

## Better living through litigation?

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**S**TUCK IN rush-hour traffic?

Kept awake by teenagers drag-racing down Main Street? Fender dented by a careless driver at the mall? In *Verdicts on Lawyers*, a 1976 volume edited by Ralph Nader and Mark Green, an ultimate if drastic answer to these familiar car-related woes was proposed: file a lawsuit—not against your fellow drivers, but against Detroit (and, these days, Yokohama) for not designing automobiles that would prevent these ills.

The contributors who made this proposal, Beverly C. Moore, Jr., described as “a public interest lawyer in Washington, D.C.,” and Fred Harris, former Democratic senator from Oklahoma and presidential-candidate-to-be, were apparently quite serious when they advanced this startling thesis. The way to make society safer, cleaner, and quieter, they argued, was to make business enterprise legally responsible for the full measure of risk, grime, and distraction entailed by its output:

If the automobile industry were saddled with an annual damage liability of perhaps \$100 billion for accidents, air pollution, noise, congestion, and highway and traffic-control costs, and were forced to raise its

prices by that amount, it would have no choice but to redesign its vehicles to minimize these costs and their associated liabilities.

Sure, car prices might jump—several-fold, at least, though Moore and Harris prudently refrained from offering any estimates. But the cars that were produced, however few in number, would be as environmentally perfect as corporate ingenuity could make them. The real beauty of the idea, in fact, would lie in its harnessing of market mechanisms to solve otherwise intractable social problems. After all, “if the profit motive helps reduce the costs of the beneficial products of our economy, it can be enlisted to reduce the harmful byproducts.” What could be more sensible?

Bizarre as it may seem, Moore and Harris’s idea should not be ignored. It serves as a specimen, admittedly extreme, of a form of thinking popular on the efficiency-oriented “right” as well as the anti-corporate “left.” Such thinking is routinely invoked to justify not only lawsuits against manufacturers but lawsuits of almost every other kind as well.

It might be called the invisible-fist theory. In Adam Smith’s famous account, self-seeking butchers and bakers are led as if by an invisible hand to further the general welfare; private striving leads to public benefit. The modern counterpart in legal commentary holds that private *quarreling* leads to public benefit. The more fights you get into, the more scrutiny the courts will apply to the conduct of others, and the better all your potential opponents and others like them will behave in expectation of this scrutiny. In short, the more suits filed, the better off the world will be.

### The attractions of deterrence

Moore and Harris concisely express the theory’s major premise when they write that the main purpose of a system of civil litigation is “deterrence—i.e., discouraging the injurious conduct that gives rise to litigation.” By imposing liability on people or institutions that could have prevented harm, society gives them “a profit incentive to reduce the magnitude of the harms they cause.” A wide range of legal commentators today might agree. In his concurrence in the 1944 case *Escola v. Coca-Cola Bottling*, which foreshadowed the modern era of product-liability law, California Justice Roger Traynor adopted a deterrence rationale for tagging manufacturers with very wide-ranging liability:

Even if there is no negligence ... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Other commentators, borrowing economic terminology, specify that the legal system's role is to ferret out and correct negative "externalities"—harms that people or institutions inflict on others without agreement or consent. The favorite Economics 101 example is the factory whose smoke befouls the windowsills and wash-day laundry-lines of its neighbors. Werner Z. Hirsch, in his 1988 *Law and Economics: An Introductory Analysis*, justifies the courts' enforcement of property and contract law as their way of "playing the role of externality adjusters."

In reality, many if not most lawsuits arise from situations quite different from the one-sided infliction of damage exemplified by the smokestack/neighbor case. The proper locus of control over the harm is often less obvious. If someone buys household lye and then inadvertently hurts himself with it, for example, it is far from clear that he was harmed, without agreeing or consenting, by the manufacturer. Arguably the real externality arises only afterward, in the opposite direction—when the buyer uses the courts to recover money from the lye maker. But those who are fond of the externality model can stretch it to cover such cases by assuming that people would never voluntarily buy a product or enter a commercial relationship that they knew would harm them; when the mishap occurs, the argument goes, they are victims of externalities just as surely as if they had been assaulted in the night.

Whether couched in the "hot" language of wrongdoing or the "cool" language of social cost, the deterrence premise is offered to justify virtually every kind of lawsuit in American courts today. The victim mugged in a parking lot or dormitory sues the supermarket or university for "negligent security"—not, ostensibly, to make a fast buck, but to ensure that such safety lapses never happen again. The bartender or private party-giver who lets a guest drive away tipsy gets sued to encourage other hosts and servers—though not other guests, of course—to be more careful in the future. Tobacco liability, it is said, will drive up the price of a pack of cigarettes to reflect the full harm that they do. A spokesman for the Center to Prevent Handgun Violence calls for making gun manufacturers liable to shooting victims so that "those who profit

from dealing in these death machines ... pay for their inevitable social cost."

