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The Role of the Courts and Legislatures in the Reform of Tort Law

That the law of torts needs continuous reform is not disputed; but debate does rage over the proper role of the courts and legislature in such law revision. In this Article, Professor Peck asserts that the judiciary should evaluate the comparative abilities of the courts and legislature to make the revision, in the context of the particular case. In setting out the criteria by which this evaluation should be made, he reveals the realities of the legislative process that hinder the reform of tort law: legislators are basically indifferent to tort law-making; legislators lack experience, time, and adequate wages; legislatures fail to hold satisfactory committee and public hearings; legislators are subject to well-organized lobbies and pressure groups. Professor Peck then examines recent catalytic court decisions that have sparked legislative enactments, to show that a creative judicial role does not conflict with the legislature; he concludes that, to overcome legislative inertia, the courts should play a more positive role in the reform of tort law.

Cornelius J. Peck*

The necessity of continuous reform in areas of the private law has long been recognized. More than 40 years ago Mr. Justice Cardozo forcefully argued for a "ministry of justice," which would recommend needed reforms in the law. Following demonstrations of how law changes and the role that judges played in

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producing that change, there has been an increased demand for judicial participation in the reform process. Professor Robert Keeton recently commented with approval on "candidly creative" judicial action; for example, he calls on the judiciary to establish a comparative negligence scheme to supplant the more prevalent contributory negligence rule. Professor Seavey, summarizing conclusions based on nearly a half-century of teaching torts, has also urged an active and creative role for the judiciary with respect to many problems of tort law, ranging from the liability of innocent converters and the rule denying contribution to the adoption of comparative negligence and changes in the law of defamation. Other scholars have also urged an activist role for the judiciary—in fact, Mr. Justice Traynor has publicly stated that the concern for judicial activity should focus on the continuing scarcity of creative opinions rather than on the overabundance of activity.

Not all legal scholars have so enthusiastically approved of an active reform role for the judiciary. Mr. Justice Holmes, in one of his famous phrases, characterized the judicial power to legislate as interstitial—a power confined "from molar to molecular motions." Even Judge Jerome Frank, a leader of the jurisprudential realists, has urged a modest role for the courts in performing their inescapable function of judicial legislation, while others have more firmly opposed active judicial reform.

Of course, a good part of the battle rages over the substance

4. Id. at 506-09.
of the proposed reforms. Scholars may easily disagree about the extent to which the law of torts should be reformulated to encompass additional mechanisms of loss distribution. They may likewise disagree, for example, on the opportunity for fraud created by a rule abrogating interspousal immunity in tort cases. But inevitably, debate over the reform of the law of torts involves the question of the proper role of the courts and the legislature in law-making and law revision. The advocate of reform by the judiciary is often informed by the court that the requested revision falls within the peculiar competence of the legislature. On the other hand, the defender of the status quo has frequently been told—perhaps more frequently in recent years—that common-law traditions require the judiciary to alter and adapt its decisional law to meet the demands of our rapidly changing society. The conflicting opinions on the proper role of the courts and legislatures in the reform of tort law have unfortunately yielded little, if any, careful analysis of the criteria by which the conflict should be decided. As Dean Frank Newman has said, “it seems inexcusable that we are still so ignorant on the question, ‘By whom and how are laws best made?’”

This Article will explore that question with particular reference to the law of torts and present at least a partial evaluation.


tion of the comparative abilities of courts and legislatures to revise the law. In so framing the question, however, one must be cautious of searching for a single answer applicable to all phases of such a comprehensive problem. The major criticism of those who have discussed the creative role of the courts in judicial law-making is that they have failed to differentiate between the varied contexts in which the problem appears. Obviously, the creative role suggested for the courts in the area of contracts and property law or an area dominated by legislation and administrative regulation, such as taxation, is markedly different from the role it should play in the areas of procedure and torts. But even within these categories a more discriminating approach should be taken to avoid label-thinking. Thus, a court may properly refuse to expand the protection given by tort law against certain trade practices because legislation and administrative regulation have established a pattern of legal control. Yet the same court could properly exercise a creative role to expand the protection given by tort law against intentional infliction of emotional harm even though it occurred in a business context.

I. LEGISLATIVE INDIFFERENCE

Having issued a warning against generalization, one may now be permitted to make one. It is that as a general proposition, legislatures are indifferent to the problems of reform of tort law. As Professor Cowan has articulated, “legislatures have no stomach for reform in tort law”; correspondingly, Professor

14. In reforming the law, a number of courts have considered that the change related to the law of torts as being a significant factor. Molitor v. Kaneland Community Unit Dist., 18 Ill. App. 2d 11, 26, 163 N.E.2d 80, 96 (1959); Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946); Fussner v. Andert, 261 Minn. 347, 361, 113 N.W.2d 355, 364 (1961); Pierce v. Yakima Valley Memorial Hosp. Ass'n, 48 Wash. 2d 162, 179, 260 P.2d 765, 774 (1953); Borst v. Borst, 41 Wash. 2d 642, 657, 251 P.2d 149, 156 (1953). But cf. Helton v. Sisters of Mercy, 351 S.W.2d 129 (Ark. 1961). The commentators have also, of course, frequently pointed out the distinction in urging an active reform role in the area of torts. E.g., Seavey, op. cit. supra note 5, at 66–68.

15. E.g., Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929); see Chafee, Unfair Competition, 58 HARV. L. REV. 1289 (1940).

16. E.g., State Rubbish Collectors Ass'n v. Silizinoff, 38 Cal. App. 2d 280, 282 (1939). For a discussion of the propriety of an active role for the courts with respect to this problem, see text accompanying notes 190–93 infra.

Pedrick has pointed out that the piecemeal legislation adopted is of equal significance to the total picture of legislative inactivity. Moreover, statutorily imposed tort liabilities may be inconsistent with the principles of tort law, as where a statute imposes a limited liability on parents whose children willfully or maliciously destroy property. The obvious purpose of such legislation is to combat juvenile delinquency rather than to fulfill the compensatory objectives of tort law. Even though a statute is generally consistent with the objectives of tort law, the motivation for enactment may not have been the achievement of those objectives. For example, during the 30 years that proposals to waive the United States’ immunity from tort liability were under consideration, Congress must have realized that such a waiver was consistent with both the objectives of the law of torts and valid governmental interests. But apparently the increasing burden of reviewing over 2000 private bills during each session of Congress, rather than an interest in a more symmetrical scheme of tort law, finally produced congressional action.

If additional proof is needed that legislatures frequently overlook or ignore the problems of tort law, it may be convincingly


For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims.

The magnitude of the task of considering and disposing of private claims can be gathered from the following statistics:

In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law, then the largest number in the history of the Claims Committee.

In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,880,000, of which 144, in the amount of $562,000, were for tort.

In each of the Seventy-fourth and Seventy-fifth Congresses over 2,950 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,500 bills were introduced, of which 815 were approved for a total of $820,000.

In the Seventy-seventh Congress, of the 1,829 private claim bills in-
found in the frequency with which legislatures enact criminal statutes that provide no concurrent civil remedies for one injured by the criminal conduct. In some instances the courts have supplemented the statutory language by applying the doctrine of negligence per se to unexcused violations of criminal statutes, but the difficulties encountered in the application of that doctrine warrant the assumption that a legislature concerned with the civil consequences of a violation would have stated them. Perhaps the underlying legislative rationale is that the criminal law, which sets guidelines for future conduct, is worthy of legislative consideration; whereas tort law, which is only a system for distributing fortuitous losses, does not merit the exercise of the planning function of legislation. In any event, the civil consequences of violations are frequently ignored by legislatures.

This legislative indifference to tort law might be considered a delegation knowingly made to an expert body qualified at reformulating particular rules while maintaining consistency of governing principles—much as delegations of power to administrative agencies have been viewed. Indeed, the Supreme Court has characterized the Federal Employers Liability Act as a statute by which Congress created "only a framework within which the courts were left to evolve . . . a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry." 21 If the question could be raised, such an indefinite delegation might properly be determined constitutional by analogy to delegations of authority to administrative agencies, which have been sustained because experience and custom have made sufficiently explicit standards that otherwise would have been too vague. 22 But, tempting as this view of a conscious delegation may be, the truth lies elsewhere.

II. THE MOTIVATIONS, PERSONALITIES, AND WORKING CONDITIONS OF LEGISLATORS

If legislatures were composed of a modern day equivalent of Plato's guardians or philosopher kings—a group selected on

the basis of ability and prepared by a special education to settle affairs dispassionately for the good of the republic—they would undoubtedly undertake periodic, systematic reappraisals of the effectiveness of tort principles in serving society. Without descending to the stereotyped and frequently erroneous characterization of politicians, however, this is clearly not the case. Even at their best, members of state legislatures bear but little resemblance to Plato’s guardians.

A recent study of the political socialization of state legislators23 indicates that, while over half of the state legislators first became interested in politics in the pre-college or equivalent period, a sizeable proportion became interested after college or its equivalent period.24 The fact that almost one-third of state legislators are lawyers by occupation25 suggests that they are qualified to make competent reappraisals of the principles of private law; of course this generalization does not apply to the very large occupation group consisting of farmers.26 Nor is there more than a conjectural hope that any special preparation for the role of lawmaker was included in the formal education of merchants, businessmen, bankers, real estate men, insurance brokers, and professional men who collectively compose the largest category of legislator occupations.27

Professor Leon Green has opined that there are not large numbers of scholarly men in state legislatures, a factor which he believes weighs in favor of judicial reform of tort rules.28 Another writer has expressed the idea that a scholarly approach would only entangle a legislator because his function is to act, to fight, and to seize advantages rather than to meditate on

24. Id. at 306.
25. During the period 1925 to 1935 lawyers held 28% of the seats in the upper and lower houses of 13 states selected for study. Hyneman, Who Makes Our Laws, 85 Pol. Sci. Q. 556, 557 (1940), reprinted in Legislative Behavior 254, 255 (Wahlke & Eulau eds. 1959). A more recent study indicates that the proportion of lawyers in state legislatures has declined to less than 25%. American Political Science Ass’n, American State Legislatures 71 (Zeller ed. 1954) [hereinafter cited as American State Legislatures].
26. The study by Hyneman, supra note 25, at 557, revealed that in the period 1925 to 1935 farmers occupied 21.5% of the memberships in the state legislatures studied. A more recent study indicates that in 1949 the proportion was slightly less than 20%. American State Legislatures 71.
27. American State Legislatures 71. See also Hyneman, supra note 25, at 557.
28. Green, supra note 6, at 117–18.
While it is improbable that any empirical test can be devised to measure the scholarly attributes of legislators, an abundance of evidence indicates that the legislative environment is not conducive to scholarly or detailed examination which is essential to effective reformulation of a complicated area of private law.

