) (stating that "[a]lthough the scales appear to us to be nearly evenly weighted, they tip in favor of subject-matter jurisdiction . . ."); In re San Juan Dupont Plaza Hotel Fire Litig., 129 F.R.D. 409, 417 (D.P.R. 1989), *vacated and remanded sub nom.* In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603 (1st Cir. 1992) (stating that "it is hard to imagine how this Court could, in the public's eye, fall from the high wire of propriety when the balancing pole is so evenly weighted"); People v. Kurtz, 216 N.E.2d 524, 526 (Ill. App. Ct. 1966) (noting the problem of maintaining "a stable equilibrium between the freedom of the press and the right of one accused of crime to a fair trial before a jury not influenced by publicity regarding the alleged offense").

2. *See* Nielson v. Flashberg, 419 P.2d 514 (Ariz. 1966) (upholding verdict of actual and

sale of real estate, and all manner of other measuring devices and techniques in other areas.[3] An inexact measure, lacking metes and bounds, will undermine a claim.[4]

In his concurring opinion in *Patterson v. Shumate*, Justice Scalia used the metaphor of the scales to emphasize the foundational presumption of consistency in the law. "I trust that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw."[5] In *Patterson*, a federal district court ordered that a debtor's interest in a qualified plan under the Employee Retirement Income Security Act ("ERISA") be paid over to the trustee in bankruptcy.[6] The Court of Appeals for the Fourth Circuit reversed the district court's order on the ground that debtor's interest in the plan was excludable from estate property.[7] The Supreme Court affirmed the appellate court's decision.[8]

In his concurring opinion, Justice Scalia urged for consistency in interpretation of definitions within a statutory scheme. "Speaking of agreed-upon methodology: It is good that the Court's analysis today proceeds on the assumption that use of the phrases 'state law' and 'applicable nonbankruptcy law' in *other* provisions of the Bankruptcy Code is highly relevant" in determining meaning in the provision at issue.[9] Justice Scalia noted the presumptive nature of consistency in interpretation within a statute, calling it the "normal and obvious principle of statutory construction."[10] He emphasized the strength of his view, using the metaphorical and critical reference to the seesaw as the symbol for "a one-subsection-at-a-time approach."[11] Justice Scalia's rationale on this point went beyond the scope of the *Patterson* case to note a general presumed norm of consistent interpretation and fair measurement, stating that consistent "usage within the same statute is to

punitive damages against a public weight master for providing false certificates of weight).

3. *See* National Treasury Employees Union v. Chertoff, 385 F. Supp. 2d 1, 29 (D.D.C. 2005) (calling new standards for collective bargaining "new metes and bounds for collective bargaining").

4. *See* Blue Mountain Pres. Ass'n v. Township of Eldred, 867 A.2d 692 (Pa. Commw. Ct. 2005) (remanding for identification of site because a lack of metes and bounds description resulted in a lack of certainty of location).

5. Patterson v. Shumate, 504 U.S. 753, 766-67 (1992) (Scalia, J., concurring).

6. *Id.* at 756.

7. *Id.*

8. *Id.* at 766.

9. *Id.*

10. *Id.*

11. *Id.*

be presumed."[12] Such a general norm of consistency has a far greater sphere of operation than the particular case at issue because, as Justice Scalia's treatment suggests, the approach of consistent interpretation applies to interpretation generally.

The law demonstrates the principle of proportionality by recognizing the varying degrees of protection afforded by different legal doctrines. Criminal law, tort law, and contract law all present different damage formulas and sanctions based on the differing strength of the norms for protecting the interests at stake. The law recognizes that the strength of the interests protected by the legal norms varies based on the interests at stake and the conduct that violates the norm involved. Likewise, the culpability attaching to the breach of particular norms bears a relationship to the interests harmed by the particular breach. Additional evidence of the importance of proportionality in the law is found in comparisons of the penalty for violation of a criminal law with the harm inflicted by the criminal act. In other words, criminal sanctions must be proportionate to the harm caused by the breach of the criminal law. For example, the U.S. Supreme Court held that the application of the death penalty to the crime of rape violated the Constitution because of the disproportionality between the harm suffered by the victim and the sanction.[13] The Supreme Court has also held other types of punishment disproportionate to the crime.[14]

III. A HIERARCHY OF NORMS

The norms established by law influence the behavior of people in virtually all aspects of life. Moreover, courts and scholars study the influence of norms on a wide range of legal issues.[15] The range of

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12. *Id.*

13. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty for rape unconstitutional on ground that disproportionate sanction violates the Eighth Amendment); *but see* Louisiana v. Wilson, 685 So.2d 1063, 1072 (La. 1996) (holding death penalty not excessive punishment for rape of child under twelve).

