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How We Lost Our Way: The Road To Civil Justice Reform

James M. Wootton
Mayer, Brown, Rowe & Maw LLP

Foreward by

Thomas Gottschalk
Executive Vice-President & General Counsel
General Motors Corporation

Washington Legal Foundation
Critical Legal Issues
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ABOUT THE AUTHOR

James M. Wootton joined the Government Relations Practice of Mayer, Brown, Rowe & Maw LLP in Washington, D.C. on November 18, 2002. He is the former president of the U.S. Chamber Institute for Legal Reform, which advocates significant changes in the civil justice system at both the federal and state levels designed to reduce frivolous, wasteful and excessive litigation. He was selected to head the Institute by U.S. Chamber of Commerce President & CEO Thomas J. Donohue in November 1999.

Mr. Wootton joined the U.S. Chamber Institute for Legal Reform staff in January 1998 as its Executive Director. He was the Chamber's lead negotiator of the recently enacted Y2K Act of 1999 that limits liability for Y2K failures.

Before this appointment, Mr. Wootton was president of two related non-profit corporations that he formed in 1992. The Safe Streets Alliance, a public charity dedicated to education about crime and creating youth leadership opportunities, and the Safe Streets Coalition, a public advocacy group with over 130,000 members.

As president of Safe Streets, Mr. Wootton was principal drafter and advocate for the truth-in-sentencing provisions of the 1994 Crime Bill, which authorized over $5.7 billion for prison construction in the states. Articles by Mr. Wootton have appeared in *Newsweek* magazine and newspapers across the country. In addition, he has appeared on the Today Show, Good Morning America, NBC Nightly News, C-Span, CNN, ESPN, CNBC, Newstalk, The Phil Donahue Show, The Jesse Jackson Show, Court-TV, Fox Morning News, Dateline NBC, and numerous radio talk shows. Mr. Wootton authored two backgrounders for the Heritage Foundation on truth-in-sentencing and juvenile crime and edited the book *Freed to Kill*.

In 1973 Mr. Wootton graduated from the University of Virginia with a Bachelor of Arts degree with High Honors in Economics. In 1976 he graduated from the University of Virginia Law School and is a member of the Virginia State Bar Association.

In 1979, Mr. Wootton joined Governor John Connolly's Presidential Campaign as Domestic and Economic Policy Advisor and was later promoted to the position of Issues Director. In 1980 Mr. Wootton joined the American Enterprise Institute as Senior Editor of *Regulation* magazine.

Mr. Wootton joined the Reagan Administration in early 1981 and was appointed Deputy Administrator of the Office of Juvenile Justice and Delinquency Prevention in 1983. While at the Department of Justice, he helped create the National Center for Missing and Exploited Children, the National Center for the Analysis of Violent Crime at the FBI Academy, and the National Court Appointed Special Advocate Program.

In 1986, Mr. Wootton was appointed to the Legal Services Corporation as Director of Policy, Communications and Legislative Affairs, and was later named Counselor to the President. Mr. Wootton drafted legislation to reform the federally funded legal services program that was sponsored by Congressmen McCollum and Stenholm in October 1988. After leaving the Legal Services Corporation, Mr. Wootton continued to advocate passage of the McCollum-Stenholm Bill and in 1996 it became law as a part of the Fiscal Year 1997 Appropriations Bill.

The author wishes to acknowledge George E.C. York and Jeffrey H. Lewis, associates at the law firm of Mayer, Brown, Rowe & Maw, LLP, for their assistance with this article.

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FOREWORD

by Thomas A. Gottschalk
Executive Vice-President & General Counsel
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In this excellent Washington Legal Foundation Working Paper, Jim Wootton provides a road map on how and why the American civil justice system has been increasingly subverted from the principle on which it was founded, the rule of law, to an undemocratic, self-interested rule by lawyers. He identifies the major developments, both in society and law, which transformed our legal system during the latter half of the twentieth century to a business proposition—one which rewards lawyers for creating legal theories and finding friendly judicial forums to effect mammoth transfers of wealth on a contingency basis by allowing the lawyer to keep a third or more of the money changing hands. Having succinctly diagnosed the abuses found in our civil justice system, he sounds the trumpet for the rest of society to effect meaningful reforms against the opposition of a well-entrenched and politically-connected personal injury lawyers' bar.

There is much that is good in our system of justice. We are fortunate to attract, in the great majority of cases, fair-minded jurists who endeavor with integrity to follow the law set by democratically elected legislatures or by well-reasoned precedent. These judges seek in good faith to decide the cases before them on the facts of the particular case and the relevant law. But, in the area of tort law, there has evolved what some refer to as "entrepreneurial litigation." It is not only unique to this country, but is regarded with disbelief and disrespect by observers from abroad, and with increasing alarm even within the American legal community. This Working Paper cites the growing cost of our civil justice system to those defendants—the "deep pockets"—who are caught up in it and forced to pay extortionate sums in settlements or verdicts to persons (and their lawyers) who often have only the flimsiest medical or scientific basis for their claim of injury or illness and its relationship to defendant's conduct. Indeed, by encouraging the plaintiffs' bar to amass literally hundreds, if not thousands, of claimants in mass tort lawsuits, the courts have become sim-

ply unable in many cases to make factually based findings supported by the individual evidence admitted in a full and fair trial.

