

JUSTICE FOR SALE:
**SHORTCHANGING THE PUBLIC INTEREST
FOR PRIVATE GAIN**

Alliance for Justice

1993

The **Alliance for Justice** is a national association of environmental, civil rights and consumer public interest legal organizations. Founded in 1980, the Alliance is a voice for the public interest community before Congress, the courts and the federal government, and serves as a mechanism through which members can take joint action quickly and effectively. The work of the Alliance includes monitoring the selection of federal judges, promoting reform of the legal system to ensure equal access to the courts for disenfranchised groups and individuals, and protecting the advocacy rights of nonprofit organizations.

Justice for Sale is the culmination of extraordinary efforts by many individuals. I am especially grateful to those individuals who helped me transform my initial thoughts and beliefs into concrete ideas and assimilate our research into readable prose. Special thanks go to Barbara Moulton, the principal writer, Chris Owens for her enormous assistance in the final drafting and editing phase, Carol Seifert for getting this project off the ground, David Shapiro for his many contributions, and Jeffrey Shavelson for undertaking much of the initial research. Larry Yackle, Leonard Schroeter, Tony Roisman, Frank Askin, Jamie Raskin, and Herman Schwartz all provided invaluable comments on earlier drafts. Thanks also to the many student interns, who provided wonderful research assistance, and to Alliance staff members Lisa Brett and George Kassouf, who each contributed in numerous ways to the report's development and completion.

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Nan Aron
Executive Director

EXECUTIVE SUMMARY

A relatively quiet but significant effort to reshape the American legal system took place over the last two decades. Capitalizing on growing public wariness of lawyers and litigants, a powerful coalition of business groups and ideologically-compatible foundations engaged in a multi-faceted, comprehensive, and integrated campaign to elevate corporate profits and private wealth over social justice and individual rights as the cornerstones of our legal process. In *Justice for Sale: Shortchanging the Public Interest for Private Gain*, the Alliance for Justice, a coalition of public interest legal organizations, documents this campaign. It discusses the major issues involved and examines some of the most influential financial and philosophical players.

The Campaign for the Courts

Combining their vast resources, self-interested business concerns and ideologically-driven foundations have invested millions of dollars in various programs designed to make the intellectual case for a new legal vision that is predominantly concerned with promoting and protecting commercial and private wealth. *Justice for Sale* examines five major aspects of the campaign: business-funded "public interest" law firms, "civil justice reform," law and economics, privately-funded judicial "education" programs, and the Federalist Society. Among the key points made:

- ▶ Conservative foundations, particularly Olin, Sarah Scaife, Lynde and Harry Bradley, and Smith Richardson, are the effort's philosophical leaders. Concerned primarily with building an intellectual foundation for their cause, they have poured money into law schools for academic research that supports their claims and objectives. The Olin Foundation, for example, has donated millions of dollars to some of the nation's most elite law schools for the study of law and economics, a legal theory that champions an unfettered economic marketplace and scorns virtually all governmental regulation of corporate affairs. The money has been used to fund faculty positions, create law and economics courses, support student and faculty research projects, conduct workshops and seminars, and provide scholarships to students to study law and economics.
- ▶ Major corporations and business-friendly foundations have invested hundreds of thousands of dollars in privately-run judicial seminars at which federal judges learn -- free-of-charge -- about areas of the law that are of primary concern to business. The most popular of these seminars is the annual "economics institute" sponsored by George Mason University's Law and Economics Center, which is funded primarily by

corporations and supportive foundations. Expenses to attend the seminar, which run as high as several thousand dollars per judge, are paid entirely by the Center.

- ▶ The insurance and manufacturing industries, led by Aetna Life and Casualty and including such corporate giants as Exxon, Pfizer, RJR Nabisco, General Electric, Dow Chemical, and Monsanto, have spent millions of dollars advertising their claims, lobbying state and federal legislators to enact substantial tort "reform" measures, and bankrolling legal scholarship and judicial seminars designed to educate the legal and judicial communities about the need for curtailing access to the courts.
- ▶ Business-funded "public interest" law firms such as the Pacific Legal Foundation (PLF) are the campaign's courthouse lawyers. While traditional public interest groups represent people or causes that are otherwise underrepresented in the legal system, PLF and similar organizations use their tax-deductible contributions to champion the private interests of their already powerful, well-represented business sponsors.

The Concerns

The corporate and foundation attack on the law represents a concerted effort by monied interests in America to secure a reordering of American jurisprudence. *Justice for Sale* demonstrates that at its core, the campaign is not simply about making the law more efficient or more fair, as its proponents claim. Rather, it is about creating a trickle-down system of justice whereby the exaltation of corporate and private wealth will -- in theory -- foster a legal environment that ultimately benefits all. As our failed experiment with supply-side economics demonstrates, however, this is a vision that is at root inequitable, and it will surely exacerbate rather than alleviate the problems in a legal system that already favors the rich and powerful.

Moreover, there is something disconcertingly covert about the campaign's true objectives, the report suggests. Using appealing terminology such as "civil justice reform," "efficiency," and "free enterprise," the effort's leaders have attempted to frame the issues in the debate about legal change and equate public support for ideals such as the "free" market with their own substantive agendas. In addition, by supporting non-profit law firms that promote business interests in the nation's courts, wealthy corporations and insurance companies tend to mask their self-interested legal agendas by promoting them in the guise of "the public interest."

The study also looks at the sizable foundation funding dedicated to the study of law and economics on law school campuses. While foundations on all sides of the ideological spectrum support academic research, this particular funding raises concern because the predominant law and economics school of thought advocates a way of looking at the law that elevates business profits and power over considerations of social welfare and equal justice. Law and economics has gained an institutionalized presence at a number of law schools across the country, and may be changing forever how legal scholars, judges, and possibly the public view the law's role in our democratic society.

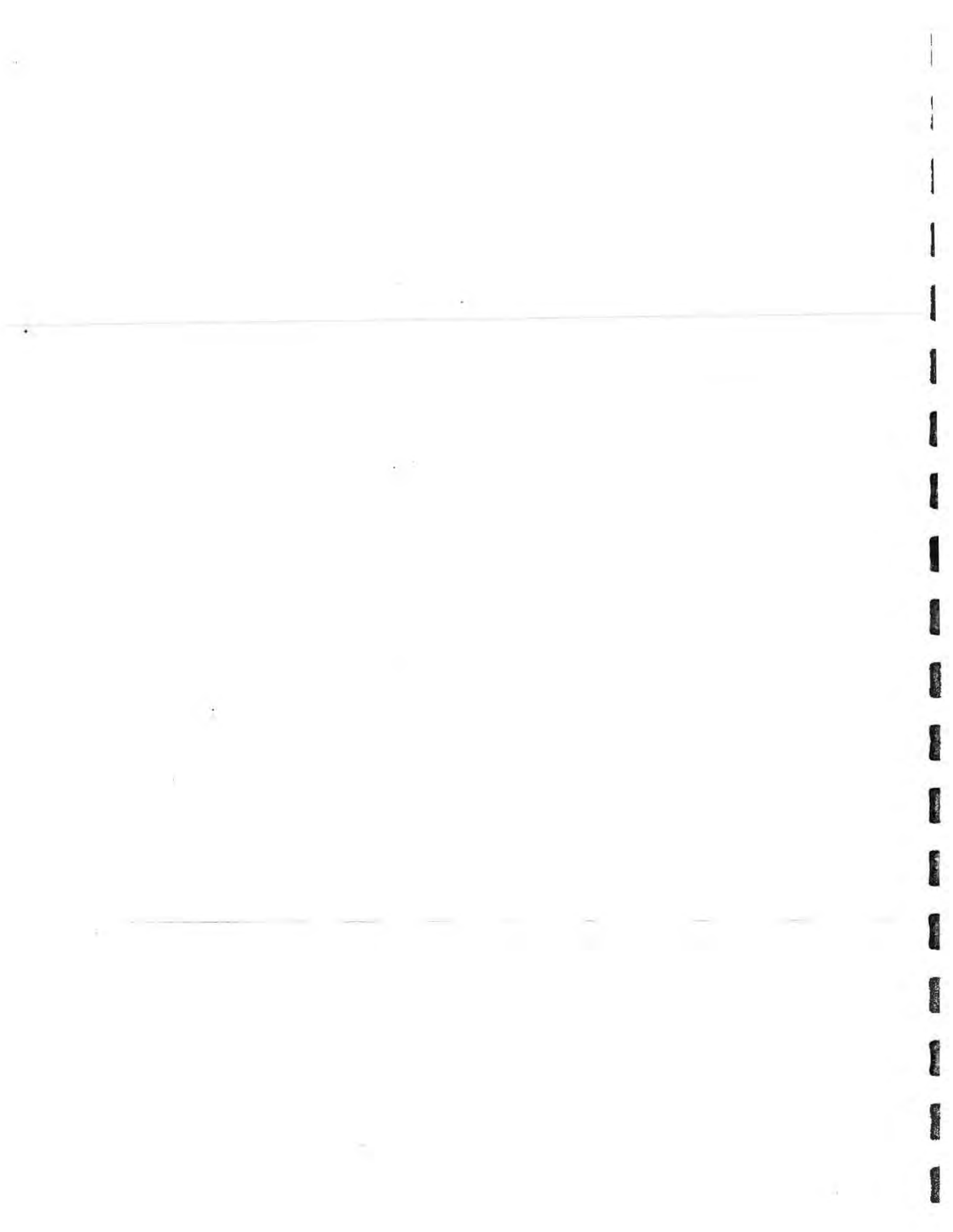
Justice for Sale documents the ongoing efforts of a small, wealthy group to mold a new jurisprudence. It is both a warning and a clarion call for those who are committed to ensuring that the American judicial system does not become just another commodity for sale to the highest bidder.

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INTRODUCTION

Impetus for the Study

During the last two decades, public cynicism about the nation's political system has soared. By 1990, a startling 80% of the electorate was telling pollsters that government all too often serves only the rich and powerful. Public frustration grew over the next two years, stoked in part by publication of several thoughtful and probing analyses that showed just how dearly the 80's politics of wealth and power had cost ordinary Americans: Voters vented their anger in the 1992 elections, turning out in record numbers to demand change.

The public's disdain of elected officials, however, ignored another more long-term and possibly more devastating consequence of an era marked by seemingly unbridled pursuit of corporate and private wealth. Subtly but effectively, during that period financial powerhouses -- corporate contributors and business-friendly funders in a handful of foundations -- invested millions of dollars in a multi-faceted, comprehensive and integrated campaign to mold a new American jurisprudence that favors protecting and enhancing corporate and private gain over preserving social justice and individual rights.

This campaign to alter the defining principles of the legal system dates back to the early 1970s.¹ As domestic and global economic pressures at that time threatened corporate profits, major business and insurance interests mobilized politically to secure relief. A primary target of their efforts was government regulation, particularly federal regulation of the environment, consumer products, and the workplace. Assailing these regulations as too costly and burdensome, dozens of corporations and insurance companies set out to convince the public and policymakers that American business should be freed from allegedly excessive government regulation.

Money was key to this effort. As Olin Foundation President William Simon exhorted his corporate colleagues:

Funds generated by business (by which I mean profits, funds in business foundations and contributions from individual businessmen) must rush by multimillions to the aid of liberty ... to funnel desperately needed funds to scholars, social scientists, writers, and journalists who understand the relationship between political and economic liberty.²

Responding to such calls, business supporters pumped vast amounts of money into sophisticated media offensives, academic research, and advocacy efforts that equated economic prosperity and global competitiveness with freedom from corporate restraints. By the beginning of the 1980s, corporations were spending approximately \$1 billion per year on "advocacy advertising" and grass roots lobbying, much of which was devoted to attacks on government regulation.³

The Study

The money flowing from major corporations, insurance companies, and supportive foundations into efforts to build a new legal vision has run along several veins. It supports business-oriented "public interest" law firms that advance pro-business positions in court, "law and economics" research that envisions the legal system primarily as an adjunct of the marketplace, organizations and scholars specializing in research that calls for capping the legal liability of corporations, sympathetic law student groups, and privately-funded seminars that "educate" judges in areas of law and theory of particular importance to business.

Justice For Sale provides a look at the effort to shift the law from its traditional foundation of public justice and equity toward enhanced protection for commercial and private financial interests. The report examines some of the major issues, programs, and institutions that are funded and discusses the role their funders play in nourishing and sustaining them. It also considers why the crusade has received little critical examination by the public and the legal community, and the extent to which it threatens to produce a legal system in which justice becomes just another commodity for sale to the highest bidder.

The Funders

Olin President William Simon has previously counseled corporations to take a self-interested approach to their giving: "Corporations exist to make a profit in competitive markets ... I've been saying for years now that businessmen must give the same kind of careful thought to their corporate contributions as they do to their capital investments." Quoting his colleague Irving Kristol, Simon went on to argue that corporate "philanthropy must serve the longer-term interest of the corporation. Corporate philanthropy should not be, cannot be, disinterested ..."

From Foundation News, Sept/Oct 1983

Corporations and insurance companies were major funders of the effort to reshape the legal system. As early as 1971, powerful business interests set out to identify and implement strategies to counter what they perceived to be a pervasive, anti-business attitude among the American public. According to a memorandum prepared for the United States Chamber of Commerce by future Supreme Court Justice Lewis Powell, the public's hostility toward business was fueled by environmentalists, consumer activists, and other supposed attackers of the American free enterprise system. Powell counseled the business community to respond

in kind to these activists' efforts by creating a business-organized and funded legal center that would promote the general interests of business in the nation's courts. Two years later, the Pacific Legal Foundation (PLF) was created for precisely this purpose. During the next few years, similar business-funded "public interest" law firms cropped up throughout the country.

Corporate funders have expanded their focus beyond litigation centers such as PLF to a variety of other groups and programs that advocate legal change in the name of promoting American competitiveness and corporate productivity. Major business interests such as Exxon, Pfizer, RJR Nabisco, General Electric, Dow Chemical, and Monsanto, for example, have invested heavily in efforts to "reform" the nation's civil justice system. They have contributed individually, by financing various groups and programs, and collectively, through trade associations such as the Insurance Information Institute and the corporate-dominated, 700,000 member Product Liability Coordinating Committee that lobby for judicial and legislative restrictions to the litigation process to lessen business liability for damages caused by harmful products or behavior. Among corporate and insurance groups, Aetna Life and Casualty has by far been the most substantively and financially active in the movement. In addition to providing millions of dollars to law schools, think tanks, and judicial education programs (mostly through its corporate-funded foundation), Aetna has been a ubiquitous player in "civil justice reform" efforts, with its managers participating in academic conferences, hosting workshops, serving on task forces, and testifying before Congress.

