Litigation in America:
Runaway Greed or Fundamental Component of Our Constitutional Tradition?

It has become very easy, and quite fashionable, to criticize the American tradition of tort law. Criticism has become easy because there are a number of examples paraded before the public that appear, on the surface, to clearly illustrate a system run amok. Large monetary awards that are made prominent in the media seem to indicate that greed has taken over our system, are responsible for expenses, and reduced levels of service that we all have to bear. Those who expound this polemic are calling for reform. Criticism has become fashionable because complex subjects that defy simple understanding are tempting targets for demagogues who stand to gain while appearing to be benevolent experts looking out for "the little guy." What is rarely considered is that the American system of tort law is the individual's largest check on concentrated power, both governmental and private. In the deepest traditions of the American Constitution, tort law is an integral element of the fabric of society that we hold so dear. Reforming such an elemental component of our political system should not be undertaken without a comprehensive effort to understand all the issues and potential consequences involved.

Inefficiency is one hallmark of the American political system. "Americans have had to confront the trade-off between tyranny and effectiveness - the one to be feared and the other to be prized" (Pika, et al p.11). The Constitution relies heavily on a certain amount of inefficiency manifest as a constant level of tension between the three branches. As James Madison put it: ambition must be made to counteract ambition. The effect of this tension is to prevent any single part of the government from exerting undue influence over the others or from becoming too powerful in and of itself. As power accumulates in one branch, there becomes effective in another branch a mechanism for blunting that growth which eventually brings the whole system back into its original state of approximate equilibrium. The government is thus balanced so that it is deliberation of the people's representatives, not the whim of the people, the tyranny of the

majority, or the government alone that determines the direction taken. Overall, the effect is to keep the powers of the government limited and the people sovereign. "American government, accordingly, is designed to fragment and limit power" (Kagan p. 15). This is a uniquely American concept. As a result, it is just plain harder for democratically elected leaders to get things done.

Another hallmark of the American political system is adaptability. The "original Constitution was a racist and sexist document…that the Framers wrote…in a way that benefited their class" (Epstein p. 6). Yet today, the Constitution remains a symbol of America's dedication to individual liberty and a government constrained by the will of the people, even as the "U.S. population has become increasingly heterogeneous" (Epstein p. 6). How are the changes in population and culture relevant to the original text of the Constitution? "The answer lies in part with the Supreme Court, which generally has analyzed the document in light of its contemporary context. That is, some justices have viewed the Constitution as a living document and have sought to adapt it to the times" (Epstein p. 7).

This is a top-down approach to affecting change within our system. It acts to adapt the very precepts of our system to the ever changing conditions of a dynamic society. Additionally, there is a fundamental bottom-up component of adaptability that should not be overlooked: our belief in, and continued use of, the common law.

Comparative Politics & Law

America has a decentralized political and financial system as compared to other economically advanced democracies. "Among the rich democracies, American government is the most easily penetrated by organized interest groups and extracts less tax revenue as a proportion of gross national product" (Kagan p. 14). The resulting benefit is maximum

opportunity for individuals to innovate and to be empowered to battle with established centers of power. The disadvantages are inefficiencies. "A decentralized financial system, rooted in autonomous equity markets, deprives the American government of direct controls over the economy that, for good or for ill, many governments elsewhere in the world employ" (Kagan p 15). This weak hierarchical control results in some level of formal legal contesting and litigant activism. Just where this level is currently located has become a main source of controversy.

As members of an economically advanced democracy, we "want and expect justice, economic security, guaranteed health care, financial aid when disability or disaster strikes and protection from harmful technology and pollutants. But getting those things from an institutionally fragmented, tax averse political system presents a problem" (Kagan p. 15). Therefore; there is a gap between our desire and expectation of governmental protection from harm, injustice, and environmental dangers and our powerful, anti-government structure that reflects the basic mistrust of concentrated power and forces fragmentation of governmental and political authority. Our legal system is the mechanism that bridges this gap:

> "In a 'weak,' structurally fragmented state, lawsuits and courts provide 'nonpolitical,' non-statist mechanisms through which individuals can demand high standards of justice from government. Lawsuits and courts empower interest groups to prod the government to implement ambitious public policies. It is only a slight over-simplification to say that lawyers, legal rights, judges and lawsuits are the functional equivalent of large central bureaucracies that dominate governance in high-tax, activist welfare states" (Kagan p. 16).

In other words, "instead of national health care, Americans get proposals for a "patients' bill of rights' that would allow the sick to sue their managed-care companies" (Burke p. 121).