As the paper also makes clear, the costs of this system are not borne only by the litigant with the deep pockets. They are passed on as a de facto "tort tax" on all citizens and certainly every consumer to whom the prices of goods or services must be increased to pay this judicially imposed "cost of doing business." The costs are borne by every individual who needs liability insurance in order to drive a car, provide a public service, or run a business—large or small. It is a cost to every expectant mother who has trouble finding a doctor to deliver her child, and to every family who must pay more and travel farther to find a pediatrician for their children, because the high cost of medical malpractice premiums and the constant threat of having to defend against unwarranted lawsuits have caused doctors to leave communities and even to abandon their profession. It is a reason why this country has the highest health care costs of any nation in the world.

Mr. Wootton notes that one of the early rationales for what has led to this "litigation explosion" was the hope that "litigation would serve as a proxy for the interests of society as a whole."

Instead, it has turned out that the pursuit of one private interest against another private interest is a decidedly inept and unrepresentative way of making societal decisions. Who represents the many patients whom the defendant doctor has healed? Who represents the many schoolchildren whose playground is shut down as a result of a lawsuit filed against the school district for one playground accident, or more likely will never have the playground built because of fear of liability or, again, the high cost of insurance? Courts can resolve private disputes arising between individual litigants quite well. But the legislatures are the better, and certainly the more democratic and representative branch of government, to resolve public policy issues which affect many sectors of society.

The paper notes, in particular, the devastating impact and cost of asbestos liability litigation where the vast majority of claimants are free of symptoms and likely will never be diagnosed with an asbestos-related disease. Major

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companies have been forced into bankruptcy resulting in the loss of many thousands of jobs, and more such bankruptcies are threatened. Who represents the laid-off workers in that litigation? Who represents the millions of pensioners whose retirement income and health care coverage are jeopardized by these contingent fee attacks on the companies that pay those bills? The civil justice system leaves those larger interests of society unrepresented in litigation and largely ignored by the decision maker, be it judge or jury.

Certainly, the interests of the larger society are not being represented by the personal injury attorneys who in the last decade walked away with literally billions of dollars in multi-year fee awards for representing individual states in lawsuits against tobacco manufacturers. It is incredible to think that our system allows lawyers to pursue civil damage cases ostensibly in the public interest and rewards them personally with billions of dollars, when we as a society refuse to increase the pay of federal and state court judges for careers in public service even to the levels enjoyed by relatively junior attorneys in many private law firms. Too often, the reward for judges who must stand for re-election is sizeable campaign contributions from the war chests of these billionaire lawyers, which only further lessen the public's confidence in the integrity and independence of the judiciary.

The trumpet call sounded by this Working Paper is a call to battle—in the legislatures, in the courts, and in other public arenas to join forces to curb and cure these abuses of our civil justice system. Mr. Wootton has been a leader in the civil justice reform effort for many years. His diagnosis and prescription are sound. They should be taken to heart by all who want to enhance the rule of law in this country and all it stands for, including due process for all litigants, fair trials on the merits, judges chosen for their integrity and ability, and judgments based on competent evidence and sound science.

INTRODUCTION

The American civil justice system has lost its way, having veered wildly off course from its original purpose. It is a legal system that has been set adrift on the uncharted waters of lawyer-driven litigation and is now badly in need of reform.

The "Fen-Phen" litigation provides a perfect example of the current crisis. In 1997, Wyeth, the maker of two diet drugs including one often used in the combination popularly known as "Fen-Phen," withdrew the drugs following research linking them to heart valve disease. In 1999, the company offered a $3.75 billion settlement fund in response to claims made by individuals allegedly injured by the drugs.[1]

Plaintiffs' lawyers, however, launched a massive advertising campaign to induce these individuals to opt out of the settlement and file their own cases in state court. In fact, the plaintiffs' lawyers who negotiated the settlement with Wyeth in 1999 later documented over $50 million in advertising from 2000 through 2002 by *other* plaintiffs' lawyers seeking to persuade diet drug users to opt out.

While the settlement fund faced 2,157 injury claims prior to January 2002, the fund paid an additional 17,170 injury claims between February and early August 2002 alone. According to the website administered by the AHP Settlement Trust, as of March 19, 2004, the trust had paid $1,166,845,048 in benefits, 400,365 claimants had been notified of their eligibility to participate in the echocardiogram screening program established under the settlement, and 350,802 claimants had received other settlement payments. So far, Wyeth has had to establish reserves of more than $14 billion for the total cost of the Fen-Phen litigation, including claims inside and outside of the settlement.

Even plaintiffs' class counsel has expressed concern that much of the compensation has gone to those not seriously injured or not injured at all. In fact, the federal judge overseeing the settlement now allows 100 percent of claims to be audited as a result of this proliferation of suspect claims. Originally, only 15 percent of those claims were subject to the settlement's audit

requirement. Clearly, Wyeth, its shareholders, employees and consumers have suffered, as well as those members of the class actually suffering from heart valve ailments, whose claims have been jeopardized by the large number of questionable claims that have also been filed.

In reaction to these and other concerns, the Federal Bureau of Investigation launched an investigation in late 2003 into one of the most notorious of the Fen-Phen jurisdictions—Mississippi. In that investigation, trial lawyers are alleged to have bribed jurors, judges and other elected officials in order to ensure favorable outcomes and to have employed so-called "runners" to recruit the (often questionable) plaintiffs so as to enlarge the ultimate award or settlement. In fact, several plaintiffs involved in the Fen-Phen litigation have filed lawsuits against their attorneys, which question the credibility of their fellow complainants. In a related action, a federal grand jury subpoenaed two Mississippi drug stores regarding patient information and possible forged prescription records.[2]

In the Fen-Phen litigation, we see the symptoms of the host of ills that plague our legal system. We see state courts, with elected judges, making and applying the law to citizens of other states. These courts regularly dictate regulatory policy for entire sectors of our national economy, leaving juries free to usurp the regulatory jurisdiction of federal agencies. Fen-Phen also demonstrates the devastating power of mass actions, which result in clogged courts and coercive settlements. The size of such actions are rivaled only by their increasing frequency. In some jurisdictions, rules regarding class certification, diversity, and jurisdiction are all but ignored.

