IS CIVIL LITIGATION A THREAT TO FREEDOM?

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Is civil litigation a threat to our freedom? Let me start by emphasizing the importance of the civil law system in the legal structure of a free society. Lawsuits are important in order to compensate the injured, to act as deterrents, and to provide incentives for people to act reasonably.[1] Civil justice is one of many components in the American legal system that work together in order to preserve freedom.[2] The criminal justice system, for example, prevents others from stealing money; the regulatory system ensures that the water and air remain clean.

Of course, the most important legal safeguard is the Constitution, which protects against governmental abuses of power.[3] Indeed, the founders more or less defined freedom as protection against such abuse, so they provided the First Amendment, the Fifth Amendment, and the other protections of the Bill of Rights in order to ensure that all citizens would live freely in this great country.[4]

Taken together, all these components of law distinguish right from wrong. Law is the foundation of freedom because it provides guideposts of wrongful conduct in society. As long as you act within

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1. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 5 (5th ed. 1984) (quoting Prosser's statement that "the purpose of the law of torts" is "directed toward the compensation of individuals"); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 268 (2004) ("Reduction of risk through deterrence of harm is the true purpose of liability today, but compensation and avoidance of strife were also important historically.").

2. *See* John Locke, Second Treatise of Civil Government § 57 (Peter Laslett ed., 1967) (1690) ("The end of Law is not to abolish or restrain, but to preserve Freedom.").

3. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

4. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991) (arguing that the original purpose of the Bill of Rights was to protect against abuses by the federal government).

those guideposts, you are free to think what you want, say what you want, and act on your beliefs—simply because you believe it is right. You take risks, do all of the things that you choose to do, and succeed or fail according to the judgments of other free persons, not because you are coerced by law.

Today America's civil justice system is not providing these guideposts. There exists a widespread perception, generally accurate, that any injured or angry person can haul another person into court over any accident or disagreement and put that claim to a jury. There is also a perception that the amounts for which people may sue, if not unlimited, are subject to amorphous guidelines and few limits. The amounts that plaintiffs claim in lawsuits have escalated exponentially since the early 1970s.[5] Someone recently told me that, thirty years ago, a $1 million verdict in a personal injury case made headlines on the front page of the *Miami Herald.* Today the verdict would likely have to be $100 million to make the tenth page. This cannot be explained by inflation. Something else has changed in the American legal system to cause this escalation.

The perception that justice is kind of an "open season" has enormous appeal if people are thinking about getting back at their boss, or like to blame others, but it also has another effect that has not yet received much attention. This "open season" approach to justice has infected people's daily behavior with a kind of legal fear. This legal fear is tearing at the fabric of the culture.

Distrust of justice is transforming American healthcare, and not for the better. Escalating medical malpractice litigation costs and jury verdicts have increased malpractice insurance premiums exponentially, forcing doctors to strike, move their practices, or even leave the practice of medicine altogether.[6] In truth, society could

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5. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 988–89 ("Some empirical evidence indicates that awards in tort cases have increased significantly and that the number of million-dollar awards has risen sharply over a thirty-year period, most dramatically in the areas of medical malpractice and products liability.") (citing Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST SYS. J. 349 (1986) (number of awards over one million dollars increased from "single digits" in 1960s to "double digits" in 1970s, and to "triple digits" in 1980s)).

6. *See* Kevin J. Gfell, Note, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 778 (2004) ("The most recent illustration of this was the well-publicized physician strikes in Florida, West Virginia, and New Jersey in late 2002 and early 2003, where surgeons walked out in an effort to urge state policy makers to do something about the increase in medical malpractice insurance premiums."); *id.* ("Without adequate malpractice insurance, many healthcare providers are either abandoning certain high risk

solve this problem, without too much pain, if the government paid these costs. The total amount at stake, depending on whom you ask, is between $10 and $15 billion per year—just a drop in the bucket of our total healthcare budget.[7] But litigation costs are only the tip of the iceberg. According to a recent nationwide poll, nearly 80% of doctors said they ordered tests that they did not think were necessary solely to provide a defense in the event of a lawsuit.[8] One study suggests that the cost of this "defensive" medicine may exceed $100 billion per year.[9] That is enough money to pay for healthcare insurance for the 44 million people who are uninsured.[10]

The Institute of Medicine, perhaps the most respected organization dealing with quality and access to healthcare in our country, has conducted studies showing that the distrust of the legal system has adversely affected the quality of medical care because doctors are scared to be candid with each other.[11] They avoid using e-mail because it leaves a written record. They are reluctant to admit fault even in cases, like near misses, when no harm is done to the patient, because doing so may damage their credibility when they *are* faced with a lawsuit at a later time.[12] Common Good, a nonprofit legal reform organization which I founded, has been assembling a

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procedures or leaving their practices altogether.") (quoting Council of Insurance Agents & Brokers, *Medical Malpractice Costs Skyrocket*, at http://www.niagroup.com/home/newsletter.html#may_medical (last visited Nov. 15, 2004)).

