SEPTEMBER 1997 Volume 26, Number 9

IMPRIMIS

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American Injustice: The Case for Legal Reform

Spencer Abraham
U. S. Senator (R-MI)

Spencer Abraham is a U.S. Senator. Elected in 1994, he is the first Michigan Republican to win a senate seat since 1978. He serves as a member of the Judiciary, Commerce, and Budget Committees; during the 105th Congress, he was named chairman of the Judiciary Subcommittee on Immigration and the Commerce Subcommittee on Manufacturing and Competitiveness.

Senator Abraham graduated from Harvard Law School in 1979. He went on to teach at Thomas M. Cooley Law School and to serve with the Detroit law firm of Miller, Canfield, Paddock and Stone. He co-founded the Federalist Society for Law and Public Policy Studies in 1982. In the same year, at age thirty, he became the youngest chairman of the Michigan Republican Party. In 1990, he was appointed as White House deputy chief of staff for the Office of the Vice President. He also served for a time as the co-chairman of the National Republican Congressional Committee. Today, he is one of the most high-profile leaders of the Senate, and is the subject and author of numerous articles in the national press.

Senator Spencer Abraham adds up the high cost of frivolous lawsuits and judicial activism. We are not only losing billions of dollars; we are subverting the Constitution and our entire system of civil justice.

The Senator's remarks were delivered during the March 1997 campus seminar, "Between Power and Liberty: Economics and the Law," sponsored by the Center for Constructive Alternatives and the Ludwig von Mises Lecture Series. All the presentations from this seminar will be available in Volume 25 of Champions of Freedom, *forthcoming from the Hillsdale College Press in November 1997. For ordering information, please call our toll free number: 1/800/437-2268.*

Our legal system is broken. The United States has been transformed from a nation of friends and neighbors into a nation of actual and potential litigants. The separation of powers and the provisions of the Constitution have been defied by activist judges who prefer making laws to observing them and substituting their will for the will of the people. These are serious allegations, to be sure. What I would like to do here is briefly examine each and present the case for legal reform.

Frivolous Lawsuits

We should not keep people with genuine injuries and claims from seeking redress through the judicial process. But the damage being done by frivolous

lawsuits is all too obvious. The current system hurts our economy and our competitiveness. Litigation adds 2.5 percent to the average cost of a new product in America. And the figure is much higher for advanced technology and medical goods and services. One reputable research group reports that court costs, awards, and lost time cost our economy $132 billion in 1991 alone. Imagine how that figure has soared in recent years. We also pay for frivolous lawsuits through decreased innovation. According to a Gallup survey, one of every five small businesses decides not to introduce a new product or to improve an existing one because of fear of litigation.

The rules for playing the frivolous lawsuit game are quite predictable. *The first rule is to sue anyone in sight, no matter how minimally connected they are to the injury.* Just to give you a case in point, a man recently attended a boxing match, had too much to drink, got into an altercation, and fell down a flight of stairs. He died as a result of his injuries. Unbelievably, one of the defendants named in the suit brought by his family was Ticketmaster, the company that had issued tickets to the boxing match.

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The second rule is to claim that the defendant should protect the plaintiff against injury regardless of circumstances. It doesn't matter if the plaintiff is negligent or willfully disregards proper safety procedures. In the case of *Piper Aircraft* v. *Cleveland*, a man bought an airplane and decided to remove the pilot's seat and attempt to handle the controls from the back seat. The plane crashed and he was killed. His family sued Piper Aircraft and collected a $1 million judgment. His death was a tragedy, but to claim that the company that built his plane was to blame is simply wrong. It also perverts the traditional definition of legal responsibility, making virtually every manufacturer liable for injuries that occur through deliberate misuse of a product.

The third rule is to establish any conceivable level of negligence against the party with "deep pockets," so that party can be forced to pay all of the damages. This is known as the doctrine of "joint and several liability," which currently prevails in our legal system. It means that if a defendant is only 1 percent negligent, he can still be held responsible for 100 percent of the damages. Several years ago, Walt Disney World found out how unjust this doctrine can be. A young couple decided to play "bumper cars" on the Grand Prix go-cart track.

Now, those of you who have been to the Magic Kingdom know how difficult it is to do this. The cars are spaced so they cannot touch each other, and they can't go more than about seven miles per hour. But at the very end of the track, where the drivers disembark, there is a momentary window of opportunity in which a determined and reckless driver can crash into the car ahead.

Apparently that's what happened in this case. The young man was finally able to do what he had repeatedly tried to do and crashed into his fiancée's car. She was injured, and she went to court. The jury found that the young man was 85 percent negligent. The young woman was 14 percent negligent. And Walt Disney World was 1 percent negligent. Guess who ended up paying the entire judgment? Disney, of course, since it had the deepest pockets.