Then there are the plaintiffs' lawyers. Unleashed by the liberalization of ethics rules allowing for advertising and solicitation and motivated by enormous contingency fee profits, these trial lawyers exploit the weaknesses of our legal system for their own enrichment. Those truly injured are often sacrificed on the altar of the more lucrative mass action. Plaintiffs are but one variable in a complex contingency fee calculus where the attorney's goal is profit maximization.

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Consumed by these fees, plaintiffs' trial attorneys face serious conflicts of interest, which are not limited to their clients. For where would the trial lawyers be without the elected judges before whom they practice and the activist attorney generals with whom they partner?[3] Shrouded in the cloak of public service and armed with the club of political patronage, plaintiffs' attorneys are free to bring countless frivolous suits based on questionable legal theories and junk science.

While litigation thrives, cherished constitutional principles are imperiled. Federalism, due process, and checks and balances are often treated as afterthoughts as activist state judges and profit-motivated plaintiffs' lawyers routinely regulate through litigation. Judges perform the role of legislators, while activist state attorneys general assume the role of tax collector and plaintiffs' lawyers act as attorneys general without public accountability.

The economic and social consequences of this litigation explosion are substantial. Whether it is asbestos, medical malpractice, pharmaceutical side effects or securities litigation, American companies and industries continue to be hobbled. Such litigation involves colossal sums of money. As a result, product prices go up, share prices go down, companies go bankrupt or move overseas, physicians quit their practices, hospitals close, and thousands and thousands of employees lose their jobs.

The numbers speak for themselves. America's civil justice system is the world's most expensive. For the second year in a row, the cost of the tort system in the United States experienced a double-digit percentage increase, growing 13.3 percent in 2002 and 14.4 percent in 2001.[4] At current levels, the costs of the tort system total $233 billion or 2.23 percent of GDP. If they continue to grow at this rate, costs will amount to more than $4.8 trillion by 2011.[5]

Tort costs in 2002 were $809 for each U.S. citizen in 2002, up $87 from 2001.[6] This is the equivalent of a five percent tax on wages.[7] Over the past ten years, class actions have increased by 1,000 percent in state courts and that rate continues to grow.[8]

In asbestos litigation, an estimated 1.1 million individuals will file claims at a cost of $275 billion.[9] Such litigation will cost insurers alone $130 billion. Total costs for insurers and defendant corporations could reach as high as $200 billion.[10] These rising costs are attributable, in part, to the soaring number of claims filed each year. While roughly 30,000 cases were filed in 1999, some 90,000 new asbestos cases were filed in 2001.[11] The resulting litigation has cost companies a total of $54 billion, causing 67 of those companies to file for bankruptcy.[12] Despite the collapse of the asbestos industry many years ago, at least 16 asbestos defendants have entered Chapter 11 since 2000.[13] In turn, some 60,000 jobs have been lost and another 138,000 were not created because of the costs of litigation.[14]

Since 1994, the average medical malpractice verdict has increased from $1.1 million to $3.5 million.[15] In 2002, the three largest medical malpractice verdicts in the country occurred in New York State and amounted to $94.5 million, $91 million, and $80 million.[16] Medical malpractice suits cost the U.S. economy $21 billion in 2001.[17] While roughly 70 to 80 percent of obstetricians have been sued, it is reported that 100 percent of Washington, D.C.'s neurosurgeons have also been sued.[18] As a result, doctors protest, maternity clinics, and trauma centers shut down, and patients have to travel great distances for expensive procedures.[19]

The National Institute of Medicine (IOM) has found that the rise of "defensive medicine" has resulted in significant reductions in the quality of healthcare in the United States.[20] With liability insurance premiums skyrocketing, the IOM found that in addition to taking unnecessary liability-reducing procedures, many physicians are simply leaving medicine. In rural areas, for example, one in five doctors has ceased delivering babies, citing medical malpractice suits as the primary cause.[21]

A July 2003 study by Harris Interactive offers strong support for the IOM's findings. Harris interviewed 250 physicians from five different medical specialties, and found virtually all of them (99 percent) are personally concerned that they may be the target of groundless litigation.[22] Two-thirds of the physicians interviewed said they are very concerned they may be involved in a groundless lawsuit.[23] Even more troubling, 43 per-

cent of physicians interviewed said they have avoided prescribing a drug that was appropriate for a patient because they were aware it might be involved in product liability litigation.[24]

The clear beneficiaries of this litigation explosion are plaintiffs' attorneys. In 2002, the top ten jury awards totaled $32.7 billion, which is a jump of nearly $24 billion since 1999.[25] Only 46 cents of every dollar spent on litigation in liability actions went to claimants in 1995, with the rest going to legal fees and administrative costs.[26] Another study has found that the effective rates for asbestos plaintiffs' lawyers range from $1,000 to $25,000 *an hour*.[27] Only contingency fees in the tobacco litigation exceed these hourly rates.