Businesses' efforts received a major strategic and financial boost in the late 1970s from sympathetic funders in a handful of foundations. Though they pursue a larger and more general ideological agenda than the corporations, the Olin, Sarah Scaife, Lynde and Harry Bradley, and Smith Richardson foundations have been the philosophical leaders of the campaign to reshape the law to accord greater deference to commercial interests. In particular, Olin and its president, William Simon, were instrumental in developing a philanthropic network to support this effort. Recognizing that effecting fundamental, institutional change in political and legal policy required a solid intellectual foundation, in 1978 Simon and neoconservative Irving Kristol helped found the Institute for Educational Affairs (IEA), an organization specifically dedicated to matching corporate funders with sympathetic scholars. A self-described "foundation for foundations," IEA's founders defined the Institute's mission as helping to

defend America's 200-year-old experiment in self-government and economic freedom from a self-conscious cultural establishment eager to condemn the principles, aspirations, and loyalties of most Americans.... Part of the Institute's own uniqueness involves its very constitution; we brought together business leaders and scholars, two parts of our society between which in the past there had been too little interaction. We did so because one of our explicit goals was to demonstrate that there exists a natural harmony between enlightened philanthropy and enlightening scholarship.⁴

Olin, Scaife, Smith Richardson and Bradley also provide generous financial support to the various components of the campaign. Olin concentrates its giving primarily on legal academia, contributing roughly \$13 million since 1988 to law and economics programs on law school campuses. Richard Scaife has devoted millions of his family's fortune to funding and promoting conservative legal scholars and law students and to supporting business-sponsored "public interest" law firms. The Smith Richardson Foundation divides its funding among institutions such as the George Mason University Foundation (for law and economics), the Federalist Society, and the Manhattan Institute. Finally, the Lynde and Harry Bradley Foundation, though the most recent addition to the network, is fast becoming the most powerful, at least if money is used as the measure. Created in 1985, the foundation describes its mandate as "strengthening American democratic capitalism and the institutions, principles, and values which sustain and nurture it."⁵ For the two years ending in July 1990, Bradley Foundation grants totaled \$75,618,772.⁶ Substantial shares of that poured into think tanks and organizations that made the intellectual case for transforming the legal system. Grant recipients included the American Enterprise Institute (\$1,840,291), the Federalist Society (\$240,000), the Free Congress Research and Education Foundation (\$702,000), the Heritage Foundation (\$2,225,800), the Manhattan Institute for Policy Research (\$308,500), and the University of Chicago (\$2,589,840).⁷

The Funded

Even as the middle class was shrinking, the 'top 1 percent economy' marshaled its own well-funded intellectual champions, ever ready to contend that critical studies or statistics were wrong, that America's true weakness lay in eroded family values or a pernicious politics of 'envy,' or to argue that the rich hadn't really done that well Some of these champions were in Congress, but many hung their hats at conservative foundations -- the Heritage Foundation, the Hudson Institute, the American Enterprise Institute and the Manhattan Institute

Kevin Phillips
BOILING POINT (1992)

The campaign has been waged in virtually every legal and political arena in an attempt to win over the public, law students and academics, legislators, and -- most importantly -- judges. *Justice for Sale* examines five major areas: business-funded "public interest" law firms, "civil justice reform," law and economics, privately-funded judicial "education" programs, and the Federalist Society.

Corporate-sponsored "public interest" law firms, such as the Pacific Legal Foundation (PLF), are the campaign's courthouse lawyers. Ostensibly dedicated to the "public interest," these litigation centers, which enjoy tax-exempt, non-profit status under the Internal Revenue Service Code, are funded almost exclusively by corporations and insurance companies and routinely promote their benefactors' causes in court. As such, they turn the concept of "public interest" law on its head. While traditional public interest groups represent people or causes that would otherwise go unrepresented, PLF and similar organizations use tax-deductible contributions to champion the private interests of their already powerful, well-represented business sponsors.

The insurance and manufacturing industries are the driving force behind "civil justice reform" efforts. During the 1970s and 1980s, they engineered a massive campaign to limit businesses' legal liability for intentional or negligent wrongdoing resulting in injury or death. Arguing that the tort system (particularly personal injury law) impedes American competitiveness and economic prosperity, they continuously promoted their anti-liability message in an effort to curtail the remedies available to tort victims. They spent millions of dollars advertising their claims, lobbying state and federal legislators to enact substantial "reform" measures, and bankrolling legal scholarship and judicial seminars designed to "educate" the legal and judicial communities about the need for curtailing access to the courts.

Conservative foundations have focused their attention on more academic pursuits in an effort to build the intellectual foundation for a new legal vision. During the 1980s, they contributed millions of dollars to law schools for the study of law and economics, a legal theory employing microeconomic principles to explain and solve legal controversies. Though law and economics as a general theory is not inherently ideological, the animating principle underlying much of its scholarship is that a totally unregulated marketplace produces the most efficient -- hence just -- society. This view was shared by the movement's prominent founding fathers, most of whom adhered to "Chicago School" neoclassical economic models, and ideologically sympathetic benefactors whose generous support for the theory's development accelerated its rise and imbued it with seriousness, visibility, and institutionalized prestige. With money from the Olin foundation, for example, several of the most elite law schools in the country have funded faculty positions, created law and economics courses, supported student and faculty research projects, conducted workshops and seminars, and offered stipends and scholarships to students demonstrating significant interest in law and economics.

Educating judges is another critical element of the campaign. Several corporations and business-friendly foundations have invested hundreds of thousands of dollars in privately-run judicial seminars at which judges learn about areas of the law that are of primary concern to business. The most popular of these seminars is the annual "economics institute" for federal judges sponsored by George Mason University's Law and Economics Center, which is funded primarily by corporations and supportive foundations. Held in resort locations such as Marco Island, Florida, the institute is a two-week, all-expenses-paid

program designed to educate federal judges in the economic analysis of the law. Yale's civil liability conferences are additional examples of significant judicial education programs. Underwritten by Aetna Life and Casualty's corporate foundation, the programs bring together legal scholars, judges, and business leaders to examine current issues in the civil justice system. Judges are invited to attend the conferences free-of-charge.

Finally, the Federalist Society is a major beneficiary of the campaign's philanthropy. The legal advocacy organization was created by a handful of conservative law students in 1982 with critical seed money provided by the Institute for Educational Affairs and the Olin Foundation. The group grew to 10,000 members within a decade. Olin, Scaife, Bradley, and Smith Richardson all generously support the Society, utilizing their charitable giving to groom young lawyers to carry on the funders' crusade in decades to come.

The Concerns

Conservative foundations and business interests are certainly entitled to fund efforts to promote their political and ideological agendas. Indeed, some of the efforts discussed in *Justice for Sale* touch on important concerns that warrant an accurate and complete public airing. No one disputes, for example, that our civil justice system is far from perfect. Barriers to judicial access, delays, and other inefficiencies in the tort system often diminish the remedies available to tort victims or deter them from seeking relief altogether. By the same token, economic analysis can be a useful and appropriate tool for analyzing certain legal issues.

Nevertheless, the campaign to secure a reordering of American jurisprudence is not simply about making the law more efficient or more fair. At its core, it is an effort designed to make protection and enhancement of corporate profits and private wealth the cornerstones of our legal system. Some of its funders have purely self-interested motives, while others undoubtedly are inspired by their own ideological beliefs about the type of society we are or ought to be. Whatever the motives, however, the campaign's overall mission is to fundamentally alter the way justice is dispensed in our society. It is, in essence, an attempt to create a trickle-down system of justice: the immediate and primary beneficiaries will be those at the top of the pyramid, whose efforts to amass great corporate or personal wealth will be enhanced; the benefits of the restructured system, however, presumably will trickle down naturally to the rest of society. As the failed experiment in supply-side economics demonstrates, this is a dangerous vision that will assuredly exacerbate, rather than alleviate, the inequities already existing in the American legal system.

Of as much concern as the campaign's ultimate goal is its often misleading packaging. Through their reliance on such appealing terminology as "civil justice reform," "efficiency," and "free enterprise," for example, business and allied philanthropic leaders have attempted to frame issues in a manner that equates approval of an ideal -- such as the "free" market or legal reform -- with their own substantive agendas. The upshot has been a groundswell of

support for at best unproven positions that are far more complex than is evident from the simplistic messages employed in the public domain.

Also troubling is the manner in which some corporations, in pursuit of their own agendas, are skewing the debate about legal reform in ways that are neither accurate nor complete. The extensive campaign for "civil justice reform" is a prime example. Spending unparalleled resources on advertising and other public relations endeavors, business partisans have deluged the public with unsubstantiated -- some completely erroneous -- claims about a "litigation crisis" that allegedly threatens American competitiveness and economic prosperity. Through such distorted messages, they have generated enormous public sympathy for "reform" and then have exploited that sympathy in an attempt to convince judges, government policymakers, and legal scholars of the need for drastic liability-limiting measures. For the most part, their efforts do not encompass any kind of balanced debate, and the "reforms" they seek, while presumably protecting their profits, are generally unproven measures for making the legal system more efficient or equitable.

A related concern is the degree to which these same corporate interests are masking their own agendas by promoting them in the guise of "the public interest." Business-funded "public interest" law firms best exemplify this disturbing phenomenon. These litigation centers are funded almost entirely by corporations and insurance companies that are among the most well-represented litigants in our society. The centers almost always promote the general or specific interests of their business sponsors, but they do so with the cloak of "public interest," tax-exempt status under the IRS code. In essence, business sponsors of these groups are often receiving two bites of the litigation apple.

Finally, the sizable foundation funding dedicated to the study of law and economics on law school campuses and by the federal judiciary has generated support for a new legal theory that has major implications for society. While foundations on all sides of the ideological spectrum financially support academic research, this funding raises particular concern because the predominant law and economics school of thought -- and the most attractive one to business-friendly funders such as Olin -- advocates a way of looking at the law that exalts corporate profits and power over considerations of social welfare and equal justice. Yet, law and economics' most passionate advocates and funders market it as a neutral, objective analytic tool. This marketing has deflected concerns about the motives of law and economics' funders and the implications the theory has for our jurisprudential system. Consequently, critical examination of the type of programs being created and the courses offered has been largely nonexistent at law schools, which are all too eager to accept much needed private financial support.

Conclusion

Through the coordinated deployment of their unparalleled resources, the financiers of the campaign to rewrite American jurisprudence have made inroads in advancing their agenda before judges, lawyers, legal scholars, and government policymakers. In addition, by focusing extensively on law schools and the next generation of lawyers, they have sought to assure control over the future direction of the law.

As we enter a new era, it is important to understand the purposes, funding, and effects of the campaign of the last twenty years and, armed with that understanding, to move forward to rebuild society's commitment to the principles of social justice. *Justice for Sale* provides a glimpse at the motives and strategies that guided the campaign so that the legal community and the public can make their own informed judgments about it and the proper role of the law and legal system in today's society. The report is also intended to provoke debate about the ease with which major efforts at legal change are often undertaken with little notice or examination by the public or those within the legal community. We hope that by sparking fuller disclosure and discussion, *Justice for Sale* will instigate true reform of the legal system and a return to a process that seeks to secure equal justice for all.

1. See T. FERGUSON & J. ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 86-88 (1986).
2. *Id.* at 87 (quoting J. SALOMA, *OMINOUS POLITICS: THE NEW CONSERVATIVE LABYRINTH* 65-66 (1984)).
3. *Id.* at 88 (citing E. HERMAN, *CORPORATE CONTROL, CORPORATE POWER* 384-85 (1981) and T. EDSALL, *THE NEW POLITICS OF INEQUALITY* 116 (1984)).
4. Institute for Educational Affairs, *1989 ANNUAL REPORT*, at 3.
5. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1985 - July 1988, at 8.
6. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 47.
7. *Id.* at 12-41.

BUSINESS-SPONSORED "PUBLIC INTEREST" LAW FIRMS

Because of our special position, and because many of you often prefer to maintain a low profile where direct confrontation with government agencies is concerned, we are the logical spearhead to do the job.

Former Pacific Legal Foundation Chairman
Joseph Burris, speaking to corporate counsel in 1979

Introduction

In many respects, business-funded "public interest" law firms epitomize the campaign to reshape American jurisprudence. Occupying the campaign's courtroom battleground, they challenge environmental regulations, land use restrictions, rent control statutes, civil rights programs and the like, all in order to end governmental intervention in private enterprise and to elevate the status of property and commercial interests in the legal system. The law firms' philosophies and agendas are virtually indistinguishable from the profit-oriented motives of the business interests that provide almost all of their financial support. Nevertheless, because the groups purport to represent the public interest, they enjoy tax-exempt status under the Internal Revenue Code. Olin President William Simon recently praised one of the firms, the Atlantic Legal Foundation, as "a modern-day cavalry, riding to the rescue of free enterprise against a bureaucratic and regulatory system run amuck."¹

Operating as watchdogs and defenders of private and commercial interests, these organizations have redefined the term "public interest." Traditional public interest organizations represent indigents and other disadvantaged groups or causes who are otherwise denied a voice in our civil justice system. The business-oriented "public interest" law firms, however, routinely advance positions that benefit their corporate contributors, which are already well-represented and powerful players in the legal system. In doing so, they give their corporate sponsors two bites of the apple in the litigation process, the second one purchased with a tax-deductible contribution.

The Beginning: Creating a Legal Voice for Business

The concept of general, business-oriented legal centers originated in the early 1970s. Concerned that public support for private enterprise was eroding, the United States Chamber of Commerce in 1971 solicited Virginia attorney and future Supreme Court Justice Lewis Powell's advice about problems faced by the American business community.² In a

memorandum entitled "Attack of American Free Enterprise System," Powell warned of an assault by zealous environmentalists, consumer activists, and others who "propagandize against the system, seeking insidiously and constantly to sabotage it."³ Moreover, he lamented, businesses had done little to fight back, instead showing "appeasement, ineptitude and ignor[ance of] the problem."⁴ He argued that it was time "for the wisdom, ingenuity and resources of American business to be marshalled against those who would destroy it."⁵

A successful counterattack, Powell warned, would require broad-based and coordinated activism on campuses, in the media, in political arenas, and -- most importantly -- in the courts:

American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.

Other organizations and groups, recognizing this, have been far more astute in exploiting judicial action than American business.⁶

Powell recommended the creation of a business-sponsored legal center, one that would promote business interests and not hesitate to "attack the Naders ... and others who openly seek destruction of the system."⁷

The Powell memorandum was widely distributed among Chamber of Commerce members. Shortly thereafter, the California Chamber proposed the creation of a non-profit legal foundation

to meet the challenge of those who have gone to the courts to seek change in public policy in areas which vitally affect private, industrial, business and agricultural interests, and to successfully deter government agencies from the disruption of their daily functions.⁸

In 1973, the Pacific Legal Foundation (PLF) was established in Sacramento, California.