14. *See*, *e.g.*, Pulley v. Harris, 465 U.S. 37, 42-43 (1984) (describing two forms of proportionality review); Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding deprivation of citizenship excessive punishment for wartime desertion); Weems v. United States, 217 U.S. 349, 381 (1910) (holding 15 years hard labor excessive for falsifying public document); *see generally* Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons From Washington State)*, 79 WASH. L. REV. 775, 813-14 (2004).

15. *See*, *e.g.*, Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005) (noting novelty of applying and proceeding to apply transaction cost framework to constitutional entitlements). For comparisons of the effects of different sanctions, see Louis Kaplow & Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

norms established by law and the types of sanctions applied by law are wide ranging. "Monetary incentives and deterrents are not the only mechanisms through which law affects behavior. Law also exerts influence through its effects on social norms, the market, or other circumstances that people consider when deciding how to behave."[16]

Legal norms are by no means uniform and do not intend to establish equal emphasis on all rights or risks. The law obviously regards the violation of the norms established by criminal law as more serious than the norms of either tort or contract law. The need for significant criminal sanctions is based on a judgment that the interests protected by criminal law deserve significant and serious legal incentives. Put another way, the violation of the public norms of criminal law are regarded as more blameworthy and deserving of serious sanctions than violations of the norms of tort law or contract law. Thus, the law recognizes a relationship between the importance of the public interest protected by a norm and the culpability of the violation of that interest through a breach of the norm.

The sanctions accorded under tort law are not as severe as those of criminal law; yet, they are significantly more far reaching than contract damages. Seen this way, the sanctions of criminal, tort, and contract law present a continuum of sanctions. These sanctions range from the very serious punishment under criminal statutes to the full measure of damages, including punitive damages, in tort law. Finally, contract damages are a more limited form of compensation. Both criminal and tort law involve the breach of public norms. In a sense, a breach of contract also involves a private norm created by the parties. The term "private law" generally refers to law that "traditionally encompassed the common law of contract, torts, and property that regulate relations among individuals."[17] However, the public-private distinction is also valid in describing the dichotomy among norms, such as those established by tort law and contract law.[18] One can choose not to enter a contract. By contrast, one cannot refuse to be subject to tort sanctions against negligent conduct.[19] The social contract between the driver and the pedestrian crossing the street is a public norm that neither can avoid. Everyone is subject to the public norm not to create unreasonable risks

16. Richard A. Primus, *Bolling Alone,* 104 COLUM. L. REV. 975, 1016 (2004).

17. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 404 (2006).

18. *See id.* (noting that "all legal regimes, even if ostensibly private at common law, are in some sense public").

19. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

of harm to others. The measure of damages afforded for a breach of the private contractual order is clearly more limited than the sanctions of criminal or tort law. Contract damages are not intended to punish the breaching party unless the breach also constitutes a violation of a public norm.[20]

Contract law encourages parties to plan for the future by bargaining for future performance. As a result, society as a whole gains a significant benefit – the certainty in future markets that allows a modern economy to exist. With its approach to damages, contract law neutralizes the risk of shifts in the market value of resources and the individual will of the contracting parties. Market participants recognize that the benefit of securing a commitment from the other carries the risk of being obligated to perform or pay damages for a substitute performance, despite the potential of unfavorable market shifts. The foundation, or "given," of contract law is the "deal," the agreement of the parties, including its allocation of future risks and benefits.[21] A party who is injured by the breach of the other may seek a substitute transaction, such as "cover" for the goods. The aggrieved buyer can purchase the same goods on the market. If the substitute goods cost more than the contract price, contract law provides a damage measure whereby the breaching party pays the difference in the cost of cover, as well as incidental and consequential damages. Thus, when the seller under a goods contract refuses to deliver, the buyer can recover damages based on the cover price.[22] If the aggrieved buyer covers, he can obtain substitute goods at the original price set by the contract via Section 2-712 of the Uniform Commercial Code (UCC). Thus, the formula for a breach in a simple case of sale of goods demonstrates the incentives set by contract law, giving the aggrieved party the benefit of the bargain by allocating the additional costs of the cover contract to the breaching party.