7. *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM, (July 25, 2002), *available at* http://aspe.hhs.gov/daltcp/reports/litrefm.pdf; Robert P. Hartwig, *Trends in Medical Malpractice Insurance: Behind the Chaos*, Presentation Before the American Academy of Orthopaedic Surgeons, *at* http://www.iii.org/media/presentations/medmal (Apr. 25, 2003).

8. COMMON GOOD, FEAR OF LITIGATION STUDY: THE IMPACT ON MEDICINE, *at* http://cgood.org/assets/attachments/68.pdf (Apr. 11, 2002).

9. Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353, 353 (1996) ("We find that malpractice reforms that directly reduce provider liability pressures lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications.").

10. *See* JACK HADLEY & JOHN HOLAHAN, KAISER COMM'N ON MEDICAID AND THE UNINSURED, THE COST OF CARE FOR THE UNINSURED: WHAT DO WE SPEND, WHO PAYS, AND WHAT WOULD FULL COVERAGE ADD TO MEDICAL SPENDING 1 (2004).

11. *See* TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 22, 43 (Linda T. Kohn et al. eds., 2000) ("Patient safety is also hindered through the liability system and the threat of malpractice, which discourages the disclosure of errors. The discoverability of data under legal proceedings encourages silence about errors committed or observed. Most errors and safety issues go undetected and unreported, both externally and within health care organizations.").

12. *See* COMMON GOOD, *supra* note 8 (indicating that 94% of physicians say fear of liability discourages medical professionals from openly discussing and thinking of ways to reduce medical errors).

healthcare coalition for the last two years. That coalition includes virtually every patient safety expert and the leading healthcare consumer groups, because the distrust of the system is corroding the foundation of quality as well as impeding access to healthcare.

Ironically, in the name of accountability, the legal system makes it difficult to hold bad doctors responsible. A doctor who makes a terrible mistake can delay the litigation of his case for years. If the licensing board is trying to revoke his license, a doctor can respond by hiring a lawyer and threatening to sue for defamation.[13] The dispute is typically settled by "sanitizing" the record—letting the bad doctor have one more chance to operate on unsuspecting patients.[14]

"Legal fear" has even infected our schools. In America today, a teacher cannot put an arm around a crying child for fear of being accused of unwanted sexual touching.[15] Teachers struggle to maintain order in the classroom because they face threats of being dragged to hearings.[16] These hearings may not lead to monetary damage awards, but administrative hearings cost them months of time and trouble. How does a teacher prove that Johnny threw the pencil first? Polls show that educators will do almost anything to avoid the unpleasantness of legal hearings, which subject them to aggressive cross-examination.[17] These days, in too many school districts, the

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13. *See* Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361, 1378 (2003) (noting that physicians may bring defamation countersuits in medical malpractice cases); *see also* Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV. 604 (1976). As two commentators explain:

> Although defamation actions help only in a limited number of cases, they may be used to combat situations not reached by other actions. For example, in a products liability or medical malpractice case that had at least an arguable basis and was not brought for an improper purpose, an attorney or litigant might release damaging publicity to increase settlement pressure. The opposing party could respond with a defamation action even though a malicious prosecution action would not lie.

John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief Is Available?*, 36 ALA. L. REV. 927, 942 (1985).

14. *See* Patricia M. Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 362-67 (1983) (discussing factors involved in decision to settle).

15. *See* Robin K. Carlson, Comment, *If You've Been Kissed, Who Do You Tell? Notice of Sexual Harassment Under a Title IX Claim*, 42 WASHBURN L.J. 185, 185 (noting that sexual harassment is "the most frequent subject of lawsuits in the educational system").

16. *See* Public Agenda, *Teaching Interrupted: Do Discipline Policies In Today's Public Schools Foster the Common Good?*, *available at* http://cgood.org/assets/attachments/22.pdf (May 2004) (reporting that 55 percent of teachers say districts backing down out of fear of litigation from assertive parents cause school discipline problems); *id.* (noting that 78% of teachers say students are quick to remind them that they have rights or that their parents can sue).

17. *See* Harris Interactive Poll, *Evaluating Legal Attitudes Toward the Threat of Legal*

teachers cannot maintain order; the disobedient students are in charge.