A notoriously inadequate compensation scale requires many, if not most, legislators to supplement their incomes through outside employment — they perform their legislative work during time borrowed from their regular full-time employment. Although some legislators can limit the demands of their regular employment during the legislative session, those demands certainly cannot be slighted by all. In short, state legislators are part-time employees whose thoughts are directed substantially to other matters.

Even if legislators could devote all of their legislative time to the study of substantive proposals, the length of legislative sessions would seriously hamper scholarly work. Most legislatures meet for such limited periods of time that they cannot give the prolonged, detailed, and studious attention necessary for an effective study of any area in which the existing rules are technical, complicated, and frequently stated in a legal jargon.


30. At the end of 1961 the range of salaries per biennium was from $300 in New Hampshire to $15,000 in New York, while the median salary of the 34 states paying salaries was $3,900 to $4,000. For the 19 states employing a daily or weekly pay plan, the pay rate varied from $5 to $50 per day, with a median daily pay of $15. All but five of the daily-pay states and all but 11 of the salary states also paid living expense allowances that sometimes exceeded the basic pay. The Council of State Governments, The Book of the States 1962–1963, at 37 (1962) [hereinafter cited as Book of the States 1962–1963]. See generally Babcock, State and Local Government and Politics 183 (2d ed. 1962).

31. Only 18 state legislatures meet annually; the remaining 32 hold biennial sessions. Book of the States 1962–1963, at 35. Fifteen states have regular unlimited sessions; 21 directly limit them to a specified number of days, frequently 60 legislative or calendar days; 11 indirectly limit the length of the session by stopping pay or allowances after a certain number of days; and 3 others have other methods of limitation. Id. at 36, 42–43. Special sessions are less restricted: 28 states have no limit; 15 are directly limited; and the remainder are indirectly limited by restrictions on pay or allowances. Ibid.

Longer legislative sessions do not necessarily mean more time spent on legislation. In New Jersey, for example, the legislature sits once a week over a five month period, but commuting problems distract attention from legislation. Anton, The Legislature, Politics and Public Policy: 1959, 14 Rutgers L. Rev. 269, 278 (1960).
unfamiliar to most non-lawyers. Moreover, a high turnover rate precludes any great accumulation of legislative experience. This turnover rate even affects the chairmen of committees, with the result that the average committee head is relatively new at the procedures of law-making.

Legislators are limited not only by the lack of legislative experience and the shortness of the legislative session; they must also work under physical conditions that are unsatisfactory for deliberate consideration of complex matters. The provisions for office space, committee rooms, and secretarial services are, in most states, inadequate at best.

32. Almost 50% of the members of state legislatures have very little legislative experience. AMERICAN STATE LEGISLATURES 65, 67, 70. According to another study of ten state legislatures during the six sessions held from 1925 to 1935, an average of 33.4% of the legislators in any given session were attending their first session and another 22.6% were attending their second session; slightly more than 20% had served as many as four sessions. Hyneman, Tenure and Turnover of Legislative Personnel, 195 Annals 21, 23 (1938). A more recent study indicates that a high level of turnover has continued. See Beckett & Sunderland, Washington State's Lawmakers: Some Personnel Factors in the Washington Legislature, 10 WESTERN POL. Q. 160, 188 (1957). See also Hyneman & Ricketts, Tenure and Turnover of the Iowa Legislature, 24 IOWA L. REV. 673 (1939); Hyneman, Legislative Experiences of Illinois Lawmakers, 3 U. CHI. L. REV. 104 (1935).

33. According to the Hyneman study, 17.3% of committee chairmen were serving in their first session of the legislature while another 24.8% were attending their second sessions. Only 28.1% had attended five or more sessions. Hyneman, supra note 32, at 25. A similar pattern was shown in a later study of committee chairmen in 1950. AMERICAN STATE LEGISLATURES 68-70.

34. A report published in 1954 indicates that at that time no state provided all its legislators with individual offices. AMERICAN STATE LEGISLATURES 159. Thirty-six states did not provide individual office space for members of either house; three states provided individual office space for senate members; eight provided office space to be shared by varying numbers of senators; and five states provided office space to be shared by varying numbers of representatives. Id. at 157. A former Connecticut state senator recently described his working conditions as follows: "I had no office staff and indeed no office except for a corner in my hallway at home, where unsorted and unfilled letters, brochures, notes, and thousands of bills constantly threatened to bury my children under a paper cascade." Lockard, The Tribulations of a State Senator, in LEGISLATIVE BEHAVIOR 204, 206 (Wahlke & Eulau eds. 1959).

35. An earlier study of the New Jersey legislature indicates that in 1938 there were no committee rooms for committee meetings, and consequently hearings had to be held in the Assembly Chamber at times when the legislature was not using the space. McKean, PRESSURE ON THE LEGISLATURE OF NEW JERSEY 47 (1938).

36. The study of American State Legislatures made in 1954 by the American Political Science Association indicated that at that time fewer than 20
In recent years, however, some legislators have been provided with the assistance of legislative reference and bill drafting services, or legislative councils and law revision commissions have been established to originate law reform. In fact, the members of all state legislatures presently have some such staff services available, but these services vary greatly between states, and their significance to the problem at hand will be considered below.

Of course, men have been known to make notable achievements even under adverse conditions, especially where self-interest motivated their labors. The pragmatic nature of American politics, however, is revealed in a survey showing that only a small minority of state legislators entered politics because of political principles. Many political scientists have expressed the opinion that party politics is a relatively unimportant factor in the adoption of state legislation; instead, most legislators are simply striving to satisfy the organized local interests of their respective constituencies. A legislator will probably avoid general legislation that has no organized support from his constituents for the double reason that his action will not bring him credit with his electors, and it may alienate other legislators whose votes are important if he is to serve his constituency loyally.

In this respect lawyers probably do not differ from other legislators, which partially explains their inactivity in reforming the private law, despite their substantial numbers in state legislatures. A less flattering explanation is that their interest in legislative service is engendered by an opportunity to obtain permissible "advertising" while serving their established clients.

Finally, the dilution of urban and suburban voting strength

states assumed the responsibility for providing individual legislators with stenographic assistance in adequate quantity. In only five states did legislators have individually assigned stenographic or secretarial help, and in another each legislator received $2,400 a biennium for clerical assistance. However, 29 states did provide clerical and secretarial assistance for their standing committees, and such assistance was available to major committees in seven states.

38. Eulau, Buchanan, Ferguson & Wahlke, supra note 23, at 311.
40. American State Legislatures 192–93; Anton, supra note 31, at 273–74. See also Green, supra note 6, at 117.
42. See Babcock, op. cit. supra note 30, at 183; McKean, op. cit. supra note 35, at 42.
in state legislatures should be considered. That the rural population enjoys a much greater representation than the urban population cannot be denied. Legislators from rural areas naturally attempt to satisfy their constituents and tend to lack concern for urban problems. Yet the needed reforms in the law of torts are primarily the result of industrialization, the centralization of commercial activities, and other factors accompanying the development of a highly urbanized society. Rural populations are less claims-conscious than their urban counterparts, perhaps because the rigors of rural life induce an acceptance of hardships that urban residents would find unacceptable. In short, the problem areas in the law of torts are of less concern to the rural population and its representatives than to the population as a whole, and in many state legislatures, the representatives of rural areas direct the course of legislative affairs.

III. LEGISLATIVE COMMITTEES AND COMMITTEE HEARINGS

Frequently when judges decline to accept the role of reformer or innovator they do so in deference to the superiority which the legislative process supposedly enjoys in its use of committee hearings. The thought is that through committee hearings the various effects of a change in law may be thoroughly investigated, the competing policy factors critically analyzed, and after extensive consideration and evaluation, a reasoned and well-balanced solution produced. Unfortunately, this idealized view of the legislative process bears little resemblance to what political scientists tell us are the realities of the situation.

For one thing, hearings are not held on all bills, and there is a surprising lack of rules providing for advance notice and scheduling of hearings. A recent study indicates that in all but 19 states whether or not the hearings will be open to the public

46. American State Legislatures 102, 117-18; McKean, op. cit. supra note 35, at 47.
is a discretionary matter. Normally, the crucial decisions are made in executive sessions, from which the press and the public are excluded. The records of committee hearings are in notoriously bad shape, and the committee reports to the legislature are frequently summary and uninformative. As an institution for informing the entire legislative body about the content of proposed legislation and the problems with which it deals, a legislative committee leaves much to be desired.

This assumes, however, that the purpose of legislative committees is one of investigation, accumulation and evaluation of data, and exploration of alternative solutions to various problems. Political scientists indicate, however, that hearings are seldom held for this purpose, and if this result does obtain, it is usually incidental to other purposes. Frequently committee hearings are held to provide an appearance of well-reasoned grounds to support action to which legislators are already committed. If the matter under investigation is one about which there is a division of commitments, the result is likely to be the development of two fact pictures, each conforming to its adherents' views, rather than a complete and objective portrayal of the situation.

49. American State Legislatures 102.
50. For example, the Report of the Committee on Judiciary — Civil of the Washington House of Representatives on a bill, subsequently enacted, to waive the state's immunity to suits in tort stated only:

   We, a majority of your Committee on Judiciary — Civil, to whom was referred House Bill No. 388, consenting to suits against state [sic] in tort actions, have had the same under consideration, and we do respectfully report the same back to the House with the recommendation that it do pass.

52. Steiner & Gove, op. cit. supra note 51, at 83; TRUMAN, op. cit. supra note 48, at 379; Cohen, Hearing on a Bill: Legislative Folklore, 37 Minn. L. Rev. 34, 38 (1952); Cohen, Towards Realism in Legisperudence, 59 Yale L.J. 886, 892 (1950).
53. See, e.g., Huit, supra note 51, at 353, 354, 365.
A very practical purpose served by the hearings is that of revealing the alignment of various interest groups on the subject, thus providing a gauge of their support or opposition to a bill. The cathartic value of committee hearings is obvious and may even assist the legislators in their role as mediators between contending pressure groups. In short, while committee hearings may develop some information upon which a well-reasoned policy decision could be made, this is the exception rather than the rule.

