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**THE NEW SOCIAL POLICY TORTS:
LITIGATION AS A LEGISLATIVE STRATEGY
SOME PRELIMINARY THOUGHTS ON
A NEW RESEARCH PROJECT**

*Deborah R. Hensler**

INTRODUCTION

On June 20, 1997, Mississippi Attorney General Mike Moore appeared before a nationwide television audience to announce that tobacco companies had agreed to pay \$368.5 billion to smokers and states to cover medical costs for smoking-related illnesses.¹ The settlement was unprecedented. Intended to resolve a raft of private class action lawsuits² and state attorneys' general suits, the settlement required Congress to validate agreements the lawyers had made to prohibit any future class actions and eliminate punitive damages in any future individual litigation against tobacco manufacturers.³ As a result of the settlement, which was negotiated over three years, tobacco companies accepted marketing restrictions that anti-smoking advocates for years had tried unsuccessfully to obtain from Congress.⁴ Plaintiffs' attorneys, in turn, accepted tort reform measures regarding the tobacco industry that the business community had been trying unsuccessfully to obtain from Congress since 1980 for all industry.⁵

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1. CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS*, 220, 231 (1998). The first state attorney's general suit against the tobacco manufacturers was filed by Mr. Moore in 1994. *Id.* at 30. By 1997, 38 other states had joined in the litigation and when a global settlement was announced in November 1998, 46 states were listed as participants. *Id.*

2. In 1995, a federal district court judge in Louisiana certified the first private class action suit against tobacco manufacturers. *Castano v. American Tobacco Company*, 160 F.R.D. 544 (E.D. La. 1995). When class certification was withdrawn by the United States Court of Appeals for the Fifth Circuit, the attorneys behind *Castano* re-filed the class action litigation in numerous state courts. *Id.* at 74. By spring 2001, only one of these class action lawsuits was still pending; the remainder had proved unsuccessful.

3. Settlement Agreement, Title VIII, "Civil Liability," B (1), in MOLLENKAMP ET AL., *supra* note 1, at 296.

4. Settlement Agreement, Title I, "Reformation of the Tobacco Industry," in *Id.* at 271-284.

5. *Id.* at 208-34. For discussions of the tort reform debate, see Steve Brill & James Lyons, *The Not-So-Simple Crisis*, AM. LAW., May 1, 1986, at 1; Marc Galanter, *The Tort Panic and After: A*

The effort to secure congressional approval of the settlement ultimately failed. But in November 1998, tobacco manufacturers agreed to settle the litigation—without the protections against future class actions and punitive damages—for \$206 billion.⁶ Although the companies did not get the legal protections they had previously sought,⁷ they did agree to restrictions on advertising and sales that they had previously lobbied against.⁸ In subsequent proceedings, the companies agreed to pay billions of dollars in legal fees to the private attorneys who collaborated with the state attorneys general on the litigation.⁹

Virtually every feature of the tobacco litigation stirred controversy. Should litigators be able to secure changes in industry practice that state and federal legislators have repeatedly considered and denied? Should litigators be able to impose costs on an industry that inevitably would be passed on to consumers, in essence constituting a new tax on smoking? Should legislators validate the results of privately negotiated lawsuit settlements? Should private lawyers reap huge profits from such litigation?¹⁰

The success of the tobacco litigation was not lost on the bar. If private and public lawyers could join together to force the tobacco companies to the bargaining table,¹¹ could they also successfully take on gun manufacturers who had joined with the National Rifle Associa-

Commentary, 16 JUST. SYS. J. 1 (1993); Joseph Sanders & Craig Joyce, *Off to the Races: The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

6. The \$206 billion settlement covered 46 states. Prior to the November 1998 settlement, an additional four states (Mississippi, Florida, Texas and Minnesota) reached separate settlements with defendants totaling over \$36 billion. See Howard Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 11 (2000).

7. The difference between the earlier and ultimate settlement amounts suggests that these protections were worth more than \$150 billion to the companies.

8. Erichson, *supra* note 6, at 31.

9. Lawyers acting on behalf of just three of the states — Florida, Mississippi and Texas — were awarded \$8.2 billion. Estimates of the total lawyer share of the \$206 billion 46-state settlement ranged up to \$30 billion. See Barry Meier, *The Spoils of Tobacco Wars: Big Settlement Puts Many Lawyers in the Path of a Windfall*, N.Y. TIMES, Dec. 22, 1998, at C1.

10. See e.g., Editorial, *The Law Is at Risk in Tobacco Suits*, WALL ST. J., April 7, 1999 at D-15. *Guns, Tobacco, Big Macs — and the Courts*, 107:6 COMMENTARY. The private lawyers had negotiated contingency fee contracts with state attorneys general that promised them 10 to 25 percent of any future recoveries. See Barry Meier, *Lawyers in Early Tobacco Suits to Get \$8 Billion*, N. Y. TIMES December 12, 1998, at A1.

11. Prior to the class action lawsuits and the state attorneys general litigation, the tobacco manufacturers had waged a successful battle against plaintiffs. See e.g., RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED YEAR CIGARETTE WAR, THE PUBLIC HEALTH AND THE UNABASHED TRIUMPH OF PHILIP MORRIS*, (1996); Robert Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE*, (Robert Rabin & Stephen Sugarman, eds., 1993).

tion in resisting marketing and design restrictions on guns?¹² What about health maintenance organizations, which had successfully opposed expanding consumers' ability to challenge health care coverage decisions?¹³ To some advocacy groups, tobacco litigation seemed to offer a new prescription for pursuing social change. To some lawyers, it opened new vistas for entrepreneurial activity.