In many areas of life, such as land use regulation and worker protection, "Western European polities typically have more restrictive laws than does the United States." (Kagan p. 6). "Japan has a more detailed and extensive set of legally mandated product standards and pre-market testing requirements" (Edelman p. 292). "Germany has stricter recycling regulations and

much tighter legal restrictions on the opening and operating of new retail enterprises" (Davis & Gumbal). "Compared to most American states, Sweden has tougher laws, and tougher law enforcement, concerning fathers' obligations to provide child support. The Netherlands regulates how much manure a farmer can spread on his fields" (Huppes & Kagan p. 215) and, like Germany, "has more stringent emissions standards than the United States for some major air pollutants" (Rose-Ackerman pp. 27-28). These countries have a more centralized version of government with powerful regulatory agencies to provide safeguards in addition to generous social welfare benefits to protect individuals from the unpredictable. They have proportionately higher tax collection rates as well. In contrast, the more decentralized American system of government encourages (some may say forces) Americans to take their problems to court.

When comparing the U.S. system against other advanced democracies in areas of "compensating injured people, regulating pollution and chemicals, punishing criminals, equalizing educational opportunity, promoting worker safety, discouraging narcotics use, deterring malpractice by police officers, physicians and product manufacturers, the American system for making and implementing public policy, and resolving disputes, is distinctive. American dispute resolution generally entails:

1. More complex bodies of legal rules;
2. More formal, adversarial procedures;
3. More costly forms of legal contestation;
4. More frequent judicial review of administrative decisions and processes;
5. More political controversy over legal rules and institutions;
6. More politically fragmented, less closely coordinated decision making systems; and
7. More legal uncertainty and instability." (Kagan p. 7)

The result of this is that the American system of law does differ significantly from that of other nations in very noticeable ways. One of these differences is that public policy itself, in America, is litigious. Our public policies result in laws "that promote the use of litigation in resolving disputes and implementing public policies by (1) creating rights to sue, (2) lowering barriers to litigation, or (3) increasing the rewards of litigation. These policies produce an environment in which lawyers and legal concepts structure everyday practices and where the *threat* of a lawsuit always looms, even when, as is usually the case, no lawsuit is filed" (Burke p. 4).

"Our Constitutional tradition - federalism, separation of powers, an independent judiciary - designed to tame government power, induce litigious policy making and help resist anti-litigation reform." This tradition creates "powerful incentives for activists - those who favor governmental action on social problems - to implement their schemes through courts" (Burke p. 7). This arrangement suits extra-governmental activism in important ways. First, courts provide an avenue for activists to implement policy without seeming to augment the power of the state and it provides a means of action on social issues without invoking the dreaded state tools of bureaucratic regulation and welfare programs. Also, politicians who enable litigation are providing their constituents a benefit without having to directly pay for the enforcement or the application of the benefit. This cost shifting permits quick policy decisions in areas where the consensus required for a budget change would be difficult to implement. "Courts and individual rights provide a promising alternative" (Burke p. 7) to centralized, government sponsored solutions to every problem and situation that may arise.

Litigious policies provide a method to prevail against the barriers to activist government that are placed there by the structure of the Constitution. The separation of powers make it

difficult for activists to keep control of their policies and easy for enemies to defeat them. Courts offer a way around these problems. Courts permit activists to find ways to resolve the inherent tensions of the fragmented, decentralized system of our government so that their policies can be implemented.

America's Use of Common Law

A mechanism used to propagate social changes throughout the justice system from the bottom up is our use of "common law." The term common law is often used to refer broadly to the English legal tradition, as opposed to the civil law tradition that was developed on the European continent. In the English system, the fabric of the law was woven largely by the courts. "Common law courts decided cases based on custom and precedent" (Bogus p. 52). Statutory law was relatively thin compared to the far fuller and richer body of law produced by courts.

Common law began its development in England during the reign of King Henry II (1154 - 1189). "When Henry became king, he wanted to strengthen both his political and economic position. To assist in achieving these ends, he synthesized both old and new ideas with regard to centralizing the administration of justice" (Terrill p. 29). During Henry's reign it was increasingly felt by the people that the king, who was considered the source of justice, should hear and decide cases. Henry established three royal courts in response to complaints that the existing system of manorial justice would no longer suffice. "If subjects could not come to the courts that permanently sat at Westminster, royal justice would come to them in the form of a circuit judge," a term still in use in our country today. "Henry II borrowed this idea from his father, King Henry I (1100 - 1135), but expanded its use to a considerable degree" (Terrill p. 30). These "judges were respectful not only of the lawful authority of past rulings, but also of what

they believed must have been their essential wisdom" (Bogus p. 52). From this, a body of socially responsive law evolved over a long period of time.

This evolved form of English common law is still in use in the United States today. Justice Harlan F. Stone wrote that the common law's "distinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all pervading doctrine of the supremacy of law - that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts" (Bogus p. 115). In modern usage, common law encompasses the areas of "contracts, torts, and property, three areas of law that have traditionally been developed through judicial decision. To this we should add products liability" (Bogus p. 116). Of course, the definition of common law varies according to how one applies the term. I use the example of these four areas because I feel they are the ones most often portrayed as being in crisis, particularly tort and products liability law.