Even if legislative committees were organized to conduct objective and scientific investigations of areas in which reform legislation is needed, they are ill-equipped to do so. As mentioned above, near to one-half of the committee chairmen are serving in either their first or second session of the legislature. Committees frequently lack an adequate staff, and what they have is chosen, not for professional competence in investigation of technical problems, but for their connections and political competence. Moreover, insofar as reform in tort law is concerned, the concentration of most legislative work in a few standing committees goes far to ensure that there will be no organized pool of talent to work on specialized problems. What legislative proposals are made concerning the reform of tort law will probably be referred to the already overworked judiciary committee, with its far-flung interests.

Finally, no empirical data would be available for a substantial number of tort law subjects that a legislative committee might investigate. For other subjects the empirical data is equally available to the courts as to legislative committees. For example, a field study probably could produce no valid and detailed conclusions concerning the effect of an abandonment of charitable immunity from tort liability on charitable donations or the level of charitable operations. The numerous uncontrolled variables affecting donations and charitable operations undermine the scientific approach. The same reasoning applies to the removal of charitable or governmental immunity from educational institutions. The crude fact that liability insur-

54. Truman, op. cit. supra note 48; Cohen, Hearing on a Bill: Legislative Folklore, 37 Minn. L. Rev. 34, 39 (1952).
55. See note 33 supra.
57. American State Legislatures 96. See also Babcock, op. cit. supra note 30, at 189 for a discussion of the usual standing committees, none of which has a special relationship to tort law.
ance permits the continued operation of charities and schools in nonimmunity jurisdictions can be noted by courts as well as legislatures.\textsuperscript{58}

To take another immunity rule as an example, one of the reasons advanced in support of the inter-spousal immunity rule is that abandonment would lead to a substantial number of fraudulent claims, where liability insurance would cover the claim. According to Professor McCurdy, insurers generally have no statistics showing the number or amount of inter-spousal automobile liability claims in states allowing such suits.\textsuperscript{59} That other comprehensive and reliable data would be available to legislative committees seems unlikely. Any legislative estimation of the effect of a change of that immunity rule would probably have to rest, as it does with courts, upon a priori assumptions.

As Judge Magruder has asked,\textsuperscript{60} could a factual survey establish that in a particular state the rule recognizing a privilege for honest, but erroneous, statements concerning candidates for public office had the effect of driving honorable men from politics? Would a more detailed documentation of the effect of modern advertising campaigns on consumer purchasing habits and a more complete account of the dangerous potential of automobiles have provided a sounder basis for the New Jersey Supreme Court's holding that when a manufacturer puts a new automobile in the stream of trade and promotes its purchase, an implied warranty of fitness accompanies it into the hands of the ultimate purchaser?\textsuperscript{61}

The suggestion is not that legislative committees could never uncover empirical data bearing on a choice of or change in various tort rules, nor that courts have made adequate use of the available data.\textsuperscript{62} Important empirical data relevant to some tort problems might be available to legislative committees. Thus, a

\textsuperscript{58} See, e.g., President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 823 (D.C. Cir. 1942); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

\textsuperscript{59} McCurdy, \textit{Personal Injury Torts Between Spouses}, 4 \textit{Vill. L. Rev.} 303, 334 (1959). Professor McCurdy does state, however, that there are indications that premium rates have increased in recent years in states that permit inter-spousal suits, but he does not state exactly what those indications are.


study of the causes of trichinosis, its spread, and methods of control might lead to a conclusion that a warranty of freedom from trichinae should accompany a sale of pork. But courts could make a better appraisal of the comparative abilities of the judiciary and the legislature to deal with a particular problem if consideration were given, on a selective basis, to the probabilities that relevant empirical data would be available to legislative committees but not to the judiciary.9

IV. LEGISLATIVE SERVICE AGENCIES

The handicaps under which state legislatures work have not gone unnoticed. At the present time all state legislatures have some kind of staff services, but the level and quality of these services vary greatly.94 Legislative reference services are available in 47 states, although some of their functions are now being assumed by newer forms of service agencies.95 Valuable as their research services are to state legislatures, they are library-oriented96 and are unlikely to turn up any information not available to judges who look beyond the traditional sources of legal information.

Bill drafting and law revision services are also available in 47 states.97 Although these services are important, they are primarily confined to matters of form and style and utilize skills certainly possessed in equal measure by the judiciary. Only a few states provide for systematic revision of the substantive law; California, Louisiana, and North Carolina having followed New York's lead in this direction.98

The increasing use of legislative councils has been the most significant development in the reform of substantive law. Thirty-nine states now have established legislative councils,99 most of which are super-interim committees of the legislature, formed on a bipartisan and bicameral basis, and assisted by a research staff. Some have broad statutory duties; some have been restricted by statute; and others have imposed their own restrictions.100 In 1962,

65. Id. at 63–64.
66. AMERICAN STATE LEGISLATURES 142–44.
68. Id. at 64–65.
69. Id. at 65.
70. AMERICAN STATE LEGISLATURES 128–30.
Budgets for legislative councils ranged from 29,500 to 850,000 dollars, with a median budget between 84,000 and 90,000 dollars. These variations suggest the fallacy of a generalized reliance on the existence of the legislative council as an adequate instrument for the reform of tort law. Not all councils have both the inclination and resources for productive work in the area. New York, with its famous law revision commission, adopted three items of what might be called tort legislation in 1956 and two similar items in 1958, but apparently enacted no significant tort legislation in 1955, 1957, 1959, 1960, or 1961. A similar situation apparently exists in Pennsylvania and Illinois. In each jurisdiction the courts could and should examine the record of the legislative council, if one exists, to determine how active and how successful the council has been in a particular field. In the course of doing so a court may find, as did the New York Court of Appeals, a council report gathering dust in legislative files that persuasively supports a court-made reform of tort law.

Other legislative services, such as interim legislative committees, have been provided in recent years. As a general proposition, interim committees are less effective than legislative councils and more limited in duration and scope of activity. The choice of subjects for investigation is determined by the interests of individual members; much effort is wasted in organization; and they lack the experienced staff that legislative councils may develop. Again, a court considering its reform role should properly determine not merely the existence of interim committees, but whether they ever investigate and successfully suggest proposals for the reform of tort law.

Of course, with respect to all of these legislative service agencies the same question should be asked that was asked concerning

75. Note, 29 N.Y.S.B. Bull. 198-244 (1957).
80. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (relying upon a 1936 report of the Law Revision Commission that recommended changes in the earlier rule by which there was no recovery for physical or mental injuries caused by negligently induced fright).
legislative committees: Is it probable that empirical data bearing on a particular area in which reform may be desirable exists in a form available to the service agencies but not available to the judiciary? In this respect it might be noted that, according to political scientists, the function of a legislative research staff is not to gather primary data, but rather to collate and synthesize data already culled by administrative agencies and private organizations.82

V. LOBBIES AND PRESSURE GROUPS

Political scientists unanimously assert that lobbies and pressure groups play a tremendously important role in the legislative process. Professor Truman's authoritative work on the governmental process83 consists primarily of a study of pressure groups, their problems of organization, and their tactics of influence. In his judgment, political interest groups are as clearly a part of government as the political parties or the branches established by the constitution.84 One scholarly state legislator came to believe after two legislative sessions that outside group pressures accounted for 90 percent of what was done.85 The authors of an Illinois study concluded that non-legislators sometimes exert more influence on legislative decisions than do members.86 Moreover, the amateur legislators, who make up a considerable part of state legislatures, may find it difficult to identify the various pressure groups,87 a fact that may well intensify the significance of these group activities.

The scope of pressure group and lobby activity is, of course, not confined to initiating legislation; of equal importance is their opposition to the passage of legislation deemed inimical to their interests. Since bills that have no organized support may fail to pass even though unopposed,88 a pressure group or lobby can

82. Id. at 133.
83. TRUMAN, op. cit. supra note 48.
84. Id. at 502. According to Truman, the unorganized interests of society also play a role in the governmental process, setting the rules or norms of conduct by which the behavior of organized interest groups are judged. This factor, as well as the overlapping of group memberships, serves as a check against activities of organized groups. Id. at 512–16.
85. McKean, op. cit. supra note 85, at 218.
86. STEINER & GOVE, op. cit. supra note 51, at 32–57. Included in this powerful group were the governor, the press, private lobbyists, and lobbyists for various governmental units.
easily dispatch such legislation to oblivion. Faced with organized resistance on one side and no organized support on the other, the choice is obvious to any legislator whose approval is necessary to obtain release of the bill from committee, particularly where the local legislative rules permit secret votes.89

Of course, not all lobbies and pressure groups are equally effective. Groups with lobbying experience tend to be more successful than ad hoc groups, partly because of their familiarity with the legislative process.90 Moreover, effective action of a lobby or pressure group requires the cooperation of other lobbies and pressure groups.91 In short, legislative log-rolling techniques are also employed by lobby and pressure groups.

How does this knowledge of the legislative process apply to the problem of reform of tort law? It reveals the incredible naivete of much judicial language. For example, courts have frequently expressed the idea that any reform in the rule granting charitable hospitals immunity from tort liability must be made by the legislature.92 Yet the realities of the legislative process render the suggested means of reform as unworkable as the most visionary of utopian schemes. The fortuitous victims of negligence and malpractice of employees of charitable hospitals form no natural or integrated economic, social, or political group. Moreover, legislation oriented toward the consequences of future events will not satisfy their demands for redress of past negligence, and they will not move in an organized fashion along legislative avenues. Alternatively, if an individual legislator should become interested in the matter, either through personal experience or the experience of some friend or relative, his proposals would face opposition from the organized and attentive lobbies of hospitals and insurance companies. Moreover, removal of the immunity of hospitals might initiate similar action affecting other charities, such as some churches, that might therefore intervene in behalf of the

89. In only 11 states are committees required to report on all bills. Book of the States 1962-1963, at 50-51. Crucial committee decisions are usually made in executive sessions from which the public and press are excluded. See text accompanying note 48 supra. See also American State Legislatures 102.

90. Steiner & Gove, op. cit. supra note 51, at 48.


hospitals. It would indeed be an unusual legislator who, faced with an organized defense by a group with such immediate appeal, would persist unaided in the battle to remove the immunity. Even if he organized a group to support the proposed legislation, that group would be an ad hoc organization unable to engage in the long run cooperative or log-rolling techniques so essential to effective legislative action.