The new suits, which I term "social policy torts," raise questions about the proper role of public and private litigation in shaping social policy. Should important social policy decisions be entrusted to public attorneys general whose explicit mandate is to enforce existing law, not make new law?¹⁴ Should these decisions be entrusted to entrepreneurial private lawyers?¹⁵ Should defendants be pressed by the exigencies of litigation to agree to settlements that require what legislatures have been unwilling to require of them? Are courts the proper fora for social policy-making?

Whether and to what extent courts and litigation should be used to achieve social ends are not new questions for Americans. Indeed the civil rights movement, as well as advocates on behalf of prisoners, welfare recipients, and school children, have long sought to use the judicial process to achieve social reform goals. Today, there seems to be a political consensus that it is sometimes appropriate for citizens to pursue social reform goals through the courts in what has become known as "social impact litigation." But many seem to think that the claims underlying the new litigation do not qualify for such acceptance.¹⁶

At the heart of the controversy over the new social policy torts is the concern that they threaten democratic norms of public policy-making. Is there a basis for this concern and, hence, reason to restrict or eliminate the new litigation? Or are the new social policy torts themselves indicators that the public policy-making process—particularly the legislative process—requires reform? Civil rights litigation

12. See e.g., John Gibeaut, *Gunning for Change*, 86 A.B.A. J. 48 (March 2000).

13. See e.g., David G. Savage, *Cost Cutting Consequences: An HMO Liability Case is Being Closely Watched by the Lawyers Who Targeted Tobacco Companies*, 86 A.B.A. J. 30 (February 2000); Kathy Cerminara, *The Class Action Suit as a Method of Patient Empowerment in the Managed Care Setting*, 24 AM. J. L. & MED. 7 (1998).

14. The January 2001 confirmation hearings for former Senator John Ashcroft vividly illustrated the importance of this distinction in defining the roles of state and federal attorneys general. Attorney General Ashcroft was repeatedly asked for his commitment to enforcing laws that his questioners believed Ashcroft opposed.

15. The leading private attorneys in the tobacco, gun and HMO litigation first built successful practices as private tort and damage class action litigators.

16. See, e.g. CENTER FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE, REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT-SPONSORED LITIGATION, Conference Proceedings (1999) available at http://www.manhattan-institute.org/html/misc_1_a.htm.

arose in the United States out of frustration with state and local lawmakers who denied African-Americans equal access to education, other public services, and the voting booth. Proponents of the new social policy torts argue that they too are responding to a failure of government to meet its responsibilities to its citizens.¹⁷

Working with the RAND Institute for Civil Justice (ICJ), I have recently begun a study aimed at exploring these issues. In this paper, I sketch out the conceptual framework for the study and briefly describe my research approach. In so doing, I hope to stimulate conversation and debate about the question of whether the new litigation is indeed phenomenologically new or simply a new chapter in a well-known story and if so, to what concerns it should give rise.

II. CONCEPTUAL FRAMEWORK

Damage class actions—a form of collective litigation in which one or a few individuals or entities claim monetary compensation on behalf of a large number of similarly situated parties—have been a lightning rod for controversy over the past decade.¹⁸ Until recently, the controversy focused on three sorts of suits: securities class actions, consumer class actions, and mass tort class actions.¹⁹ Although these class actions differ in many ways, they share two key features: they are brought chiefly by private parties (e.g., individual shareholders or consumers) and their primary objectives are monetary compensation and enforcement of current legal standards.²⁰

17. Speaking at this Conference, plaintiff attorney Don Barrett described the judicial system as an alternative to government bureaucratic regulation. He portrayed the tobacco litigators as "enforcing the social contract." His fellow panelist plaintiff attorney Richard Scruggs told Conference attendees that the purpose of the tobacco litigation was to raise the financial stakes for the tobacco manufacturers high enough to "coerce" a change in manufacturers' behavior, and noted that ongoing litigation against the managed care industry has the same purpose. Speaking of the tobacco litigation, Mr. Scruggs said: "Our purpose was to change the world." (Notes on conference discussions, on file with author.)

18. Class actions are also occasionally brought by defendants who choose to contest a lawsuit collectively. Federal class actions are brought under the Federal Rule of Civil Procedure 23; damage class actions are brought under Rule 23(b)(3). Most states have adopted similar rules that authorize class actions under state law. For a description of the legal framework for state and federal class actions, see DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 9-48 (2000).

19. Congress passed legislation to curb securities class actions in 1995. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). Efforts to reform the federal class action rule as it pertains to consumer and mass tort suits has occupied much of the 1990s and are ongoing. See HENSLER ET AL., *supra* note 18 at 50-62.

20. The proposition that regulatory enforcement is a proper objective of private damage class action litigation has been vigorously contested in the policy arena in the past few years. However, the historical record contains substantial support for this view. See HENSLER ET AL., *supra* note 18 at 69-72.