Critics of common law claim that nothing short of total reform will have much beneficial effect. Underlying most proposed changes intended to speed up delivery of justice and reduce costs are decried as being "based upon the same substantive laws, the same adversary system and approximately the same procedural rules" (Forer p.151). That in our modern, technological age, the common law seems to be a throwback to another, more primitive time does not automatically make it an anachronism. It is simply not true that today "we are trying cases in very much the same way that they were tried in the Middle Ages" (Forer p. 151). In reality, modern law, while based on common law at its core, is "composed of both case law and statutes" (Bogus p. 122).

The common law survives today because it has proven to be fair and efficacious far more so than an equivalent body of statute law derived by "experts" who try to foresee every possible

eventuality. Certainty of outcome may seem to be the Holy Grail of law, but it has been impossible to achieve. Pure rule making and statutory law is an attempt at removing discretion, of making law self-executing. But it doesn't work. "Human activity can't be regulated without judgement by humans" (Howard p. 12).

America's Use of the Jury

Another unique aspect of common law that survives in America today is the use of a lay jury. "The jury is a legal institution that has been synonymous with the evolution of the common law" (Terrill p. 30). "Indeed, it is not too much to say that within the common law world, the jury is one of the institutions most closely associated with the development of civilized society" (Bogus p. 66). During the founding of our country, the constitutional debates considered the use of a jury for judicial matters in great detail. There were two points of view that were debated, one held by the Federalists and one held by those advocating State's rights.

The Federalists, led by Hamilton, believed that "the jury system was important when liberty was at stake, that is, when one was being tried for a crime that could result in incarceration or execution. The Anti-Federalists, however, argued that the jury system had a broader purpose - that it was an integral part of democratic government" (Bogus p. 78). The question really boiled down to what percentage of questions should be decided by the people as opposed to the percentage decided by the learned elite, which, of course, was the class the Framers themselves occupied. Accordingly, the Framers worried about a lay jury having "excesses of democracy" in property disputes. This was natural as the framers themselves were large holders of property, which was their main source of wealth and power. They therefore resisted enumerating in the constitution the right to jury trial in civil cases.

During the Constitutional Convention in Philadelphia, the Federalists temporarily won the point. Ultimately, however, the Anti-Federalists prevailed with the adoption of the Seventh Amendment, which reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." As a result of this, it can be said that the core of American civil justice is democratic. It is however, a very specialized kind of democratic expression.

While "citizen participation is considered both a check on government power and a mechanism for bringing the people's voice into the justice system, there are serious misgivings about populism in the jury box" (Bogus p. 82). As a result, participation has become carefully circumscribed and controlled. There are, in fact, eight mechanisms by which discipline is imposed on the democracy of the jury. They are:

1. Jury selection process;
2. Rules of evidence, which limits what the jury hears and sees;
3. Procedural rules and practices governing how the jury conducts its business;
4. Judge's discretion to bifurcate trials;
5. Judge's role in instructing the jury;
6. Judge's discretion to use special jury verdicts;
7. Ability of both trial and appellate courts to order new trials if jury decision is against the weight of the evidence; and
8. Ability of trial and appellate courts to refashion jury verdicts" (Bogus p. 83).

Despite these limitations, the power of the jury remains paramount. Since damage amounts will be determined by jury, "the jury system affects not only cases actually tried before juries,

but all those that might be tried before juries, including even potential cases that plaintiff lawyers decide not to file at all" (Bogus p. 83). In fact, "less than two percent of all civil cases are resolved by jury verdict. A small part of the 98 percent of cases not adjudicated by jury are decided by judges, but the vast bulk of cases are resolved by the parties themselves by way of settlement" (Bogus p. 82).

Though the influence of the jury is far reaching, and results in most cases being settled prior to trial, the issue of jury competence is often raised as one reason for alarming trends in rising damage awards. The question is naturally posed: wouldn't trained professionals be better at deciding important issues than a group of amateurs? After all, "Judges went to law school, practiced law, distinguished themselves in some fashion to rise to the bench, and, day in and day out, evaluate witnesses and lawyer's arguments" (Bogus p. 88). Shouldn't they be better at deciding cases than a group of lay persons? "The answer in the American system is no. When it comes to finding facts - deciding what happened, why people did what they did, or who is telling the truth - the collective judgement of lay people drawing on their collective experience is better" (Bogus p. 89). It is better because these lay people represent a wider range of experience, collectively, than a single specialized individual and also because they represent an essential check on power, both of the government and of elites, be they wealthy individuals or powerful corporations.