Certainly this is but one example of what has been commented on a number of times: There are no well organized and permanent lobbies which have a comprehensive interest in the reform of tort law.93 Within bar associations, lawyers representing insurance companies are balanced against those representing injured plaintiffs. The National Association of Compensation Claimant Attorneys (NACCA) might be considered a natural lobby group, but a review of the recent volumes of its journal fails to disclose any involvement in legislative reform. On the contrary, the reform emphasis is on case developments, with the courts viewed as the reform agency.94 If the NACCA should lobby vigorously for reform, it would undoubtedly suffer not only from a general distrust of lawyer-proposed legislation but also, turning a phrase that had political significance, from a profound distrust of the idea that what is good for the plaintiffs’ bar is necessarily good for the law of torts.

What has been said thus far should not suggest that there are no organized pressure groups or lobbies with interests in various problems of tort law. The insurance lobby has been mentioned. Newspapers, radio, television, and other news media have an obvious interest in the law of defamation. The public lobby, consisting of representatives of state agencies, municipal and county

93. E.g., Green, The Thrust of Tort Law: Part II Judicial Law Making, 64 W. Va. L. Rev. 115, 117–18 (1962); James, Tort Law in Midstream: Its Challenge to the Judicial Process, 9 Buffalo L. Rev. 315, 334 (1959). See also McKean, Pressure on the Legislature of New Jersey 52–95 (1959), for a list of 164 interest groups working in the state legislature, none of which would have a general interest, if indeed any interest, in reform of tort law.

governments, and other public bodies, is interested in proposals to use their funds to finance a waiver of immunity. A proposal relating to punitive damages generally can be expected to produce an unusual alliance of the lobbies for organized labor, communication media, and insurance companies. Occasionally the organized interest groups or lobbies may support legislative proposals; but having accommodated themselves to the existing state of affairs, they probably will seek to preserve the status quo by resisting reform.

The record of adoptions of Model and Uniform acts confirms what has been said about the role of pressure groups and lobbies in the legislative process. For example, in 14 years the Uniform Photographic Copies as Evidence Act has been enacted in a total of 35 jurisdictions, whereas in a considerably longer period the Uniform Joint Tortfeasors Act has been adopted in only eight jurisdictions. Certainly this disparity cannot be explained solely in terms of draftsmanship or breadth of appeal. The explanation of the difference in reception seems to lie in the existence of organized lobbies for insurance companies, banks, and other businesses that actively sought enactment of the former act for business convenience, and the absence of any organized lobby supporting the latter act. Similar lack of interest has been demonstrated for other uniform laws touching on torts, while other narrow and technical uniform acts have achieved a much higher level of adoptions. Indeed, the fact that only four of the 114 uniform and model acts approved by the Commissioners on Uniform Laws are

96. 9 U.L.A. 97 (Supp. 1962). There were some objections to the adoption of § 5 of the act because it was thought to open the way to collusion by an injured plaintiff and one of several defendants. See the Commissioner's note to § 4 of the 1955 Uniform Contribution Among Tortfeasors Act, 9 U.L.A. 113 (Supp. 1962). But correction of this defect has not accelerated its adoption. See note 97 infra.
98. The Uniform Trust Receipts Act, approved in 1933, has had 39 adoptions, 9C U.L.A. 118 (Supp. 1962); the Uniform Common Trust Fund Act, approved in 1938, has had 30 adoptions, 9 U.L.A. 95 (Supp. 1962); the Uniform Simultaneous Death Act, approved in 1940, has had 48 adoptions, 9C U.L.A. 87 (Supp. 1962); the Uniform Gifts to Minors Act, approved in 1956, has had 48 adoptions, 9B U.L.A. 39 (Supp. 1969); and the Uniform Act for Simplification of Fiduciary Security Transfers, approved in 1958, has had 86 adoptions, 9C U.L.A. 71 (Supp. 1962).
concerned with torts, is itself of some significance in evaluating the legislative and judicial avenues of reform. It also corroborates the fact that lobbies and pressure groups are effective in arrogating the attention of legislative service agencies to their particular fields of interest.\footnote{Cf. Kernochan, A University Service to Legislation: Columbia’s Legislative Drafting Research Fund, 16 La. L. Rev. 623, 635 (1956), commenting on the fund’s inability to accommodate all those requesting aid in drafting proposed legislation.} In short, torts more than many other areas of private law is neglected in the legislative process and therefore may more appropriately be considered an area for judicial reform.

VI. THE POSSIBLE CONFLICT WITH THE LEGISLATURE

In considering the propriety of revising or overruling some principle of tort law, should a court give any effect to the factors mentioned in this summary of legislative realities? Would doing so smack too much of the practical political considerations that should be confined to other areas of the governmental process? To put it another way, lest they overplay their creative role, should the judges of the highest court of a state feign ignorance of what any intelligent person can discover about the legislative process within their state? Or should they, summoning their courage, take note that while the Emperor does have clothes, some of which may be beautiful indeed, there are others which are tattered and full of holes?

One of the arguments that might be made against this realistic approach to problems of government is that it conflicts with our democratic faith. In a society dedicated to representative government there is legitimate concern about judicial methods of policymaking. After all, even if elected, judges are not chosen for their abilities to represent or respond to public pressures.

They are, however, men trained by their profession to exercise self restraint. They are certainly capable of distinguishing between the problems that would arise if they acted in conflict with legislative pronouncements and the problems of action in an area in which no such conflict exists. The judge who makes that distinction is as responsive to the electorate as the legislature which enacted the statute. Indeed, to argue that judicial creativity properly confined to areas where no conflict with representational determinations exists is contrary to our democratic traditions is to argue that one of those traditions is itself in conflict with the others. Quite clearly, the common law today is not what it was at
the founding of this nation, and the ability of judges to change and adapt it to different circumstances has been one of the greatest achievements of our judicial system.\textsuperscript{100}

Where a court makes what appears to be a needed adjustment in an area in which the legislature has failed to act, that adjustment is not, of course, irreversible. If the judicial reform has provoked sufficient opposition, it is subject to legislative revision or repudiation.\textsuperscript{101} The same is true when a court deals with an ambiguous statute, such as one waiving the sovereign immunity of a state without mentioning the derived immunity of municipalities.\textsuperscript{102}

Of course, the forces that will produce a legislative response to judicial action will be similar to those that produce other legislation. A response is not likely if the judicial reform has not affected the interests of organized pressure groups and lobbies. In other words, it will not come because legislators spend their spare time reading advance sheets to check on how well the court is performing its work.\textsuperscript{103} When the judicial reform is challenged the lobbies and pressure groups will, fortunately, bear a burden absent in the usual legislative situation—that of persuading legislators to overturn or modify the determination of a respected body of impartial men. Such a catalytic function of the judiciary, producing legislative consideration of society's needs on matters that no interested group would otherwise question, might well be categorized as an implementation of representative government. It certainly is not opposed to it.

The courts are not unaware of these pragmatic considerations. In \textit{Wong Yang Sung v. McGrath}\textsuperscript{104} the Supreme Court of the United States considered the question of whether deportation proceedings of the Immigration Service were subject to certain provisions of the Administrative Procedure Act; those provisions required separation of prosecuting functions from adjudicating functions. The Court held that the Service was subject to the provisions, saying:\textsuperscript{105}

\begin{itemize}
  \item \textsuperscript{100} See notes 2 \& 12 supra.
  \item \textsuperscript{101} See \textit{Holytz v. City of Milwaukee}, 17 Wis. 2d 20, 115 N.W. 2d 618 (1962), for a case in which a court specifically notes the possibility of corrective legislative action.
  \item \textsuperscript{102} See Comment, \textit{Abolition of Sovereign Immunity in Washington}, 80 Wash. L. Rev. 312, 326-27 (1961).
  \item \textsuperscript{103} Cf. \textit{Knecht v. Saint Mary's Hosp.}, 592 Pa. 75, 140 A.2d 30 (1958) (Musmanno, J., dissenting).
  \item \textsuperscript{104} 339 U.S. 33 (1950).
  \item \textsuperscript{105} \textit{Id.} at 47.
\end{itemize}
The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter.

More directly related, in this respect, to the problem of reform of tort law is the recent decision of the Supreme Court of Wisconsin, Holytz v. City of Milwaukee. In that case the court abrogated the doctrine of sovereign immunity as it applied to all public bodies within the state, noting that if the legislature deemed it better public policy, it was free to reinstate the immunity. Also noted by the court were the possibilities that the legislature might impose ceilings upon liability or establish administrative requirements preliminary to commencement of suit.

Of even more interest is the recent decision of the Minnesota Supreme Court in Spanel v. Mounds View School Dist. In the Spanel case the court abolished sovereign immunity as a defense to the tort liability of school districts, municipal corporations, and other subdivisions of government. Utilizing the technique of prospective overruling, the court announced that it would apply the new rule after the next session of the Minnesota Legislature adjourned, subject to any statutes that might then regulate the prosecution of the claims. Not only did the Minnesota court give the legislature an opportunity to pass upon the question; it also suggested a number of procedural and substantive matters that should be dealt with in such a statute.

In response to Spanel, the Minnesota Legislature restored all sovereign immunity for the remainder of 1963. Thereafter the immunity of school and drainage districts is specifically retained another four years, while the immunity of municipalities is, with certain exceptions, removed. These exceptions may be waived if the municipality obtains liability insurance, but in no other case will the municipality be liable beyond the monetary limits imposed by the statute.

The realistic and ingenious approach to the relationship between the judiciary and the legislature adopted in Spanel was, perhaps, suggested by recent experiences in other jurisdictions in which the courts have overruled immunity doctrines. In Molitor v. Kaneland Community Unit Dist., the Illinois Supreme Court abandoned the position that school districts enjoy an immunity from tort liability, implying that the whole doctrine of sovereign
immunity had been abrogated. In the legislative session that followed this decision, four bills were enacted conferring immunity from tort liability on various governmental subdivisions and one bill was enacted restoring the immunity of school districts from liability in excess of 10,000 dollars on each separate cause of action.

A similar experience occurred in New Jersey following the decision in Collopy v. Newark Eye and Ear Infirmary. In Collopy the New Jersey Supreme Court overruled the principle that a charitable corporation was immune from liability for the torts of its employees. The legislature responded by establishing a general charitable immunity from liability for what would otherwise be torts to beneficiaries, but permitting recovery, in tort actions involving not more than 10,000 dollars, from a nonprofit corporation organized exclusively for hospital purposes.

More recently, the California Supreme Court discarded the rule of governmental immunity from tort liability. The legislative response was the adoption of a statute re-enacting the doctrine of sovereign immunity as it had previously existed, such im-

110. ILL. REV. STAT. ch. 105, §§ 12.1-1, 491 (1961) (park districts); ILL. REV. STAT. ch. 34, § 301.1 (1961) (counties); ILL. REV. STAT. ch. 571/2 § 3a (1961) (forest preserve districts); ILL. REV. STAT. ch. 105, § 393.2a (1961) (Chicago Park District).