Finally, the extent of the American litigation crisis becomes clear when viewed through the lens of international litigation trends. In 1987, there were nearly four times as many lawyers per capita in the United States as in the United Kingdom.[28] Per capita, there were ten times as many tort claims in the United States as in the United Kingdom, 30 to 40 times as many malpractice claims, and nearly 100 times as many product claims.[29] The United States spends five times more on its personal injury litigation than any other industrialized country.[30]

ORIGIN OF THE CRISIS

THE OLD ORDER

To better understand this crisis, it helps to return to its origin. For our purposes, the modern civil justice system was conceived in the 1960s and early 1970s. It was a time of considerable and even well-intentioned legal policy experimentation but, like much of the experimentation during that period, the original rationale has become hazy if not forgotten. It was also a time of social revolution with profound effects on our society. Law, in its own way, was part of this movement. With social activism came legal activism, transforming litigation into a public good and lawyers into champions of liberty and justice.[31]

This was a pivotal moment in our nation's legal history. Prior to this point, the law and lawyers were conceived of in a fundamentally different way. Under the old system, a lawsuit was viewed as a conflict between private parties that was to be avoided. "[T]he good lawyer did not go about looking for chances to litigate.… [T]he lawsuit [was] something unfortunate, something with more losers than winners, a poor substitute for getting along with each other."[32] Litigation was a regrettable event that lawyers were ethically required not to stir up.

A guide for lawyers practicing in New York state courts, which was written in 1844, articulated this ethos well:

> It is said to be a secret worth knowing, that lawyers rarely ever go to law, and Doctors seldom take medicine. It is also said to be a wise child that knows enough to keep out of the fire, and I should think as much of the man who contrives to keep out of the law; for generally speaking, like the majority of prizes in a lottery, it is a losing game even when successful. A prudent man, therefore, will refrain from law as long as his wrongs are tolerable or endurable.[33]

The Canons of Professional Ethics of 1936 echoed this view. Canon 28 provided that "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit.… It is disreputable…to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."[34]

Members of the legal guild who strayed from these norms were viewed as undignified and worthy of contempt. In his *Commentaries* of 1803, Blackstone wrote about the "pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."[35] When there were good grounds for litigation, however, lawyers were to behave civilly, particularly toward one another. As one nineteenth century legal ethicist wrote:

> A very great part of a man's comfort, as well as his success at the Bar, depends upon his relations with his professional

> brethren.… He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them.… He should never unnecessarily have a personal difficulty with a professional brother. He should neither give nor provoke insult.… Let him shun most carefully the reputation of a sharp practitioner.[36]

THE VANGUARD OF CHANGE

By the 1960s, however, the foundational norms of the old order began to give way and were soon replaced by a new philosophical superstructure.[37] The chief architects of this paradigm shift include William Prosser, Guido Calabresi, and Richard Posner. For Prosser, the law of torts more than any other branch of law "…is a battleground of social theory.… [T]he twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants.… There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future."[38]

In order to direct the law to achieve such desirable social results, Prosser contended that courts should consider interests beyond those directly involved in the case at hand. He explained that courts examine the parties' "capacity to avoid the loss, or to absorb it, or to pass it along and distribute it in smaller portions among a larger group."[39] In tort law, the most desirable social result, then, will result from the selection of the party, which can best sustain current accident costs. For him, while litigation serves as a proxy for the interests of society as a whole, liability serves as a nexus between policy and law with regard to who could most adequately further those interests.

In most tort cases, the choice was clear. The defendants were primarily companies and individuals with means—*e.g.,* public utilities, industrial corporations, commercial enterprises, and automobile owners with insurance. Adopting the shorthand of the time, Prosser referred to these defendants as "deep pockets."[40] For "Mr. Deep Pocket," the price of accidents is just an-

other cost of doing business.[41] "[B]y means of rates, prices, taxes or insurance [deep pocket defendants] are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization."[42]

Logically, lawyers set out to find new and better ways to pick those deep pockets. If the immediate transgressor's pockets were not deep enough, then the hunt would begin to find the party who could bear the cost of the accident, and the deeper the pockets the better. Courts, too, did their part, by generally finding against deep pocket defendants as they upheld increasingly novel legal theories such as successor liability and negligent entrustment. Not surprisingly, judges and juries began to award larger and larger recoveries because of the extensive use of insurance and other measures by defendants.[43] Although Prosser argues that the availability of liability insurance is not in-and-of itself sufficient to attach liability to a defendant, he did believe that insurance does serve as a "makeweight" or additional reason for attaching liability.[44]

Calabresi's contribution was to re-conceptualize the tort system by articulating a new economically rationalized theory of deterrence. Like Prosser, he argued that the costs of accidents can be reduced most "by placing them on the categories of people least likely to suffer substantial social or economic dislocation as a result of bearing them, usually thought to be the wealthy."[45] Accident costs will be reduced by forcing these parties to internalize the costs of accidents on an *ex ante* basis. In turn, "internalizing the costs of accidents provides an incentive for manufacturers to make appropriately safe products."[46]

With Calabresi, the economic logic of the law replaced the custom of the old guild. In the calculus that torts had become, accidents, victims, and defendants were all abstract variables to be manipulated in order to maximize market efficiencies for the advancement of social welfare. The question for judges and juries was reduced to an equation to determine which party is the "cheapest cost avoider."[47] The cheapest cost avoider is that party which is in the most appropriate position to choose between paying for the present cost of accidents or paying for the cost of avoiding future accidents.