20. *See*, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

21. Economists sought to discredit the classical and elegantly simple bargain theory of contract, emphasizing the exceptions to the rule of consideration. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 179-84 (2000) (using two examples of firm offer in the sale of goods and reasonable reliance to assert that the bargain theory of contract is "wrong"). The economic critique of bargain theory merely shows that courts enforce some promises that do not meet the test of consideration. The fact of additional enforceable categories of promises does not invalidate the main force of bargain theory, i.e., that the parties allocate interests based on their bargain and contract law enforces those allocations by the default measure of expectancy.

22. The measure of damages often does not fully compensate the injured party because it fails to include the transaction costs of collecting damages. For example, the injured party must pay for the attorney's fees incurred as a result of pursuing damages against the breaching party. Thus, as a practical matter, the UCC's regime under-compensates plaintiffs. Other works establish the failure of the UCC measure to fully compensate the injured party.

The principle against punishing a party for breach of the private contract norm presents a weaker norm than tort law. The offending party who is guilty of breaching the public norm of tort law by creating unreasonable risks to another faces more severe penalties, including punitive damages intended to punish the tortfeasor as well as making the injured party "whole."[23]

> One of the chief functions of law is to influence behavior, and much of our understanding of law assumes that most people will seek to conform their conduct to what the law requires, whether from a sense of simple obligation or because the system of legal incentives and deterrents makes it instrumentally rational for them to do so.[24]

The strength of the social norm for protecting the safety and physical integrity of members of society individually as well as collectively generally trumps economic considerations. Certainly, economic and financial interests deserve protection. Incentives to protect financial interests are by no means trivial.[25] Nevertheless, the measure of damages or punishment should be commensurate with harm or culpability. Sanctions applicable to conduct that breaches a public norm of criminal law or tort law are a reflection of, and differing views of, both the culpability of the conduct at issue and the interests at stake.

The liberty interest also influences common law and statutory law standards, leading to such things as the rejection of specific performance of personal services contracts.[26] Society's choice of punishment for the

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23. *Compare* RESTATEMENT (SECOND) OF TORTS, §§ 903, 908 (1979) (defining compensatory damages as those which are necessary to put the party in the position she would have been had no tort been committed and stating that punitive damages serve to punish or deter future conduct) and RESTATEMENT (SECOND) OF CONTRACTS, § 344 (1981) (stating that the purpose of contract damages are give the aggrieved party the benefit of the bargain as if the contract had been performed).

24. Primus, *supra* note 17, at 1010.

25. For example, the relatively recent judicial recognition of the theory of the well-managed account for measuring the loss to an investor by a broker who fails to follow accepted norms shows the significance of financial interests. *See*, *e.g.*, Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38 (2d Cir. 1978); Scalp & Blade, Inc. v. Advest, Inc., 309 A.D.2d 219 (N.Y. App. Div. 2003) (approving use the of well-managed account standard in case for mismanagement of trust fund); Perry E. Wallace, Jr., *Securities Arbitration after McMahon, Rodriguez, and the New Rules: Can Investors' Rights Really Be Protected?* 43 VAND. L. REV. 1199, 1235 n.181 (1990) (noting judicial recognition of "well-managed account measure of damages"). *See also* Barbara Black & Jill J. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1012 n.135 (2002).

26. RESTATEMENT (SECOND) OF CONTRACTS, §367 (1981). *See* Shubert Theatrical Co. v. Rath, 271 F. 827 (2d Cir. 1921); Fitzpatrick v. Michael, 9 A.2d 639 (Md. 1939); Felch v. Findlay Coll., 200 N.E. 2d 353 (Ohio Ct. App. 1963); Philadelphia Ball Club v. Lajoie, 51 A. 973 (Penn. 1902).

breach of criminal laws reflects the importance of those norms. The punishment for such violations may include deprivation of property, liberty, or, in extreme cases, death under capital punishment statutes. Such significant sanctions apply to the most egregious breaches of social norms, such as murder, rape, and physical assault. The principle of proportionality applies even with regard to extreme harms.[27]