Many interest groups lobbying for reform of the legal system like to make the assertion that juries act with collective prejudice against certain entities, such as corporations or social elites. Studies performed to examine this assertion do not bear it out. Jury verdicts have been compared to the assessments of judges many times over the years. In each case, a very high percentage of judges report that they agreed with the verdicts of juries most of the time. A 1998 Arizona study

of civil cases found an 84% rate of agreement between judge and jury.[1] In a national survey of state and federal judges performed in 1987, 61% of the judges said they disagreed with the jury less than 10% of the time.[2] Studies comparing jury verdicts in medical malpractice cases with independent evaluations by physicians have found similar results - that is, a high rate of agreement between juries and physicians about whether doctors and hospitals were negligent.[3] Other studies that track win rates in certain types of cases, such as tort, medical malpractice, non-medical malpractice (such as attorney and accountant malpractice), and product liabilities cases, "suggests that juries are not strongly biased against business enterprises or individuals with high status" (Bogus p. 90).

In spite of high rates of agreement, there are still fundamental differences in the way a judge or jury evaluates a case. It is these differences that we value. While study after study has been performed checking rates of agreement, there is a more definitive statistic to keep in mind when all is said and done: "more than 75% of both federal and state judges agree 'that for routine civil cases, the right to trial by jury is an essential safeguard which must be retained'" (Bogus p. 95). Without juries, cases would be decided exclusively by judges, as is practically the case in modern England. Why would American judges prefer lay juries over themselves? Because in this way, "the common law prevents legal doctrine from becoming detached from social values" (Bogus 98). "Legal scholars may advocate that the common law take a particular path; judges may attempt to place the common law on a particular path; but they can take the common law only so far without public consent" (Bogus p. 100).

Another factor is the relationship between a judge and other governmental bodies such as administrative agencies. Judges dealing exclusively with statutory agency law have been

[1] Hannaford, Paula L, et al., *How Judges View Civil Service*. 48 DePaul Law Review 247 (1998)
[2] *The View From the Bench*. National Law Journal, Aug. 10, 1987

accused of "something that has been called judicial-centricism, more popularly known as 'black robes disease'" (Richtel p. 277). "Men and woman put on black robes, sit on elevated benches, are called 'Your Honor,' watch everyone rise when they enter or leave the courtroom. Law clerks treat them with genuine awe, luminaries of the bar bow and scrape before them" (Bogus p. 148). Using this psychological condition, a skillful attorney representing a large corporation can subtly belittle the work of an agency at issue and play on a judge's false sense of superiority in order to prevail. Common law juries do not suffer from this. They are largely insulated from political, professional or other external influence when evaluating issues regarding corporations or agencies.

While the biases of juries has not changed appreciably in modern times what has changed is a willingness to consider compensation to plaintiffs in a new, more sophisticated light. While "legal theory has not changed very much with regard to the elements that judge and jury may properly consider…their behavior implies a changed sense of what 'compensation' means" (Friedman p. 62).

The awarding of actual damages is a fairly straightforward calculus that includes things like medical bills, lost wages, and future earning power lost. But punitive damages, meant to punish behavior, or the amorphous catch-all category of pain and suffering, is where the most dramatic changes are taking place. Between a juries original award, the one most often flouted in the press by those eager for reform, and the award amount finally settled upon by appellate courts when the original amount was deemed to be the result of "passion, partiality or corruption," (Bogus p. 105) lies a new willingness to determine punishment not as 'what is deserved' by the plaintiff, but what is a true deterrent to the defendants future likelihood of repeating the

[3] Vidmar, Neil. *The Performance of the American Civil Jury*. 40 Arizona Law Review 849, 853 (1998)

egregious act. That is, in the past, "damages in practice were mostly backward looking: what has plaintiff suffered so far?" (Friedman p. 63).

Juries are much more willing today to be forward looking in their judgement. While "there is no formula for calculating punitive damages, it is a matter of judgement, taking into account both the nature of the conduct and the defendants financial status," (Bogus p. 104) modern juries have shown they are willing to make their intent known when the issue is reprehensible conduct. This element of human judgement is essential to an adaptive and responsive system of legal justice.

Cases and Controversies

Our Constitution clearly enumerates the situations that permit the use of the judiciary. It requires that for a court or judicial body to become involved that there is a case or controversy to be settled. The two parties must be in true adversarial opposition. For instance, it is improper for two parties to go to court when they both agree and desire a similar outcome, the so called "collusive suit," or for the court to decide a hypothetical conflict. In other words, the courts are an avenue of last resort.

But what has caused the explosion in cases and controversies of last resort in the latter half of the twentieth century? Why has there been more of a willingness for people to use the courts to effect social change and to modify or repudiate the behavior of corporations? Those advocating reform, predominantly corporations and insurance companies, claim that lowering of barriers to litigation and the rise of compensation awards "has done cruel grave harm and little lasting good" (Olson p. 2). "The system is costly, inefficient and unpredictable, deterring meritorious claims and inspiring contentiousness" (Eviatar). But this can be seen as a cry for change from those who have been forced to alter their behavior by legal activism, and rarely

from those who have demanded this alteration take place. What, then, are the nature of these forced alterations?