Hardly anyone makes it clear, however, exactly where the boundaries to this theory lie—if anywhere. That is what makes the *Verdicts on Lawyers* article so special. Moore and Harris had a list. On it are twenty-four broad categories of ills to which human flesh is heir, ranging from alcohol-induced cirrhosis of the liver to the tendency of major home appliances to go on the fritz. Corresponding to them are broad categories of business and professional defendants, whom Moore and Harris would require to fork over cash on the barrelhead, through class-action lawsuits, in compensation.

The usual suspects—tobacco companies, distillers, polluting industries—are, of course, in evidence. Then things start to get more interesting. Moore and Harris would make the producers of sugar- and fat-laden foods legally responsible for a wide range of maladies, from tooth decay to adult-onset diabetes. Automakers, as we have seen, would be tagged with the cost of every highway collision. The makers of ordinary household products involved in accidents, from beds to bicycles, would share a similarly expensive fate.

What about mishaps that arise from user carelessness or deliberate misuse? Or the inevitable side effects of, say, valuable prescription drugs? No reason for business to be let off the hook in either case, said Moore and Harris. If drug makers were made fully liable for overdoses and side effects, for example, "it can be safely predicted that the industry would develop effective mechanisms to ensure that many or most such cases are in fact avoided. In response to similar potential damage liabilities, food corporations would reduce the fat, sugar, salt, and cholesterol content of their products."

They would also add fiber to their products; Moore and Harris declared that colon trouble, appendicitis, and other illnesses should be chargeable to food manufacturers who do not put enough indigestible matter in their wares. Here we encounter some especially knotty practical problems regarding which defendants should pay for what. It happens that fiber can be added to any food or for that matter any beverage, from champagne to carrot juice. Will the makers of fried pork rinds pay more or less than the makers of after-dinner mints? Can chewing-gum makers reduce their liability

by pointing out that their product is sometimes inadvertently swallowed?

Whatever might happen to every other industry in the squabbling over these issues, one would be sure to thrive: the litigation industry. By even a conservative tally, paying for the items on the list would have led to the annual redistribution of well over a trillion dollars at the time; the figure would be much higher in today's depreciated dollars. The billable hours for the legal profession would also have mounted fast; so would the contingency fees, which the authors enthusiastically specified for the plaintiffs' side, and which typically run about one-third of the amount recovered. "Of course," they conceded in a footnote, "it might be advisable to phase in these new liabilities over a reasonable period of time."

Nonetheless, Moore and Harris declared the overall economic logic of universal enterprise liability to be "compelling." They were sorry to report, however, that the American legal system was slow to adopt it. Had they written today, they would have less cause for sorrow.

### Learning to love litigation

We now have begun to conceive of lawsuits primarily as vessels for "deterrence," so that it is hard not to focus on their brighter side. Lawsuits are seen as an opportunity for policy making.

This is a significant departure from the past. Our legal tradition used to view lawsuits as an evil, at best a necessary evil; they might be unavoidable from time to time, but they were to be discouraged except as a last resort. Litigiousness was a distinctive vice, a form of bullying.

The law accordingly used to maintain a series of barriers that caused people to think twice before bringing anything short of a strong and definite grievance to court. Ethical controls on the legal profession discouraged lawyers from "stirring up" litigation. Procedural rules assigned many of the inevitable costs of litigation to those who wanted to initiate or prolong it, rather than to its targets alone. Evidence rules tended to discourage doubtful, speculative claims built on factual guesswork. Finally, the rules of substantive law were written where possible to sidestep the sort of open-ended, highly subjective inquiries—deciding which custodial arrangements would serve the "best interests" of a child, or when a worker was being dismissed for "good cause"—that generate large numbers of potential disputes.

Once litigation was reconceived as a productive, socially beneficial activity, these rules ceased to make much sense. If a product is wholesome and desirable, how better to get it churned out in quantity than by freeing its producers from archaic restrictions? So American legal reformers set about to deregulate the practice of suing people.

Consider, for example, the rules against advertising and solicitation by lawyers. It had formerly been thought that lawyers should sit back passively and wait for clients to appear, lest they wittingly or unwittingly initiate needless contention and strife. Although "extensive advertising would doubtless increase litigation," declared the legal ethicist Henry Drinker in 1953, "this has always been considered as against public policy." On the whole, spontaneous grievances were likelier to be more substantive than grievances elicited by outside suggestion and promotion.

Then, in 1977, the U.S. Supreme Court decided in the landmark case of *Bates v. State Bar of Arizona* that lawyers have a constitutional right to solicit new business through advertising and other methods. Writing on behalf of a five-to-four majority, Justice Harry Blackmun deplored the "underutilization" of lawyers' services and said that advertising might "offer great benefits" in changing this state of affairs. Lest anyone imagine that by this he was referring only to, say, lawyers' advisory and negotiating services, he pointedly observed that advertising "might increase the use of the judicial machinery." He dismissed—in a footnote no less—the idea that a lawsuit could "somehow [be] viewed as an evil in itself." Justice Byron White's majority opinion in a related case eight years later struck the same note: "We cannot endorse the proposition that a lawsuit, as such, is an evil."