Damage class action critics claim that the majority of these suits are non-meritorious and that the benefits of resolving even meritorious suits are slim, compared to the direct and indirect costs they impose on the economy and legal system.²¹ They say that plaintiff class action lawyers bring these cases simply to obtain large legal fees rather than to right legal wrongs, and that these lawyers often agree to compromise settlements of the lawsuits that benefit themselves more than the class members.²² The poster children for the critique of damage class actions are lawsuits that bind a vast number of class members to settlements that award the class members "worthless" coupons and release defendants from further liability in exchange for multi-million dollar fees for class counsel.²³

Damage class action supporters respond that these suits obtain compensation for individuals who have suffered losses as a result of others' wrongdoing that would not otherwise be recompensed. In addition, they provide regulatory enforcement in situations in which public regulators fail to act because of financial or political constraints and they send important deterrent signals to potential wrongdoers.²⁴ They worry that horror stories about class action abuses will undermine popular and judicial support for meritorious class actions, and they support reforms aimed at ending such abuses.²⁵

Recent suits against tobacco and gun manufacturers and against managed care organizations have added a new dimension to the controversy over class actions. Because such suits rest on novel (some say questionable) legal claims, seek enormous damages, and yield large legal fees to the private attorneys who bring or help prosecute them, many critics view the new suits as exemplars of the same excesses that they associate with damage class actions. The new litigation involves a mix of private class actions brought by private attorneys on behalf of injured individuals and consumers, and public actions brought by state attorneys general, municipalities, and others, often with the assistance of private attorneys.²⁶ The distinction between private damage class

21. Marc Fisher, *Class Actions' Big Winners: The Lawyers*, WASH. POST, May 25, 1997, at A1.

22. For a discussion of the critique of contemporary damage class action practice, see HENSLER ET AL., *supra* note 18 at 79-99.

23. See, e.g., Reynolds Holding, *Class Action Central-Hefty Costs, Slim Pickings*, S. F. CHRON., May 25, 1997, at 7, 21; Fisher, *supra* note 21, at A1.

24. HENSLER ET AL., *supra* note 18, at 69-72.

25. *Id.* at 93-99.

26. Sometimes these suits are coordinated, but sometimes they are brought by rival groups pursuing competing strategies.

actions and public actions brought on behalf of consumers and citizens is often lost in the cacaphony of criticism of the new litigation.²⁷

What seems to most distinguish the new tort actions from conventional damage class actions is that, in addition to seeking damages and enforcement of current regulations, the plaintiffs seek to change the rules that govern industry-wide business practices. For example, to settle the state attorneys general suits against them, tobacco manufacturers agreed not only to compensate state governments for the additional medical costs the states incurred to treat smokers, but also to adopt new advertising and marketing policies, including abandoning the popular "Joe Camel" advertising campaign.²⁸ In contrast, the first nationwide class action against the tobacco manufacturers sought monetary damages from tobacco manufacturers for smokers and their families.²⁹ While some crime victims and their families have filed suits against gun manufacturers claiming monetary damages for personal injuries and wrongful death, municipalities and other public entities have sued the manufacturers seeking changes in the design of handguns (e.g., adding safety devices) and their marketing that gun control advocates have been unable to obtain through legislative processes.³⁰ Similarly, while individuals have sued health care insurers for injuries allegedly resulting from the insurers' failure to provide financial coverage for certain treatments, leading plaintiff class action attorneys have sued managed care organizations to obtain changes in coverage decision-making similar to those that were debated without reaching closure in the 106th Congress.³¹ In discussions with reporters and others, plaintiffs in the new litigation say that they have adopted a litigation strategy as an "end-run" around a legislative process that has previously proved impervious to their demands.³²

27. See e.g. Editorial, *Al Gore's Class-Action: Trial lawyers try to litigate their man into the White House*, WALL ST. J., Nov. 17, 2000 at A18 (relating post-election litigation in Florida to trial lawyers' litigiousness); Seth Lipsky, Editorial, *The Strange Politics of Holocaust Restitution*, WALL ST. J., Sept. 13, 2000 at A26 (discussing class action suits brought against Swiss banks by holocaust survivors, questioning lawyers' motives).

28. MOLLENKAMP ET AL., *supra* note 1 at 162.

29. *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995). Certification was overturned on appeal. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Subsequently the group of attorneys who had banded together to bring the *Castano* action filed similar statewide class actions in state courts around the country. Most of these cases have been unsuccessful.

30. Gibeaut, *supra* note 12, at 48; Patrick Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N. Y. TIMES, March 10, 1999 at A1, 14.

31. Tyler, *supra* note 30, at A14.

32. *Id.*; Paul Barrett, "Jumping the Gun: Where Tobacco and Firearm Diverge," 145 WALL ST. J. 1 (March 12, 1999).

Controversy over using the courts and litigation to achieve social policy reform is hardly new. Members of the committee that revised the federal class action rule in 1966 (Rule 23) have said that their primary purpose was to facilitate civil rights litigation.³³ In the decade following its revision, Rule 23 was used variously to desegregate schools, reform prison conditions, and expand welfare rights.³⁴ Such "social impact litigation" swelled controversy about "activist judges" who imposed busing plans that were opposed by school boards and substituted their judgments about proper prison management for that of state authorities.³⁵ Critics questioned both the appropriateness of having judges who are not subject to electoral control³⁶ make (arguably) legislative decisions and the ability of judges who were not chosen for their managerial skills to carry out (arguably) executive activities.³⁷ Subsequent scholarship questioned how effective *Brown v. Board of Education*³⁸ and other landmark judicial decisions were in effecting the social changes for which their advocates struggled.³⁹

The aftermath of these controversies may have contributed to Congress' decision in 1996 to forbid the use of legal services funds for litigating class actions.⁴⁰ Nonetheless, providing a private legal mechanism for pursuing remedies that are due under the law seems to have

33. According to committee member John Frank, the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights, and explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee*, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO RULE 23 266 (Administrative Office of the U.S. Courts 1997). As discussed in the text, Rule 23(b)(2) authorizes suits for injunctive relief.