The fourth and last rule is to sue in states or in jurisdictions where punitive damage awards have typically been astronomical. Any lawyer can tell you: Where you sue sometimes makes as much if not more difference than who you sue and why. There are particular courts and judges that are notorious for awarding millions of dollars to the plaintiffs in frivolous lawsuits. But they are never forced to pay the price for their bias.

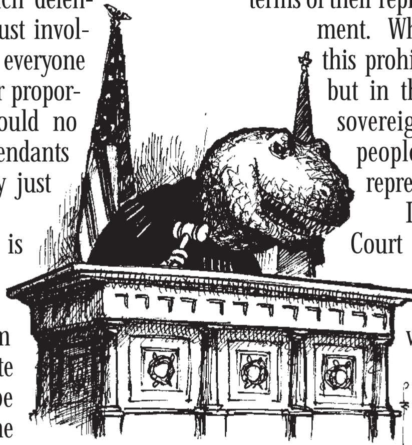
Changing the Rules

We need to change the rules in the lawsuit game. The first rule change is limiting punitive damages. Originally intended to be a rare punishment imposed only on convicted defendants who had acted with an unusual degree of recklessness or viciousness, punitive damages have become increasingly common, and in many instances the dollar amounts involved have been astronomical.

A cap would permit plaintiffs to recover their due–full compensation for true losses and injuries–while discouraging profit-seeking lawsuits and the use of punitive damage claims to frighten defendants into agreeing to out-of-court

settlements. It would also free up the court calendar and lessen the huge burden litigation has placed on our economy.

The second rule change is replacing joint and several liability with "proportionate liability." This would lessen the unfairness and expense of the current system in which defendants with "deep pockets" must involuntarily serve as insurers for everyone who crosses their path. Under proportionate liability, plaintiffs would no longer be able to force defendants with the most money to pay just because they can.



The third rule change is reforming "conflict of law" provisions that govern lawsuits between parties from different states. In corporate cases, plaintiffs would be required to bring suit using the provisions of the state in which the defending company has the most employees. This would mean plaintiffs couldn't simply pick the state with the best (meaning the worst) record of high awards for frivolous lawsuits. And because states do tend to worry about such issues as competitiveness, attracting new businesses, and job creation, this rule change might actually lead them to improve their records.

Changing the Players

Beyond changing the rules, we also need to change some of the players. No substantive legal reform is possible without ridding the system of "judicial activists," that is, judges who act as legislators in the courtroom. The black-robed heirs of Solomon who sit on the bench today have a crucial role to play in our legal system. We should do nothing to bar them from determining the constitutionality of our laws. But we cannot allow them to make the law, which is exactly what many modern judges have been doing.

One recent example is provided by *U. S. Term Limits* v. *Thornton.* Now, not everyone agrees on whether there should be term limits for political office, but when the voters of a given state decide they want term limits, surely they should be able to give them a try. In a 1992 ballot initiative that commanded over 60 percent support, Arkansas voters adopted term limits for their U. S. senators and representatives. At the time, twenty-two states had adopted similar limits (twenty-one by direct vote). The Supreme Court struck down all congressional term limits laws in a five-to-four decision in 1995. The tortured logic of the majority was that the Constitution–which explicitly allows states to decide a number of key questions about federal elections–forbids them from limiting the terms of their representatives in the federal government. Where did the Supreme Court find this prohibition? Not in the Constitution but in the implicit notion of "national sovereignty" and, ironically, in the people's right to decide who will represent them.

In *Romer* v. *Evans,* the Supreme Court held by a six-to-three vote in 1996 that the Constitution's equal protection clause prevents the states from outlawing special legal protections for homosexuals. Now, leaving aside valid questions about the morality of this "alternative lifestyle" and the need to legally protect it, we can say with absolute certainty that this is an issue on which the Constitution is totally silent. Some states have adopted legislation regarding homosexuals; some have not. But it is virtually impossible to conclude that the Constitution constrains them from doing so. Impossible for everyone to conclude, that is, but certain judicial activists who preside over the highest court of the land.

Amazed as they would be by the *Term Limits* and *Romer* decisions, the Founding Fathers would be struck dumb by the recent California case in which a district court judge struck down the California Civil Rights Initiative (CCRI). In this case, the judge concluded that the ballot initiative–which outlawed discrimination and preference on the basis of race or sex in public employment (including education and contracting) and which was approved by 54 percent of California voters–should not be allowed to go into effect because it allegedly violates the equal protection clause.

Once again, there is room for disagreement about the merits of the initiative, but not about its constitutionality. CCRI is true, in both the letter and spirit of the law, to the equal protection clause. Worse yet, invalidating this kind of ballot initiative destroys the very foundations of our republic. It destroys local and state government. It destroys communities by taking disputes out of the realm of public debate and out of the democratic process. It destroys Americans' confidence that their votes count. And it destroys constitutional limits on judicial power.