In almost all cases, the increases in the use of the law, and the nature of the alterations brought about, can be lumped into two broad categories:

1. Modern tort law; and
2. Social litigation

Modern Tort Law & Product Liability

One definition of the word tort is: "…a civil wrong or wrongful act, whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as intentional wrongs which result in harm. Therefore tort law is one of the major areas of law and results in more civil litigation than any other category" (law.com). "Modern tort law actually developed because the American government wasn't passing laws to protect people from the hazards of the industrial revolution" (Eviatar).

"In significant part, tort law flowed from creation of the transcontinental railroad system" (Kagan p. 127). Early incentives for industrializing the nation came in the form of government subsidies. The railroads, for example, received substantial federal loans for each mile of track laid and in their haste to lay new track threw safety to the winds. Early railroad systems were designed for economy and efficiency, and safety was not yet a part of becoming more efficient. "These factors combined to create horrific levels of carnage. In just a single year, 1,972 railway men were killed and 20,028 were injured on the job" (Licht p. 168).

When state government did try to regulate railroads, which were national in nature and funded primarily by the federal government, those regulations were deflected. "Legislators introduced bills that would have required railroads to install automatic air brakes, but the

railroads - arguing that automatic brakes were too expensive or not yet perfected, or that railway executives knew more about running railroads than did legislatures - successfully lobbied against most of these measures. When Michigan enacted legislation requiring air brakes in 1867, most companies ignored it" (Bogus p. 128). The courts, at first deferential to the railroads, eventually came around and wrote into the common law decisions that reflected the turn of the century political slogan: "The cost of the product should bear the blood of the workman" (Kagan p. 133).

"Reformers asserted that if engineers could make locomotives that roared along at fifty miles per hour, they could also make better braking, signaling and coupling systems; if they didn't, corporate officials, not God, were responsible for train wrecks and related human carnage" (Kagan p. 128). This end of fatalism coincided with the emergence of mass markets for casualty insurance. Courts could now "compel business firms to compensate the victims of their technologies without bankrupting useful companies" (Friedman p. 187). "At a sharply increasing rate, therefore, accident victims brought tort suits against factory owners, railroads and streetcar companies" (Kagan p. 128). Safety could now be factored in as a legitimate cost of doing business. This was truly a revolutionary concept for an industrializing nation.

Throughout the twentieth century, the use of tort suits grew to compensate for the relatively weak social compensation and welfare systems that keep American taxation relatively low. "Beginning in the 1960's, reform minded judges sharply modified the common law rule that tort claimants are barred from recovery by their own contributory negligence, abolished governmental…legal immunity from tort liability, changed evidentiary rules for medical malpractice cases, and imposed 'strict liability' for product defects - all making it easier for plaintiffs to win" (Kagan p. 131). This rise in liability exposure and the New Deal political economy combined to create governmental regulatory agencies that tried to anticipate problems

and legislate them out of existence. "Highly specific and 'self-executing' rules would cover every eventuality, preserve uniformity, and avoid discretion and possible abuse by officials" (Howard p. 27).

Regulation and government agency action alone has many drawbacks. Unlike courts, agencies suffer from something called "capture" - where they become beholden upon the industries they regulate. Information and staffing are but two ways an industry, slowly but inevitably, can capture an agency. "Information is power, and most agencies are heavily dependant on the companies they regulate for information about research, product design, and accident experience. Another tool is staff relationships. Agency staff often become too cozy with their agency counterparts" (Bogus p. 146). The flow of workers between governmental agencies and the private sector creates a conflict of interest problem for both sides.

While regulatory and administrative agencies have their place, are indeed essential to a modern state, it is their fixed nature and standards based law that, when it does fail or otherwise find itself in controversy, requires the common law to resolve any issue in a particular case and circumstance. The result of this is a mix of motives for improvements in product safety. Some improvements came about because of increased regulation, and some by products liability litigation, which "came into being in the mid-1960's" (Bogus p. 144).

The courts have clearly recognized this problem and provide a method to counter it. "Starting in 1967 courts became increasingly rigorous in reviewing action by administrative agencies and more willing to second guess agency decision making, focusing in particular on the problem of capture" (Bogus p. 148).

All improvements in product safety in the last few decades were influenced by the increased awareness of litigation as a means of individuals to combat both errant corporate

behavior and government regulators who are not following the best interests of the people. The areas and interactions between business, society, and government became ever more interconnected by our judicial system as the way for individuals to gain immediate relief against unfair or dangerous practices. "Confronting these issues, the legal rules and adjudicatory processes of tort law grew ever more complicated" (Kagan p. 128).