34. See Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"*, 92 HARV. L. REV. 664 n. 1-4 (1979).

35. See, e.g., ROBERT WOOD, REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS 113 (1990) (discussing the school busing cases).

36. Of course, state judges who decide some social impact lawsuits *are* subject to electoral challenge when they are required to stand for re-election, for retention, or for election to a higher state court.

37. WOOD, *supra*, note 35. The latter criticism seems ironic in an era when judges are formally educated and informally exhorted to manage their caseloads and their courtrooms.

38. 347 U.S. 483 (1954).

39. See, e.g., GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (discussing school integration, abortion rights, and criminal law).

40. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504 (a)(7), 110 Stat. 1321 (1996). Justifying his support for a Republican initiative, Democratic Senator Ernest Hollings explained that "there are plenty of moneys [sic] for class actions for these other groups" that is, from other sources, apparently referring to advocacy groups who

become an accepted feature of the U.S. political landscape.⁴¹ The recent decision by a New York state judge declaring the state's method of school financing illegal vividly illustrates this.⁴² The suit was brought by the Campaign For Fiscal Equity, a non-profit organization formed by parent-school board members and other advocates for the express purpose of bringing the litigation. The *New York Times* discussed the possible ramifications of the judge's decision, quoting various local and state officials and advocates.⁴³ In the three articles that the *New York Times* devoted to the suit the day after the trial judge delivered his opinion, there was not a single reference to the question of whether the issue belonged in the court.⁴⁴

The new suits also evoke questions about whether, as a practical matter, collective litigation can effectively serve the policy interests of the broad constituencies on whose behalf it is brought. Recent analyses suggest that state governments are not, as anticipated, spending the monies they obtained from the settlement of the state attorneys general suits against tobacco manufacturers on smoking prevention programs, but rather are using these funds to cover other needs.⁴⁵ Such analyses contribute to skepticism about the litigation, which was supported by some public health advocates as a strategy for achieving smoking reduction and prevention. Some of the citizens of the municipalities that are suing gun manufacturers likely oppose the gun control measures that the suits seek. These citizens were not consulted by those who have brought the suits, although if the suits become a campaign issue, citizens may have an opportunity to express their views in the future at the ballot box. Rather than assisting people in obtaining more or better health care coverage, forcing managed care organizations to change their health care coverage policies could lead to higher health insurance costs and ultimately reduce access to care for lower-

have brought class actions on behalf of low income Americans. 141 Cong. Rec. S14, 607 (September 29, 1995).

41. No one knows for sure what proportion of current class action litigation is brought exclusively to secure money damages, and what proportion implicates civil rights. Estimates of the proportion of federal class actions that arose out of civil rights allegations in the mid-1990s range from 12 to 30 percent. Another 10 percent or so were seeking changes in agencies' interpretation of statutes – for example, with regard to the provision of benefits. State court data are fragmentary but the available information suggests that about 25 percent of such cases involve civil rights allegations or suits against public agencies. See HENSLER ET. AL., *supra* note 18, at 53.

42. *Campaign for Fiscal Equity v. New York*, No. 111070/93 (N.Y.S.2d, Jan. 9, 2001).

43. See e.g. Abby Goodnough, *State Judge Rules School Aid System is Unfair to City*, N. Y. TIMES, Jan. 11, 2001, A1, B4.

44. *Id.*

45. See, e.g., Greg Winter, *State Officials Are Faulted on Anti-Tobacco Programs*, N. Y. TIMES, Jan. 11, 2001, A20.

income families.⁴⁶ These representation questions also arose in the past with regard to social impact litigation. For example, civil rights organizations and individual leaders disagreed over what strategies—busing, political control, or school finance reform⁴⁷—were most likely to help their constituents.

The 1960s social policy class actions and their progeny differ, however, from the new social policy torts in some important ways. First, the “old” suits sought injunctive relief—changes in institutional policies and practices—not monetary damages.⁴⁸ Second, (perhaps as a consequence) the lawsuits were litigated by public interest lawyers such as the staff of the National Association for the Advancement of Colored People or the American Civil Liberties Union, or by private lawyers on a *pro bono* basis. The “aroma of gross profiteering” that liberal critic John Frank has attributed to contemporary damage class actions generally does not waft up into the air above social impact litigation.⁴⁹ Moreover, the public interest organizations that spearheaded the old social policy class actions were membership-based and had deep roots in their communities. Whether or not the leaders were as responsive to their members’ desires as they could or should have been, there were structures within these organizations to enable communication between leaders and their constituencies. Third, although the suits aimed at changing social policies, their legal claims arguably derived from existing law because the plaintiffs argued that defendants were violating constitutional or statutory protections.