115. CAL. CIV. CODE § 22.3. For a discussion of the problems raised by this sequence of events, see Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A.L. REV. 463 (1963).

Editors Note: The California legislature recently enacted a statute that, with certain exceptions, abolishes sovereign immunity. Cal. Sess. Laws 1963, ch. 1681. Under the new statute, a public entity is liable for the injurious acts or omissions of its employees "if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Cal. Sess. Laws 1963, ch. 1681, § 815.2(a). A public employee is liable for his injurious acts or omissions to the same extent that he would be liable as a private person. Cal. Sess. Laws 1963, ch. 1681, § 820(a). This liability is qualified, however, by several provisions, the broadest of which exempts a public employee, and hence his employer, from liability for an injury that "was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Sess. Laws 1963, ch. 1681, § 820.2. This provision seems to encompass the subsequent, more specific exemptions. Cal. Sess. Laws 1963, ch. 1681, §§ 820.3-821.8. Two final sections grant immunity from liability for funds stolen from
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munity to expire on the ninety-first day after the regular legislative session of 1963. Provision was also made for maintenance of suits on claims that otherwise would have arisen in the interim. In short, the legislature gave itself two years to study the problem and make provisions for tort suits against the state and its subordinate constituents.\textsuperscript{116}

The experiences in Illinois, New Jersey, and California might be interpreted as rebuffs to reform-minded courts. The rules announced by the courts were not allowed to stand, and the immunities they had overruled were partially reinstated. Yet the Illinois Supreme Court certainly did not consider the legislative action as a rebuff; instead it adhered to its position in an opinion filed on rehearing after the legislature had acted, and it was on sound ground in doing so. The statement of policy of the new Illinois act,\textsuperscript{117} relating to the tort liability of school districts and nonprofit private schools, refers to "excessive" diversion of school funds but recognizes that there "should be a reasonable distribution among the members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in

\begin{quote}
\textit{a non-negligent public employee and for negligent or even intentional misrepresentations, if the employee was not guilty "of actual fraud, corruption or actual malice."} Cal. Sess. Laws 1963, ch. 1081, §§ 822, 822.2.
\end{quote}

\textsuperscript{116} The Michigan Supreme Court has experienced a period of rather spasmodic interpretation of local sovereign immunity provisions. In Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961), an equally divided court affirmed, on the basis of sovereign immunity, the lower court's dismissal of a tort claim against the defendant municipality. A majority agreed, however, that the doctrine as applied to municipalities should be prospectively overruled. Four justices, headed by Mr. Justice Edwards, felt that the prospective overruling should have applied to the instant case. \textit{Id.} at 267-68, 111 N.W.2d at 28-29. Mr. Justice Black wrote a separate opinion in which he agreed that the lower court's judgment should be affirmed, but concluded that municipal corporations should not have the protection of sovereign immunity in the future. \textit{Id.} at 287, 111 N.W.2d at 18. Three justices, headed by Mr. Justice Carr, refused to acquiesce in the overruling of the doctrine of sovereign immunity. \textit{Id.} at 249, 111 N.W.2d at 9.

Any hopes that the court would abrogate sovereign immunity for all purposes were quashed by the decisions in McDowell v. State Highway Comm'r, 365 Mich. 268, 112 N.W.2d 491 (1961), in which the court retained the immunity of the State and its departments, and Sayers v. School Dist., 366 Mich. 217, 114 N.W.2d 191 (1962), and Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N.W.2d 69 (1962), two cases in which the court refused to remove the immunity of school districts. These last three decisions indicate a retreat from the court's position in \textit{Williams}, where the court apparently took positive action in an area of legislative inactivity.

the conduct of school district affairs . . . .” During the same legisla-
tive session another bill was adopted increasing the tort jur-
isdiction of the Illinois Court of Claims from 7,500 to 25,000 dol-
ars. Similarly, the immunity reinstated in New Jersey was not as complete as that previously recognized. The final result in Cal-
ifornia remains to be seen. But in each of the three states the judi-
ciary clearly succeeded in serving as a catalyst, activating the legis-
lation with respect to problems that otherwise would have been ignored. And in none of them has the court taken a position de-
fi ant of an expressed legislative determination.

It has been argued, however, that legislative inaction constitu-
tes a tacit approval of the status quo. According to this view, judi-
cial creativity in an area in which the legislature has not acted would amount to defiance of the legislature. The argument is well represented in a statement of the Oregon Supreme Court on the doctrine of charitable immunity:

Over the years the legislature has taken no action to overturn the doc-
trine. By its silence, we may well infer its approval. But, however that may be, there was no occasion for it to act specifically if it was satis-
ished with the rule. The doctrine had become the firmly established law of this state; a part of the general public policy of the state relating to charitable institutions, and as established by the legislature.

The legislature had the right to assume that the rule would not be changed unless it itself acted.

Obviously this statement is a fine example of what Llewellyn called the “formal style,” but the most striking thing about it is the way in which it ignores the legislative realities. As the Oregon court sees it, the legislature is really an assembly of philosopher kings, gathered to consider the problems of the republic and to settle matters dispassionately, for the good of society. It does, in

118. ILL. REV. STAT. ch. 37, § 439.8(D) (1961).

Editors Note: Subsequent to the completion of this Article, the Oregon Supreme Court, in Hungerford v. Portland Sanitarium & Benevo-
lent Ass’n, 384 P.2d 1009 (Ore. 1963), rejected its previous approval of the charitable immunity doctrine, reasoning that “it is neither realistic nor consistent with the common-law tradition to wait upon the legislature to correct an outmoded rule of case law . . . . The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist.” Id. at 1011.

fact, comb through old decisions of the court to see which, if any, are getting out of adjustment with current values. Legislators will do this even though much of their time and attention in the short and hectic legislative sessions is taken by representatives of pressure groups and lobbies. Moreover, though most of them have had no legal training, they are able to understand, evaluate, and select for revision or repeal those judicially developed principles that are no longer productive of justice. And they can do this even though the rules and their various exceptions are stated, frequently without indicia of doubt, in the complicated, technical jargon of a learned profession.

In reality, there is no basis for this inference of legislative approval of the existing tort rules, and not all courts draw such an inference. For example, the Michigan court refused to find in legislative inactivity following decisions under a wrongful death statute an approval of the judicial interpretations. In the view of the Michigan court, "a legislature legislates by legislating, not by doing nothing, not by keeping silent." Or, as Professor Hart has pointed out, the Constitution of the United States and each of the state constitutions prescribe the ways in which bills shall become law, and failing to enact a bill is not one of them. Indeed, it is just as reasonable for the legislature to assume that if a judicially developed rule is unjust the courts will overrule it. And as Justice Black of the Supreme Court of Michigan demonstrated, this equally permissible inference has in fact been used by lobbyists in opposing changes in the law of torts.

Where reform bills have been defeated in a legislature, there may be more reason to infer legislative approval of the status quo. Some courts have drawn this inference but others have refused

to do so.\textsuperscript{127} Once again the legislative realities indicate that the inference may be incorrect either as to the existence of a formulated legislative judgment or as to the reasons why the legislation failed to pass. Professor Hart's observation is again in point even if the inference might correctly be drawn as a matter of fact. Likewise, one might infer from limited reforms in a particular area of tort law that the legislature had determined that no further changes should be made in the doctrine involved. Yet at least three courts have refused to draw such an inference within recent years.\textsuperscript{128}

Of course, in some areas, legislatures may have substituted comprehensive statutory schemes for common-law tort principles. For example, the field of labor law was formerly governed by judicially developed tort principles.\textsuperscript{129} Presently, federal statutes so dominate the area that continued judicial creativity would be inappropriate. The inappropriateness is currently stated in the doctrine of federal pre-emption,\textsuperscript{130} although that doctrine does not apply to all torts which occur in a labor context.\textsuperscript{131} Even without the constitutional basis for the pre-emption doctrine, courts should refuse to play a creative role. In labor matters there is no lack of pressure groups or lobbies to initiate action; nor is there indifference on the legislative scene. Legislative policy-making is preferable in such a context, and judicial policy-making by state courts is inappropriate.

Excepting these areas where legislation has established a comprehensive scheme, and the specific situations in which the legislature has in fact spoken, recognition of the judiciary's reform function with respect to the law of torts involves no actual conflict with the legislature. Arguments to the contrary are based on an artificial view of the legislative process or a rigid and doctrinaire view of the common law. Indeed, as has been pointed out,


\textsuperscript{129} See 4 Restatement, Torts §§ 775-816 (1939).

\textsuperscript{130} Garner v. Teamsters Union, 346 U.S. 485 (1953).

judicial activity may well complement the representational system of government, apprising the legislature of matters that would otherwise be ignored in the turmoil of the legislative process.

VII. OTHER RESTRAINTS ON ACTIVE AND OPEN JUDICIAL REFORM

The absence of conflict with either the legislature or the concept of representative government does not of itself require an active and openly creative reform role for the judiciary. The potential gains must be weighed against the benefits to be lost and the new burdens imposed.

Probably the greatest danger of an active and openly creative reform role for the judiciary is that it might produce or even facilitate a legislative counterattack by the lobbies and pressure groups that favor the status quo. There is little reason to believe that they will not combat both judicial and legislative change with equal vigor. The same factors that lead to legislative inactivity will result in the absence of countervailing pressure groups protecting the judicial reform.

If revision is made demonstrably as a function of policy-making, it probably will be easier for lobbies and pressure groups to convince legislators that they are as competent as judges to make such decisions. And a rigid statutory solution established by the lobbyists may easily prove to be more of an inhibition to future adjustments than adherence to traditional methods of dealing with precedent. By Professor Llewellyn's count, there are 64 traditional and impeccable techniques for dealing with precedent.\textsuperscript{122}

Even if one were inclined to doubt the separate identity of some of the listed techniques, one cannot but be impressed by his account of the freedom and mobility which courts have developed within traditional limits and accordingly hold fears that this mobility might be lost under a statutory scheme.

Mr. Justice Cardozo recognized the potential of these techniques for accomplishing reform and the inhibiting influence that legislation might exert:

Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but it has taken the use out of our own hands and put it in the hands of others.\textsuperscript{133}

\textsuperscript{122} LLEWELLYN, \textit{op. cit. supra} note 120, at 77-91.

