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Symposium

Introduction: Genuine Tort Reform

Carl T. Bogus*

I am not sure who coined the term “tort reform,” but as far as I know it was first used in 1974 in a student article published by the *UCLA Law Review*.¹ That article was very much a Sixties piece. The author praised Justice Roger Traynor and the California Supreme Court for their leadership in “placing tort liability on the party who is best able to spread the risk of loss.” She continued:

Though judicial activism is generally regarded by traditional legal process scholars as undesirable, in tort law, it appears to be an appropriate fulfillment of the historical function of the common law—to meld the precedents of the past and needs and concerns of the present.²

For nearly a decade thereafter, “tort reform” was still occasionally used to refer to efforts to make the tort system more dynamic by making it easier for victims to hold accountable wrongdoers and those who were in a position to prevent harm.³

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1. Dian Dickson Ogilvie, Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence*, 21 *UCLA L. REV.* 1566 (1974).

2. *Id.* at 1566.

3. See, e.g., Mark D. Seltzer, Comment, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 *B.C. ENVTL. AFF. L. REV.* 797 (1983).

Times, however, were changing. The modern conservative movement was gaining force. That movement was repelled by what it considered judicial activism. The movement's original target was the Warren Court and its constitutional innovations in civil rights, voting rights, and criminal procedure. In 1968, Richard M. Nixon campaigned for the presidency on a promise to appoint "law and order" judges, by which he meant judges who would stop enlarging protections for criminal defendants. Conservatives felt that an era of permissiveness had frayed the social fabric. Stability was breaking down.

Before long conservatives began seeing tort reforms—especially the advent of strict liability for defective and unreasonably dangerous products—as part and parcel of the same phenomenon. That is, they increasingly saw courts as anti-order, anti-establishment, anti-free enterprise. In 1971, Lewis F. Powell, Jr., who was then a corporate lawyer, wrote a memorandum for the U.S. Chamber of Commerce in which he famously said "the American free enterprise system is under broad attack."⁴ Powell lumped together "Communists, New Leftists, and other revolutionaries" with the American Civil Liberties Union and Ralph Nader, whom Powell called "[p]erhaps the single most effective antagonist of American business."⁵ Powell urged that the Chamber of Commerce lead a political and social counterassault. He wanted the counterassault launched in the venues where public opinion is molded—college campuses, graduate schools, secondary schools, textbooks, television and radio, scholarly journals, newspapers and popular magazines—as well as in all branches of government. Powell wanted the Chamber and its allies to focus particularly on the courts. Powell was not arguing against an activist judiciary; he was arguing for a pro-business activist judiciary. "Under our constitutional system," he wrote, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and

4. Lewis F. Powell, Jr., Confidential Memorandum: Attack on American Free Enterprise System, To Eugene B. Syndor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971) *available at* http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html (hereinafter Powell Memorandum). *See also* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38 (discussing importance of Powell's memorandum).

5. Powell Memorandum, *supra* note 4.

political change.” Powell continued: “This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.”⁶

Powell saw his vision realized more quickly and effectively than he could have imagined. The Chamber led the assault that Powell envisioned, helping to develop a powerful infrastructure of trade association and advocacy groups. The Business Roundtable was founded in 1972,⁷ the Heritage Institute in 1973,⁸ the Cato Institute in 1977,⁹ the Washington Legal Foundation in 1978,¹⁰ the Manhattan Institute in 1980,¹¹ and the American Tort Reform Association (ATRA) in 1986,¹² to name only the most prominent groups dedicated to protecting business from governmental regulation generally and from the civil justice system specifically. Moreover, only two months after Powell wrote his famous memorandum, President Nixon nominated him to a seat on the United States Supreme Court. Powell’s elevation to the Court was the beginning of a long conversion of the Court from protector of citizen rights to hold big business accountable to protector of business from citizen lawsuits.¹³