Pacific Legal Foundation

PLF is the oldest and largest of the business-sponsored "public interest" law firms. It was co-founded in 1973 by Roy Green and Ron Zumbrun, whose efforts to dismantle the California welfare system inspired them to start an organization that would go into court and represent the "true" public interest -- private enterprise, private property, and the individual

taxpayer.⁹ According to a 1976 *Barron's* article, PLF's founding mission was to "stem the rampage" of environmentalists and "clever poverty lawyers suing to obtain welfare checks for people regardless of need at the taxpayer's expense."¹⁰

Corporations provided critical financial support for the fledgling organization. The Chamber of Commerce was its original landlord, and Sacramento developer George McKeon initially paid its rent.¹¹ In addition, corporate leader J. Simon Fluor, of the Fluor Corporation, "almost single-handedly raised the seed money to get [PLF] launched."¹²

One of PLF's earliest and most consistent targets was the environmental movement. In a 1980 speech, PLF's managing attorney, Raymond Momboisse, dubbed environmentalists the "New Feudalists" who use land controls "to create a 'better society' for themselves." He praised those who exposed their "selfish, self-centered motivation ...; their ability to conceal their true aims in lofty sounding motives of public interest; their indifference to the injury they inflict on the masses of mankind; their ability to manipulate the law and the media; and, most of all, their power to inflict monumental harm on society"¹³

In its earliest cases, PLF supported the use of DDT and herbicides in national forests and construction of the Trident Missile base.¹⁴ Since then, the firm has litigated numerous environmental cases, consistently opposing the efforts of groups such as the Sierra Club and Natural Resources Defense Council. In 1989, PLF's Limited Government Project Coalition -- comprised of "national industry, agriculture, housing, and other business and community leaders"¹⁵ -- issued a report criticizing environmental regulations of wetlands, toxic waste, and private property.

Today, PLF is a major player in the "private property rights" movement, the ultimate goal of which is to overturn thousands of regulations enacted by public authorities to protect the environment, consumer health and safety, and the welfare of the general public. In support of this quest, PLF, along with other like-minded activists, has revived an argument long thought to be legally dead -- that government regulations which even minimally restrict the use of private property constitute "takings" of property "without just compensation," and thus violate the Fifth Amendment to the U.S. Constitution. The argument is asserted to challenge hundreds of governmental regulations and programs, including zoning restrictions, pollution control statutes, and rent control schemes. Though many of the cases seem innocuous if not appealing -- pitting a single hapless property holder against a recalcitrant and overreaching public authority -- their potential sweep is extremely broad, as is PLF's ultimate objective.

Initially, this resurrected takings position received little attention by courts, but in the 1980s, an increasingly conservative Supreme Court began to show support for it. For PLF, the issue reached a pinnacle in 1987 with the Supreme Court decision in *Nollan v. California Coastal Commission*.¹⁶ In *Nollan*, beachfront property owners sued the California Coastal Commission, claiming that the agency violated their rights under the takings clause when it refused to grant them permission to replace their small bungalow with a larger house unless

they agreed to provide public access across their property, which was located between two public beaches. The Coastal Commission's rationale for imposing the permit requirement was that the new larger house would block the public's view of the beach area and increase private use of the shorefront. Thus, the Commission concluded, the public might assume that the beachfront was no longer available for its use.¹⁷

Representing the property owners, PLF argued that the Commission's condition constituted a taking of private property without just compensation. In a landmark 5-4 decision, the Supreme Court agreed. Claiming there was "nothing" to the Commission's argument, the Court held that "if [the Commission] wants an easement across the Nollans' property, it must pay for it."¹⁸ In dissent, Justice Brennan lamented:

[t]he Court has ... struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given [the Nollans] a windfall at the expense of the public.¹⁹

PLF continues to be a significant force in the private property rights movement. Capitalizing on its *Nollan* success, PLF was an active player in the case of *Lucas v. South Carolina Coastal Council*,²⁰ which reached the Supreme Court last year. In *Lucas*, the Court held that the government must compensate individuals whenever regulations deprive them of all "economically beneficial or productive use of land" unless the regulation or another similarly prohibitive law was in place at the time the land was purchased.²¹ Although the decision was far less sweeping than property rights advocates hoped it would be, PLF and others have hailed it as a landmark case, marketing it as another significant achievement in their ongoing attempts to undermine hundreds of environmental regulations.

In addition to the environment and property rights, rent control and affirmative action will be primary areas of concentration for PLF in the 1990s. Arguing that rent control statutes are unconstitutional, PLF vows to help eradicate current rent control programs. "If one good 'takings' case reaches the Supreme Court, rent control, as it currently exists, will be dismantled," a recent PLF brochure boasted. "Under the Supreme Court decision in *Nollan*, it must be shown that rent control substantially advances a legitimate state interest. PLF contends that it does not."²²

PLF has indicated that litigation will remain its primary activity, as the firm believes its greatest impact can be made in the courts:

With the make-up of Congress and the power of the bureaucracy, PLF sees the judicial branch as the sole opportunity during the 1990's to restore and enhance economic freedoms in our country.²³

In the next few years, the firm's litigation portfolio is likely to touch on many issues of particular concern to business interests. Specifically, PLF has indicated it will look to the courts to "balance" environmental protection and economic development, protect individuals from the "overwhelming power of government," increase protection of private property rights, overturn "free enterprise-stifling regulations, such as rent control," and apply "fairness and balance to liability issues, thus helping cancel the so-called 'deep pockets' syndrome[.]"²⁴

Expanding the Network

In 1975, two years after PLF's creation, the National Legal Center for the Public Interest (NLCPI) was formed to "assist in the establishment of independent regional litigation foundations dedicated to a balanced view of the role of law in achieving economic and social progress."²⁵ In essence, its mission was to establish PLF-like centers throughout the country. Major corporate executives were recruited for NLCPI's board of directors. With Richard Scaife (through his various charitable interests) and J. Simon Fluor providing critical seed money, these executives set out to build a network of legal groups that would fight governmental regulations and promote the merits of an unfettered market in federal and state courts.²⁶

Over the next few years, NLCPI helped create seven additional business-oriented tax-exempt law firms: the Capital Legal Foundation in Washington, D.C.; the mid-Atlantic Legal Foundation in Philadelphia (now the Atlantic Legal Foundation); the Gulf and Great Plains Legal Foundation in Kansas City (now the Landmark Legal Foundation); the mid-America Legal Foundation in Chicago; the Mountain States Legal Foundation in Denver; the New England Legal Foundation in Boston; and the Southeastern Legal Foundation in Atlanta. With the exception of Capital Legal Foundation, all are still operating today.

Like PLF, these litigation centers have remained true to their founding principles, and they are remarkably similar to each other in philosophy and agenda. The New England Legal Foundation, for example, is dedicated "to encourag[ing] individual economic liberties, traditional property rights, balanced economic growth, and a properly limited government."²⁷ Mountain States Legal Foundation similarly is "dedicated to the values and concepts of individual economic freedom, the right to own property, and the free enterprise system,"²⁸ while the Atlantic Legal Foundation defends "private rights, free enterprise and sound economic development."²⁹

Challenging environmental regulations, opposing rent control statutes, and generally supporting pro-business positions remain the firms' core activities. Over the last several years, for example, the New England Legal Foundation has campaigned "to rein in" Cambridge, Massachusetts' rent control system, challenged environmental regulations on "takings" grounds, and fought state environmental clean-up efforts.³⁰ Similarly, Mountain

States Legal Foundation has recently

undertaken a bold program aimed at limiting unreasonable government regulation, targeting abuses of the Endangered Species Act and curtailing the confiscation of property by means of the erroneous use of the term *wetland*. Property rights and land access, environmentalist accountability, Superfund/hazardous waste programs -- each pose grave challenges -- threats which are being addressed through MSLF's defense of economic freedom.³¹

The Corporate Relationship

With their focus on challenges to government regulation, these "public interest" law firms have received substantial financial support from foundations such as Olin, Scaife, Bradley, and Smith Richardson. Between 1985 and 1990, Bradley contributed \$200,000 to Landmark Legal Foundation, \$150,000 to the National Legal Center for the Public Interest, \$225,000 to Pacific Legal Foundation (for study of the *Nollan* case), and \$50,000 to Capital Legal Foundation.³² In 1990 and 1991, Scaife donated \$200,000 to Atlantic Legal Foundation, \$125,000 to Landmark Legal Foundation, \$30,000 to the National Legal Center for the Public Interest, \$100,000 to New England Legal Foundation, \$175,000 to Pacific Legal Foundation, and \$100,000 to Southeastern Legal Foundation.³³ Over the same two years, Olin provided a total of \$98,000 to the firms,³⁴ and Smith Richardson contributed nearly \$300,000.³⁵

As much financial support as foundations give, however, corporations are the souls of these organizations -- both financially and managerially. So closely linked are business interests and these law firms that many in the legal community question the legitimacy of the latter's charitable, "public interest" status under section 501(c)(3) of the IRS Code -- a status that exempts them *and their funders' contributions* from federal tax.

The IRS has long recognized certain legal organizations as "charitable" under the Code. Before 1970, however, these organizations were generally limited to those representing "certain disadvantaged minorities -- in areas of poverty, racial discrimination, and civil liberties"³⁶ When groups representing more general "public interest" issues such as consumer protection and the environment began to increase in number, the IRS was forced to reconsider what representing the "public interest" really meant, and consequently which organizations should be entitled to charitable, 501(c)(3) status. In late 1970, the IRS ruled that serving the "public interest" means representing interests that are otherwise unrepresented in the legal process. In so ruling, it emphasized that the represented interest must be "wholly" public rather than private:

Under these guidelines an applicant can receive from the Service recognition of its charitable status not primarily because of the merit of designated social goals which it may seek to achieve through litigation but, rather, because in this way legal representation will be made available where it has been determined that there is a public, rather than a private interest to be served through litigation ... it is the availability of this type of representation that is being deemed charitable rather than the particular cause being serviced, *provided, of course, that the cause is wholly a public one, not tainted by any substantial private interest*³⁷

In 1984, Tulane Law Professor Oliver Houck studied PLF and the other firms to determine whether they in fact met the IRS's own definitions of charity and "public interest." Reviewing the IRS revenue rulings on the issue, Houck identified two overriding requirements a legal organization must satisfy to qualify for 501(c)(3) status: first, its activities must not be substantially directed to insiders; second, the cases it undertakes must "not be 'economically feasible' for the private bar."³⁸ Applying these two requirements to the organizational structure and caseload of the business-funded law firms, Houck sought to determine whether they in fact litigated on behalf of the "public interest." He found that they did not, concluding that qualifying the firms as public charities "stretches the concepts of charity and public interest practice beyond meaningful definition."³⁹

Reviewing each organization individually, Houck reached similar conclusions about each group's corporate connections. He found, for example, that corporations formed the bulk of the original funders and board members of the Atlantic (then still the mid-Atlantic) Legal Foundation (ALF). The Sun Company, Betz Laboratories, Ingersoll-Rand, the U.S. Steel Foundation, the Alcoa Foundation, the National Legal Center for the Public Interest, and the Scaife Foundation provided initial funding.⁴⁰ At the time of Houck's research, ALF's 16-member board of directors included 14 major corporate executives, and the regional legal counsel for Sears & Roebuck was ALF's president. In addition, Houck noted, of the 21 members of ALF's legal advisory and public affairs councils, 16 were legal counsel to corporations such as Rockwell International, Bethlehem Steel, Consolidated Natural Gas, and Merck & Co.⁴¹

Houck found that 25% of ALF's cases supported the position of electric utilities, providing insider benefit to several corporations represented on its boards.⁴² Other cases providing such benefits included one in which it filed an *amicus curiae* brief in a case against Eli Lilly & Co. and its anti-nausea pregnancy drug DES. In the brief, ALF argued against imposing market share liability on drug manufacturers, a position which indisputably benefitted ALF's numerous pharmaceutical supporters, including Eli Lilly, Warner-Lambert, Smith-Kline, and Merck & Co. (the latter three were all represented on ALF's legal advisory council at the time).⁴³ In addition, ALF "intervened directly" in a case on behalf of

American Lumber International. Although ALF ostensibly was acting to protect all "small business enterprises," it was, according to Houck, in essence "providing free legal representation for a private company."⁴⁴

These ties, and similar ones at the other law firms, led Houck to conclude that the firms should not qualify as "public interest" legal centers. They continue to hold their tax-exempt status under the Code, however, even though their corporate ties are as strong today as ever. In 1990, more than 70 corporations contributed to ALF, including pharmaceutical giant Pfizer, Inc., which was also represented on ALF's board and provided the organization with free space in its New York offices (as a contribution in kind). The same year, ALF fought to stop a state university in New York from using student fees to support NYPIRG, a consumer-watchdog group. In the opinion of NYPIRG officials, the group had angered Pfizer and other large pharmaceutical companies during the 1980s when it pushed extensively and successfully for wider availability of generic drugs.⁴⁵

Additionally, ALF made its representation of business interests explicit during the Supreme Court's 1989-90 term, when it filed an *amicus curiae* brief in *Pacific Mutual Life Insurance Company v. Haslip*. In that case, ALF's brief indicated that the firm was representing Bethlehem Steel Corporation and Hercules Incorporated, both of which were 1990 contributors to ALF.⁴⁶ *Haslip* challenged the constitutionality of punitive damages awards and was of enormous importance to the American business community. The ALF *amicus* brief supported the company's position that the punitive damages award at issue was unconstitutional.⁴⁷

New England Legal Foundation (NELF) is another prime example of the continued corporate dominance of business-sponsored "public interest" law firms, and the firms' corresponding continued representation of these business sponsors' interests in court. In 1991, NELF received 68% of its financial contributions from corporations (only 6% came from individuals), and received "the highest cash revenues in its history."⁴⁸ In addition, corporate executives -- including Marcia Hincks, vice president and senior counsel of insurance giant and "civil justice reform" leader Aetna Life & Casualty -- make up almost two-thirds of NELF's board of directors.⁴⁹ NELF was active on behalf of its business supporters before the Supreme Court this term (October 1992). In *Twin City Fire Ins. Co. v. Fortunato*, No. 92-728, which challenged a New Jersey insurance restriction, NELF filed an *amicus* brief for the Connecticut Business and Industry Association, urging the Court to grant a petition for certiorari and, ultimately, to invalidate the challenged regulation. NELF's brief argued that the regulation was an unlawful "taking" of private property. NELF's motion to file the *amicus* (which must accompany all such non-governmental requests) highlights the symbiotic relationship that exists between these law firms and their business backers. Describing their client, NELF's lawyers wrote:

The Connecticut Business and Industry Association ("CBIA") ... is a business association whose members reflect a broad cross section of businesses in Connecticut, the state with the highest

concentration of insurance underwriters in the nation CBIA is the largest business organization in Connecticut, having approximately 7,000 members that employ a total work force of over 700,000 employees.... Approximately eighteen of CBIA's members are insurance underwriters.