Varying levels of protection for varying interests often turn on whether the interest at issue relates to safety or economic interests. For example, the failure of a seller of property to reveal environmental contamination to the purchaser may lead to significant liability to the seller when the condition constitutes a material defect unknown to the buyer.[28] The significance of the risk of harm is also an important factor in establishing the hierarchy of laws. For example, both federal and state statutes provide significant sanctions for violating environmental laws that protect individuals and the public from unreasonable risk of harm. Environmental statutes provide for punishment of those who fail or refuse to control environmental risks at prescribed levels and by prescribed mechanisms.[29] State and federal environmental statutes provide both civil and criminal sanctions, including significant fines and imprisonment[30] for knowing violations.[31]

Property or economic interests evoke lesser protection than sanctions accorded to the interest in bodily integrity. Tort law provides incentives to encourage safe practices and discourage negligent conduct. "Tort law does and should provide deterrence as well as compensation, and if wrongful death actions produce significant under-deterrence, something is seriously amiss."[32] The net result may be greater costs for actors in the world but lower costs to society as a whole, by virtue of the costs saved in terms of the injuries and pain and suffering avoided by enhanced safety. The burden to act in a non-negligent manner preserves physical integrity. The cost may seem out of line in a *lassiez-faire* world that accords no value for the safety created by tort principles.

27. *See, e.g.,* Enmund v. Florida, 458 U.S. 782 (1982) (holding death penalty violates Eighth Amendment as disproportionate penalty for robbery); Coker v. Georgia, 433 U.S. 584 (1977) (applying proportionality review to reject death penalty for rape of adult woman).

28. *See* New West Urban Renewal Co. v. Westinghouse Elec. Corp., 909 F. Supp. 219 (D. N.J. 1995).

29. Clean Air Act § 113(c)(2), 42 U.S.C. § 7413(c)(2) (2006). The Clean Air Act classifies knowing failure to make required reports or keep required records as a felony. *See id.*

30. *See*, *e.g.*, 33 U.S.C. § 1319 (2006).

31. *See*, *e.g.*, 42 U.S.C. § 6928(d) (1994); Solid Waste Disposal Act § 3008(d), 42 U.S.C. § 6928(d) (1994).

32. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 540 (2005).

Nevertheless, the transfer of costs to the negligent party is a basic premise of modern American tort law and is generally endorsed as consistent with the economic approach to law as well as traditional norms.

> Modern tort theory is founded upon the so-called "Hand Formula," which considers the probability of harm (P), the cost of harm (L), and the burden of taking precautions to prevent harm (B). Under this formula, a defendant is liable in negligence if and only if $B < PL$. This negligence formula provides the proper incentives to a prospective defendant.[33]

The system of judgment advocated by standards of comparison and measurement deserves study in relation to the substantive doctrines that impose different standards of care. Identifying an appropriate measure for a particular loss also involves judgments about the severity of the loss or the interest compromised. For example, in the area of physical injury, damages for pain and suffering may compensate injured parties in only an approximate way. However, these damages also provide incentives for minimizing the risk of physical harm in the jurisdiction.[34] Punitive damages apply to create disincentives for outrageously negligent conduct,[35] as explained by recent Supreme Court decisions.

Similarly, statutory treble damages and the doctrine of strict liability secure heightened incentives in situations deemed to require clear expression of the social norm against the sanctioned conduct. Treble damage statutes demonstrate the use of damages to create incentives that protect society in addition to the consumer harmed by the conduct that violates the statute. Both statutory and common law tort doctrines seek to minimize risks with diverse approaches.

IV. TORT REFORM: MEASURING AND COMPARING THE INTERESTS

The debate on tort reform in the United States is far from a new

33. Matthew S. Levine, *Punishment and Willingness to Pay*, 40 GONZ. L. REV. 329 (2004-2005) (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Learned Hand, J.) and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 180-82 (5th ed. 1998).

34. *See* RESTATEMENT (SECOND) OF TORTS, § 905 (1979); *see also* Morris v. St. Paul City R. Co., 117 N.W. 500 (Minn. 1908).

