Better living through litigation?

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STUCK 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-Coca 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 washday 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