This access to the court is unique to the United States among the advanced democracies of the world. "The United States employs a wider array of litigation encouraging procedural mechanisms - contingency fees to finance tort litigation, extensive lawyer controlled pretrial discovery, large class actions, and the rule that losing litigants generally need not reimburse the winner's legal fees" (Burke p. 127). Some have pointed out that this unparalleled access to power makes our court system a "fourth branch of government." Of course, those who cry for reform point to these very same characteristics as being the source of the problem. They point out that "as a mechanism for compensation, adversarial legalism proved to be costly, inconsistent, and inequitable," (Burke p. 127) but offer only more restrictions in its place. "Critics of modern law and government pick out symptoms of ineptness and call for broad reforms. By and large, however, they continue to champion the idea that law should be as specific as possible" (Howard p. 29). Critics do not want less law - they want laws friendly to their cause. Some states are now passing laws that cap the amount of damage awards that are possible. It remains to be seen how these additional regulations will either lower legal costs, and whether these costs will be passed on to consumers, or how levels of service will change.

No-fault systems, as used in many progressive European democracies, along with heavy regulation, result in blanket increases in taxation and hinder entrepeneurship and innovation, both essential components of the American psyche and economy. Perhaps the courts do function

imperfectly, at best, but they do function. In our history "it is neither the market system nor, on its own initiative, the legislative system that forced improvements in safer workplaces…and products,…it was the common law system" (Bogus p. 135).

Social Litigation & Due Process

By the middle of the 20th century, lawyers discovered that litigation could also be a tool for broad social change, filing the landmark Brown v. Board of Education suit, in 1954. Then Congress passed the Civil Rights Act of 1964, inviting plaintiffs to sue to open up the workplace to women and minorities. "This was the era of what's known as the 'due process revolution,' when lawyers won criminal defendants the right to counsel and welfare recipients the right to hearings" (Eviatar). Eventually, the aged and disabled won rights that were likewise enforceable by lawsuits. Lawyers began bringing class actions, and the law seemed to be expanding into every facet of daily life. Sexual harassment law developed in the 1980's, for example, bringing the courts into the workplace.

"It is hard to give an exact definition of the legal changes that go under the general phrase, the 'due process revolution.' They consist of a…vast expansion of procedural rights. Due process is…a fundamental constitutional principle. Thus, the due process revolution grows out of a specific tradition, the American constitutional experience" (Friedman p. 80). Once again, many law scholars claim that this explosion of litigation on the constitutional side is caused by a lack of formal rules, similar to those reformers who think civil litigation rates have increased due to too many common law inquiries. "The court shows unsettling pride in its refusal to offer guidance through any set formula, insisting instead on 'ad hoc' factual inquiries into the circumstances of each individual case" (Olson p. 147).

This individual attention to each case and circumstance seems very fitting when the machinery of accusation is turned against oneself. The other side of the coin, it can be argued, is that the lack of standards means it is less clear how to avoid coming into this situation in the first place. "The unclearness of the standards for permissible search and seizure, for example, gives countless criminals the chance to appeal their convictions, yet it does not give law-abiding citizens a reliable sense of what we may expect to keep private should the police take an unwarranted interest in our affairs" (Olson p. 148). This approach is short sighted and gives too much credit to those charged with defining what it is we are permitted to do. This is especially true in the current climate of attempting to deal with terrorism and the right to privacy. As this area of investigation is relatively new within the domestic sphere, as is its sense of urgency, the advantages of a flexible appeals system must surely outweigh any gains to be made from formal rules, especially as formal rules simply do not exist for this situation. It is much more desirable to use one's common sense to stay away from trouble and retain the ability for extensive due process in the event an error is made rather than to forego due process guarantees in exchange for more clearly defined rules of behavior. Such trust in authority is anathema to our constitutional heritage.

As in the case of civil litigation, those urging reform on the due process front are mainly from the business, institutional and administrative spheres. This is because due process has, over the years, "spilled over from the courtroom to institutional and administrative behavior in general" (Friedman p. 82). In these cases, litigation takes many forms. Very often, the process to which an individual is entitled is less than a full blown judicial procedure, though there is an attempt to keep fundamental fairness and the basic elements of a judicial proceeding in place. These quasi-judicial procedures are now commonplace in areas that formerly maintained a

deference to authority, such as the military, the school system, or the prison system. "One by one, courts and legislatures have stripped institutions of their former immunity" (Friedman p. 85). Those sponsoring reform would like that immunity returned.