In the workplace, including my own law firm, it is now a regular practice not to give references because of fear of liability. Recently a nurse admitted to killing 42 people in several hospitals in New Jersey and Pennsylvania. He was, even aside from the homicide, a terrible nurse. That is, his employers clearly did not know that he was murdering people, but they knew that something was wrong with him. Employers fired him repeatedly, and each new hospital would call the previous one for a reference, but they would not give disparaging references because they were afraid of getting sued.[18] So this nurse literally got away with murder.

Ordinary elements of life, such as playgrounds, have been completely transformed. They are so boring that hardly any child over the age of four will use them. Even see-saws have disappeared, not because any court ever held that see-saws were too dangerous, but simply because concern about potential liability has spread.[19]

Perhaps the silliest of all the manifestations arising from legal fear are the ubiquitous warning labels. Archaeologists in 1000 years will excavate our remains, and they may not know that see-saws disappeared or that doctors were paranoid, or that teachers could not maintain order in the classroom. What they will see, in black and white, are warning labels on practically every product and container. "Caution – contents are hot" appears on billions of coffee cups. Another warning, "extremely hot," will make them wonder if it was an aphrodisiac. Each year the Michigan Lawsuit Abuse Watch

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Challenges in Public Schools, *available at* http://cgood.org/assets/attachments/11.pdf (Mar. 10, 2004) (finding that 63 percent of teachers and 64 percent of principals believe that the increased potential for legal challenges by students or parents has hurt their ability to do their jobs).

18. Randy Dotinga, *Would You Hire This Man?*, CHRISTIAN SCIENCE MONITOR, Mar. 1, 2004, at 14; Richard Pérez-Peña et al., *Through Gaps in System, Nurse Left Trail of Grief*, N.Y. TIMES, Feb. 29, 2004, at A1; Richard Pérez-Peña & Jason George, *No Warnings as Nurse Left Job After Job*, N.Y. TIMES, Dec. 18, 2003, at B1; Richard Pérez-Peña et al., *Hospitals Didn't Share Records of Nurse Suspected in Killings*, N.Y. TIMES, Dec. 17, 2003, at A1.

19. *See* U.S. CONSUMER PROD. SAFETY COMM'N, PUB. NO. 325, HANDBOOK FOR PUBLIC PLAYGROUND SAFETY § 12.3 (1997) ("Seesaw use is quite complex because it requires two children to cooperate and combine their actions. . . . There is a trend to replace fulcrum seesaws on public playgrounds with spring-centered seesaws which have the advantage of not requiring two children to coordinate their actions in order to play safely . . . ."); *id.* § 12.5 ("Preschool-age children enjoy the bouncing and rocking activities presented by [spring rocking equipment], but older children may not find it challenging enough."); *see also* DUFF, DUBBERLY, TURNER, WHITE & BOYKIN, LLC, PLAYGROUND SAFETY (1998) (suggesting that the potential for liability influences the choice of playground equipment at public schools), *at* http://library.lp.findlaw.com/articles/file/00332/006270/title/Subject/topic/Education%20Law_Student%20Rights/filename/educationlaw_1_405 (last visited Oct. 22, 2004).

organizes the Wacky Warning Contest. One of the winners a few years ago was a baby stroller that had a warning on it: "Caution—remove baby before folding."[20] One of this year's winners was a five-inch fishing lure with a big three-pronged hook in the back that said on the side: "Harmful if swallowed." If only fish could read. It won only fourth place.[21]

In all of these areas—health care, schools, playgrounds, and others—the common theme is that people avoid doing what they know is right because they do not feel free to do so. They do not trust the legal system to protect them if there is a dispute.

Why do people now distrust the legal system so much? People have been trained to believe that we have the fairest system of law in the world. Anyone can make a claim; it goes through a neutral process. The judge, overseeing the trial like a referee, applies legal standards when the issue is perfectly clear, but not if the issue is not clear, because we do not want judges making value judgments. Who knows what bias lurks in the heart of the judge? So the dispute goes to the jury to determine whether the case has been proven.

We have all been trained to believe that this is what justice is supposed to be. How could it be any more fair? What makes it so fair, we are taught, is that judges are not allowed to make value judgments. We leave decisions about right and wrong to juries. Senator John Edwards, the 2004 Democratic nominee for Vice President, recently wrote an essay in *Newsweek* entitled "Juries: Democracy in Action."[22] It sounds so attractive.

The problem is that the rule of law is supposed to be predictable. It is not supposed to be a kind of *ad hoc* plebiscite, jury vote by jury vote, tolerating wildly inconsistent verdicts. Today, one jury may find no liability for the same conduct for which another jury awards punitive damages.[23] Law is supposed to let people know where they stand; it is supposed to provide guideposts for right and wrong. But

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20. Michigan Lawsuit Abuse Watch, *Past Winners of M-Law's Wacky Warning Label Contests*, *available at* http://www.mlaw.org/_pages/pastwinners.htm (last visited Oct. 22, 2004).