In contrast, the new social policy torts usually seek substantial monetary damages, as well as changes in policy. In some instances, they are litigated by private attorneys acting on behalf of a class who expect to win a percentage of the monetary value of any settlement or trial award if they are successful. In other instances, they are litigated by private attorneys (often the same class action attorneys who brought the first suits) who are hired by public attorneys general and other public officials to represent them on a contingent fee basis. In both instances, the prize for plaintiffs’ attorneys is valued in the tens

46. See CAROLE GRENZ ET AL., A FLOOD OF LITIGATION? PREDICTING THE CONSEQUENCES OF CHANGING LEGAL REMEDIES AVAILABLE TO ERISA BENEFICIARIES 12 (1998); David Studdert, *Expanded Managed Care Liability: What Impact on Employer Coverage?* 18 HEALTH AFFAIRS 7, 13 n. 6 (1999).

47. Today we might add school vouchers to the list of social policy strategies on which groups representing arguably the same constituencies disagree.

48. Suits for injunctive relief are brought under FED. R. CIV. P. 23(b)(2).

49. John P. Frank, *Whither Rule 23: Memorandum to the Honorable Patrick E. Higginbotham* (April 28, 1995) (on file with the Civil Rules Advisory Committee).

or hundreds of millions of dollars, or sometimes billions. The new social policy torts are brought on behalf of amorphous groups or ad hoc coalitions of advocacy organizations whose governance structures may not facilitate communication with and monitoring of those who are litigating on their behalf. Their aim is to impose new rules on defendants that will govern their future behavior in the absence of any legislative or judicial ruling that such behaviors are required. The central question for policymakers is whether these differences raise new and important questions about the role of litigation in shaping social policy that require restricting or eliminating such litigation, or whether the litigation reflects significant weaknesses in contemporary public policy-making processes that ought to be the objects of reform efforts.

III. RESEARCH QUESTIONS

The research in which I am now engaged seeks to answer three questions that are important to any future public policy decision-making with regard to the new social policy torts. First, as I have discussed, the popular commentary on the new social policy torts frequently presents them as an entirely new species of litigation. The commentary rarely considers the similarities and differences between the new suits and other social impact litigation that I have suggested exist. Instead, it analogizes the new suits to damage class actions and depicts them as driven by entrepreneurial lawyers in search of fees. Does the notion that the new social policy torts are fundamentally different from other social policy litigation hold up on close inspection? Are these new suits genuine attempts to seek social reforms that have been thwarted by the legislative process? Or are the cases simply entrepreneurial litigation in new clothes? Figure 1 provides an initial accounting of the differences among the three types of litigation.

Second, do the new social policy torts violate fundamental democratic norms of representation and accountability? Are representation and accountability issues raised by the new suits substantively different from or more severe than those raised by other representative litigation, such that they cannot be dealt with by current procedural rules and judicial doctrine (e.g., the requirement that judges review all class action settlements for fairness)? Does the involvement of private fee-seeking attorneys distort the purposes of the litigation? Is the new litigation an *effective* policy-making tool—that is, do the suits achieve their purported objectives? When litigation is used as a legislative strategy, does the public accord the resultant policies the same degree of legitimacy as they accord statutes enacted by popularly elected legislatures? Figure 2 sketches out a framework for comparing the gov-

FIGURE 1.
A COMPARATIVE PROFILE OF DAMAGE CLASS ACTIONS,
SOCIAL POLICY TORTS & SOCIAL IMPACT
CLASS ACTIONS

KEY FEATURES	CONVENTIONAL DAMAGE CLASS ACTIONS	SOCIAL POLICY TORTS	TRADITIONAL SOCIAL IMPACT CLASS ACTIONS
GOALS	COMPENSATION; REGULATORY ENFORCEMENT	COMPENSATION; REFORM INDUSTRY PRACTICE	INSTITUTIONAL REFORM
SCOPE	LAWSUIT DEFENDANTS	INDUSTRY	SYSTEMIC (e.g. prisons, schools)
PLAINTIFFS	DISPERSED CLASS MEMBERS (e.g. consumers)	PUBLIC & PRIVATE ENTITIES/ HETEROGENEOUS	MEMBERSHIP ORGANIZATIONS & AD HOC COALITIONS/ MORE HOMOGENEOUS
PLAINTIFF ATTORNEYS	PRIVATE, ENTREPRENEURIAL	PUBLIC OFFICIALS & PRIVATE ENTREPRENEURIAL LAWYERS	PUBLIC INTEREST & PRO BONO
DEFENDANTS	CORPORATIONS	CORPORATIONS	GOVERNMENT
PROCEDURAL FORM	F.R.C.P. 23(B)(3)	VARIOUS	F.R.C.P. 23(B)(2)
REMEDIES	DAMAGES; SOMETIMES CHANGES IN DEFENDANT PRACTICES	DAMAGES; CHANGES IN INDUSTRY-WIDE PRACTICES	INJUNCTIVE RELIEF
PLAINTIFF ATTORNEY FEES	JUDGE AWARDED, PERCENT-OF-FUND	CONTINGENT FEE CONTRACTS WITH PUBLIC OFFICIALS	JUDGE AWARDED, STATUTORY
ENFORCEMENT	OFTEN NOT AN ISSUE	UNCERTAIN	JUDGE OR JUDICIAL APPOINTEE, UNDER CONSENT AGREEMENT

ernance issues raised by the new social policy torts to the issues that long have been discussed with regard to traditional social impact litigation.