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For Calabresi, "[t]he consumer, in practice, cannot make this comparison. Relatively, the producer is the cheapest cost avoider, the party the best suited to make the cost-benefit analysis and to act upon it."[48] Therefore, defendants and potential defendants have an obligation to make an economically rational choice between these two costs. Those who do not pay in advance to prevent accidents will pay, and pay dearly, after the fact. Plaintiffs, on behalf of society at large, merely hold defendants to this obligation.

In Posner's view, the primary function of the tort system is regulation and not compensation.[49] While administrative agencies regulate, so too do courts. Both represent forms of public control. As the common law is a "system for maximizing the wealth of society," liability plays a critical social function.[50] Therefore, it is argued, litigation should not be understood within the narrow confines of the parties to the dispute. Rather, judges and litigants are actors in the regulatory process, on equal footing with executive and legislative officials.[51]

Moreover, effective regulation involves incentives. Posner believed that, "people respond to incentives—that if a person's surroundings change in such a way that he could increase his satisfaction by altering his behavior, he will do so."[52] As a rational profit maximizer, a plaintiff is induced by jury awards and settlements "to play his regulatory role of identifying violations of the applicable judge-made rule…and when appropriate pressing for changes in the rule."[53] While plaintiffs are incentivized to make law and police it, defendants are similarly incentivized to follow the law. "[I]ncentives to obey are created by the threat of having to compensate victims for the harm done them by a violation of the rules."[54]

Prosser, Calabresi, Posner and others signaled the beginning of the end of the old order. With a new philosophical and moral mandate, the law was transformed and lawyers heralded the dawning of a new age of liberty through litigation, justice through jurisprudence and, not coincidently, civic virtue through contingency fees. Once viewed as an evil between private parties, litigation came to be seen as a public good, and a profitable one at that. Plaintiffs and their attorneys had been recast as the de-

fenders of the public interest in improved health and safety by deterring bad behavior.

Few, it seemed, mourned the passing of the old order. In fact, "[t]he fall of the old rules was widely hailed as a victory for the public welfare over the organized bar's crass self-interest and pompous concern for its dignity. Mysteriously, however, the profession began to prosper mightily after the self-interested rules came off, and to become vastly more powerful and widely feared after suffering this blow to its dignity."[55] This marriage of public-spiritedness and profit proved irresistible. Few could resist its charms, including the Supreme Court.

In 1977, Justice Blackmun expressed great concern that "the middle 70 percent of our population is not being reached or served adequately by the legal profession," and that this "underutilization" of lawyers is a significant problem.[56] Exemplifying the emergent philosophy, the administration of justice had become inextricably intertwined with market share. Because supply was not meeting demand and lawyers were not litigating, justice was not being served. Therefore, the logic continues, lawyers need greater market access to those in need of their services. Then justice will be done. Eight years later, Justice White announced the end of the old order, stating, "we cannot endorse the proposition that a lawsuit, as such, is an evil.… That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."[57]

MILESTONES

With the philosophical roadmap in place, six key milestones mark the route which led us to where we are today: (1) the business of law; (2) law as just another business; (3) lawyers and society; (4) class and mass actions; (5) activist state attorney generals; and (6) "magic jurisdictions" and judicial elections.

THE BUSINESS OF LAW

First, the practice of law has become a truly profitable business which was facilitated, in part, by the relaxation of the ethical rules guiding our country's lawyers.

At the heart of this transformation was the contingency fee. Its use developed as a response to the exceptional American decision to deny the winner of a lawsuit the right to collect legal fees from the loser.[58] As volunteer legal service was unable to cope with the demands of the neediest plaintiffs, our country turned to the contingency fee as the solution. While states began to end the prohibition on contingency fees following the Civil War and acceptance had become fairly widespread by the end of the nineteenth century, several states continued their ban well into the second half of the twentieth century.[59] Maine was the last state to legalize the use of such fees in 1965.[60]

Restrictions on the use of contingency fees quickly fell by the wayside. As they did, the principal-agent conflict of interest problem moved to the fore. With the contingency fee, the interest of the principal-client and the agent-attorney diverged.[61] Contingency fees provide lawyers with a powerful incentive to minimize their work so as to maximize their fees-to-hour ratio; settle early in order to develop a war chest for other suits or prolong litigation in order to test their legal theories and those of (current and future) defendants; and fish for sympathetic jurisdictions. It was not long before plaintiffs complained that their attorneys were settling too early or dragging litigation on for too long.[62] With more and more clients came the judicial consolidation of tort cases as mass actions and statutorily-sanctioned class actions that clogged the courts and forced settlements, resulting in huge fees for the attorneys and next to nothing for the individual plaintiffs.

The rise of coupon settlements is illustrative. In 2001, for example, Blockbuster agreed to settle a nationwide class action case challenging the company's late fee policy that was filed in a Texas state court. Under the settlement, while each plaintiff became eligible to receive up to $20 worth of coupons for free video rentals (not including new releases) and certificates for $1 off

non-food items, plaintiffs' attorneys received over $9.25 million in fees and expenses. It is estimated that less than ten percent of the coupons were used.[63] With the plaintiffs' attorneys in the driver's seat, plaintiffs themselves had been reduced to mere contingency fee delivery vehicles.