Today “tort reform” means the opposite of what it meant a quarter of a century ago. Notwithstanding the progressive sound of the word *reform*, the phrase *tort reform* now stands for a collection of regressive proposals designed to shield big business and medicine from citizen lawsuits. It has been enormously successful. ATRA is able to boast that “85 percent of Americans believe too many frivolous lawsuits clog our courts,” and “more

6. *Id.*

7. About the Business Roundtable, <http://www.businessroundtable.org/aboutUs/history.aspx> (last visited Mar. 21, 2008).

8. About the Heritage Foundation, <http://www.heritage.org/about/> (last visited Mar. 21, 2008).

9. About CATO, <http://www.cato.org/about.php> (last visited Mar. 21, 2008).

10. Washington Legal Foundation Mission, <http://www.wlf.org/Resources/WLFMission/> (last visited March 21, 2008).

11. Manhattan Forums (Manhattan Institute for Policy Research, New York N.Y.), available at http://www.manhattan-institute.org/pdf/mi_five.pdf (last visited Mar. 21, 2008).

12. About the American Tort Reform Association, <http://www.atra.org/about/> (last visited Mar. 21, 2008).

13. See Rosen, *supra* note 4.

than 45 states have enacted portions of ATRA's legislative agenda."¹⁴ Those two facts are directly related. Powell's strategy of simultaneously waging a two-front war—one in the branches of government and the other in the media, on the newsstands, and in universities and think tanks—worked. ATRA achieved successes in legislatures and the courts because it and its allies worked at shaping public opinion. Meanwhile, for too long the principal defender of the civil justice system, the American Association of Justice, directed its efforts principally at lobbying the political branches of government and litigating in the courts and largely neglected the public relations war.¹⁵ As a result, AAJ was like the boy with its thumb in the dike. It was able to succeed for a while but with the waters of adverse public opinion rising constantly, its position became increasingly untenable.

The public today believes that citizen litigation is expanding and that the courts are filled with frivolous lawsuits— notwithstanding that the data prove otherwise.¹⁶ The conventional wisdom, however, affects not only voters, but legislators, judges, and juries. Champions of civil justice are increasingly defeated in all forums. At least twenty-five states have capped non-economic damages.¹⁷ Thirty-four states have capped punitive damages.¹⁸ The United States Supreme Court has also effectively imposed a constitutional cap on punitive

14. ATRA, "A Track Record of Success," available at <http://www.atra.org/about/> (last visited March 27, 2008). For additional polling data about public attitudes toward the torts and civil justice systems, see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISES* 267-68 (2004).

15. During the period of time when public relations was neglected, the American Association of Justice (AAJ) was named the Association of Trial Lawyers of America, but for simplicity's sake I refer to organization throughout as AAJ. For the history of how AAJ neglected the public relations war, see HALTOM & MCCANN, *supra* note 15, at 122-27 (2004).

16. See generally CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW* (2001); JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (2004); and HALTOM & MCCANN, *supra* note 15.

17. See Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 73, 132 (2008).

18. Scott S. Evans, Note, *Dynamic Incentives: Improving the Safety, Effectivity, and Availability of Medical Products through Progressively Increasing Damage Caps for Manufacturers*, 2007 U. ILL. L. REV. 1069, 1081 (2007).

damages by declaring that punitive awards are constitutionally suspect if they are more than four times compensatory damages and that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”¹⁹ Taking advantage of hysteria over rising medical malpractice premiums, in the first half of 2005 alone the health care industries persuaded thirty-one state legislatures to enact some form of medical malpractice tort reform.²⁰ A majority of states have also enacted tort reform measures regarding joint and several liability and the collateral source rule.²¹ At the federal level, Congress has enacted a panoply of statutes designed to protect particular industries—including gun manufacturers and an industry of special importance to national welfare, namely, the cruise ship industry—from lawsuits.²²