Third, if the new social policy torts threaten important values, what are the appropriate policy responses? Can these threats be met by stricter implementation of current rules, such as the requirements for class certification or the bases for awarding attorney fees?⁵⁰ Should we restrict or eliminate these types of suits entirely? Or, if the suits reflect failures in the public policy-making process, should we re-focus our attention on remedying those failures, rather than decrying the litigation?

50. HENSLER ET AL., *supra* note 18, at 476, 480 (evaluating alternative strategies for damage class action reform).

FIGURE 2.
A COMPARISON OF GOVERNANCE ISSUES RAISED BY
SOCIAL POLICY TORTS & TRADITIONAL SOCIAL
IMPACT CLASS ACTIONS

GOVERNANCE ISSUES	SOCIAL POLICY TORTS	TRADITIONAL SOCIAL IMPACT CLASS ACTIONS
VOICE/ REPRESENTATION	INDIRECT THROUGH ELECTORAL PROCESS FOR PUBLIC SUITS; UNCERTAIN FOR PRIVATE SUITS	MAY BE PROVIDED BY MEMBERSHIP ORGANIZATIONS
PUBLIC ACCOUNTABILITY	IF LITIGATION IS UNPOPULAR, MAY LEAD TO LOSS OF ELECTORAL SUPPORT FOR PUBLIC OFFICIALS; NO OBVIOUS PUBLIC ACCOUNTABILITY MECHANISM FOR PRIVATE SUITS	IF LITIGATION IS UNPOPULAR, MAY LEAD TO LOSS OF MEMBERSHIP SUPPORT, INCLUDING FINANCIAL SUPPORT
MONITORING	MAY DEPEND ON MEDIA REPORTING	MAY BE PROVIDED BY MEMBERSHIP ORGANIZATION
EFFECTIVENESS	UNCERTAIN	UNCERTAIN
LEGITIMACY	MAY BE UNDERCUT BY PERCEIVED ENTREPRENEURIAL & POLITICAL MOTIVES OF LAWYERS	MAY BE ENHANCED BY PERCEIVED PUBLIC INTEREST MOTIVES OF LAWYERS

IV. RESEARCH APPROACH

To explore these research questions, I am analyzing traditional social impact litigation, drawing on historical commentary and new case study material, and comparing it to the new social policy torts. My analysis of the latter draws on published descriptions of the litigation, legal documents, and interviews with key plaintiff and defense lawyers.

A. Traditional Social Policy Class Actions

The social policy litigation that followed the 1966 revision of Rule 23 might well have satisfied the drafters' hopes. Within a few years, the legal system was entertaining a wide variety of "social impact" lawsuits.⁵¹ Critics of the new litigation included jurists who worried about the burdens imposed on the court system, social conservatives who objected to the interpretations of legal doctrine that the suits produced, and some time later, scholars and activists who argued that the suits ultimately failed to achieve the social changes they promised.⁵²

51. See Miller, *supra* note 34, at 664.

52. See, e.g., Derek Bell, *Serving Two Masters: Integration Ideals and Clients' Interests in School Desegregation Litigation* 85 YALE L. J. 470 (1976); MARTHA F. DAVIS, *BRUTAL NEED:*

Critics of the new social policy torts generally have overlooked this rich literature.

Drawing inferences about a particular type of contemporary litigation from studies of a (arguably) different type of litigation brought some years ago poses an obvious pitfall: if we identify significant differences between the two domains, how will we know that these differences reflect differences in kind, rather than differences in time? To help sort out this question, I plan to conduct a small number of case studies of recent class actions that appear to represent "traditional" social impact litigation. My goal is to select a mix of cases that include suits for monetary and policy remedies, and public and private plaintiff attorneys. In addition, I want to include some cases in which the remedies sought arguably lie within the domain of legislative action and others where the remedies might be viewed more as enforcement of constitutional or statutory law. To illustrate what I have in mind, here are some possible candidates for the case study analysis:

Labor Community Strategy Center v. Los Angeles Metropolitan Transit Authority:⁵³ Filed in 1994 in a Los Angeles federal court by an ad hoc coalition popularly known as the "Bus Riders Union," the suit alleged that the Metropolitan Transit Authority (MTA) was disproportionately allocating resources to subway and rail transit that would serve middle-class residents, rather than Los Angeles bus transit that serves primarily low-income minority communities.⁵⁴ Judge Terry Hatter appointed a special master to assist the parties in reaching an agreement, and the suit was settled in 1996 when the MTA agreed to a consent decree that required them to reduce overcrowding on buses and improve service.⁵⁵ In 1999, Judge Hatter found that the MTA had failed to comply with the consent decree and ordered the agency to purchase 248 new buses. The MTA appealed and the United States Court of Appeals for the Ninth Circuit heard arguments in the case in May 2000.⁵⁶

Shumate v. Wilson:⁵⁷ This suit was filed in 1995 by Charisse Shumate, a female inmate serving a 15 years-to-life sentence for murder, on behalf of thousands of women prisoners at Chowchilla and Fron-

LAWYERS AND THE WELFARE RIGHTS MOVEMENT (1993); ROSENBERG, *supra* note 40; WOOD, *supra* note 36.