\textsuperscript{133} Cardozo, \textit{A Ministry of Justice}, 35 Harv. L. Rev. 118 (1921).
His opinion in *MacPherson v. Buick Motor Co.* is some measure of his ability to accomplish a major reform while insisting throughout an avowedly uncreative opinion that the result was dictated by a principle drawn from earlier cases, a good number of which were in a very practical way overruled. If Justice Cardozo had expressly stated a judicial responsibility for active and creative reform and then announced as the latest policy judgment the rule of manufacturers' liability for negligently made products, manufacturers' associations might have successfully sponsored an undesirable legislative response.

The danger of statutory intrusions depriving courts of the flexibility they possess in its absence can be overstated. As Gray pointed out several times in his classic work, quoting Bishop Hoadly, judges make the final determination of the meaning of a statute. They may exercise this power more than once, by changing an earlier court's interpretation of the statutory language. For present purposes, a perverse exercise of this power may be found in the treatment that a number of state courts have given constitutional and statutory provisions authorizing suits against the state. A much more severe test of a court's ability to interpret a statute without invoking legislative retaliation — perhaps the most severe test — can be found in those cases in which courts issued an injunction in a labor dispute on the basis of the preamble of a statute designed to prevent the issuance of such injunctions. The presence of opposing pressure groups, however, may have made the venture less risky than an equally cavalier treatment of legislation that had strong supporters and no opponents.

Certainly, the judicial tendency to construe statutes strictly rather than analogize from their provisions has been demonstrated more than adequately. On the other hand, a court may

134. 217 N.Y. 382, 111 N.E. 1050 (1916).
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utilize a statute as the base for a creative venture; for example the United States Supreme Court recently announced that the Federal Employers Liability Act created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles to compensate injured employees consistent with the changing realities of the railroad industry.\textsuperscript{140} In short, courts can remain creative even while working within a statutory scheme.

Assuming that courts can and do withstand the counterattack on their reforms, they face problems within their own walls. Having acknowledged their creative role, they should expect a response from those with an interest in producing change. The organized interests that function as legislative lobbies might well undertake experimental litigation to produce changes consistent with their objectives. If the appellate court might play its creative role in any case coming before it, interest groups may well conclude that they cannot ignore pending cases involving principles of law important to them. At the present time such groups do participate as amici in significant cases, but only where the significance of the case appears from the lack of controlling precedent or the convergence of conflicting precedents in the context of the pending case. Unless the courts develop some signaling device, such as setting the case for re-argument and inviting amicus briefs, they can expect an increase in the applications to participate as amici. Even with the use of such a device, as case reports indicate,\textsuperscript{141} courts will receive what they might consider the mixed blessing of numerous briefs and oral arguments. While the matter rests within their control, it is unlikely that courts would want to refuse such assistance in the new role they have openly assumed.

If the courts undertake a creative role, they can expect pressure for changes in the rules of evidence. Much of the evidence that is inadmissible as irrelevant under existing rules might be relevant to the consideration of a change in the rules. The size of records might increase significantly, as those using the litigation process experimentally attempt to build the proper record, with data drawn from other disciplines and professions, for the policy

\textsuperscript{141} For example, in Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) the court received seven amicus curiae briefs, and in Spancl v. Mounds View School Dist., 118 N.W. 2d 795 (Minn. 1962) ten amici curiae participated.
decision they will urge upon the court.\textsuperscript{142} To a certain extent, the problem can be avoided by liberal use of the technique of judicial notice. Not all relevant information and analysis, however, appear in available printed form. Again, the problem is within the control of the court, but the pressure to receive all volunteered information relevant to the policy decision will be difficult for a non-investigatory body to withstand.

Another facet of the total problem presented by a creative judicial role is that of dealing with ex parte communications. If the function of the judiciary is to ensure the correct application of the appropriate rules of law to the facts of a case, improper communications concerning these facts may be quite easily prohibited. If the courts affirmatively assume a policy-making role, however, what is the status of non-record communications made by a nonparty and not directed to the facts of a particular case but of great importance in establishing a policy that the communicator supports? Lord Mansfield has been commended for consulting with experts in the practices of merchants, but it is far from certain that present-day judges would not be censured for private discussions with economists, psychiatrists, or sociologists. The problem has been a major one for administrative agencies which possess both adjudicatory and rule-making powers.\textsuperscript{143}

VIII. LEGISLATIVE AND JUDICIAL STRENGTHS AND WEAKNESSES

Having surveyed some of the pros and cons of an actively creative role for the judiciary in the reform of tort law, a summary of the relative strengths and weaknesses of legislatures and courts as reform agencies is appropriate.

As the above discussion shows, there is a remarkable dearth of legislative incentive to consider or initiate reforms of tort law. A conscientious judge, on the other hand, might easily consider it one of his professional obligations. While legislatures have the power, and sometimes even the means, to investigate the relevant factors underlying a policy decision, their utilization of the existing facilities is extremely unlikely. No empirical data is available for some problems and for others the available data can be obtained without the use of legislative investigatory powers. On the other hand, courts have no investigatory powers to facilitate

\begin{itemize}
\item \textsuperscript{142} Cf. Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929); Freund, On Understanding the Supreme Court 86–92 (1949).
\item \textsuperscript{143} See Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 293 (1963).
\end{itemize}
the accumulation of data relating to policy decisions, except as they might provide power to litigants by relaxing the evidentiary rules of relevance. Moreover, court records unfortunately stop short at the rendition of a judgment and are barren of information on how the determination made subsequently affected the parties and society. The necessity of making occasional policy decisions without adequate supporting data often produces a judicial tendency to ignore pertinent empirical data. But frequent encounters with a general problem, presented in various contexts that an endless variety of fact patterns provides, give courts a type of experimental program in which they can formulate and test a governing rule. Moreover, their experience with jury refusals to apply the rules propounded by trial judges gives them some basis for determining whether the rules are compatible with the current values of society. Thus, courts have recently commented on the unacceptability of the rule by which contributory negligence bars recovery and the rule limiting a parent's recovery for the wrongful death of a child to pecuniary losses.

If the comparison is made on the basis of what has in fact been done to accumulate data, as opposed to what could be done, courts compare quite favorably with legislatures. As Professor Leon Green has said, courts know more of the history of the law, and thus probably more of what departure from an established rule involves, than a legislature knows or can learn.

Courts certainly equal legislatures in the ability to appraise the rationale of an existing rule. Particularly is this so in those areas where the need for reform has produced a host of irrational and unworkable distinctions, impressive and even awe-inspiring to laymen as an elaborate and complicated structure built by a learned profession, but without merit or justification to those who understand the problem. Not surprisingly, it is in these areas that


courts have recently been most active in making reforms. In making such appraisals they have the benefit of the extensive literature of the profession and, unlike legislators, a physical and social environment conducive to scholarly pursuits. Indeed, the extent to which judges have relied on law review commentary and scholarly treatises when undertaking a reform is probably one of the greatest reassurances that can be given to those who wonder whether their literary products have a value equal to the pain of their labors.

Changes in substantive rules may affect the important relationship between the trial judge and jury. In this area, courts are clearly superior to legislatures in the ability to determine the likelihood of such an effect and its desirability.

The proponents of legislation frequently are interested in maximizing only one value and may neglect others which assume 148. See, e.g., Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 349 P.2d 457, 11 Cal. Rep. 89 (1961); Hargrove v. Town of Cocoa Beach, 90 So. 2d 130 (Fla. 1957) (municipal immunity from tort liability); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1964); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 22, 141 A.2d 276 (1958); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 94 (1961) (liability for injury from negligently induced fright); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) (immunity of charitable hospitals); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); cf. President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 822 (D.C. Cir. 1942). See also Schulte v. Missionaries of La Salette Corp., 352 S.W.2d 636, 641-42 (Mo. 1961) (noting that the jurisdictions in which charitable immunity has recently been rejected were jurisdictions in which that immunity was not complete).


equal importance in varying factual contexts. The protection
given insurers from fraudulent claims by host-guest statutes is
an apt example. Indeed, if a statute incorporates a number of
values and principles, it is likely to amount to no more than a gen-
eral delegation of power which does not effectively control judicial
decisions. Because of this, the legislative treatment of torts car-
ries no guarantee of a reasoned and consistent approach to the
problems of compensation and loss distribution. Courts, on the
other hand, are constantly presented arguments based on com-
parison and analogy, and for that reason, may produce a more
balanced jurisprudential approach.

On the other hand, the flexibility of the legislative technique
can be put to good use. Statutory limits on the amount of recov-
ery can be used to balance the value of compensating an injured
party against the value of preventing excessive diversion of funds
or crushing
liabilities.\footnote{151. See text accompanying note 117 supra.}
The legislative technique may provide
the administrative machinery to carry out an established pro-
gram. Thus, a compulsory automobile liability or loss insurance
program can be established legislatively with the necessary ad-
ministrative support in the licensing of vehicles and drivers, as
well as the police supervision of their operation. Judicial expan-
sion of the insurance principle must rely, however, on the self-
executing effect of newly adopted rules which induce persons to
purchase insurance to avoid liabilities.

The legislative approach to reform has the advantage of a pos-
sible statement of all the ramifications and consequences of the
change made, whereas the traditional judicial approach may
leave the full extent and significance of the change in doubt until
another case presents the opportunity to consider another varia-
tion of the problem. But this limitation on judicial reform can be
overstated. Thus, the day that the Supreme Court of California
decided \textit{Muskopf v. Corning Hosp. Dist.},\footnote{152. 55 Cal. 2d 211, 339 P.2d 457, 11 Cal. Rep. 89 (1961).} abrogating the rule of
governmental immunity in that state, it also decided \textit{Lipman v.
Brisbane Elementary School Dist.},\footnote{153. 55 Cal. 2d 224, 339 P.2d 465, 11 Cal. Rep. 97 (1961).} establishing a rule of non-
liability for certain discretionary acts of governmental officials.
This court also announced on the same day, two new rules creating
The Supreme Courts of Florida\textsuperscript{156} and Wisconsin\textsuperscript{157} did not enjoy the presence of such parallel cases when they decided cases abolishing the immunity of municipal corporations, but both found it possible to discuss the limitation of their new rules with respect to legislative and judicial acts of officials. The Wisconsin court distinguished between "governmental immunity from torts and the sovereign immunity of the state from suit"\textsuperscript{158} and concluded that its decision had no effect on "the state's sovereign right under the Constitution to be sued only upon its consent."\textsuperscript{159}

Another advantage of the legislative technique of reform is that it can be given only future effect, thus avoiding what is generally considered undesirable: retroactive change in the law. Judicial reform is traditionally considered retroactive in effect, subjecting conduct to a rule of law that was not in existence when that conduct occurred. Of course, as has been frequently recognized,\textsuperscript{160} the area of torts is largely an area of accidental loss where the objection of retroactivity is entitled to less consideration than in other contexts.