The success of the tort reform movement is unfortunate. The common law plays an important role in protecting public health and safety. Lawsuits shine light into dark corners, exposing corporate wrongdoing or shortcuts that have placed citizens at

19. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). What about a case such as Westbrook Pegler’s deliberate attempt to destroy the reputation of the writer Quentin Reynolds by telling outrageous lies about him in Pegler’s syndicated column that was published in 186 newspapers? The maliciousness was proved, but compensatory damages were difficult to establish because magazines continued to publish Reynolds work and his income did not decline. The jury awarded one dollar in compensatory damages and \$175,000 in punitive damages – that’s more than \$1.3 million in 2007 dollars – an award that, I submit, most observers would consider fair and just? *Reynolds v. Pegler*, 123 F. Supp. 36 (S.D.N.Y. 1954), *aff’d*, 223 F.2d 429 (2d Cir. 1955), *cert. denied*, 350 U.S. 846 (1955). The case became famous from the riveting account in LOUIS NIZER, *MY LIFE IN COURT* 17-152 (1961). Cases in which affluent defendants maliciously or recklessly put people at grave risk but thankfully caused little injury may not be exceedingly rare. Although the Supreme Court arguably has left room for such cases, few judges are likely to let awards with a punitive to compensatory ratio exceeding nine to one stand.

20. Edward J. Kionka, *Things To Do (or Not) To Address the Medical Malpractice Insurance Problem*, 26 N. ILL. L. REV. 469, 479 (2006).

21. JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 859-62 (2d. ed. 1992).

22. See Terry Carter, *Piecemeal Tort Reform*, A.B.A.J., Dec. 2001, at 50 (regarding statutes protecting particular industries generally), *id.* at 53 (regarding cruise ship industry). The legislation protecting firearm manufacturers, distributors, and dealers from litigation is the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (2006).

risk. Indeed, it may be the exposure function that matters most, even more than the money judgments. But of course money matters too, providing incentives for business and health care providers to find ways to reduce injuries. Examples abound. Evidence shows that products liability has played a significant role in reducing the automobile fatality rate by 79 percent since the adoption of strict liability and the crashworthiness doctrine.²³ Escalating medical malpractice premiums provided the incentive that caused the health care and insurance industries to team up, analyze why there were so many anesthesia-related fatalities, and find ways to make anesthesia safer—indeed, making a twenty-fold improvement in the anesthesia mortality rate.²⁴ Moreover, contrary to popular opinion, the tort system is cost effective: the best evidence is that the “tort tax”—how much of the retail price we pay for products covers litigation costs—is on average 0.21 percent and the “malpractice tax” is between one and two percent of health care expenses.²⁵ Although more research must be undertaken to provide conclusive evidence, the best data available now suggest that there is an inverse relationship between malpractice risk and injuries due to medical negligence, that is, the stronger the medical malpractice litigation system the safer the health care system.²⁶

There is a great need for more research by scholars who are interested in improving the tort system. It is in this spirit that we organized this symposium. The Roscoe Pound Foundation made a generous grant that made it possible for us to bring together some of the nation’s most prominent and respected legal scholars. We asked the symposium participants to each make one proposal for improving the tort system. We did not define what we meant by “improving” the system, and we did not place any parameters on what they might suggest. We call this project a Symposium for Genuine Tort Reform to distinguish it from efforts with the

23. See BOGUS, *supra* note 16 at 138-72 (arguing that products liability played a major role in the reduction of automobile fatalities).

24. See TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 108-110 (2005); and David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution*, 90 CORNELL L. REV. 893, 917-23 (2005).

25. See *respectively* BOGUS, *supra* note 16 at 218-18 (regarding tort tax) and BAKER, *supra* note 24 at 40 (regarding malpractice tax).

26. Hyman & Silver, *supra* note 24 at 915-16.

objective of curtailing the civil justice system. Our participants have not disappointed; they have provided thoughtful and provocative proposals and insights.