LAW AS JUST ANOTHER BUSINESS

In addition to contingency fees, the floodgates of the legal business were thrown wide open when attorneys were authorized to advertise and solicit. In 1976, the ABA relaxed its rules on advertising and, in the following year, the Supreme Court upheld the right of attorneys to advertise the availability and price of legal services. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court severed its ties with the old order once and for all. Rejecting the British view (read un-American) that "trade" is unseemly, it explained:

> In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled….Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.[64]

Tapping into the populist and libertarian spirit of the new order, the Court explained that law is not a public service provided by our society's philanthropists, it is a trade by which hard-working men and women earn their livings. Justice Blackmun's reminder that "[a]dvertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange," was consistent with Calabresi and Posner.[65]

What was once as unseemly as it was prohibited had become a standard tool of the trade. Now, these ads are commonplace; many are unabashedly inflammatory. Those with children coping with cerebral palsy are faced

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with ads announcing, "Your child's cerebral palsy may be the result of a medical mistake. Don't get mad. Get Even!"[66] During the height of the Norplant litigation, ads proclaimed, "Freedom Shouldn't Hurt, Norplant Does" and "Norplant Birth Control Implants are Unfair."[67] When the Supreme Court argued that advertising would not diminish the attorneys' reputations in the community, they clearly had not foreseen the full impact of their decision.[68] "The legitimization of advertising changed the image of lawyers from professionals who deplored self-laudation into that of aggressive self-promoters."[69]

Solicitation was soon to follow. Arguing in 1978 that "'[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts," the Supreme Court held that solicitation involving political or ideological dimensions could not be prohibited.[70] Ten years later the legalization of solicitation by lawyers was made complete when the Court ruled that attorneys had the right to solicit individuals through targeted direct mail.[71] No longer were attorneys admonished to refrain from stirring up litigation. Now they are exhorted to churn away. A *Wall Street Journal* article captured the new ethos in its description of the Exxon Valdez incident, writing "liability lawyers and prostitutes fresh from nearby Anchorage are said to prowl the dark smoky bars in search of clients."[72] Under the new regime, there is a "professional responsibility to chase ambulances."[73]

LAWYERS AND SOCIETY

While significant in and of themselves, contingency fees, advertising, and soliciting all reflect a deeper transformation of the legal profession and its place in society. Under the old order, lawyers occupied a unique position in the American landscape between capital and labor. As Alexis de Tocqueville explained, "[b]y birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes. . . ."[74] For de Tocqueville, lawyers were at once patrician and plebian, promoting both the economics of capitalism and the politics of democracy.

Thus, lawyers served as a fulcrum upon which our culture's two principal interests were balanced. "[H]istorically, the American legal profession's

basic function in our society has been to aid the development and protection of business property within a political system committed to both popular government and constitutional restraints on government."[75] Lawyers were united around a shared understanding of their social station and bound together by a common set of norms and traditions. Self-governance was a natural result.

During the second half of the twentieth century, however, the legal profession's social function was profoundly altered. Today, "[t]he legal profession no longer enjoys an unchallenged sense of purpose and worth in its traditional practice of mediating through the courts between business enterprise and popular politics."[76] As with the collapse of the *ancien regime* in de Tocqueville's France, the legal revolution of the 1960s descended into its own Reign of Terror. While returning to the old order is neither possible nor desirable, balance must be restored to the profession as lawyers have lost the capacity to self-regulate. As Geoffrey Hazard concludes:

> [The legal profession's] governing norms no longer represent the shared understandings of a substantially cohesive group. They are simply rules of public law regulating a widely pursued technical vocation whose constitutional position is now in doubt.… As a consequence, the dominant normative institution for the legal profession will no longer be "the bar," meaning the profession as a substantially inclusive fraternal group. The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance.[77]

CLASS AND MASS ACTIONS

The fourth milestone along the road to our current legal crisis is the proliferation of class and mass actions. While class actions have their origins in medieval England, the first rule providing for group litigation in U.S. federal courts was promulgated as Equity Rule 48 in 1833.[78] Over the next hundred years this rule evolved until the adoption of the Federal Rules of Civil Procedure in 1938. Rule 23 of the Rules provided for three categories of class action—"true," "spurious," and "hybrid." The central

feature distinguishing the three categories was whether the outcome of the class action was binding upon absent (*i.e.,* represented) parties. "True" class actions bound absent parties, "spurious" class actions did not, and "hybrid" class actions bound absent parties in some, but not all, aspects.[79]

The class action explosion was triggered, however, by the revision of Rule 23 in 1966. The new Rule 23 profoundly altered the class action process, leading to significantly larger and more lucrative classes. Whereas the former system required individuals seeking to join a class to expressly opt into the class, revised Rule 23 allowed all individuals who shared a common attribute (*e.g.,* use of a particular product) to automatically be deemed to have joined the class, unless they affirmatively withdrew themselves from that class. "Because the incentives for so excluding oneself were often modest or nil, classes certified under the revised Rule 23(b)(3) were almost certain to be larger—and, therefore, the sum of their potential damages much larger—than classes certified under the old rules."[80]

By 1971 four times as many class actions were being filed than had been filed in 1966.[81] As an April 1973 article in *Fortune* lamented:

> There was a time and it was not so very long ago, when the legal departments of many sizeable corporations led relatively low-pressure lives. The chores they handled were remote from the major decisions of policy, and the legal staff was, accordingly, somewhat remote from the chief executive. That was, of course, before the great legal explosion—before class-action suits became a kind of popular sport, before consumerism, environmentalism, and other forms of Naderism, before Americans in general became so litigious.[82]

Then, in 1974, the Supreme Court found that, in order to certify a class, class action attorneys were *not* required to demonstrate that the action is likely to prevail on the merits. In that case, the Court quoted a U.S. Court of Appeals for the Fifth Circuit holding which provided that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[83] While the 1970s

witnessed a sharp growth in the number of cases based on consumer protection statutes, during the mid-1990s, American business experienced a 300 to 1,000 percent increase in the number of class actions they faced.[84]

Class actions were further encouraged through the exploitation of the state court system and diversity jurisdiction rules. Under the Judiciary Act of 1789, the Framers provided for federal courts to hear diversity cases.[85] They did so to avoid the problem of locally elected judges and juries discriminating against out-of-state parties and retarding interstate commerce. This intent has been substantially frustrated, however, by current federal diversity rules and plaintiffs' lawyer tactics.