53. Case No. CV 945936 TJH (MCx) (C.D. CALIF).

54. See Jeffrey L. Rabin, *Bus Battle Rages in Federal Courtroom*, L. A. TIMES, May 3, 2000 at B-3; Editorial, *MTA Buses in Reverse*, L. A. TIMES, July 26, 1998 at M-4.

55. *Id.*

56. *Id.*

57. No. Civ. S-95-619 WBS JFM (E.D. CALIF).

tera, two state correctional facilities.⁵⁸ The suit alleged that the state provided inadequate or insufficient medical care for female inmates.⁵⁹ It was settled in 1997 by a consent decree.⁶⁰ In August 2000, prisoners' rights advocacy groups asked a judge to re-open the case, permit additional discovery, and set the case for trial, alleging that the consent decree was based on false evidence.⁶¹

Campaign for Fiscal Equity v. State of New York:⁶² This suit was filed in 1993 in New York state court by a coalition of advocacy groups on behalf of New York City school children.⁶³ On January 10, 2001, Judge Leland DeGrasse held that New York state's method of financing education was illegal because it deprived city children of their right to "sound, basic education" guaranteed under the state constitution.⁶⁴ Judge DeGrasse traced the challenge of New York's state school financing policies to the landmark case of *Serrano v. Priest*⁶⁵ decided in 1971.⁶⁶ A week later, Governor George Pataki announced that the state would appeal the decision.⁶⁷

Ridgeway v. Flagstar Corp.:⁶⁸ This case was one of two class action suits filed by Black customers against the Denny's restaurant chain alleging discrimination in how the company treated Black and other minority customers.⁶⁹ The suits were settled in 1994, when Flagstar, the parent company, agreed to pay more than \$54 million in damages to an estimated 290,000 people⁷⁰ and to provide sensitivity training to Denny's employees.⁷¹ A private civil rights lawyer was appointed by the Justice Department to monitor compliance. Subsequently, customers in different parts of the country charged Denny's with continuing discriminatory practices, and the federal government investigated

58. Email from prisoners of Davis to Kelly St. John, Chronicle Staff Writer, San Francisco Chronicle, Aug. 8, 2000 (available at <http://www.sfgate.com/caibin/article.cqi?file=/Chronicle/archive/2000/08/01/01>).

59. *Id.*

60. *Id.*

61. *Id.*

62. No. 111070/93 (N.Y.S.2d, Jan. 9, 2001).

63. See Goodnough, *supra* note 43 at A1.

64. *Id.*

65. 5 Cal3d 584, 487 P2d 1241 (1971).

66. Campaign for Fiscal Equity v. State of New York, No. 111070/93 (N.Y.S.2d, Jan. 9, 2001).

67. Richard Perez-Pena & Abby Goodnough, *Pataki to Appeal Decision By Judge on Aid to School*, N. Y. TIMES, Jan. 17, 2001 at A-1.

68. *Ridgeway v. Flagstar Corp.*, Nos. C 93-20202 JW, C 93-20208 JW (N. D. Cal. 1994).

69. David Herszenhorn, *Punitive Actions are Advised in Discrimination at Denny's*, N. Y. TIMES, Aug. 15, 1997 at B-5.

70. *Id.* See also *President and Chief Executive of Denny's Resigns*, N. Y. TIMES, Oct. 8, 1996 at D-1.

71. C. Ronald Petty, *Diversity is Good for Business*, N. Y. TIMES, Nov. 16, 1996 at I-23.

incidents in which customers alleged that they had been harassed by the Denny's staff.⁷² In 1997, Flagstar, the parent company, sought the protection of bankruptcy court.

Roberts v. Texaco Inc.:⁷³ This suit was filed in 1994 by black employees who alleged that Texaco engaged in discriminatory employment practices, including promotion and compensation decisions, job training, and other practices, against them.⁷⁴ After a disgruntled employee who was not party to the suit produced tapes that seemed to indicate that some executives had used racial slurs in management discussions,⁷⁵ Texaco agreed in 1997 to settle the suit. The provisions of the settlement included the creation of a \$115 million fund for class compensation and the establishment of a corporate Task Force on Equality and Fairness to guide the corporation in developing and monitoring the progress of various diversity efforts intended to assist Black and other minority employees.⁷⁶

B. *The New Social Policy Torts*

My analysis of the new social policy torts will focus on the tobacco litigation, and suits against gun manufacturers and managed care organizations. This conference and previous symposia have produced rich literature on the tobacco litigation. Although nowhere near as rich, there has been extensive press coverage (particularly in the business press), as well as some academic commentary, on the gun suits.⁷⁷ Like the tobacco cases, the gun litigation comprises a mix of personal injury suits filed on behalf of gunshot victims and suits filed by public entities. Suits against gun manufacturers, filed on behalf of municipalities, variously seek changes in practice and damages to cover public costs associated with gun violence, such as police protection and emergency medical services, and some are grounded on novel legal theories.⁷⁸ The attorneys pursuing this litigation have said their efforts are

72. *Metro News Briefs: New York; No Federal Charges in Suit Against Denny's*, N. Y. TIMES, Nov. 18, 1999 at B-10.

73. *Roberts v. Texaco Inc.*, No. 94 Civ. 2015 (S.D.N.Y. 1997).

74. *Roberts v. Texaco Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997).