Restoring Limits

The cases I have cited are not the only ones in which judicial activism should concern us. They are simply the most recent and striking examples of how the courts and in many instances lone judges have overruled the democratic process and twisted the Constitution to serve their own ends. How then do we restore constitutional limits on judicial power?

Let me address this question by examining one specific target area where reform has already begun to change the rules and the players in the judicial activism game. When I was elected to the U. S. Senate in 1994, I discovered that the federal courts had virtually taken over, in whole or in part, the administration of prisons in thirty-nine states. This included three hundred of the nation's largest penal institutions. In many jurisdictions, judicial decrees had led to skyrocketing operating costs, dramatically reduced punitive and deterrent effects of sentencing, and the early release of literally thousands of dangerous criminals.

In 1995, 65,000 prisoner lawsuits were filed in federal court. That is more than the total number of criminal prosecutions in all federal jurisdictions for the same year.

Moreover, these decrees had precipitated an avalanche of frivolous prisoner lawsuits. Although the vast majority were found to be without merit (over 99 percent in the Ninth Circuit and at least 95 percent in all jurisdictions nationwide), these lawsuits were taking up enormous amounts of time, money, and manpower–precious resources that could be better spent on incarcerating offenders. On the question of money alone, the National Association of Attorneys General estimated that the typical annual cost of prisoner lawsuits exceeded $80 million.

In 1995, 65,000 prisoner lawsuits were filed in federal court. That is more than the total number of criminal prosecutions in all federal jurisdictions for the same year. Yet in Michigan, for example, prisons had to be routinely monitored to determine:

- how warm the food was;
- how bright the lights were;
- whether there were electrical outlets in each cell;
- whether windows were inspected and up to code;
- whether prisoners' hair was cut by licensed barbers; and
- whether air and water temperatures were "comfortable."

Such micromanagement might be understandable if a court had ever found that Michigan's prison system was in violation of the Constitution in any of these areas, or if conditions were inhumane, but this was not the case. No court had ever found that Michigan's prisons had violated the Constitution or any federal law in any of these areas. In addition, Michigan boasted the number-one training program for corrections officers. Its rate of prison violence was one of the lowest in the nation. It spent an average of $4,000 a year per prisoner for health care, including nearly $1,700 for mental health services. Nevertheless, complying with court orders, litigating over what they meant, and producing the reports necessary to keep individual judges satisfied had cost Michigan taxpayers hundreds of millions of dollars over the course of a decade.

While the judicial decrees imposed on Michigan were bad, there were worse. In some states, judges "cured" prison overcrowding by freeing dangerous criminals years before they finished serving their time and by refusing to incarcerate certain types of criminals. One of the worst situations was in Philadelphia. For eight years, a single federal judge oversaw a "cap" program that released up to six hundred criminal defendants per week. This kept the prison population at what she considered an "appropriate level."

It did not matter if the defendants had one or more previous convictions or if these had been for shoplifting or murder. If the charge giving rise to the current arrest was based on a "non-violent crime," the defendant could not be held in custody prior to his trial. Not surprisingly, thousands of defendants returned to the streets were rearrested for new crimes. In one eighteen-month period, there were rearrests for 79 murders, 959 robberies, 2,214 drug deals, 90 rapes, and 1,113 assaults. The citizens of Philadelphia lost faith in the legal system's ability to protect them. The criminals, on the other hand, had every reason to believe that the system couldn't punish them.

In 1996, I helped author legislation that is the crucial first step toward restoring limits on judicial power and taking judicial activists out of the game. Already, there have been enormous positive changes as a result of the Prison Litigation Reform Act (PLRA):

— Lawsuits brought by inmates must meet stricter standards.

— Caps on attorney fees have been established in such cases.

— There must be proof of actual violations before judicial decrees regarding prison conditions can be issued.

— Courts must take the public safety into serious consideration when decreeing changes in the operation of the criminal justice system.

— And in cases brought in federal court, only panels of three federal judges can order early release for defendants, and only as a last resort.

The PLRA has not undone all the damage caused by previous decisions. And it remains to be seen whether the courts will uphold key provisions. Courts so far have been split. And a number of state statutes, passed in part in response to court orders about prisons, continue to dictate early prisoner releases. Much more needs to be done. But this single piece of legislation proves that we *can* change the rules and the players. We *can* contain the litigation explosion, curb judicial activism, and restore authority and safety to our penal system. We should not look to the PLRA as a cure-all but as a model for other reforms aimed at restoring American justice. By re-establishing responsibility under law to potential litigants, judges, and criminals, we can make our country once again a land of family, friends, and neighbors. ♠

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