Amicus participation by CBIA was desirable, the NELF motion continued, to "offer the Court a disinterested analysis of the general significance of the issues raised by the petition"⁵⁰ Aetna is a member of CBIA (Aetna's President, Robert Compton, is a CBIA director) and Kenneth Decko, CBIA's president, serves on NELF's board of directors.⁵¹ Certiorari was denied on January 19, 1993.

NELF also recently began a network of "state advisory councils" in Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont and Maine. Corporate interests represent approximately two-thirds of each council. According to NELF:

[t]he councils have proven beneficial in opening new lines of communication between NELF and New England's legal and business communities. The timely sharing and exchanging of information on emerging public policy issues by members has become a valued resource in NELF's prospecting of issues and securing of cases. As a result, the state advisory council network has been the origin of several of NELF's leading 1991 cases.⁵²

When the last of the councils was established in Maine, NELF commented on the council's role in helping NELF promote the interests of the Maine business community:

The State of Maine has retained many of its traditional and burdensome regulatory concepts which were in vogue during the 1950's and 1960's. Couple these tiresome regulations with the state's adoption of new and aggressive land-use regulations and the business community is hard-pressed to experience economic development under the free market concept. NELF's ability to help the State of Maine strike an effective balance on behalf of its business community will be the critical agenda for this new Advisory Council.⁵³

Conclusion

The business-sponsored "public interest" law firms today, no less than twenty years ago, retain an intimate relationship with their business sponsors. The latter recognize that despite their own substantial financial resources and direct advocacy, pumping money into these litigation groups remains a profitable venture. Cloaked in the respectability that the term "public interest" confers, these organizations persistently lobby the judiciary on the evils of government and the merits of an unfettered market. Writing off donations to these "freedom fighters" as charitable contributions, businesses are able to influence those most able to effect their status in the legal system — judges.

1. *Atlantic Legal Foundation Report* (newsletter), Dec. 1988, at 1.
2. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1457 (July 1984).
3. Memorandum from Louis F. Powell, Jr. to Eugene B. Sydnor, Jr. (Aug. 23, 1971) reprinted in WASHINGTON REPORT at 2.
4. *Id.*
5. *Id.* at 3.
6. *Id.* at 6.
7. *Id.* at 7.
8. Houck, *supra* note 2, at 1459 (quoting Berthelsen, *Big Business, Ecologists Clash Nears*, Sacramento Bee, Mar. 4, 1973, at 1).
9. Thomas, *On the Right Side*, Barron's, Feb. 2, 1976, reprinted in Pacific Legal Foundation publication (undated and non-paginated).
10. *Id.*
11. Houck, *supra* note 2, at 1460.
12. *Id.* (quoting Wheaton, *The Pacific Legal Foundation, Public Interest for Profit*, Truth, May 9, 1983, at 1).
13. Remarks of Raymond M. Momboisse at the Second Annual National Land Use Conference, *Private Property -- Endangered Constitutional Right*, Pacific Legal Foundation (May, 1980).
14. Thomas, *supra* note 9.
15. Pacific Legal Foundation, *Limited Government Project Coalition Releases Environmental Recommendations* (press release) (Feb. 22, 1989).
16. 483 U.S. 825 (1987).
17. *Id.* at 850 (Brennan, J., dissenting).
18. *Id.* at 838, 842.
19. *Id.* at 842 (Brennan, J., dissenting).
20. ___ U.S. ___, 112 S. Ct. 2886 (1992).

21. *Id.* at 2893.
22. *Making a Difference!* (informational brochure) (undated).
23. *Id.*
24. *Id.*
25. Houck, *supra* note 2, at 1475 (quoting National Legal Center for Public Interest Articles of Incorporation).
26. *Id.* at 1475-76 (citations omitted).
27. New England Legal Foundation, 1991 ANNUAL REPORT, inside front cover.
28. Mountain States Legal Foundation, 1986-87 ANNUAL REPORT, at 23.
29. *Atlantic Legal Foundation Report* (newsletter), June 1992, at 4.
30. *See* New England Legal Foundation, 1991 ANNUAL REPORT, at 2-3.
31. Mountain States Legal Foundation, promotional brochure (undated).
32. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1985 - July 1988, at 20, 36, 44; Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 29, 35, 36.
33. Sarah Scaife Foundation, 1990 ANNUAL REPORT, at 11, 14-16; 1991 ANNUAL REPORT, at 19, 23-25.
34. John M. Olin Foundation, Inc., 1990 ANNUAL REPORT, at 7-23.
35. Smith Richardson Foundation, Inc., 1990 ANNUAL REPORT, at 4-7; 1991 ANNUAL REPORT, at 4-7.
36. Houck, *supra* note 2, at 1439.
37. *Id.* at 1448-49 (quoting *Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare, 91st Cong., 2d Sess. 66-67 (1970)* (testimony of Richard Thrower, IRS Commissioner)) (emphasis added).
38. *Id.* at 1454.
39. *Id.* at 1544.

40. *Id.* at 1495 (quoting *Defending Your Rights*, an undated pamphlet of Mid-Atlantic Legal Found., at 3).
41. *Id.* at 1495 & n.412.
42. *Id.* at 1495-96.
43. *Id.* at 1497.
44. *Id.* at 1497-98.
45. Maier, *Conservative Attack Dog bites a Liberal Watchdog*, *Newsday*, Sept. 15, 1991, at 69 (discussing whether Pfizer and other companies supported the lawsuit in order to slash NYPIRG's funding).
46. *See Atlantic Legal Foundation Report* (newsletter), Dec., 1990, at 3.
47. *See* Brief of *Amici Curiae* Bethlehem Steel Corp. and Hercules Inc., *Pacific Mutual Life Ins. Co. v. Haslip* (No. 89-1279).
48. New England Legal Foundation, 1991 ANNUAL REPORT, at 11.
49. *See id.* at 13-14.
50. Brief of *Amicus Curiae* Connecticut Business & Industry Assn. in Support of Petition for Writ of Certiorari (No. 92-728).
51. New England Legal Foundation, 1991 ANNUAL REPORT, at 13.
52. *Id.* at 15.
53. *the Docket* (New England Legal Foundation newsletter), Winter 1992, at 2.

LAW AND ECONOMICS

Introduction

Coinciding with the mid-1970s business revolt against governmental regulation was a growing interest in "law and economics," a theory that uses economic analysis to help resolve legal disputes. In the early 1960s, Ronald Coase, a future Nobel laureate in economics, and Guido Calabresi, now Dean of Yale Law School, wrote separately of the benefits of applying this approach in traditionally "noneconomic" areas of the law. Their work sparked academic interest in applying economic principles systematically to legal issues and helped launch the "law and economics" movement.

The movement particularly flourished at the University of Chicago, home of the "Chicago School" of economics, whose adherents are devotees of "free market" theory who reject governmental intervention in the marketplace. In 1972, Chicago Law Professor Richard Posner, now a federal judge on the United States Court of Appeals for the Seventh Circuit, published *Economic Analysis of Law*, a comprehensive treatise applying Chicago School economic principles and concepts to a host of legal issues. The book circulated widely throughout legal academia and became the bible of the law and economics movement.

The works by Posner and other Chicago Schoolers captured the attention of business leaders such as Olin Foundation President William Simon. They perceived widespread application of law and economics as leading to a more predictable legal environment for businesses, because of its anti-regulatory orientation and its focus on economic costs and benefits rather than "abstract" notions of right and wrong. As such, they believed it held real potential for promoting corporate interests and enhancing corporate profits. The Olin Foundation and others thereafter began to funnel large amounts of money to law schools and legal scholars to foster interest in the theory.

While law and economics as a general theory is not, at least in the opinion of many scholars, inherently ideological, it has developed academically with the distinctively pro-business slant of the Chicago School. This undoubtedly resulted in part from the early research of Posner and his colleagues. But the generous financial support of a handful of conservative foundations was highly influential in assuring that the Chicago School's philosophies shaped law and economics' academic rise. By 1981, for example, Richard Scaife had contributed (through his various charitable activities) roughly \$3 million (including invaluable seed money) to the Law and Economics Center, an organization created and headed by Chicago Schooler Henry Manne.¹

Following Scaife's lead, conservative foundations (and some corporations) have poured millions of dollars into law and economics, which today remains wedded in important respects to the basic tenets of the Chicago School. The money has supported law and economics professorships, courses, research positions, seminars, workshops, and

conferences. As a result, law and economics is now institutionalized at dozens of law schools. The impressive funding these programs receive helps young law professors launch promising careers and lures students to pursue education in the economic approach to legal decisionmaking.

Law and Economics Theory And Its Chicago School Antecedents

The most simplistic definition of law and economics is that it promotes the "use of economic theory to explain legal doctrine."² Based on the precept that human beings are rational actors intent on maximizing their own self-interest, law and economics scholars contend that legal rules can be analyzed and developed using microeconomic principles about how people act in the marketplace. At root, law and economics practitioners tend to view "rules of law like prices and legal actors like perfectly rational individuals."³ New York University Law Professor Lewis Kornhauser explains:

In deciding how to act, an individual considers all personal costs and benefits of each possible action. Thus, a liability rule, which imposes costs on individuals for various actions, may be seen as setting the price for engaging in those activities. For example, the legal rules of negligence set (at least part of) the cost of driving carelessly. People 'buy' carelessness by paying the 'price' set in part by liability rules just as they buy oranges by paying the market price.⁴

According to Chicago School theorists, the bedrock principle of law and economics is that the legal system can and should promote economic efficiency.⁵ They assert that the law's fundamental goal should be to maximize the wealth of society by promoting the efficient use of scarce resources. Chicago Schoolers bring to law and economics theory a marked disdain for governmental regulation, arguing that such intervention interferes with the natural tendency of resources to gravitate toward their most valuable uses in the market. They believe the law should mimic the market by seeking only "efficient" legal outcomes, those whose economic benefits outweigh their economic costs. Thus conceived, the law is not an exponent and promoter of constitutional or ethical tenets; rather, it is "a mere supplement to the market: a necessary but minor vehicle for perfecting market-like solutions."⁶

Among the law and economics scholars who hail from the Chicago School, Judge Posner has been the most prolific, well-known, and cited. One of his most significant contributions to the movement is his application of the legal theory to virtually all legal problems. Posner has, for example, used market-based analysis to suggest: (1) that selling babies on the open market can cure the shortage of infants available for adoption⁷ (*see box on next page*); (2) that a criminal will commit a crime if the benefits he will receive from it outweigh the costs he will incur (including the expected costs if he is caught);⁸ and (3) that

A FREE MARKET SOLUTION TO THE BABY SHORTAGE

In his textbook, *Economic Analysis of Law*, Richard Posner provides numerous examples of how his free market-based economic analysis of law works to promote "wealth maximization." One such example involves allowing the sale of babies on an open market. Posner explains the "efficiency" of open baby selling as follows:

"[T]he [baby] shortage appears to be an artifact of government regulation, in particular the uniform state policy forbidding the sale of babies. That there are many people who are capable of bearing children but who do not want to raise them, and many other people who cannot produce their own children but want to raise children in their homes, suggests the possibility of a thriving market in babies, especially since the costs of production by the natural parents are typically much lower than the value that many childless people attach to the possession of children. There is, in fact, a black market in babies, with prices as high as \$25,000 reported recently, but its necessarily clandestine mode of operation imposes heavy information costs on the market participants, as well as significant expected punishment costs on the middlemen (typically lawyers and obstetricians). The result is higher prices and smaller quantities sold than would be likely in a legal market....

"The objections to permitting babies to be sold are, first, that there is no assurance that the adoptive parents who are willing to pay the most money for a child will provide it with the best home. But willingness to pay is a generally reliable, although not infallible, index of value, and the parents who value a child the most are likely to give it the most care....

"Opponents of the market approach also argue that the rich would end up with all the babies, or at least all the good babies.... Such a result might of course be in the children's best interest—but is unlikely to materialize. Because people with high incomes tend to have high opportunity costs of time, the wealthy usually have smaller families than the poor, and permitting babies to be sold would not change this situation. Moreover, the total demand for children on the part of wealthy childless couples must be very small in relation to the supply of children, even high-quality children, that would be generated in a system where there were economic incentives to produce children for purchase by childless couples....

"A final objection to baby selling is that it involves the spectacle of 'trafficking' in human lives. This objection, the basis of which is unclear, may have been undermined by the recent changes in public policy concerning abortion. Is paying a pregnant woman to carry the child to term so offensive an alternative to the abortion of the foetus?"

prisoners should not be appointed counsel to pursue prison abuse cases except in the most extraordinary circumstances. Posner's rationale for the latter is that "a prisoner who has a good damages suit should be able to hire a competent lawyer and that by making the prisoner go this route we subject the probable merit of his case to the test of the market.... If [the prisoner] cannot retain a lawyer on a contingent fee basis the natural inference to draw is that he does not have a good case."⁹

Recent law and economics scholarship has become much more diverse, with more "liberal" scholars retreating somewhat from the Chicago Schoolers' total antipathy toward government intervention. Nonetheless, the Chicago School's emphasis on unregulated markets and "efficiency" remains highly influential. As Brooklyn Law Professor Gary Minda explains, even though later law and economics scholars

have sought to distance themselves from the conservative influence of their founding fathers, their underlying vocabulary and methodology remains heavily embedded within the vocabulary and theoretical perspective of the Chicago School. The right-wing tilt which observers attribute to the movement is probably the result of the continuing influence of the Chicago School's claims. By far, one of the most popular slogans of the movement continues to be that 'law is efficient.'¹⁰

Exactly how dominant the Chicago School will be in shaping future law and economics scholarship is unclear, although its influence is likely to be felt for decades. Several of its most prominent alumni -- Judges Posner and Frank Easterbrook, Law Dean Henry Manne, and Chicago Professor Richard Epstein, among others -- occupy important and prestigious positions within the legal establishment and remain among the theory's most ardent supporters and persistent proselytizers. Moreover, Manne's Law and Economics Center has provided law and economics training to over 40% of the federal judiciary and remains the largest private "educator" of federal judges.