35. RESTATEMENT (SECOND) OF TORTS, § 908 cmt. c (1979). *See also* LINDA L. SCHLUETER & KENNETH R. REDDEN, 1 PUNITIVE DAMAGES § 2.1 (D), at 24 (LexisPublishing 2005) (stating that "in most jurisdictions, the court awards punitive damages because of the positive public policy to punish the defendant and to serve as a warning or example to others who may commit similar outrageous acts in the future").

development.[36] It has a long and contentious history.[37] No-fault automobile insurance is seen as an early example of tort reform.[38] Indeed, the genesis of the debate dates near the beginning of modern tort law, suggesting virtually continuous disagreement about social valuing and social norms relating to negligent conduct.[39] The tort reform debate has provoked intense dispute among legal scholars and practitioners.[40] The American Medical Association and the American Consulting Engineers Counsel founded the American Tort Reform Foundation ("ATRF") in 1986.[41] The Foundation reports that its efforts in tort reform resulted in an "unparalleled track record of legislative success."[42] The ATRF website describes the foundation as a "nonpartisan, nonprofit organization with affiliated coalitions in more than 40 states."[43] The ATRF reports that "America's $246 billion civil justice system is the most expensive in the industrialized world."[44] It asserts that lawyers "systematically recruit clients who may never have suffered a real illness or injury and use scare tactics, combined with the promise of awards, to bring these people into massive class action suits."[45]

In the 1970's some jurisdictions instituted mandatory arbitration or malpractice disclosure panels for medical malpractice claims.[46] Additionally, adjustment of tort principles in products liability litigation,

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36. *See* Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943 (2006).

37. *See* H. Kronberg, *What a Long, Strange Trip It's Been: The History of Tort Reform*, TEX MED. 1993 Mar; 89(3): 40-3; Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 623 (1985).

38. Sugarman, *supra* note 37, at 623.

39. *See*, *e.g.*, Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1215 (1995); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 93 (2002) (asserting that "[t]ort retrenchment is jeopardizing the social role of tort law in protecting the public from corporate and individual misbehavior. Women, consumers, workers and the elderly are just a few of the groups that have benefited from the expansion of tort law after World War II. Through the centuries, tort law has provided important protections for average citizens against powerful interests").

40. *See*, *e.g.*, Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405 (1995); Jordyn K. McAfee, *Medical Malpractice Crisis Factional Crisis Factional or Fictional?: An Overview of the GAO Report as Interpreted by the Proponents and Opponents of Tort Reform*, 9 J. MED. & L. 161 (2005).

41. *See* American Tort Reform Foundation, *available at* http://www.atra.org/about/ (last visited Apr. 8, 2006).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Payne, *supra* note 39, at 1217.

specifically design defect cases, began around the same time.[47] Some courts have adopted restrictions in this context, limiting manufacturer liability to damage resulting from risks known by the manufacturer.[48] Forty-eight jurisdictions enacted some kind of tort reform legislation between 1985 and 1988.[49] These reforms included abolishing the collateral source rule, altering punitive damage rules, and capping some damage awards.[50] In 1995 Congress enacted additional tort reform measures with its "Contract with America."[51] The reforms called for the adoption of the British rule of attorney fee shifting, the institution of punitive damages limits, and major changes to the products liability law.[52] Continuing this progression, the Bush administration and the Republican-controlled Congress pushed for mandatory removal of class-action suits to federal court, limits on asbestos liability, and a cap of $250,000 on non-economic medical malpractice damages.[53]

Corporations and other employers argue that the negative consequences of large judicial awards outweigh the plaintiffs' interests in such suits.[54] They focus on the diminished ability of companies to survive and prosper in a legal regime that allows large awards. When large companies fail, the people they employ may be without work. The products and services they provide dwindle, affecting the economy and the public welfare. They emphasize that corporate health is crucial for public welfare and the impacts of large settlements affect the public, both as employees and as consumers.[55] Large money judgments are not exclusively a phenomenon of personal injury claims, however. Courts often render substantial verdicts in a wide variety of areas, including common law contract and property claims, intellectual property, and

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47. *Id.* at 1219.

48. *Id.*

49. *Id.* at 1222.

50. *Id.*

51. *Id.* at 1224.

52. *See "Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1769 (1996).

53. John T. Nockleby & Shannon Curreri, *Symposium: Access to Justice: Can Business Co-exist with the Civil Justice System? 100 Years of Conflict: The Past and Future of Tort Entrenchment*, 38 LOY. L.A. L. REV. 1021, 1033-35 (2005).

54. John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667 (1998) (noting claims by tort reform proponents of outrageous fees).