75. Alison Frankel, *Tale of the Tapes*, THE AMERICAN LAWYER 65 (March 1997); Kurt Eichenwald, *Texaco Executives, On Tape, Discussed an Impending Bias Suit*, N.Y. TIMES, Nov. 4, 1996; Kurt Eichenwald, *Investigation Finds No Evidence of Slur on Texaco Tapes*, N. Y. TIMES, Nov. 11, 1996 at A-1.

76. *Roberts v. Texaco*, 979 F. Supp. 185, 190-192 (S.D.N.Y. 1997).

77. See e.g. Derrick Jackson, *A Wound to the Gun Makers*, LOS ANGELES DAILY JOURNAL, February 19, 1999, at 6. Barrett, *supra* note 32 at 1; Doug Morgan, *What in the Wide, Wide World of Torts is going On? First Tobacco, Now Guns*, 69 MISS. L. J. 521 (1999); John Gibeaut, *supra* note 12, at 50.

78. Gibeaut, *supra* note 12, at 50.

modeled on the litigation against the tobacco manufacturers.⁷⁹ Although some of the attorneys who played prominent roles in the tobacco litigation have not joined the litigation against gun manufacturers,⁸⁰ the plaintiffs' attorneys who filed the *Castano*⁸¹ class action against tobacco manufacturers in the 1990s, led by Wendell Gauthier of New Orleans, are key participants.⁸² Some anti-smoking advocates also have offered their support. While noting that he and his colleagues expected to win substantial fees if successful, Gauthier argued that, as a result of the litigation, the gun manufacturers would be forced to agree to regulations on manufacturing and marketing that they have previously resisted.⁸³

The managed care litigation has been less extensively reported than the tobacco or gun litigation.⁸⁴ More than a dozen class action lawsuits have been filed against managed care organizations,⁸⁵ representing some fifty million persons in the United States whose care is provided by health maintenance organizations.⁸⁶ Suits have been filed both by private attorneys and state attorneys general. The class action lawsuits generally argue that health care plans have breached their fiduciary duties to plan enrollees by adopting various cost-control mechanisms.⁸⁷ Among the private attorneys involved are Ron Motley, a leading asbestos mass tort attorney, and Richard Scruggs. Mr. Scruggs has described his role in the litigation as an effort to force changes in health care policy that Congress has failed so far to adopt.⁸⁸ Although a recent United States Supreme Court decision, holding that a managed care organization cannot be sued for imposing such constraints,⁸⁹ is widely regarded as placing a major roadblock in

79. Barrett, *supra* note 32, at A-1.

80. For example, as of about a year ago, Richard Scruggs, a leading tobacco class action attorney, had declined to become involved. Among the reasons he gave the *Wall Street Journal* reporter who interviewed him was that he felt that guns were not "wholly bad" and he questioned whether "there's so much money at the end of the day" [as there was in the tobacco litigation] for a potential settlement. *See Id.*

81. *Castano v. American Tobacco Company*, 961 F. Supp 953 (E.D. La. 1997).

82. Barrett, *supra* note 32, at A1.

83. *Id.* at A-6.

84. *But see, e.g.*, Milt Freudenheim, *Under Legal Attack, HMOs, Face Supreme Court Test*, N. Y. TIMES, Jan. 4, 2000, at A-1; David Savage, *Cost-Cutting Consequences: An HMO liability case is being closely watched by the lawyers who targeted tobacco companies*, 86 A.B.A. J. 30 (Feb. 2000).

85. Freudenheim, *supra* note 84, A-1.

86. Savage, *supra* note 84, at 30.

87. Freudenheim, *supra* note 84, A-1.

88. Savage, *supra* note 84, at 30.

89. *Pegram v. Herdrich*, 530 U.S. 211 (2000).

the paths of these suits,⁹⁰ the health insurance industry remains concerned about the outcomes of the class litigation.

C. Political Theory

At the heart of the critique of the new social policy torts, which is sometimes obscured by more general criticism of entrepreneurial mass litigation, is the notion that pursuing public policy change through a combination of public action undertaken by executive officials and private action undertaken by entrepreneurial lawyers offends norms of democratic governance. Litigators on the plaintiffs' side are portrayed as unfaithful agents of the public, seeking political or financial profit. In addition, they are unconstrained by electorates who have not requested the litigation, have little or no ability to monitor it, and little or no say about its outcome.

Questions about the public-private distinction, the proper allocation of tasks among executive, legislative, and judicial branches of government, the role of an independent judiciary in policy-making, and optimal representation strategies lie at the heart of political science and public law. Reviewing this literature may help to put the debate over the new social policy torts in a broader governance perspective.

V. CONCLUSION

When viewing the new social policy litigation through the lens of democratic theory, one must be wary of comparing real litigation phenomena to an idealized legislative process. As the ongoing debate on campaign finance reform makes abundantly clear, there is a significant question about whether Congress can overcome the agency problems posed by an electoral process that relies on unregulated contributions from well-organized and well-subsidized interest groups. Moreover, the two-party system, operating within a districting scheme that provides enormous benefits to incumbents, itself challenges democratic ideals of responsive government. Viewed up close, the new social policy litigation and the legislative process may look more alike than critics of the new litigation would care to believe.

90. Edward Walsh & Amy Goldstein, *High Court Hands HMOs A Victory*, WASH. POST, June 13, 2000, at A1. See also Savage, *supra* note 84.