Perhaps the most serious objection is raised by those who claim they did not obtain liability insurance because of their reliance on a former rule that provided immunity from liability. Insurers could claim that the rates they charge for liability insurance are based on the prior rules governing liability and that

\begin{itemize}
  \item 156. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
  \item 157. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
  \item 158. Ibid.
  \item 159. Id. at 38, 115 N.W.2d at 626. If this language refers to the United States Constitution, it is much too broad; the eleventh amendment precludes actions unconsented to against states in a federal court, but it does not grant immunity from similar actions in state courts. U.S. Const. amend. XI; see Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Dunnuck v. Kansas State Highway Comm'n, 21 F. Supp. 882 (D.C. Kan. 1937); Prudential Ins. Co. v. Murphy, 207 S.C. 324, 35 S.E.2d 586 (1945), aff'd, 328 U.S. 408 (1946). In the context of its earlier discussion of the applicable provisions of the Wisconsin Constitution, however, a more reasonable interpretation of the court's statement would limit it to the state constitution. See Holytz v. City of Milwaukee, 17 Wis. 2d 26, 39, 115 N.W.2d 618, 625-26 (1962).
  \item 160. See note 14 supra.
\end{itemize}
change will inflict losses on them by requiring payments over and above those for which provision was made. What studies have been made, however, indicate that details of the substantive law governing liability play but a small and frequently undetectable part in the total costs of providing liability insurance.\footnote{161. Morris, \textit{Enterprise Liability and the Actuarial Process—The Significance of Foresight}, 70 Yale L.J. 554 (1961); Peck, \textit{Comparative Negligence and Automobile Liability Insurance}, 58 Mich. L. Rev. 689 (1960).}

While legislatures can give statutes only a prospective effect, they do not always do so, and when they do, the statutory language is not always clear and explicit.\footnote{162. \textit{E.g.}, compare Denning v. Quist, 160 Wash. 681, 296 Pac. 145 (1931), and Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 (1930) (both giving retroactive effect to a legislatively enacted immunity), \textit{with} Hammack v. Monroe St. Lumber Co., 54 Wash. 2d 224, 329 P.2d 684 (1959), 35 Wash. L. Rev. 237 (1960) (holding that a statute removing the same immunity was not retroactive in effect). See also Nogosek v. Truedner, 54 Wash. 2d 300, 344 P.2d 1028 (1959) for an example of legislative failure to state whether a change in a host-guest statute had only prospective effect.}

In this respect the legislative product should be judged by what it is and not by what it might have been. On the other hand, in recent years a number of courts have put the device of prospective overruling to effective use in making reforms in the tort area.\footnote{163. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960); Speland v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962); Witte v. Fullerton, 370 P.2d 244 (Okla. 1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Kojis v. Doctors Hosp., 12 Wis. 2d 307, 107 N.W.2d 131 (1961); cf. Moore v. Ready Mixed Concrete Co., 399 S.W.2d 14 (Mo. 1966) (prospective change of a procedural rule). The leading case on prospective overruling is Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 338 (1932) (Cardozo, J.), which involved administrative regulation of the rates of a common carrier rather than a problem of tort law. Pure prospective overruling differs from a more familiar judicial technique, the warning dictum, only in the firmness of the commitment expressed to apply a new rule in future cases. \textit{E.g.}, compare Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 349, 99 N.W.2d 163 (1959), \textit{with} Holytz v. City of Milwaukee, \textit{supra}, and Kojis v. Doctors Hosp., \textit{supra}. The leading article on prospective overruling is Levy, \textit{Realist Jurisprudence and Prospective Overruling}, 109 U. Pa. L. Rev. 1 (1960). See also Note, \textit{Prospective Overruling and Retroactive Application in the Federal Courts}, 71 Yale L.J. 907 (1962).}

The technique of applying the new rule in the case in which it is announced, as a reward for ingenuity of counsel, while giving it only prospective operation as to other cases is certainly questionable.\footnote{164. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959);
of notice of a new rule that becomes effective as of the date the opinion is filed is similarly doubtful. But some courts have provided a substantial notice period by stating a future date as of which the newly announced rule will become effective. Despite questions or refinement of technique in the use of the device, judicial use of prospective overruling can eliminate any supposed superiority of the legislature as an instrument of reform insofar as avoidance of retroactivity is concerned.

IX. SPECIFIC APPLICATIONS

At this point it is appropriate to attempt an appraisal of the comparative abilities of courts and legislatures to deal with some specific problems in the field of torts. Foremost among these problems is that of how society should deal with the tremendous losses occasioned by automobile accidents. The indications are that greater reliance on loss distribution through insurance is in order and that fault as a basis for recovery must be abandoned. Here, as with many other tort problems, the victims of automobile accidents are poorly organized and not likely to operate effectively as lobbyists, while the opponents of revision are. The breadth of the problem and its impact in all strata of society give some hope for legislative attention, but the possibilities of compre-


166. Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962) (close of the next session of the state legislature); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (40 days after filing of opinion).

hensive legislative action are slight. Moreover, the amount of empirical research available to courts is impressive and convincing. Nevertheless, the necessity of establishing administrative machinery to carry out an insurance program and check on compliance with its requirements puts this hoped-for reform beyond the limits of judicial creativity. As Professor James has suggested, courts must limit their reforms to changes of tort doctrine that give emphasis to the concepts of compensation and loss distribution.

As an illustration of how courts may do this, consideration may be given to the family car doctrine. Using their understanding of the doctrine and its fictional basis, courts should not hesitate to extend the liability to corporations or other owners of vehicles that cannot be characterized as the head of a household. And the extension of the doctrine to dangerous instruments such as powerboats, motor cycles, and mechanically powered "mountain goats," etc. is obviously a task that the courts must perform if the extension is to be made in most jurisdictions.

Courts may function effectively as reform agents in re-evaluating the various judicially created immunities from liability, such as sovereign immunity, charitable immunity, and the various family immunities. There is little reason to expect that organized pressure groups will be formed to lobby reform legislation through to enactment of statutes affecting any of these doctrines. On the other hand, organized pressure groups are active and effective in preventing their consideration by the entire legislature. The courts, however, are as competent as the legislatures to reappraise the rationale that supports the continued existence of these doctrines. Each consists of an elaborate, technical, and complicated formulation that impresses laymen as the product of a learned


169. James, supra note 167, at 334.


172. But see Feeley v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932); Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929).
profession — a product that should not be disturbed by the un-informed. There is, moreover, little hope that legislative inves-
tigations could produce much empirical data, beyond that available to the judiciary, on which to base a judgment as to the desirability of retaining the immunity.

Insofar as sovereign immunity is concerned the legislature can make the appropriate provisions regarding notice of claims, special periods of limitations for the filing of suits, trial without a jury, possible monetary limits on liability, negotiation of settlements and compromises, and the budgeting and appropriation procedures to be followed.173 But these, as the California and Minnesota experiences indicate,174 can also be produced by the legislature after the courts have played their creative role and directed legislative attention to a question that would otherwise be ignored. Finally, at least with respect to sovereign immunity and charitable immunity, the view of the scholars is that as presently recognized in most jurisdictions, they are indefensible.175

The doctrine of comparative negligence should replace the absolute bar imposed by the contributory negligence rule, and this substitution should be made by the judiciary. The present

173. Indeed, the Washington statute waiving sovereign immunity, Wash. Rev. Code § 4.92.090, was apparently enacted without hearings. H.R. 388, from which the statute comes, was introduced in the House on January 30, 1961, and referred to the Committee on Judiciary-Civil. Journal of the Washington House of Representatives 184 (1961). Three days later, on February 2, 1961, the Committee reported favorably on the bill. Journal of the Washington House of Representatives 235 (1961). The report was so short and cryptic as to be uninformative to the uninitiated. Note supra. The bill was received in the Senate on February 9, 1961, and referred to the Judiciary Committee. Journal of the Washington Senate 313, 315 (1961). Nineteen days later it was reported favorably to the Senate in a report as cryptic and uninformative as that of the House Committee on Judiciary-Civil. Journal of the Washington Senate 740 (1961). The only recorded discussion of the bill occurred in the Senate, which first adopted and then, upon reconsideration, refused to adopt an amendment giving the statute retroactive effect. The proponent of the amendment stated he had no idea of how many pending claims might be affected by adoption of the amendment. Journal of the Washington Senate 1010–12 (1961).

As enacted, the statute contained no provision respecting the immunity of municipalities, leaving its effect in that respect a matter of conjecture. Nor were any provisions made concerning notice of claims, filing of suits, or methods of payment. A statute enacted in 1963 now provides that detail. Wash. Sess. Laws 1963, ch. 159.


comparative negligence rule followed in Georgia originated in a series of common-law decisions of the Georgia court during the 1850's, and that court's construction of subsequently enacted legislation codifying those decisions.\textsuperscript{176} In Illinois, a limited form of comparative negligence, based on a distinction between gross and slight negligence, was judicially adopted in 1858\textsuperscript{177} and ultimately abandoned, also by judicial decision, in 1894.\textsuperscript{178} The significance of the abandonment is not that comparative negligence is unsound—for the abandonment was probably caused by the difficulties of working with such nebulous concepts as gross and slight negligence as well as the dissatisfaction with a rule that served only to transfer the entire loss to one party—but that such changes were made by courts, rather than legislatures, at a time when the creative role of the judiciary was not as well understood as at the present time.

It is unlikely that sufficient support for a comparative negligence rule could be organized to obtain its passage through a state legislature.\textsuperscript{179} As in other areas appropriate for judicial reform, lobby and pressure groups are active and successful in preventing bills incorporating comparative negligence principles from obtaining full legislative consideration.\textsuperscript{180} Judicial experience with jury verdicts provides the courts with ample proof that the contributory negligence rule is not compatible with the

\textsuperscript{176} The better discussions of this development are found in Philbrick, \textit{Loss Apportionment in Negligence Cases}, 99 U. PA. L. REV. 766 (1951); Turk, \textit{Comparative Negligence on the March}, 28 CHI.-KENT L. REV. 394 (1950).

\textsuperscript{177} Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858).