55. *See* Edith Greene et al, *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 806 (1991) (discussing the view that lawyers and clients were suing America out of business); Thomas Koenig, *The Shadow of Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169 (1998) (stating the tort-reformists' view that large settlements bring a social cost borne by corporations, employees, consumers, and stockholders).

torts outside the personal injury sphere. Indeed, some of the largest verdicts ever awarded relate to economic loss without a link to personal injury.[56] This observation raises questions of proportionality between the sanctions of contract and tort norms, including whether the interests of defendants in tort cases deserve greater protection against high verdicts than defendants in other matters.[57]

The United States system of tort law presents the considered judgment that compensation to a victim of negligent conduct is necessary to protect and compensate individuals who suffer harm as a result of such conduct. The tortfeasor must pay for the consequences of negligent conduct. More important, society also benefits from the compensation to the individual tort victim. Society benefits because if the law did not secure payment for the costs to the victim, those costs might ultimately require public financing. Moreover, the public benefits from the incentives of tort law against negligent activity. The policy judgment that animates tort doctrine is that the norms that maximize due care and minimize negligent conduct serve the public's interests. "American tort law recognizes the corrective justice ideal by providing a mechanism through which defendants, who have wrongfully injured plaintiffs are required to compensate those plaintiffs, for their injuries and thereby make them whole insofar as this is practically possible."[58] Thus, tort law serves not only the injured plaintiff, but also the public. Society's stake in this issue is more than a summation of the needs of individuals for compensation for negligent harm. Tort law also benefits

56. *See*, *e.g.*, Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 4 (1987) (abstaining from reviewing jury verdict of almost $11 billion stemming from claim that Texaco tortuously interfered with contract between Pennzoil and Getty Oil Co.); Biomedical Sys. Corp. v. GE Marquette Med. Sys., 287 F.3d 707 (8th Cir. 2002) (affirming a $75 million judgment for breach of contract involving a company's failure to obtain FDA approval of a new medical device); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106 (2d Cir. 2004) (discussing an appeal for sanctions in a breach of contract case in which the jury awarded $96.4 million in damages); Coc Serv.s Ltd., v. CompUSA Inc., 150 S.W.3d 654 (Tex. Ct. App. 2004) (affirming trial court's entry of judgment NOV in a breach of contract case where the jury awarded $90 million in compensatory damages); Amy Johnson Conner, *Doctor Wins $570 Million For His Inventions*, LAWYERS WEEKLY 2004, *available at* http://www.lawyersweeklyusa.com/usa/4topten2004.cfm (reporting jury verdict of $570 million in doctor's countersuit for breach of contract and patent infringement); Natalie White, *Surgeon Awarded $366 Million For Revoked Hospital Privileges*, LAWYERS WEEKLY 2004, *available at* http://www.lawyersweeklyusa.com/usa/6topten2004.cfm (discussing a $366 million awarded to a doctor for breach of contract, defamation, interference with contractual relations and intentional infliction of emotional distress arising out of the conduct of fellow doctors at the hospital where he worked).

57. Proponents of tort reform may see this statement as evidence that reform is needed throughout the judiciary.

58. Benjamin C. Zipurksy, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003).

society by reducing the number of injuries that occur. The desired result of this system is that compensating injured victims will result in less negligent conduct and, thus, fewer injuries in society at large. Focusing on the interest of the individual litigant misperceives the foundational purposes of tort law and fails to include in the balance the larger social interests at stake. A focus on individual rights leaves out of the analysis interests that are arguably the most important in the tort damage formula. The incentive of damages serves a much larger purpose than simply compensating the individual victims of negligence. This incentive enhances safe conduct and minimizes risk and damage to society.

By limiting the amount of compensation that victims of negligent conduct can recover, the success of the current tort reform movement ultimately undermines the traditional disincentives of tort law intended to compensate victims[59] as well as to discourage negligent conduct. Tort reform fails to present a principled distinction between tort actions and other types of claims. Likewise, the major tort reform advocates fail to explore explicitly the public interests involved in the debate and the rights of citizens to rely on government processes to redress wrongs.[60]

V. EXPLICIT APPLICATION OF BACKGROUND PRINCIPLES

Modern American society faces persistent tensions regarding the appropriate balance between protecting people from physical risks and judicial and governmental solicitude for economic enterprise. The general principles of consistent measurement of interests and proportionality for treatment of competing interests have relevance to the tort reform debate. Tort law protects the public in general by creating disincentives against negligent conduct. The tort reform debate is one example of this larger, long-standing debate. The public interest weighs heavily in the arguments of each side of the debate. Nonetheless, the competing vision of the common good and the weights in the scale of the costs and benefits at issue are radically different. Indeed, the term "reform" itself is part of the debate.[61] Like "tax reform," the term "tort

59. *See* Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585 (2003) (explaining compensation rationale for tort liability).

60. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 526 (2005) (arguing that "forms part of the basic structure of our government" giving "all American citizens have a right to a body of law for the redress of private wrongs").

61. As George Lakoff noted in his book, DON'T THINK OF AN ELEPHANT (Collette Leonard, ed., Chelsea Green 2004), framing of issues in public debate is of the first importance. His point is as true in the tort reform area as in any other national topic today. For example, the Lawsuit Abuse Reform Coalition (LARC) of 2005 was formed "to work for enactment of the federal Lawsuit

reform" demonstrates the effectiveness of rhetorical framing. The unspoken and important presumption embedded in the term "reform" is the perspective that the ordinary system of tort law is broken and, thus, needs fixing.[62] Tort reform, as the term is currently used, presents a reconceptualization of traditional tort principles. In other words, it is an adjustment of the scales of justice with a thumb on the scale for a defendant's interests. The approach of consistent measurement argues for including in the balance the public's interest in being protected from unreasonable risks as well as the interest of the individual in being compensated for the harm that befell him as a consequence of the defendant's creation of an unreasonable risk.

The concept of proportionality as a due process principle is of great significance in the recent tort reform debate. For example, Professor Tracy Thomas argues that due process guarantees should be read as prohibiting the government from stripping plaintiffs of the right to redress injuries.[63] Proportionality plays a role in both punitive and compensatory damages. It counsels full compensation in the ordinary tort context and punishment of the defendant when the court determines that punishment is necessary to discourage outrageous conduct in order to protect individuals and the public. Because protection of the public is the larger purpose of the tort liability regime, the focus of proportionality analysis should include the protection of the public as well as the consideration of individual litigants. In other words, proportionality in this context includes societal risks and legal doctrines aimed at minimizing those risks.

VI. CONCLUSION

This essay calls for consideration of the relationship of strong social norms to the tort reform debate. Additionally, it inquires into the concepts of measuring and comparing interests and the judgments of proportionality inherent in traditional legal doctrines, scrutinizing in particular the methodology of comparisons in tort reform. It is fair to

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Abuse Reduction Act (LARA), H.R. 420." American Tort Reform Association, *available at* http://www.lawsuitabusereform.org/ (last visited Nov. 12, 2005).

62. American Tort Reform Foundation's website defines its mission as "repairing our civil justice system." *http://www.atra.org/about/* (last visited Nov. 11, 2005). It notes that the work of the Foundation includes "champion[ing] elected officials and judges who want to fix the system." *Id*.

63. See Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001).

say that both advocates of tort reform and those defending traditional tort damages present an argument for fostering public interests. Each side in the debate sets a theoretical framework of its argumentation as an articulation of the public interest. Taking enhancement of the public interest as the goal of each approach, the principle of consistent measurement requires a balance of the inquiry. In myriad legal areas, the matrix of judgment about competing interests is effectuated through the tools of jurisprudence and rulemaking, including the use of categories, presumptions, defaults, definitional standards, burdens of proof, and other analytical tools. Such tools value economic rights and the rights to physical safety and bodily integrity differently.

Tort reform measures should preserve the traditional balance and fulfill the basic purposes of tort law that have long provided precedent and social ordering. Consideration of the historical uses of tort law and the normative baseline for comparing competing interests is crucial in the tort reform debate. The hierarchy of norms represented by criminal law, tort law, contract law, and other areas expresses the strength of society's interest in restricting and discouraging conduct judged to be contrary to the interest of individuals and society. A logical corollary is that the weight of the interests protected bears a relationship to the sanctions and remedies provided. The remedy available to a plaintiff in any area of law is the signal indicator of the strength of the social norm at issue in the contest of interests presented. Tort law creates a system of liability for conduct deemed negligent or culpable. It encourages due care by imposing liability for harm that results from a defendant's creation of unreasonable risk of harm to others. The tort system includes a deliberate assessment of the strengths of the norms involved in legal doctrine for comparing individual and group interests in an even-handed manner.