Those that propound formalism over the case method offer an Orwellian sense of knowing what is best for us before even we do. "Formalism in the law was born of a profound sense of fairness and a humane desire to spare citizens the misery of litigation" (Olson p. 148). While that sounds very altruistic, many would rather have the right to litigation, thank you very much, and the right to challenge blind authority that comes along with it. There is no shortage of political systems that strip the individual of the right to challenge the formalistic legal structure that has been erected for their benefit but may or may not actually serve in that way. When peoples find that the legal system they are dealing with actually benefits everyone but them, what alternative is left ? Due process and litigation to enact and enforce social programs that foster equality could not be more American. "Modern legal culture insists on a single standard of justice. To satisfy this demand, every institution has to fall into line" (Friedman p. 91). The ability to litigate is what makes this more likely to actually occur.

Reform: Desirable? Feasible?

Overall, the effect of litigation on our society has been extremely positive. Common law litigation in general, and products liability law specifically, accomplishes three things. First, it increases the manufacturer's cost of distributing unreasonably dangerous products. How much have costs imposed by the liability system increased the cost of consumer goods? "A 1991 study by the National Insurance Consumer Organization found that the cost of insuring products liability, including both insurance premiums and the cost of self insurance, constituted only 0.21% of retail sales. Meanwhile, an analyst looking specifically at the auto industry estimated

that liability costs do not exceed 0.2% of annual revenues of domestic auto manufacturers" (Bogus p. 219). This is surely an acceptable cost of doing business. In a market economy, this percentage is a level of cost that is determinant on what the market will bear versus what risk or danger factor the market will tolerate. Litigation thus affects the social costs of doing business.

When the costs of litigation get too high, dangerous products are removed from the marketplace. When costs are deemed acceptable, products emerge. It is litigation itself that regulates markets with social costs factored in.

Second, the discovery process reveals information that would otherwise remain hidden from public knowledge. "When corporate executives are debating whether to distribute dangerous products, fear of exposure changes both corporate and personal calculations" (Bogus p. 219). Corporations are not always huge, nameless and faceless enterprises. Often, individual actors within a corporation drive decisions, both good and bad. These individuals are either deterred or brought to justice through litigation. The threat of discovery also encourages responsible behavior. It provides an incentive to "do the right thing, " thereby easing the threat of litigation induced damages even when an accident does occur. Demonstrated responsible behavior limits liability exposure.

Third, it allows people to balance utility against risk. The law understands that products cannot be risk free. It "imposes liability not on dangerous products but only on unreasonably dangerous products" (Bogus p. 219). This calculation must not be done by product manufacturers alone. Regulatory agencies alone also do a poor job in this regard. Value judgements can and are made at the ballot box and the cash register, but these two alone are inadequate. In a democracy, it is the people's judgement that counts and so the judgement must be heard from the jury box as well. This is what the common law system of litigation does.

So, is reform a desirable goal? First of all, the word "reform" is misleading. Reform imparts a progressive improvement while the truth is that any changes made may or may not be in the interests of the people the system is meant to serve. The term reform was selected by those desiring change as a way to help sell their agenda.

When the subject of reform is raised, it is usually in regard to personal injury lawsuits. "In 2000, tort lawsuits constituted 7% of the civil case load of a sample of state courts; contract cases amounted to 23%. Yet, when politicians, pundits, and journalists criticize "litigiousness," they are speaking almost invariably about personal injury lawsuits" (Burke p. 25). Why does tort litigation receive such a disproportionate share of attention? One look at who is funding the reform effort reveals a good deal. Tort reform is partially funded by "petrochemical companies such as Dow, Exxon, Mobil, Monsanto and Union Carbide; pharmaceutical giants American Home Products, Merck, Johnson & Johnson, and Pfizer; the Sporting Arms and Ammunition Manufacturers Association and handgun makers Sturm, Ruger & Company; Philip Morris, the tobacco company that owns Miller Brewing; The National Pest Control Association; Anheuser-Busch and the Beer Institute." Most of the balance of tort reform funding comes from those professions who suffer from malpractice claims and their insurers.

Tort reform disproportionately harms women, children, the elderly and low wage earners. Artificial caps on awards limit the rights of the disenfranchised and are an attempt by the insurance industry to limit the value of a person's life or suffering before going to trial and evidence is heard. The problem with malpractice in general is that there is too much of it. Reform will not increase the quality, nor lower costs, of care.

Indeed, most of the outrageous awards played up by the media are intermediate amounts, later reduced by appellate courts or trial judges. They do not reflect greed but jury outrage at the

behavior of the defendants. Also, when these awards are framed against the revenue or profit of the companies involved, they are but a small fraction of those amounts. Anything less could hardly be considered punitive. Further, defendant behaviors are effectively modified as a result. Litigation provides an individual enough clout to modify the behavior of the world's largest corporations. Would any other method be so effective?

Because only powerful business interests have the "means and the incentive to publicize their discontents," (Burke p. 25) the benefits of our system is often voiceless. That it survives to this day despite the efforts of powerful forces to minimize it speaks of its derivative nature. We cannot set limits on the judicial system as a matter of policy without fundamentally restricting an avenue of activism that has improved the quality of life in this country more perhaps than any other single mechanism.