\textsuperscript{178} City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894).


values of our society,\textsuperscript{181} and it has been abandoned in most common-law jurisdictions outside the United States.\textsuperscript{182} Moreover, scholars almost unanimously agree that a comparative negligence standard is a workable and more just scheme than the contributory negligence rule.\textsuperscript{183} For these reasons a number of important voices have recently and quite properly urged that courts make the change to comparative negligence without waiting for legislative action.\textsuperscript{184}

Moreover, empirical data bearing upon the subject is as available to courts as it is to legislatures and their committees. Probably the most important consideration is the effect that such a change would have upon the operations of insurance companies. Few others could justifiably claim to have made commitments and taken action in reliance upon the existence of a rule by which contributory negligence bars recovery. What evidence there is indicates that a change in the rule would have a minimal and perhaps undiscernible effect on the total operations of insurers.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{181} Karcesky v. Laria, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955).
\item \textsuperscript{182} Mole & Wilson, \textit{A Study of Comparative Negligence}, 17 Cornell L.Q. 333, 387–88 (1932); Prosser, \textit{Comparative Negligence}, 61 Mich. L. Rev. 465, 466 (1953).
\item Mr. Justice Black, speaking for the Supreme Court of the United States, said about the two rules in \textit{Pope & Talbot, Inc. v. Hawn}, 346 U.S. 406, 408–09 (1953):
\begin{quote}
The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.
\end{quote}
\item \textsuperscript{184} SAVET, \textit{Cogitations on Torts} 55–56 (1954); Keeton, \textit{supra} note 150, at 506–09. The same suggestion was made in the 1962 Ross Prize Essay. Gilliam, \textit{How May the Disposition of Personal Injury Litigation Be Improved?}, 48 A.B.A.J. 834, 836 (1962).
\item \textsuperscript{185} Morris, \textit{supra} note 161, at 554; Peck, \textit{supra} note 161, at 689. Compare Rosenberg, \textit{Comparative Negligence in Arkansas: A “Before and After” Survey}, 18 Ark. L. Rev. 89, 108 (1959) concluding that adoption of a comparative negligence standard allowed plaintiffs to win a higher proportion of cases, but not to obtain larger verdicts. Indeed, directing the attention of the jury
The apparent explanation of this fact is that comparative negligence is in fact the standard by which parties negotiate settlements. The proportion of cases controlled by a judgment, which may involve as little as two percent of all claims, is too small to affect the overall result even if juries did conscientiously follow the instructions given them. Other concerns, such as the extent to which a contributory negligence rule deters risk-creating conduct, is something that probably cannot be tested empirically because appropriate laboratory experiments cannot be practiced on human beings and the variables affecting the accident rate are so numerous that no effect can be attributed to the presence of a comparative negligence rule.

Finally, the involved and convoluted features of the last clear chance doctrine seem to ameliorate what would otherwise appear to be the harsh consequences of a rule barring recovery on the basis of contributory negligence. They provide for the layman the appearances of a system carefully designed to work justice between the parties to accident litigation. To judges and members of the legal profession, of course, the doctrine represents nothing more than an illogical scheme, difficult to apply, and frequently impossible to justify, the existence of which is tolerated only because it permits courts to escape the harsh consequences of the contributory negligence rule. As elsewhere, such doctrinal complications not only establish the need for reform; they also establish the propriety of judicial action.

Changes in the common-law rules respecting the right to contribution as well as the effect of a release given one tort-feasor on claims against others have also been pointed out as changes that courts might appropriately make. There may be some doubts on the merits of permitting one tort-feasor to enforce a right to contribution against another. If changes in the rule to the possibility of deducting some portion of the plaintiff's damages as attributable to his fault may well have the effect of reducing the amount of the verdict from what it would have been under a rule by which plaintiff's negligence should only have the effect of a complete bar.

166. A study indicated that 84% of all those who made claims arising out of accidents in New York City received some compensation, leading the authors to conclude that the present liability rules prevent recovery by a maximum of 25% of all potential claimants, and that recoveries could be achieved in cases of doubtful liability. Franklin, Chanin & Mark, supra note 168, at 15, 34.

167. Franklin, Chanin & Mark, supra note 168, at 10.


169. James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1166 (1941).
are to be made, once again the lack of organized legislative lobbies to support such reforms, the presence of aged doctrines with elaborate distinctions, and the equality of access to empirical data indicate that the judiciary is an appropriate agency for reform.

In recent years courts have undertaken a creative role in enlarging the scope of liability for fright and emotional shock as well as for invasion of privacy. Appraisal of the comparative abilities of courts and legislatures to deal with the problems leads to the conclusion that the courts have acted properly in doing so. Again the disorganized state of the victims of conduct producing such results and the consequent lack of organized lobbies seeking remedial legislation provide one rational explanation for legislative inattention to the problem. Legislative investigations might produce empirical data concerning the frequency with which such conduct occurs, but they probably could supply little information bearing upon the crucial question of whether a particular victim should be compensated. A legislative investigation could conceivably be directed toward determining the increased incidence of fraudulent claims accompanying liberalization of the right of recovery, but the techniques used to determine whether particular claims were fraudulent would necessarily parallel those used by the courts to determine the validity of claims. Moreover, courts are familiar with the trial process and are in a position to formulate subsidiary rules, relating to the burden of proof and procedure, to deal with the problem. Finally, the pre-existing law was filled with technicalities, such as the requirement of some physical contact with the victim, or


191. Thus the New York Revision Commission filed a report in 1936 urging adoption of legislation that would allow the courts to impose liability for physical and mental injuries occasioned by negligently induced fright, with the courts working out the rules which would protect meritorious claimants and prevent the successful prosecution of non-meritorious or fraudulent claims. NEW YORK LAW REVISION COMM’N, REPORT 381-82 (1936). The report apparently gathered much dust but little support until utilized by the Court of Appeals in reaching its decision in Battalla v. State, 10 N.Y.2d 239, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

192. See NEW YORK LAW REVISION COMM’N, REPORT 381-82 (1936).
that the victim, though untouched, had been within the area of risk of harm from physical contact, or that substantial damages for such harm could be awarded as a parasitic incident of the right to recover on some other tort theory. Similar reasons might be advanced to support the creative role that courts have played in recent years in permitting recovery for prenatal injuries.\textsuperscript{103}

Though the courts have performed well in the last two areas, they have been woefully inadequate in responding to the call for the reform of principles affecting the liability of landowners and land occupiers. Again, unorganized victims of harm that might have been avoided through the use of no more than reasonable care have no lobby to press the case for expanded rights of recovery. On the other hand, apartment house owners in particular, and business organizations in general, do have active lobbies to prevent legislative consideration of the problem. Moreover, the program of expanding liabilities is politically unpalatable for legislators, most of whom would quickly realize that its support would likely require them to defend against the charges that these organized groups would press. In politics it is frequently more advantageous to be on the offensive than the defensive, regardless of the merits of the proposition.

That the area is one in need of reform can hardly be doubted. The Supreme Court of the United States has said of the common-law rules governing land-occupiers' liabilities:\textsuperscript{104}

\begin{quote}
The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances.
\end{quote}

\begin{itemize}
\item \textsuperscript{104} Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630–31 (1959).
\end{itemize}
These proliferating technicalities, which the Supreme Court wisely refused to incorporate into admiralty law, are exactly the type that impress laymen and obscure from legislators the trend that the law is and should be following. On the other hand, a court may easily emulate Justice Cardozo in his famous MacPherson decision and draw from the various exceptions to nonliability the governing principle that owners and occupiers have a single duty of reasonable care in all the circumstances.

Another area in which the courts have not been as responsive to the changing conditions of society is in the law of damages. Recently, the Supreme Court of Michigan abandoned the rule by which the damages awarded parents for the wrongful death of a child are measured by the pecuniary loss to the parents—that is, the difference between his probable wages during minority less the costs of his upkeep. Labeling its earlier precedents a "remote and repulsive backwash of time and civilization, untouched by the onward march of society," the court attempted to adapt the rule to what it knew juries had in fact been practicing covertly. Earlier, the Supreme Court of Mississippi had brought its law of damages into conformance with general standards by removing the established denial of recovery for mental suffering experienced either as a result of physical disfigurement, or after physical pain had ceased. But on the whole, courts, and law professors, have ignored what Professor Jaffe once called the crucial controversy in personal injury torts. Among the impressive features of the law of damages for personal injuries today is the extent to which the rules confer discretion on juries who often receive no instruction as to whether they may consider various factors bearing on the amount of damages.

In many jurisdictions, a plaintiff may receive two allowances for taxes that he will not be required to pay. If the law of torts is to be limited to the compensatory function of placing

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200. See GREGORY & KALVEN, CASES AND MATERIALS ON TORTS, ch. 7 passim (1959).
the victim, as far as possible, in the position in which he would have been absent the tort, the courts should reformulate the rules and instructions that require a consideration of income tax consequences in the verdict.

Other rules relating to the effect to be given collateral sources of compensation for injuries also need reworking. In making such changes, the courts may act with the freedom derived from the realization that new rules would impose no new duties, nor would they discriminate against persons who had relied on the old rules. Courts, more effectively than legislatures, can determine the procedural complications that might arise from admitting evidence of, and giving effect to, collateral compensation received by a tort victim. Moreover, judges, unlike legislators, are aware of the underlying theories of liability; thus they can more effectively determine whether a punitive or deterrent effect may be achieved by visiting liability upon a wrongdoer for an item of damage for which other compensation has already been received, or when the more appropriate view is that "our legal system functions as an insurance scheme under which victims should receive full, but unduplicated, compensation for the injuries they have suffered." Insurance companies might be expected to lobby for legislation limiting the damages awarded in personal injury cases by the amounts received from collateral sources, but in fact they have not done so. Instead, the cost of double and even triple compensation is passed on to the public and this inflated cost of compensating for tortious injuries is advanced as a reason for not incorporating broader principles of insurance in the law of torts.

These comparative evaluations of the abilities of courts and legislatures certainly do not exhaust the field. Detailed attention might be accorded to the predictable problems involved in compensating injuries suffered by radiation, where the complications seem too great for traditional treatment by the courts. Or attention might be given to more familiar problems, such as the appropriate use of res ipsa loquitur, burden of proof, physical examination of plaintiffs in personal injury cases, and the selection of jurors, with respect to which courts are in a superior


203. Cf. James, supra note 167, at 387.

position to deal with the problems. Other comparable problems easily come to mind.

But the purpose of this Article has not been that of making a definitive assignment of some problems to legislative treatment and other problems to judicial treatment. Instead it has been merely to suggest some of the criteria by which those assignments should be made and further to suggest that courts should attempt to evaluate the comparative abilities of the two branches of government in deciding whether they or the legislature should undertake what appears to be a needed reform in the law of torts.