The dramatic rise in state court class and mass actions which has occurred in the past thirty years is due, in part, to the "complete diversity" standard for federal jurisdiction, which requires that no plaintiff be a citizen of the same state as *any* defendant.[86] Federal jurisdiction also requires that each plaintiff assert a claim for over $75,000.[87] That such a standard tends to exclude class actions from federal court is reinforced by the fact that plaintiffs' attorneys are careful to ensure that neither of these criteria for federal jurisdiction are ever met, unless for some strategic advantage.[88]

With state courts come rampant forum shopping. Plaintiffs' lawyers game the system in their search for courts with the most sympathetic judges and juries for plaintiffs, the most lax rules of evidence, the most plaintiff-friendly procedural rules, and the most limited examination of attorneys' fees. As a result, certain "magnet courts" have become the favored venues for class attorneys, leaving level playing fields a thing of the past. Indeed, this race-to-the-bottom mentality provides plaintiffs' attorneys with a strong incentive to bombard the least equipped local jurisdictions with the largest class actions, forcing severely backlogged courts to aggregate and defendants to settle. Richard Scruggs, a leading plaintiffs' lawyer, calls these "magic jurisdictions" which he defines as jurisdictions where, no matter what happens at trial, the plaintiff always wins.

Madison County, Illinois, which is ranked third in the United States in the estimated number of class actions filed each year, is one of the most notorious of these jurisdictions.[89] In one case involving Sprint, while the U.S.

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Court of Appeals for the Seventh Circuit dismissed the case as "a nightmare of class actions," the Madison County court certified the same class with little hesitation.[90] In fact, if class actions across the country were filed at the same per capita rate as they are in Madison County, the total number of class actions filed in the United States in 2000 would have been over 42,000.[91]

One study found that of the 70 class action cases filed in that jurisdiction between 1998 and 2000, none of the companies listed as defendants were based in Madison County and only 63 percent of the named plaintiffs were county residents.[92] As for the attorneys themselves, while five firms appeared as counsel in 45 percent of all class actions filed in that county, 85 percent (56 out of 66) of the plaintiffs' firms listed which litigate in the county have their offices outside of the county.[93]

Of equal concern are the tactics allegedly used by Madison County judges to benefit plaintiffs' attorneys. To encourage settlements, judges have been known to aggressively expedite the scheduling of certain cases and to schedule multiple cases involving the same defendant and defense counsel for trial on the same day.[94] Judges have imposed equally draconian sanctions on defendants, such as striking defendants' pleadings and barring all of defendants' evidence.[95]

ACTIVIST STATE ATTORNEYS GENERAL

Third, the rise of activist state attorneys general has profoundly altered our legal system. Lawsuits brought on behalf of states, particularly in the areas of antitrust and public health, have grown rapidly in recent years.[96] Such litigation also raises serious questions about the limits of the constitutional authority of the judicial branch. Through their actions, activist state attorneys general usurp the power of legislatures and administrative agencies. According to former Alabama Attorney General Bill Pryor, "[t]he aim of [state sponsored] litigation is to shift the awesome powers of legislative bodies—powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government."[97] Like the contingency fee for trial lawyers, state attorneys general are drawn to the massive sums of money involved, as these cases

generate considerable revenue for states without raising taxes and political capital for state attorneys general.[98]

Equally menacing is the practice of state attorneys general granting contingency fee lawyers the power to sue on behalf of the state and these private lawyers having the right to act as though they were attorneys general. "We have deputized our immense professional body of lawyers to stir up grievance for profit."[99] Sometimes statutes give these attorneys free reign, being limited neither by clients nor by public accountability. "[U]nder the banner of private attorney general, lawyers could start waging litigation purely and openly on their own behalf, for ideology, profit or both."[100] Moreover, the conflict of interest question is never far below the surface. These lawyers are sometimes awarded the right to sue in recognition of their political contributions to the state attorney general.[101] It would make sense to apply the same rules to contingency fee lawyers that the SEC applies to investment bankers doing business for states and localities—if you make more than an insubstantial political donation to the decision-maker you may not receive a contract to do business with the state or locality.