Corporations do not have inherent morals and ethics. They exist to maximize shareholder value, sometimes at any other cost. In recent years, as the popularity of executive stock options has become the preferred method to provide incentives for performance by directly rewarding those who do increase shareholder value, this lack of ethics has become quite clear once again.

Scholars are now watching the heated debate over the Securities and Exchange Commission to see how the American political system will respond to a recent crisis that some say has come right out of the distorted debate over litigation. In the mid-1990's, responding to complaints about lawsuits from accounting firms, Congress changed, reformed, the law to make it harder for corporate shareholders to sue the accountants. That, along with some other legal changes, essentially immunized accounting firms from liability for fraud. That translated into greater acquiescence in aggressive and dubious accounting policies management wanted to pursue, costing the individual investor hundreds of millions of dollars with essentially no

recourse. Corporate malfeasance in companies like Enron, Tyco, Worldcom, and Lucent are disgraceful examples of Americans not being able to litigate to demand accountability.

The accounting fraud scandal is a consequence of the myths about American litigiousness. Congress took away the right to sue, but failed to substitute another credible means of enforcing the law. The SEC has proven to be inadequate to the task of filling this gap. If this is an example of reform in action, I suggest we leave the system as it is.

Because litigation is so tightly integrated into our constitutional system of government it may not even be feasible to limit litigation without crippling a vital component of our system of checks and balances. Our brand of legalism is inextricably bound to our constitutional form of government in two important ways. First, it "focuses on the importance of three structures embedded in the U.S. Constitution - federalism, separation of powers, and judicial independence. Secondly, it emphasizes the significance of the distrust of centralized governmental power that is at the core of the American constitutional tradition" (Burke p. 14). "Attempts to limit litigation, then, run up against powerful motivations, rooted in the basic structure of the Framer's handiwork" (Burke p. 8). "Tort reformers have succeeded in winning majorities in both houses of Congress. Nevertheless, and perhaps amazingly, tort reform efforts have, so far at least, not succeeded at the federal level" (Bogus p. 35).

As can be seen, all the consequences of attempted reforms are almost impossible to anticipate. This results in a situation where an imbalance occurs and one party or another is able to exploit the system to unfair advantage and someone ends up grievously harmed and without recourse, not a desirable outcome. Our fragmented government is unable to take a strong enough stand to replace the level playing field our system of justice provides. "Which means more calls to bring back the lawsuits are likely. We end up with adversarial legalism because we have all of

these government failures" (Kagan p. 221). When real adaptation of our litigation system is needed to match changing social and political conditions, the genius of the system is that it is perfectly able to slowly, but surely, reform itself.

References

Bogus, Carl T. (2001) *Why Lawsuits Are Good for America.* New York: New York University Press.

Davis, Bob and Peter Gumbel. (1995) "Red Tape Traumas: To All U.S. Managers Upset by Regulations - Try Germany or Japan." *Wall Street Journal*, December 14, 2000. P. A1.

Edelman, Peter. (1988) "Japanese Product Standards as Non-Tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue." *Standard J. International Law* 24:292

Epstein, Lee., Walker, Thomas G. (2001) *Constitutional Law for a Changing America - Institutional Powers and Constraints*. Fourth Edition. New York: Congressional Quarterly.

Eviatar, Daphne. "Litigation a Blight, Or Built In?" *New York Times*, November 23, 2002

Forer, Lois G. (1975) *The Death of the Law*. New York: McKay.

Friedman, Lawrence M. (1987) *Total Justice*. Boston: Beacon Press.

Howard, Philip K. (1996) *The Death of Common Sense - How Law is Suffocating America*. New York: Warner Books

Huppes, Gjalt and Robert A. Kagan. (1989) "Market Oriented Regulation of Environmental Problems in the Netherlands." *Law & Policy* 11:215.

Kagan, Robert A. (2001) *Adversarial Legalism*. Cambridge: Harvard University Press.

Law.com Dictionary (March, 2003). http://dictionary.law.com/.

Licht, Walter. (1983) *Working On The Railroad: The Organization of Work in the Nineteenth Century*. Mass.: Princeton University Press.

Olson, Walter K. (1991) *The Litigation Explosion*. New York: Truman Talley - Dutton.

Pika, Joseph A., Maltese, John Anthony. & Thomas, Norman C. (2001) *The Politics of the Presidency*. Fifth Edition. New York: Congressional Quarterly.

Richtel, Murray. (1996) *The Simpson Trial - A Timid Judge and a Lawless Verdict*. University of Colorado Law Review, 67

Rose-Ackerman, Susan. (1995) *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States*. New Haven: Yale University Press.

Terrill, Richard J. (1999) *World Criminal Justice Systems - A Survey.* Fourth Edition. Cincinatti: Anderson Publishing.