21. Michigan Lawsuit Abuse Watch, *M-Law Announces Winners of Seventh Annual Wacky Warning Label Contest*, *available at* http://www.mlaw.org/wwl (last visited Oct. 22, 2004).

22. John Edwards, *Juries: Democracy in Action*, NEWSWEEK, Dec. 15, 2003, at 53.

23. *See* Joni Hersch and W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 1 (2004) (conducting empirical analysis and concluding that "jury awards are highly unpredictable and are not significantly correlated with compensatory damages"); CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (concluding that jury awards are erratic and unpredictable).

these guideposts are lacking in America today.

Justice Oliver Wendell Holmes famously defined law as the "prophecies of what courts will do."[24] But today in America no one has any idea what a court will do. What that means, I submit, is that we have lost the protection of law. Justice is not supposed to be a neutral process; it is supposed to provide rulings of right and wrong; it is supposed to consist of a continuing stream of normative rulings by judges. Is it permissible to have see-saws or not? No matter what the ruling is, people should be given a clear indication of what is or is not permissible.

The problem with juries is not that they are unwise; generally juries arrive at a sensible result.[25] But juries do not have the authority to issue rulings that set precedent. They issue a verdict, up or down. The next day someone may bring a similar case to a different jury and receive a different result.[26] Nor do juries have the responsibility, or expertise, to make balancing decisions on behalf of society. That is not their role. Their job in civil cases is simply to resolve disputed issues of fact in the case before them.[27]

Read Senator Edwards's new book.[28] It is powerful, but it also shows how dangerous the current philosophy is, because it seems so compelling. He never asks the question "where does the $20 million verdict against a hospital come from?" The money does not come from the former Soviet Union. It comes from the hospital. It comes out of health care quality and accessibility. When one family becomes rich from a verdict, others lose vital services: ambulances or emergency rooms. One goal of law is to balance those considerations, but juries acting on a case-by-case basis cannot be expected to provide this necessary balance.

Eugene Rostow noted that the one characteristic that the different legal systems of all civilized countries have in common is that in each, "similar cases should be decided alike."[29] Americans distrust

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24. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

25. *See* Elizabeth G. Thornburg, The Power and the Process: Instructions and the Civil Jury, 66 FORDHAM L. REV. 1837 (1998) (arguing that "[d]espite the popular tendency to disparage juries, the empirical evidence that does exist indicates that juries do a good job at an inherently complex and difficult task").

26. *See supra* note 23.

27. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge . . . .").

28. JOHN EDWARDS, FOUR TRIALS (2003).

29. *See* EUGENE ROSTOW, THE SOVEREIGN PREROGATIVE—THE SUPREME COURT

our contemporary system of justice because it tolerates, indeed encourages, the opposite result—similar cases are not decided alike.

Americans are fearful because they understand that no one in our society has the job to protect those who act reasonably. The problem with legal reform, I think, is that everybody talks about preserving the so-called "right to sue." The language of rights is powerful because it is the language of freedom.[30] Whenever someone invokes his right to sue, it is like putting a cross in front of Dracula: we all just shrink back in terror because nobody wants to be accused of violating someone's rights. What I am suggesting is that these are false rights. Except for constitutional protections, civil law is not about rights. It is about balance. Whose "rights" do we protect: the child who fell off the see-saw or the millions of children who want to use see-saws? We cannot have it both ways. If we allow one person to take that claim to a jury, the see-saws disappear for everyone else.

There is a rich irony here: the real rights the founders gave us were the rights *against* state power. For example, the government cannot take away our property nor tell us what to say. These new rights, by contrast, are rights *to use* state power for one's own benefit. That is what a lawsuit is. It culminates at that fateful verdict at which point, if you lose, the marshal will come to take your house away. Suing is a use of state power. It is just like indicting someone, except that the plaintiff is indicting the defendant for money. When judges fail to act as gatekeepers—refusing to make what Cardozo and Corbin described as "judicial legislation,"[31] unwilling to safeguard us against abuses of

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AND THE QUEST FOR LAW 8 (1962); *see also* Ken Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1001 n.6 (1978).

30. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

31. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133–35 (1921):

[T]he judge is under a duty . . . to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience. . . . "It is the

state power in the form of a lawsuit—the idea of rights, the people's protection against state power, is turned on its head. Rights, supposedly the citizen's protection, have been turned into a weapon for extortion—a use of state power by selfish individuals anytime they want. For this reason, civil litigation now threatens our freedom.

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function of our courts . . . to keep the doctrines up to date with the *mores* by continual restatement. . . . This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."
Id. (quoting Arthur L. Corbin, *The Offer of an Act for a Promise*, 29 YALE L. J. 767, 771-72 (1920)).