Concerns

Conservatism's occasional extreme exaltation of economic markets represented another breach with the beliefs that guided America's successful years after 1945.... [T]he failing of the political right -- amply indulged in the 1980s and into the 1990s -- is to deify 'markets' and 'incentive' to the detriment of social and community interests. The more extreme mid-1980s examples, such as the Law and Economics movement, verged on self-caricature. One of its leaders, federal appeals court judge Richard A. Posner, proclaimed that the law should emphasize markets, efficiency and 'wealth-maximization,' not elusive concepts like society or fairness Other market conservatives, such as the editorial writers of the Wall Street Journal, thought that 'civil rights' should be increasingly defined economically, and President Reagan himself on July 3, 1987, proposed an Economic Bill of Rights In sharp contrast to Franklin D. Roosevelt, who promoted a different Four Freedoms, Reagan invoked commercial liberties.

Kevin Phillips
BOILING POINT, at 52-53

Former Supreme Court Justice Oliver Wendell Holmes, like many other jurists, strongly believed that economic considerations should play a role in legal decisionmaking. In fact, virtually all legal scholars and lawyers agree that, in appropriate cases, application of economic analysis is fair, just, and efficient. This report does not quarrel with that view, nor does it question the right of foundations or others to finance the study of law and economics. Nevertheless, there are aspects of the law and economics movement that raise significant concerns warranting further study and consideration.

As a substantive matter, law and economics theory, at least in its Chicago School incarnation, often appears simply not to mesh with mainstream American jurisprudence. In exhorting decisionmakers to rely on "economic efficiency" and "wealth maximization" as the conceptual touchstones for every adjudication, law and economics theorists associated with the Chicago School openly acknowledge their disdain of traditional notions of fairness and social justice. "Terms which have no content," the Wall Street Journal once quoted Judge Posner as saying.¹¹ It is precisely terms such as fairness and justice, however, that define us as a society and undergird our Constitution.

A spirited colloquy between former D.C. Circuit Judge Harold Leventhal (now deceased) and Armen Alchian, a "free market" economist and regular lecturer at Henry Manne's Law and Economics Center's "educational" seminars for federal judges, aptly captures this shortcoming in law and economics theory. At one of the Center's early training

sessions, Alchian was asked whether there are "ethics to competition." In response, he likened economics to biology in its ethical detachment. Alchian said: "[Economics] says only that there are certain kinds of behavior and that they have certain consequences, not always foreseeable. Economics doesn't tell you what is ethical." The answer prompted this rejoinder from Judge Leventhal

To explain economics and then withhold moral judgments seems to me to be wrong.... You leave a conflict between law and economics unresolved. The parallel with biology isn't fair. Biology doesn't purport to deal with human behavior, and economics does claim to explain such behavior. It deals not with cells or stones but with human beings, and human beings have moral components. Your philosophy doesn't accommodate those components.¹²

In related fashion, the Chicago School variant of law and economics has been criticized because of its idealized view of "the market." It rarely recognizes the market's failings or the necessity of government intervention to rectify them, concluding instead that the cures for societal problems and inequities is an unfettered "free market." Yet many examples drawn from our nation's history, chief among them our long civil rights struggle, belie this assumption and graphically illustrate the shortcomings of law and economics as an all-encompassing jurisprudential theory. As Judge Patricia Wald of the United States Court of Appeals for the District of Columbia has argued:

[E]conomic analysis is peculiarly unsuited to constitutional and statutory causes of action designed to protect people against racial, gender, or ethnic discrimination based solely on prejudices. While the marketplace may accept the validity of such prejudices, the legal system does not.¹³

Because of the strong ideological implications of law and economics, it is important that decisionmakers, law school communities, and the public at large recognize the enormity of the resources devoted to developing and spreading the theory and the effect it has on legal scholarship and education. Since 1987, the Olin Foundation alone has donated well over \$13 million to further law and economics study. There is no question that Olin's money and the generous contributions of other private foundations to the nation's most prestigious law schools accelerated the theory's growth, enhanced its stature, influenced curriculum decisions, and channeled educational and research opportunities of students, faculties and, to some extent, judges. Within a relatively short while, the money appeared to have a profound effect. For example, a 1986 Wall Street Journal article quotes a University of Virginia law professor as saying that "teaching there has changed in almost all aspects." The article continues:

In the late 1960s and the 1970s, for example, most basic property classes endorsed wide-ranging tenant rights to withhold rent when landlords failed to maintain certain conditions, says Prof. Kitch. Law and Economics has shifted attention to what he calls the costs of such tenant rights: the likelihood that landlords will either raise rents or abandon buildings.

Prof. William J. Carney, co-director of Emory University's Law and Economics programs, predicts that the movement will contribute to shaping 'a different kind of lawyer,' one he describes as more respectful of private arrangements and 'who doesn't assume that they need to be regulated.'¹⁴

The money has also shaped law school curriculums and legal scholarship. Elective courses in law and economics abound throughout academia and are mandatory requirements in some law schools. In addition, funding of law and economics scholarships and fellowships at several law schools is a potent lure attracting students to the field. In some of these schools, student grants are tied to their matriculation into specific law and economics courses. The huge coffers supporting law and economics research have also ensured that such scholarship constitutes a significant block of academic output. It is estimated, for example, that in recent years law and economics articles have constituted roughly 25% of the scholarship in the Yale, Harvard, Chicago, and Stanford law reviews.¹⁵

The vast funding that has flowed into the law and economics field has hardly been detached or disinterested. The thesis of much law and economics research, especially that generated by Chicago School adherents, resonates warmly in the business world and among those foundations that target some or all of their spending on achieving a more pro-business society and legal system. Dressed in the neutral and objective garb that academic research enjoys, the scholarship financed in this manner enjoys a stature and credibility that would not automatically attach to similar arguments were they made by business partisans before courts or legislatures. Generous support of academic forays in law and economics thus is an integral and strategic component of an overall campaign to secure a reshaped jurisdiction which accords heightened protection to commercial and private property interests.

Law and Economics In The Academy

Law and economics is a thriving business in law schools, due at least in part to the enormous sums conservative foundations have devoted to it. The Olin Foundation alone contributes millions of dollars a year to law and economics programs at law schools (it also supports similar programs at business schools and undergraduate institutions). Since the late 1980s, Olin has provided the University of Chicago School of Law with nearly \$2 million in law and economics money, Yale Law School \$1.5 million, and Stanford and Harvard Law Schools close to \$1 million each.

To date, Olin and other funders have concentrated their efforts on several "elite" law schools. Below is a summary of law and economics programs at some of these law schools, along with statistics about the financial support the programs receive. For each program, we examined how much money was being contributed, as well as whether that money was conditioned on any particular, i.e. "free market," perspective. Some professors we interviewed believed that Olin directed its money mostly to those with conservative viewpoints, although others indicated that liberal scholars were also funded. On the whole, however, the majority of recipients of law and economics money appear to be quite conservative.

YALE

Olin has been quite generous to Yale. Since 1988, it has awarded the school close to \$2 million for its law and economics program. The money has been distributed as follows:

- (1) \$588,256 - "To support the John M. Olin Program in Law and Economics under the direction of George L. Priest (three years, 1988-90)";
- (2) \$492,068 - "To support the John M. Olin Professorship held by George L. Priest (three years, 1989-92)";
- (3) \$481,000 - "To support the John M. Olin Program in Law and Economics (three years, 1989-91)";
- (4) \$313,514 - "To support the John M. Olin Program in Law and Economics (two years, 1992-93).¹⁶

George Priest, the John M. Olin Professor of Law and Economics and co-director of the Center for Studies in Law, Economics, and Public Policy, believes that Yale has the strongest law and economics program in the country.¹⁷ Olin money undoubtedly helps keep student interest in the legal theory flourishing. In 1990, students doing summer research for George Priest earned more than \$600 per week from the Olin program.¹⁸ That compared handsomely to the typical research assistant salary; currently, student researchers paid out of the general law school budget earn \$9 per hour, or \$360 for a 40-hour week.¹⁹

In 1988, the National Law Journal reported that the battle over the appointment of feminist Catharine MacKinnon to a visiting professorship "demonstrated the considerable power of conservative law-and-economics scholars."²⁰ Eventually, MacKinnon was invited, but according to the article the controversy left liberal faculty wondering whether Yale would "become like the University of Chicago Law School, where conservative law-and-economics professors have set the tone of the school."²¹

STANFORD

Stanford Law School is another favorite Olin beneficiary. The school received a three-year grant of \$870,733 in 1987 to establish and support the John M. Olin Program in Law and Economics.²² An additional \$513,673 was authorized for 1991-92.²³

The Olin program focuses on "furthering the development of the essential core of the law and economics movement -- the creation of new ideas and the transmittal of these ideas to students, policy makers, and legal practitioners."²⁴ According to its 1988-89 annual report, the program sponsors a variety of activities, including: (1) law and economics seminars, for which enrolled students must write a paper on the "application of economic analysis to a particular legal problem"; (2) a working paper and reprint series, which disseminates the results of faculty (and occasionally student) research in law and economics; (3) faculty and student research grants and fellowships; and (4) student prizes for the "most outstanding performance" in various law and economics classes. When Olin awarded the nearly million-dollar grant in 1987, Professor Mitchell Polinsky, a "pioneer" of Stanford's law and economics activities, stated that "[w]ith Olin's support, we clearly will continue to be one of the major players in the law and economics movement."²⁵

UNIVERSITY OF CHICAGO

The nucleus of the Chicago School of Economics, the University of Chicago has received tremendous financial support from Olin. The John M. Olin Center for Inquiry into the Theory and Practice of Democracy, for example, received \$2.6 million for 1989-93. The grant supports "seminars, publications and fellowships under the direction of Allan Bloom [now deceased] and Nathan Tarcov."²⁶ Other grantees include the school's Center for the Study of the Economy and the State, which received \$140,000 in 1990 for the "John M. Olin Fellowship Program under the direction of George Stigler,"²⁷ a Nobel laureate in economics who died in 1991.

Olin also generously supports Chicago's law and economics program. Between 1987 and 1991, the law school received \$1,686,000 from the foundation,²⁸ and has been authorized another \$731,000 for 1992-1994.²⁹ The Scaife and Bradley Foundations have richly supplemented the Olin funding, with Scaife donating \$250,000 in 1990 and 1991,³⁰ and Bradley contributing \$450,000 between 1985-1990. Bradley also gave \$325,000 for the Bradley Graduate and Post-Graduate Fellows in Law and \$35,000 to support a conference on economics and the law of contracts.³¹ The money funds a variety of activities, including faculty research, yearly student scholarships and graduate fellowships. According to program head Douglas Baird, the scholarships are offered to all students. Baird makes the final selection, choosing 9-10 students who excel academically and show an interest in law and economics. The students are not required to take any particular law and economics courses. Baird declined to disclose the exact amount each student receives, explaining that he normally does not give out such information.³² Others at Chicago surmise that the scholarships amount to as much as \$8,000 per student.

THE OLIN FOUNDATION AND LAW AND ECONOMICS

Shortly before his death in 1982, John Olin said "[m]y greatest ambition is to see free enterprise re-established in this country. Business and the public must be awakened to the creeping stranglehold that socialism has gained here since World War II." Olin, who made several fortunes in the chemical, paper, and firearm industries, devoted a great deal of his life to promoting that ambition. In 1953, he founded the John M. Olin Foundation, which provides "support for projects that reflect or are intended to strengthen the economic, political and cultural institutions upon which the American heritage of constitutional government and private enterprise is based."

Since its creation, the foundation has devoted millions to various conservative causes and scholars – in addition to law and economics. Its 1991 annual report, for example, lists grants to the Center for Individual Rights (\$100,000), the Federalist Society (90,000), the Heritage Foundation (\$275,000), and the Committee for Maintaining Editorial Diversity in America (\$125,000 for *The National Review* magazine). Intellectuals supported include one of the leaders of the neoconservative movement, Irving Kristol (\$125,400), and former Supreme Court nominee Robert Bork (\$150,880), both of whom are now at the American Enterprise Institute.

In a 1983 interview, Foundation President William Simon, former Treasury Secretary and major player in the leverage buy-out boom that engulfed Wall Street during the 1980s, explained the foundation's pro-active approach to funding law and economics. After John Olin's death, Simon said, the foundation's leaders conducted an "internal self-study on ... future directions" and decided not simply to "react to proposals ... but [to] use [their] imaginations to take new initiatives." One was funding "fellowships in law and economics at our best universities." The foundation "supported the work of many of the best scholars in the country, including" numerous conservative economists, and created Olin "Professorships, Fellowships, and Lecture Series at distinguished institutions such as Harvard, Yale," and others. It also "support[s] university research centers and 'think tanks,' specialized journals of opinion with national circulations; academic studies in the disciplines of economics, government, law and philosophy." (Foundation News, Sept./Oct. 1983, at 20).

Many law and economics scholars hail from Chicago, including Judge Posner and his Seventh Circuit colleague Frank Easterbrook. Professor Richard Epstein (who received \$46,000 in Olin money in 1989³³) is currently one of the most outspoken and influential. His scholarship, which champions the notion that economic rights should receive the same constitutional protection as other rights, has propelled him into a leadership position in libertarian circles. His book, *Takings, Private Property, and the Power of Eminent Domain*,

offers a vigorous constitutional defense of property rights, an area in which he would like to see "a level of judicial intervention far greater than we have now and indeed far greater than we have ever had."³⁴ If his wish were granted, much environmental regulation could be eviscerated. More recently, Professor Epstein published *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). In the book, Epstein argues that anti-discrimination laws are unconstitutional infringements on freedom of contract, the labor market, and private property rights. He explicitly advocates the repeal of Title VII, which prohibits employment discrimination based on race, sex, color, national origin, or religion.³⁵

HARVARD

Harvard Law School received a six-year grant of \$917,000 in 1985 "[t]o support the John M. Olin Program in Law and Economics under the direction of Steven Shavell."³⁶ An additional two-year grant of \$728,000 was awarded in 1991.³⁷ The program funds faculty research, student fellowships and assistantships, student prizes, a seminar series, curriculum development, and the "Harvard Law School Discussion Papers in Law and Economics."³⁸ Law and economics courses offered during the 1992-93 academic year included Economics and Public Policy (a first-year elective), Economic Analysis of Law, and two seminars.³⁹

At least one Harvard professor was incensed when the school initially agreed to accept Olin money because it came with strings attached. One of the things that particularly bothered him was that students would be paid to attend law and economics classes. After the money was accepted, however, the same professor, who describes himself as liberal, requested a summer research grant. Although the subject of the research was "squarely within the law and economics field," he was denied the grant because, he believes, he was not of the correct, i.e. conservative, philosophical orientation.