Thus the official wisdom swung far away from disapproving lawsuits. Citizens were to be encouraged to seek full vindication of their legally defined set of interests, and the first step was for them to be fully educated as to what those interests were. Parents of children with birth defects were soon being approached by attorneys who urged them to sue doctors and hospitals; crime victims were contacted with the happy news of their right to sue businesses for "negligent security." "The greatest barrier to courtroom justice," as Moore and Harris complained in their article, "is the marketplace reality that most victims are not even aware that they have been injured." As early as 1975 one of the most widely quoted of

the new legal ethicists, Monroe Freedman, was writing of a "professional responsibility to chase ambulances."

The trend encouraging litigation was broad in scope. Civil procedure was revamped to make it easier to file a suit and harder to get one dismissed. It also became easier to use compulsory process to pry into an opponent's internal affairs before (or instead of) trial, to shop around for favorable courts in which to file suits, to gain the admission of doubtful expert testimony in order to keep a factually dubious case alive, and so forth down the line. In each case the effect was to shift burdens from those wishing to tie up others in court to those wishing to stay out.

Meanwhile, the rewards for suing and penalties for getting successfully sued—in the form of damages—were being raised dramatically. More chances were created for plaintiffs to recover triple or punitive damages, which were said to perfect the balance of incentives by making up for the times a particular defendant (or another just like him) got off without being sued. Contingency fees, formerly held in suspicion as encouraging lawyers to press claims with excessive zeal, were welcomed into new areas of courtroom work; what could "overzealous" mean, anyway, when every new punch thrown did the world a favor?

Class actions, Moore and Harris's preferred vehicle for suits against businesses, were likewise helped along by various changes, including a 1974 Supreme Court decision that did away with a requirement that the organizing lawyer show a significant chance of winning on the merits of his case. In many of these suits lawyers emerged as the real players, with clients reduced to figure-head roles. Soon "private attorney general" and "citizen suit" statutes began to authorize lawyers to wage suits purely and openly on their own behalf, for ideology, profit, or both. The invisible-fist theorists found this a welcome streamlining of the deterrence process. The point, after all, was not so much to give pleasure to any particular client as to give pain to the defendant.

The accepted ethic and spirit of litigation also began to change; ambiguity, inhibition, and mixed feelings were replaced by enthusiasm. Writers on legal ethics spent less time worrying about the dangers of harassing opponents and more time stressing lawyers' obligation to push their clients' rights to the bitter end with red-tooth-and-claw advocacy. If litigation was good for society, there was no need for bad conscience about litigating too aggressively.

What has emerged quite predictably from all of this is an industry devoted to identifying chances to sue and maximizing profits from the resulting suits. The competitive pressure of this industry tends to weed out softness, and to bring claims into the hands of the lawyers who are most inclined to press them to the hilt without remorse. Collectively, the industry has cyclical ups and downs like any other, but over the long run it careens toward maximum output.

### Mote-and-beam department

A great many problems and difficulties have emerged in the application of the invisible-fist theory, but one is notable for its irony. The invisible-fist theorists, like Mrs. Jellyby in *Bleak House*, burn with an unquenchable desire to seek out and smite social evils even to the edges of the known world. And like Dickens's distracted matriarch, they overlook signs that the feared evils are cropping up in their very own household.

Litigation is full of externalities. Sometimes it seems to consist of little else. When people file lawsuits or resist valid suits, they dump enormous costs on their opponents. The financial costs of response, often thoroughly ruinous, are just the beginning. The suspense and uncertainty of litigation are destructive in themselves, as litigants learn when they apply for loans, invite partners into their businesses, or are forced to put their homes on the market at distress prices.

Lawsuits tend to be miserable experiences on a personal level as well, setting people against each other in bitter acrimony. Privacy is sacrificed as parties must answer probing questions under oath; especially at the pretrial stage, the questions are commonly as unpleasant as possible. Time, energy, and equanimity are all thrown on the bonfire. Assaults on reputation that would themselves be instantly actionable outside the context of a lawsuit are showcased and inscribed in permanent public records; today they are even beamed to a nationwide audience via courtroom cameras.

Among the externalities of courtroom processes should also be reckoned their error rate. Litigation over the drug Bendectin, used safely for decades against morning sickness in pregnancy, illustrates this. Leading scientific authorities agree that Bendectin does not cause birth defects. Most American courts have agreed, but a few juries have voted the other way. The makers of Bendectin, observing this inconsistency, offered well over \$100 million to set-