"MAGIC JURISDICTIONS" AND JUDICIAL ELECTIONS

Fourth, judicial elections raise many of the same concerns. They threaten the impartiality of judges and lend a false sense of mandate to those activist judges "…who aspire to be the architects of social and economic policy in this country."[102] Elections do not equate with the authority to legislate, but that does not always stop our local judges. In fact, there is a strong incentive for judges to regulate through litigation, particularly as plaintiffs' lawyers have a substantial pecuniary interest in judicial elections.[103] For as Richard Scruggs explains:

> [W]hat I call the 'magic jurisdiction'…[is] where the judiciary is elected with *verdict money*. The trial lawyers have established relationships with the judges that are elected.… They've got large populations of voters who are in on the deal…And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places.[104]

Judicial activism flourishes, and while it is motivated, in part, by politics and campaign financing, it is also inspired by an emerging judicial philosophy. At heart, this is a philosophy which "…is fundamentally elitist and which is unquestionably founded on the belief that we judges, being more intelligent and better educated than the rabble who are elected to our legislatures, are in a superior position to make refined social judgments about the critical questions of the day."[105] The late Chief Justice Walter Schaefer of the Illinois Supreme Court exemplifies this philosophy, writing that if a judge views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.[106]

This is a pervasive mentality which begs the question—under what authority do judges possess "the responsibility for change?" When was the judiciary invested with the power to determine "the ideals and the aspirations" of our time? As one elected judge has commented, "I think the framers of our constitution would be baffled, if not horrified, to learn that our courts, not our legislatures, were deciding such fundamental policy questions as these on bases that some would suggest are simply contrived constitutional grounds that have no link to the text of our constitution."[107] Indeed, the investiture of so much power in so few looks less like a democracy than an "…oligarchy in which judges increasingly take on attributes of a 'ruling class'."[108] Ultimately, it is ironic that a limited number of judges would be the ones responsible for replacing the rule of law with the rule of men. The business community should unite with the American Bar Association to work for the ultimate elimination of judicial elections. However, in the meantime, it must continue to support the election of qualified, balanced jurists to the bench.

LEGAL POLICY BATTLEFIELD

To reform this system, we must assess the constellation of forces aligned on the legal policy battlefield. These forces can be divided into two camps—those defending the *status quo* and those advancing reform. On the side of those with an interest in maintaining the current system are the Association of Trial Lawyers of America, the class action plaintiffs' bar, activist state attorneys general, public interest lawyers and environmental and consumer groups.

On the other side are those advocating reform including the business community, the U.S. Chamber of Commerce and its Institute for Legal Reform, the National Federation of Independent Business, the American Tort Reform Association, the Civil Justice Reform Group, Citizens for a Sound Economy, Lawyers for Civil Justice, the Manhattan Institute, the American Enterprise Institute, the Washington Legal Foundation and traditional state attorneys general.

It is critical for the reformers to fight on many fronts—in the media; in the courts; in judicial, legislative and executive branch elections; and with regulators and legislators. To wage these battles, strong coalitions must be built and effectively coordinated. Likewise, weaknesses in the trial lawyers' coalition should be exploited, with the conflicts of interest existing between plaintiffs and their attorneys serving as a particularly vulnerable target. Sadly for the profession, the goal of reform must be to use legislatures and executive agencies to provide more regulation of the practice of law because, as Professor Hazard notes, the courts and bar associations have been unable or unwilling to self-regulate.

CORE REFORMS

The argument for legal reform is compelling. Recognition of the crisis is growing and dissatisfaction with its abuses is building. The tide of reform appears to have turned. Central to this effort are three related responses to ethical changes and "magic" jurisdictions—expanded federal court jurisdiction, involvement in state judicial and attorney general elections, and pre-

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emptive legislation and regulation. The reform initiatives currently underway embrace aspects of these approaches. On the legislative front, as one commentator concluded, with class action, medical malpractice, and asbestos bills on the Congressional agenda, the trial lawyers are facing "a hurricane, a tidal wave, and a tornado."[109] Whatever the outcome in this session of Congress, a compelling agenda is being advanced and must be pursued.

At the center of current class action reform efforts is the Class Action Fairness Act.[110] This legislation would enlarge the scope of federal jurisdiction over sizeable interstate class actions by requiring "minimal diversity" rather than complete diversity. To achieve minimal diversity, only one plaintiff and one defendant need to be citizens of different states. Large class actions would also be removed to federal court when they are over $5 million in the Senate bill and $2 million in the House bill. In the House bill, a party would have the right to appeal class action certifications. Class certifications could also be immediately appealed to the Supreme Court if necessary. Other class action abuses that may be addressed by the legislation include: excessive attorneys' fees; rulings by state court judges on issues of national consequence; coupon settlements; and forum shopping.

The prospects for success of the Class Action Fairness Act are strong. This is the third time the House has passed a class action bill, and by the largest margin of victory yet, with 32 Democrats supporting the 253-170 vote. Commentators are optimistic about the chances of Senate passage as well.[111] Not surprisingly, a coalition of class action attorneys, supported by the American Trial Lawyers Association and other status quo groups such as Public Citizen, the Consumer Federation of America, and the Lawyers' Committee for Civil Rights Under the Law, oppose the legislation.

Medical malpractice litigation is equally in need of reform. In March of this year, the House passed the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003 by a vote of 229-196.[112] This bill would cap pain and suffering awards at $250,000 per occurrence and would establish a statute of limitations governing the time within which plaintiffs can file suit. The Senate bill, however, faces some significant hurdles.

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113 Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003, S. 607, 108th Cong. (2003); *see* Stone, *supra* note 109.

114 Cong. Rec. S1506 (daily ed., Feb. 24, 2004) (cloture vote on motion to bring up for consideration S. 2061, the Healthy Mothers and Healthy Babies Access to Care Act of 2004).

115 *Id.*

116 Fairness in Asbestos Injury Resolution (FAIR) Act, S. 1125, 108th Cong. (2003).

117 *Ortiz v. Fibreboard Corp*, 527 U.S. 815, 821 (1999).

118 Brickman, *supra* note 27.

119 *Id.*

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