COLUMBIA

Olin gave Columbia Law School a three-year grant of \$520,165 in 1989 and a two-year grant of \$350,500 in 1992 to "support the John M. Olin Program in Law and Economics."⁴⁰ Increasingly, law and economics has become a significant part of the Columbia curriculum. First year students must take Law and Economics, a course that teaches students "basic economic concepts [that are] useful as tools for contemporary legal analysis."⁴¹ They also must take "Foundations of the Regulatory State," an introductory course in the "nature of the regulatory state" which explores such issues as the "problems in setting regulatory goals and establishing the costs and benefits from regulation."⁴² Various upper level elective courses in law and economics are also available.

Columbia also houses the Center for Law and Economics Studies. Founded in 1975, the Center "sponsors an extensive program of research, teaching, and public discussion of law and economic issues."⁴³ It supports faculty, student, and outside research projects. With "assistance from the John M. Olin Foundation," the Center awarded fellowships to 13 law students during the 1991-1992 academic year.⁴⁴ According to Professor Jeffrey Gordon,

co-director of the Center, the fellowships are open to all students and are awarded based on qualifications and interest in law and economics. He said the fellows generally receive about \$3,000 to \$5,000 for the year, in exchange for which they must attend the workshop series. They also receive course credit for the series if they write a paper, but they are not required to do so.⁴⁵

UNIVERSITY OF VIRGINIA

Olin has provided nearly \$1.5 million to Virginia for the John M. Olin Program in Law and Economics since 1987.⁴⁶ The funding supports research, lectures, academic conferences, faculty workshops, visiting fellows, lawyer instruction programs, the John M. Olin Scholarship for students, and various law and economics courses.

In 1985, the National Law Journal reported that about one-third of the Virginia faculty "take" the law and economics approach.⁴⁷ It stated that law and economics is so pervasive that controversy has arisen over faculty diversity, with many students and faculty believing that law and economics is too heavily represented. One faculty member, a law and economics supporter, stated that there is "a risk of a growing sameness [at the school,] partly due to the law-and-economics mode of inquiry. We don't have enough outrageous people."⁴⁸

Virginia also offers a master of laws in the judicial process for judges. The program, primarily for appellate judges, runs during two successive summer sessions of six weeks each. One of the courses usually given is Law and Economics, which covers basic economic principles and considers "questions relating to the appropriateness of the use of economic analysis in deciding cases."⁴⁹ The course made a particularly strong impression on at least one judge, who commented that

[t]he Graduate Program for Judges has given me an entirely new perspective on the law in general and the business of judging in particular. Before my participation in the program I had but the vaguest idea of law and economics. Never would I have guessed it is really a new way of looking at nearly every legal issue.⁵⁰

The estimated cost for each judge is just over \$9,000, and financial aid is generally "available to cover all program expenses for each participant whose expenses are not covered by other funding."⁵¹ Several states provide partial funding for their judges, and the Federal Judicial Center covers some of the expenses of federal judges. Other funding is provided by the Aetna Foundation, Inc., the Michie Company, the John M. Olin Program in Law and Economics at Virginia, the State Justice Institute, and the West Publishing Company.⁵²

GEORGE MASON

One of the law and economics movement's greatest successes to date is the George Mason University School of Law. In 1986, Henry G. Manne became dean of the law school and brought with him a specific mission: to transform it into a nationally known center for law and economics.⁵³ Manne's judicial philosophy exemplifies a strong anti-governmental fervor. He believes "the Constitution is a 'charter for limited government,'" and that "it is the role of the judiciary to prevent 'majoritarian meddling' that hinders individuals from engaging in 'mutually beneficial exchanges.'"⁵⁴

Manne's passion for law and economics goes back to his days as a student at the University of Chicago Law School. An adherent of the Chicago School of economics, he is a fierce advocate of an unregulated market. That advocacy causes him, for example, to deride insider trading laws, arguing that insider trading increases efficiency because it adjusts stock prices more quickly to true economic values.⁵⁵ He dismisses the argument that allowing "insiders" to trade on non-public information is unfair, stating that the SEC was "'not created to be a moral supervisor, but experts at economic regulation.'"⁵⁶

Manne's dramatic transformation of George Mason's law school was not without controversy. Within a year, he reportedly pressured at least two faculty members to renounce their tenure, and he hired 11 new professors (out of a total 25-member full-time faculty).⁵⁷ Some faculty members resented his actions, with one describing them as "'a hostile takeover of the law school.'"⁵⁸ Many students were also bitter. Some felt that their law school education was being radically altered, with too much emphasis being placed on law and economics. Others simply felt left out by Manne's unilateral decisions with respect to the curriculum.⁵⁹ Additional concerns have been expressed about the appropriateness of a publicly-funded law school being dominated by one particular ideology. Little of the controversy seems to faze the trustees of George Mason, however, who knew precisely what they were getting with Manne. Vice President J. Wade Gilley said "'[o]ne thing Virginia did not need was another run-of-the-mill law school We wanted a distinct edge.'"⁶⁰

George Mason is home to the Law and Economics Center, founded by Manne in 1974 at the University of Miami School of Law. The Center is dedicated to educating lawyers and judges in the economic analysis of the law. Each year, it holds "economics institutes" for judges and law professors (see *Judicial Seminars* section). The Center's 1991 income was close to \$1 million, nearly all of which came from corporations and foundations.⁶¹

The Olin, Sarah Scaife, Bradley, and Smith Richardson foundations all generously contribute to Manne's law and economics programs. Olin contributed \$300,000 in 1991 and 1992 "[t]o support teaching institutes in law and economics for federal judges, faculty research and workshops in law and economics."⁶² Scaife contributed \$100,000 in 1990 and \$110,000 in 1991,⁶³ and Bradley earmarked \$200,000 between 1988 and 1990 for the seminars for federal judges (as well as providing \$63,550 between 1985 and 1988 for the economics institutes for law professors).⁶⁴ Smith Richardson gave George Mason \$100,000 in

1991 -- \$50,000 to the law school for an antitrust seminar for federal judges and \$50,000 to the Department of Economics for a law and economics textbook -- and \$42,750 in 1990 for research on "proposed sentencing guidelines for corporations."⁶⁵

Manne and George Mason's singular focus on law and economics has generated much debate. Some critics wonder whether a state university should focus on particular philosophies such as law and economics. Despite the controversy, though, Manne has largely delivered on his promise to the trustees. He has lured many well-known scholars to teach at the law school, including former Supreme Court nominees Robert Bork and Douglas Ginsburg. In addition, applications have more than tripled since he arrived, and in 1991, US News and World Report ranked George Mason one of the top five "up and coming" law schools in the country.⁶⁶

UNIVERSITY OF PENNSYLVANIA

The Institute of Law and Economics at the University of Pennsylvania is a joint venture of the law school, Wharton Business School, and the Department of Economics in the School of Arts and Sciences. Its mission is to "promote a broader understanding of the economic analysis of legal issues by sponsoring cross-disciplinary research and sponsoring roundtables for business leaders, policymakers and judges."⁶⁷ Funding for the Institute comes from corporations, financial institutions, and foundations, including Bethlehem Steel Corporation, Exxon Education Foundation, Metropolitan Life Insurance Company, and the Pew Charitable Trusts.⁶⁸ Olin contributed a three-year grant of \$412,900 in 1986 and a \$125,000 grant in 1989.⁶⁹

The Institute's program has three primary aspects: support for faculty and student research on legal and economics issues; sponsorship of seminar and roundtable programs for academics, practitioners, and judges; and development of cross-disciplinary courses in the law school curriculum.⁷⁰ In 1991, the Institute and the law school co-hosted the "Program for Federal Bankruptcy Judges" for the Federal Judicial Center. Thirty judges attended the three-day seminar, at which law and economics classes were held each morning.⁷¹ Additionally, the Institute provides research fellowships to juris doctor and graduate candidates. The Norman and Rosita Winston Foundation have funded the fellowships since 1985.⁷²

DUKE

Duke has received at least \$487,500 "to support the John M. Olin Program in Law and Economics."⁷³ Among other things, the program funds a faculty seminar/workshop series and student fellowships. According to program co-director Jerome Culp, three students per year receive a one-year, full tuition fellowship from the program, which is funded solely by Olin. Culp picks the fellows and generally chooses students working for joint degrees in law and economics. The program also helps fund the *Law and Contemporary Problems Journal*, a faculty-run journal that publishes articles from various

conferences hosted at Duke each year. One of the annual conferences is in law and economics.⁷⁴

GEORGETOWN

Olin provided Georgetown University Law Center with a three-year, \$450,000 grant in 1989 and added an additional two-year, \$130,000 grant for 1992-93.⁷⁵ The initial grant included annual amounts allocated as follows: \$60,000 for juris doctor and graduate candidates enrolled in the law and economics seminar (10 students were intended to receive \$6,000 each); \$25,000 "to enrich the seminar on law and economics by providing travel expenses and honoraria for outside speakers"; and \$65,000 to "initiate conferences on issues in law and economics and public policy."⁷⁶

The grant for the law and economics seminar has raised particular questions about whether some of the Olin money to law schools is inappropriately being used to lure students into attending particular classes. Students are accepted into the seminar at the discretion of the professors. This format is different from that pertaining to most Georgetown seminars, in which enrollment is generally based on availability and seniority. Currently, selected students are awarded \$4,000 a year *and* receive course credit, a feature unlike that offered for any other course at Georgetown. Because of the stipends, students reportedly are expected to perform more than the normal amount of work for the seminar, which runs for the entire year rather than the typical one semester. Finally, a \$2,000 prize is awarded at graduation to the student writing the best course paper.

EXPANDING THE DOMAIN

With the financial support of conservative foundations and corporations, law and economics has filtered out into the entire legal academy. Of 130 law schools surveyed by the Alliance for Justice in 1990, at least 78 offered at least one law and economics course. Many also have seminars or workshops in law and economics. Responding to a question recently about the influence of law and economics in law schools, one professor noted that it is virtually unthinkable today to teach tort, contract, or property law without reference to economic analysis.

The Olin Foundation has shown a particular interest in expanding the movement. In January 1991, the Los Angeles Times reported that the Olin Foundation awarded \$364,700 "to expand the joint program in law and rational choice at the University of Southern California Law Center and Caltech."⁷⁷ In addition, Boalt Hall School of Law at the University of California, Berkeley, has received \$320,000 from Olin since 1987.⁷⁸

In 1991, Olin granted Fordham University School of Law \$154,400 for support of a "John M. Olin visiting professorship in law and economics and a lecture series."⁷⁹ The foundation also supports the Law and Economics Center at the University of Miami (where

Henry Manne began), which hosts annual 'economics institutes' for administrative law judges, and the University of Toronto Law School (\$478,000 since 1989).⁸⁰

In 1991, Olin provided start-up support to fund the establishment of a Law and Economics professional association. The American Law and Economics Association (ALEA) (with \$150,000 from Olin) held its first annual meeting in May 1991. Among the organization's purposes are promoting the development of law and economics world-wide, developing a newsletter, holding conferences, and "contribut[ing] to the education of judges, legislators, regulators, and attorneys on law and economics issues."⁸¹

More than 200 people, mostly law professors, from 44 law schools attended the ALEA two-day meeting. Several substantive sessions were conducted, as well as an organizational session at which George Priest of Yale was elected President, William Landes of the University of Chicago was selected President-elect, and Mitchell Polinsky of Stanford was chosen Secretary-Treasurer. In addition, a plenary session honored Guido Calabresi, Ronald Coase, Henry Manne, and Richard Posner for their "exceptional influence" on the law and economics field. Henry Manne talked at the plenary session about getting law and economics in more schools and his wish to see an Olin Chair in law and economics established at every major law school in the country. Judge Posner stressed the need to expand law and economics into non-economic areas of the law, such as criminal and constitutional law.

Despite Olin's efforts to expand the realm of law and economics study, the University of California at Los Angeles School of Law is one school that apparently will *not* be establishing an Olin professorship. In 1985, the school terminated its Olin program in law and economics after just one year. Among other things, the program funded student fellowships, but on the condition that the students take certain law and economics courses. According to *The Nation*, the law school's curriculum committee believed that Olin's largesse was "taking advantage of students' financial need to indoctrinate them with a particular ideology."⁸² One professor and committee member, Christine Littleton, indicated that if law and economics was worth studying, the school should develop its own program and then seek funding for it, rather than accepting the program offered by Olin and "hoping it would not 'seriously offend notions of academic value.'"⁸³

Conclusion

Some claim that law and economics has transformed the legal landscape and "profoundly affected the way we think and talk about the law."⁸⁴ This is true, they believe, not just with respect to economic-oriented areas of the law, such as antitrust, but to the entire corpus of law from family law to torts to criminal and constitutional law.⁸⁵ Others disagree, arguing that the influence of law and economics peaked in the early to mid-1980s; and has not had the broad application forecasted by its proponents. Professor Robert Ellickson

indicates that "[c]ompared to a decade ago, law and economics is less often seen as an intellectual tide with which every scholar must come to terms, but rather as a technical side-show that a young law professor may now spurn with little professional peril."⁸⁶

There is little question, however, that law and economics has already had a significant influence on legal thinking. How much influence it will have in the future remains to be seen. Nevertheless, it is quite clear that conservative foundations and corporations are interested in ensuring that law and economics remains at the forefront of legal debate and discourse, and that their efforts to build support for the Law and Economics movement have not wavered.

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2. Reidinger, *Civil War in the Ivy*, ABA JOURNAL, Nov. 1, 1986, at 65 (quoting Judge Richard Posner).
3. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353 (1984).
4. *Id.* at 353-54.
5. See Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 604-05 (1989).
6. *Id.* at 602 n.13.
7. R. POSNER, ECONOMIC ANALYSIS OF LAW 113-16 (2d ed. 1977) (footnotes and citations omitted).
8. *Id.* at 164.
9. *Merritt v. Faulkner*, 697 F.2d 761, 769-70 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983) (Posner, J., dissenting).
10. Minda, *supra* note 5, at 606 n.24.
11. Barrett, *A Movement Called 'Law and Economics' Sways Legal Circles*, The Wall Street Journal, Aug. 4, 1986, at 1.
12. Guzzardi, *Judges Discover the World of Economics*, FORTUNE, May 27, 1979, at 58.
13. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 LAW & CONTEMP. PROBS. 225, 234 (1987) (citation omitted).
14. Barrett, *supra* note 11, at 16.
15. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L.REV. 23, 28 (1989)
16. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 33.
17. Telephone interview with George Priest, John M. Olin Professor of Law and Economics (June 28, 1990).
18. Telephone interview with Stephen Wizner (April, 1993).
19. *Id.*

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21. *Id.*
22. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 23.
23. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 27.
24. John M. Olin Program in Law and Economics, Stanford Law School, 1988-89 ANNUAL REPORT, at 3.
25. *Campus Report*, Sept. 9, 1987, at 4.
26. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 29.
27. *Id.*
28. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 25.
29. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 29.
30. Sarah Scaife Foundation, 1990 ANNUAL REPORT, at 16.
31. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1985 - July 1988, 51; Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 41.
32. Telephone interview with Douglas Baird, Director of the University of Chicago Program in Law and Economics (Mar. 15, 1993).
33. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 25.
34. Moore, *Showdown on Property Rights*, *The National Journal*, Nov. 30, 1991, at 2940.
35. Schroeter, *The Mind and Faith of Professor Richard Epstein*, unpublished draft, at 3.
36. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 14.
37. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 17.
38. Harvard Law School Catalog, 1992-1993, at 34.
39. *Id.* at 71, 111, 136.
40. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 11.
41. Columbia Law School, 1992-93 Bulletin, at 27.

42. *Id.* at 28.
43. *Id.* at 45.
44. The Center for Law & Economic Studies, Columbia University School of Law, DIRECTOR'S ANNUAL REPORT OF ACTIVITIES, 1991-1992, at 1.
45. Telephone interview with Jeffrey Gordon, Co-director of the Center for Law and Economic Studies, Columbia University School of Law (March 12, 1993).
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48. *Id.* at 58.
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50. *Id.* at 31.
51. *Id.* at 11.
52. *Id.* at 30.
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55. *Boesky Boosters?* *The National Law Journal*, Feb. 16, 1987, at 31.
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59. *Id.*
60. *Id.*
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62. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 16.
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66. *In Law, the Case for Change*, U.S. News and World Report, Apr. 29, 1991, at 74.
67. Institute for Law and Economics, 1990-1991 ANNUAL REPORT, at 1.
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69. John M. Olin Foundation, Inc., 1988 ANNUAL REPORT, at 26.
70. Institute for Law and Economics, 1990-1991 ANNUAL REPORT, at 1.
71. *Id.* at 8.
72. *Id.* at 10.
73. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 13.
74. Telephone interview with Jerome Culp, Co-director of the John M. Olin Program in Law and Economics (March 23, 1993).
75. John M. Olin Foundation, Inc. 1991 ANNUAL REPORT, at 17.
76. Memorandum from Bob Pitofsky, Dean, Georgetown University Law Center to Faculty and Administrative Staff (Apr. 4, 1989) (discussing Olin Foundation grant).
77. The Los Angeles Times, Jan. 13, 1991, at 7.
78. John M. Olin Foundation, Inc., 1989 ANNUAL REPORT, at 24.
79. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 15.
80. *Id.* at 29, 31.
81. Letter from American Law and Economics Association to prospective members (Feb. 8, 1991).
82. Wiener, *Dollars for Neocon Scholars*, The Nation, Jan. 1, 1990, at 12-13.

83. *Id.* at 13.

84. McConnell, *The Counter-Revolution in Legal Thought*, Policy Review, Summer 1987, at 23.

85. *Id.*

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CIVIL JUSTICE "REFORM"

Introduction

Since the mid-1970s, major corporations and the insurance industry have engaged in a widespread public relations offensive against the civil justice system. Arguing that the number of lawsuits and amount of jury awards have skyrocketed in the last two decades, they have spent millions of dollars to convince the public, governmental policymakers, and legal scholars that the legal liability of businesses must be drastically curtailed. The ultimate audience for this message is judges and jurors -- those most directly responsible for determining the legal fate of corporate defendants. The campaign's pervasive message to these decisionmakers is that individuals who sue businesses are abusing the system simply to make a quick buck and are thereby threatening corporate profitability and American competitiveness.

The multi-faceted and lavishly-funded effort involves everything from advertising to legislative lobbying to the funding of legal "scholarship" and judicial "education" programs. Lobbyists implore state and federal legislators to pass access-limiting statutes, bumper stickers warn of "lawsuit abuse," and insurance companies promote a doomsday scenario, advertising that liability costs are forcing schools to shut down playgrounds and obstetricians to abandon their practices. More recently, corporate-funded academics have joined the fray, producing "scholarship" that advocates substantially limiting the ability of victims of wrongful conduct to obtain full compensation for their injuries.

The campaign has already scored successes. Since 1986, 42 states have enacted some form of legislation restricting the tort litigation process generally, and by 1987, every state had enacted some sort of reform related to medical malpractice litigation.¹ In addition, evidence suggests that much of the public has been taken in by the anti-liability rhetoric consistently and prominently advertised on television and radio. Most importantly, recent studies indicate that both judges and jurors have grown more sympathetic to corporate defendants in cases involving defective products.

The effort is far from over, however. Advertising and lobbying continue unabated in an effort to retain captured audiences and legislative gains. Simultaneously, corporate-funded "scholarship" warning about the evils of the litigation process is being produced and distributed to judges throughout the country to "educate" them about the impact of their decisions on the American economy. Marketed as objective research, this material is urging judges to reject legal doctrines that allegedly stifle technological innovation and corporate profitability. Most recently, the debate over comprehensive health care reform has included renewed cries for "reform" of the medical malpractice system.

The Issues

The tort system has been the biggest target of the "civil justice reform" movement. Tort law is the body of law that allows people to be made whole for injuries sustained at the hands of others. It does so through various liability doctrines, such as strict liability (assessing liability regardless of fault), intentional torts (covering deliberate acts of wrongdoing such as assault and battery), and negligence (imposing liability for acts not meeting a reasonable standard of care).

The tort system has at least two major purposes: to compensate for harm suffered and to deter future wrongdoing. Legal academics, policymakers, lawyers, advocacy groups, professional associations, and corporate interests have long debated tort law's proper role in advancing those goals. Over the last several decades, the debate has heated up considerably, with corporations and the insurance industry arguing that the tort system has spun out of control. They claim that the system invites frivolous lawsuits and leads to unpredictable and often exorbitant jury awards.

Consumer advocates strongly dispute these claims. They argue that tort law is critical to ensuring that individuals receive adequate compensation for injuries inflicted by others and that the providers of goods and services conduct their business in a safe manner. They note, for example, that litigation played a critical role in forcing the Ford Pinto (with its exploding gas tank) off the market and exposing the dangers posed by the anti-nausea drug DES to pregnant women and their offspring.

Business and insurance leaders have also begun promoting "reform" of judicial processes and remedies. Some of their proposals are, at least in theory, unobjectionable, even beneficial. They include increasing the use of alternative dispute resolution and amending the rules of civil procedure. Other measures are far more draconian, such as those calling for limiting damages available to victims, diminishing the role of juries in complex litigation, and barring or restricting certain types of evidence upon which tort plaintiffs must rely. It is the latter proposals, however, that have formed the crux of the "reform" campaign and have been most publicly promoted by industry leaders and sympathetic politicians. In 1991, for example, Vice President Dan Quayle's Council on Competitiveness released, amid much fanfare, its *Agenda for Civil Justice Reform in America*, a 50-proposal plan for "reforming" the litigation process. Some of the proposals are fairly innocuous (in fact, many are already in place in state and federal courtrooms), while others (such as loser-pays rules) mirror those which have been heavily pushed by business interests and are clearly aimed at reducing victim access to the courts. Using the report as a centerpiece, Quayle and President Bush made legal "reform" a major issue in the 1992 presidential campaign.

The Campaign

Advertising and Lobbying

The truth about the "litigation explosion" is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access.

Second Circuit Judge Jack Weinstein
137 U. PENN. L. REV. 1901, 1909 (1989)

Proponents of tort "reform" have long used advertising to convince the public and the legal community that the civil justice system needs change. In the mid-1980s, their efforts reached a pinnacle. To explain or justify the dramatic increases in insurance rates that occurred during that time, the insurance industry engaged in an unparalleled public relations effort to link the insurance crisis to an alleged "litigation explosion." In 1986 alone, the Insurance Information Institute, "a nonprofit educational and communications organization supported by the property/casualty industry," spent \$6.5 million to inform the American people about a "lawsuit crisis."² The campaign was designed to "reach 90 percent of U.S. adults through a combination of print and television."³ Press and speaker packets were distributed, bumper stickers were given out, and scores of ads were run in local newspapers.

Individual insurance companies also did their share, frequently castigating potential litigants for allegedly demanding a "risk-free" society (see box). In 1987, for example, Aetna Life and Casualty ran an ad in the Wall Street Journal warning that "America's civil liability system has gone berserk.... [It] is no longer fair. It's no longer efficient. And it's no longer predictable.... Americans must decide what kind of society they want in the years ahead. If we insist on living in a risk-free society, it's not just America's

A favorite put-down of the unreasoning public ... is the accusation that Americans wish to live in a 'risk-free' society The complaint is usually expressed by business leaders or conservative scholars who do not themselves live next door to a hazardous-waste dump or downwind from a factory spewing dangerous chemicals into the air. Their economic status and political power protect them from such risks, though they think others ought to be willing to accept them.

William Greider
WHO WILL TELL THE PEOPLE, at 54-55

insurance that will be canceled. Our hopes and dreams for ourselves, our children and our country will be canceled at the same time."⁴

Aetna also ran "Lawsuit Abuse: Enough is Enough" ads in the fall of 1988 in selected cities. One ad exhorted "[l]awsuit abuse is out of control.... We face the loss of skating rinks, parks, playgrounds and pools, simply out of fear of crippling lawsuits. What's happening to us? When did we start looking at every accident, every mistake as just another easy shot at a quick buck?"⁵

The corporate community also participated in this massive advertising effort. National Association of Manufacturers then-chairman Robert Dee, for example, publicly decried the litigation "crisis," claiming that:

Like a plague of locusts, U.S. lawyers with their clients have descended on America and are suing the country out of business. *Literally*. The number of product liability suits and the size of jury awards are soaring.... Meanwhile, everybody suffers.... Some companies have been sued into bankruptcy. Some avoid new product introductions when there's a ghost of liability risk. Countrywide, people are throwing up their hands in despair.⁶

The problem with these rhetoric-laden claims is that they apparently are largely false. In the late 1980s, Cornell Law Professors James Henderson and Theodore Eisenberg conducted a detailed study of product liability cases, concluding that the "pro-plaintiff trend" in such cases ebbed well before the alleged liability "crisis" began. They found that "current trends favor defendants" and concluded that "since the early to mid-1980s policymakers and industry leaders have been operating from questionable, if not false, premises."⁷

Marc Galanter of the University of Wisconsin Law School, an expert on the civil justice system, also disputes claims of a mid-1980s litigation explosion. Citing a National Center for State Court study of caseloads between 1978 and 1984, Galanter wrote that

[f]ilings of civil cases surged faster than population from 1978 to 1981, but from 1981 to 1984, when litigation explosion lore would lead us to expect an intensification of litigiousness, per capita rates of filing actually declined. During this period, filings in small claims courts--the courts most readily accessible to ordinary Americans--also fell. Tort filings rose steadily, but over the six-year period they grew by 9% while population grew by 8%. In the 1981-84 period, in only five of seventeen courts for which there was tort data did filings increase significantly more than the population, while in eight of these courts, tort filings actually decreased.⁸

A CREATIVE USE OF STATISTICS

In 1989 alone, 18 million new civil lawsuits were filed in state and federal courts. That's one lawsuit for every 10 adults.

This statistic was prominently displayed in a recent pamphlet GEICO sent to its automobile insurance policyholders. The pamphlet continued: "And it's getting worse. As you review your policy, you will note that the biggest premium increase is for bodily injury coverage. This is a direct result of the increasing frequency with which injury lawsuits are filed and the resulting expense of defending our policyholders."

Well, not exactly. Although the 18 million figure is roughly accurate, it is highly misleading. According to a National Center for State Courts study, 17.3 million new civil lawsuits were filed in state courts in 1989 (more than 98% of all U.S. litigation occurs in state courts). Only 447,374 of those cases, however, were tort cases -- including automobile collision cases that are most relevant to GEICO car insurance rates -- or less than three percent. Moreover, the study concluded that "tort filings are not increasing at a faster rate than other major categories of civil filings.... [T]he most dramatic increases in the civil caseload tended to be for real property rights cases or contract cases, not torts." (Figures from Conlin, *Litigation Explosion Disputed; Studies Refute the Critics*, *The National Law Journal*, July 29, 1991, at 26)

Evidence contradicting businesses' alarmist advertising also comes from the Rand Corporation's Institute for Civil Justice (ICJ), a think tank which performs policy analysis and research on the American civil justice system. In a 1991 study of accidental injury compensation in the United States, ICJ found that

[m]ost Americans who are injured in accidents do not turn to the liability system for compensation.... With the exception of motor vehicle accident victims, only a minority of injured persons, even among those who are quite seriously injured, ever consider claiming; of those, just a small fraction use legal claiming mechanisms. In this respect, Americans' behavior does not accord with the more extreme characterizations of litigiousness that have been put forward by some.⁹

The debate over punitive damages provides a striking example of how industry leaders have attempted to foster perceptions about the litigation system that are simply not substantiated by the evidence. Businesses and insurance companies have long attacked punitive damages as one of the most anti-competitive, innovation-damaging aspects of the civil justice system. Examples of their claims include:

- ▶ "American business faces a world of unended, unbounded threat of punitive damages ..." (Victor Schwartz, lobbyist for the Product Liability Alliance, a coalition of businesses and insurance companies pressing for a federal product liability bill);¹⁰ and
- ▶ "The punitive-damages system makes it too easy for lawyers to persuade a jury -- possessing little scientific background but believing in the possibility of a risk-free society -- to enrich plaintiffs and contingent-fee lawyers with multimillion-dollar windfalls." (Monsanto CEO Richard Mahoney)¹¹

The facts about punitive damages, however, flatly contradict these claims. In 1992, Suffolk University Law Professor Michael Rustad and Northeastern Professor Thomas Koenig completed a 25-year study of state and federal punitive damages awards in product liability cases, and found only 355 such awards for the entire period.¹² Moreover, the authors concluded, in the majority of cases in which punitive damages were awarded, they were significantly reduced on appeal or post-trial motions, or in settlement agreements. Indeed, 38% of plaintiffs to whom punitive damages were awarded never collected them.¹³ The General Accounting Office, the Rand Corporation's Institute for Civil Justice, and the American Bar Foundation, among others, have similarly found that punitive damages are rarely awarded.¹⁴

Advertising for civil justice "reform" continues today. In 1990, for example, the American Tort Reform Association (ATRA) began its own "lawsuit abuse" advertising operation. ATRA, a coalition of 400 business and insurance groups that lobbies for state liability-limiting legislation, put together a "communications kit [for] ... anyone who supports tort reform." The kit includes "Lawsuit Abuse! Guess Who Picks Up the Tab?" bumper stickers, five wall-size posters addressing "different problem[s] created by continued abuses in the civil justice system," a tort reform pamphlet, and "newspaper ad fillers." Additionally, on January 1, 1992, the American International Group, "the largest underwriter of commercial and industrial insurance in America," placed a two-page ad in *U.S. News & World Report* with the headline "Why reforming our liability system is essential if America is to succeed in overseas markets."¹⁵ And in early 1993, GEICO sent its policyholders a brochure that used statistical sleight of hand to blame the American legal system for increased automobile insurance premiums (*see box on previous page*).

In tandem with advertising, the business community has lobbied extensively for statutory restrictions on common law tort remedies, achieving at least partial success in almost every state. There are numerous organizations lobbying at the state and federal levels. ATRA, whose members include the Chemical Manufacturers Association, General Electric, the National Association of Manufacturers, and the Pharmaceutical Manufacturers Association is one of the largest. Besides advertising, some of ATRA's activities include publishing a newsletter, *The Reformer*, which details recent developments in tort "reform," and sponsoring letter-writing campaigns to sway lawmakers to enact "reform" legislation.

Other lobbying groups include the Product Liability Coordinating Committee (PLCC), an association of over 700,000 businesses and organizations formed to lobby for a federal product liability law.¹⁶ PLCC has been lobbying for more than a decade for the law, gaining additional support each year. Although it is believed President Clinton would oppose such a law, Congressional leaders plan to seek its passage again this year.¹⁷ PLCC lobbyist William Fay says that business groups will not abandon their pro-business "reform" efforts: "[w]e're still going full guns."¹⁸

Most recently, Citizens for Civil Justice (CCJ) was formed to promote the reform proposals contained in Vice President Quayle's *Agenda for Civil Justice Reform in America*. The group's membership list is dominated by corporate and insurance interests, including Aetna Life and Casualty, Allstate Insurance, ATRA, General Dynamics, the Insurance Information Institute, and Eli Lilly.¹⁹ Among the reforms CCJ supports are loser-pays rules, limiting expert witness testimony to "widely accepted" theories, and narrowing the availability of punitive damages.²⁰ Each of these proposals would further restrict the ability of plaintiffs to pursue tort claims and receive fair compensation for injuries suffered at the hands of others.

Scholarship

Experience has demonstrated that legislative campaigns for tort reform are much less cost effective than education of the judiciary.... Thus, continuation of research and the marketing of research results with the judiciary and the media is critical.

Remarks of Aetna Foundation's Robert Hill at Manhattan Institute workshop on tort reform (as summarized by Attorney Leonard Schroeter)

Legislative lobbying has been expensive and only partially successful to date, as evidenced by the failure of industry lobbyists to secure (as yet) passage of a federal product liability bill. Consequently, liability-limiting efforts have expanded in recent years. While political lobbying remains a significant activity, the "reform" campaign has begun to focus more directly on what is perceived to be a more responsive target: judges. Through the funding of academic workshops, conferences, seminars, and legal research, corporate support for ostensibly objective scholarship on the civil justice system has skyrocketed. The majority of this scholarship, frequently mailed unsolicited to judges, advocates changes to the litigation process that would further restrict access for individual plaintiffs and disadvantaged groups.

Law-Related Organizations

Law schools are frequent beneficiaries of corporate philanthropy that underwrites much of the academic civil justice "reform" research. The "Monsanto Lectures on Tort Law Reform and Jurisprudence" at the Valparaiso University School of Law, for example, are funded by the Monsanto Fund, which is

the eleemosynary arm of the Monsanto Company. The gift enables Valparaiso University to invite distinguished scholars and professionals critically to re-examine the deep theory of tort as it has evolved in this country and to explore avenues for its reform. This may include comment upon the contingent-fee practice, punitive damages, strict-liability concepts, the use and misuse of expert witnesses, the problem of causation in science and law, the role of insurance, the manner of bearing 'process costs,' even the jury system itself.²¹

Papers from each lecture are published in the Valparaiso Law Review.

The 1991 symposium, entitled "The Future of Tort Reform: A Reunion Symposium," included presentations from the first five series lecturers: George Priest, the John M. Olin Professor of Law and Economics at Yale Law School, Stanford Law Professor Robert Rabin, University of Toronto Law Professor Ernest Weinrib, Peter Huber of the Manhattan Institute, and University of Chicago Law School Professor Richard Epstein. Epstein, Huber, and Priest all discussed tort issues that are part of the corporate-funded "reform" campaign. Huber and Epstein discussed "problems" with current rules governing expert witness testimony, while Priest spoke more generally on "The Inevitability of Tort Reform," citing approvingly "helpful legislation in many states that resulted from vigorous efforts to reform the law during the late-1980s"²²

Other corporate-sponsored programs include Yale Law School's civil liability conferences, which are underwritten by Aetna Life and Casualty's corporate-funded foundation. Run by George Priest, the conferences bring together academics, judges, and practicing attorneys to discuss various issues related to the civil litigation process. (See *Judicial Seminars* section for a detailed discussion of the conferences).

Another legal institution receiving substantial corporate dollars for scholarly endeavors is the American Law Institute (ALI), an esteemed organization of 2,500 lawyers, judges, and legal scholars that has produced, among other things, the Uniform Commercial Code, the Model Penal Code, and the First and Second Restatements of Torts. In 1986, ALI commissioned a five-year study of the efficacy of the tort system. The resulting report, entitled "Reporters' Study on Enterprise Responsibility for Personal Injury," recommends extensive changes in the tort system, including placing limits on pain and suffering awards,

restricting the availability of punitive damages, and adopting a "regulatory compliance" tort defense for companies that rely on administrative agency rulings about the safety of their products.²³

The study has not been adopted by the entire ALI, in part because of heated criticism that it favors corporate defendants. Further criticism arose because of the study's funding,²⁴ which came largely from corporations and corporate foundations. The Aetna Foundation alone provided \$300,000, with the RJR-Nabisco Foundation adding \$200,000; together, these contributions accounted for half of the project's budget. Indeed, the study could not have been completed had it not been for corporate money, according to reporter Ken Jost. Jost said that the project was about to end because it had run out of money, but Richmond lawyer George Freeman stepped in and raised corporate funds to keep it alive.²⁵

Although the ALI has not formally adopted the study, it is likely to be quite influential. It is a 1,000-page, comprehensive treatise on the tort system, and its association with the venerable ALI provides added credibility. In a statement announcing its intention to revise the Restatement Second of Torts, the ALI commended the study and stated that it "should occupy a prominent place in the continuing discussion of tort liability."²⁶

Think Tanks

Much of the civil justice scholarship of the 1980s came from think tanks, particularly the Manhattan Institute for Policy Research, the Brookings Institution, and the Rand Corporation's Institute for Civil Justice. All three receive substantial corporate and insurance funding and only the Institute for Civil Justice--which goes to significant lengths to remain non-partisan--has escaped criticism that the scholarship it produced is biased in favor of its funders.

The Manhattan Institute for Policy Research - In addition to its civil justice system work, the Manhattan Institute is known for its tax policy and social welfare research. One of the Institute's best-known publications is George Gilder's *Wealth and Poverty*, a book the Institute describes as being "widely credited with laying the basis for what has since become known as supply-side economics."²⁷ Also written under the Institute's aegis was Charles Murray's *Losing Ground: American Social Policy, 1950-1980*, a scathing indictment of governmental social welfare programs.

The Manhattan Institute's civil justice research is conducted under the rubric of the Judicial Studies Program, headed by acting director and senior fellow Michael Horowitz. Horowitz formerly was General Counsel at the Office of Management and Budget under Ronald Reagan, as well as head of Reagan's Tort Policy Working Group. One of Horowitz's most publicized acts during his OMB tenure was his call for the abolition of the Legal Services Corporation, which funds legal services programs for the poor around the nation.

A MANHATTAN INSTITUTE WORKSHOP

A typical Manhattan Institute regional workshop was held July 11, 1990, in Seattle. Entitled *Liability Reform as a Public Policy Issue*, the Aetna-funded, free luncheon event was the fourth that week, with others held in New York City, Chicago, and San Francisco. Speakers included Peter Huber and Walter Olson from the Manhattan Institute, and Deborah Hensler from Rand's Institute for Civil Justice. Judges, business and insurance leaders, attorneys, and journalists were among the attendees. Attorney Leonard Schroeter gave the following account of the workshop's highlights:

"Most interesting were the preliminary comments of Aetna Foundation's Robert Hill, who was introduced by Manhattan Institute President William Hammett as the person who 'made all of this possible.' Hill talked about the critical need for civil justice "reform." Without it, he said, there is a real threat to the private insurance market and to our economic system. The insurance system, and thus our economy, demands predictability and efficiency. Its values are emphasized by those two words. If that were not so, the civil justice system would be a very expensive system which would prevent the appropriate profits upon which the industry depends. However, our civil justice system is not efficient.

"He explained that Aetna long ago realized that it was necessary to have empirical evidence to persuade the judiciary and community opinion leaders of this problem. Thus, the Aetna Foundation and similar groups have provided grants to Rand, the Manhattan Institute, and others, for research to secure such evidence. The research has led to solutions which are now being marketed so that an appropriate civil justice system can be created.

"Huber stressed that judicial lobbying is key. He depicted as 'junk science' anything that associated victim harm with toxic exposure or medical negligence. He urged that efforts be made to get a single Supreme Court decision interpreting the Federal Rules of Evidence as prohibiting 'unreliable' expert testimony from reaching juries. Reform is possible within the judiciary, he said, if there is strong focus on condemnation of this testimony. He felt that this 'education' effort should be a major focus of American industry."

The Judicial Studies Program publishes a periodic newsletter, *Civil Justice Memos*, as well as books and articles addressing various aspects of the liability system. It also hosts numerous seminars, conferences, and regional workshops (*see box above*) throughout the country each year. According to recent Manhattan Institute literature, the program regularly sends its mailings to thousands of judges.

Through the work of senior fellows Walter Olson and Peter Huber, the Manhattan Institute has gained national prominence in the debate over civil justice reform. Until recently, Olson directed the Judicial Studies Program, and formerly was an Associate Editor of the American Enterprise Institute's *Regulation* magazine and a member of the Reagan Administration's transition team. In 1991, Olson published *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, an acerbic attack on the liability system and lawyers. Olson claims that the current litigation process has produced an explosion of frivolous lawsuits that serve only to make greedy lawyers rich. It is full of rhetorical flourishes, such as the "rags-to-riches story of malpractice lawsuits," and "[l]itigation and its threat have begun to metastasize to virtually every sector of the economy,"²⁸ though it often lacks supporting data.

The book received plaudits from fellow conservatives. Former Supreme Court nominee Robert Bork, for example, described it as "a more comprehensive analysis of the [litigation] crisis than any other I have seen."²⁹ In less ideological circles, however, the book received much less glowing reviews. *Business Week* called it "one-sided and thinly supported,"³⁰ and the Rand Institute for Civil Justice's Deborah Hensler concluded that "Olson's book lacks both empirical evidence to support his factual assertions and analytic methods to support his casual inferences."³¹

Peter Huber's reform efforts have also been quite extensive. A former law clerk to Supreme Court Justice Sandra Day O'Connor, Huber holds a doctorate in mechanical engineering from the Massachusetts Institute of Technology and a Harvard University law degree. Under the auspices of the Manhattan Institute, he has written two books on the liability system: *Liability: The Legal Revolution and Its Consequences* and *Galileo's Revenge: Junk Science in the Courtroom*. Both books are extremely critical of the litigation process. *Liability* takes aim at tort law, claiming that it has had a devastating impact on corporate innovation. *Galileo's Revenge* is a similarly harsh attack on expert scientific testimony, which Huber asserts is often based upon what he calls "junk science." Promotional literature for the Institute now trumpets the Ninth Circuit's citation to *Galileo's Revenge* in its recent decision in *Daubert v. Merrell Dow Pharmaceuticals* (currently on review before the Supreme Court), which ruled inadmissible the plaintiffs' scientific evidence.

Like Olson's treatise, both of Huber's books received acclaim from like-minded conservatives. Indeed, in calling for major changes to the litigation process, the Quayle *Agenda for Civil Justice Reform in America* relied prominently on Huber's claim that the liability system generates \$80 billion in direct and \$300 billion in indirect costs per year.³² Huber, however, was apparently a bit cavalier in his use of both statistics, which have been disputed by several civil justice system experts. For example, Professor Marc Galanter of the University of Wisconsin Law School notes that the \$80 billion figure, which turns out to be merely an "estimate" cited by a corporate executive at a roundtable discussion on liability costs, is "considerably higher than the several systematic estimates of tort costs that were published in the years preceding the appearance of [Huber's] book."³³ The \$300 billion figure was then extrapolated from the questionable \$80 billion—in other words, Galanter

notes, "it is fair to say, [Huber] made it up."³⁴ Another expert, Mark Hager of American University, Washington School of Law, has called Huber's projection "a huge exaggeration."³⁵ Indeed, when questioned about the reliability of his figures, Huber himself reportedly said that the study he relied upon for his figures was "biased, no doubt" and that "nobody knows what the indirect cost is."³⁶

Heated criticism of other Huber civil justice work is growing as well. In 1991, he testified before a subcommittee of the Senate Committee on Commerce, Science and Transportation about the findings detailed in the Brookings Institution's *The Liability Maze*, a book he co-edited that examines the liability system's impact on safety and innovation in five corporate industries. After his testimony, the authors of one of the books' chapters wrote to Committee Chairman Senator Ernest Hollings "to clarify" misrepresentations made by Huber:

Mr. Huber mischaracterizes the issue of liability by setting up a false dichotomy between safety and innovation. He incorrectly describes the various contributions of the authors as necessarily taking one of two sides: either that liability promotes safety or that liability deters innovation. We and other authors found it impossible to address the problem in that fashion. To repeat our findings, the liability system can both promote safety and innovation of desirable products and discourage unsafe products though they may be innovative.³⁷

The authors further complained that Huber's "free-wheeling style of editorializing the work of others, while perhaps entertaining, is ill-founded."³⁸

Despite the criticisms, Huber, Olson, and the Manhattan Institute remain at the forefront of the "civil justice reform" movement. A recent *Washington Post* article dubbed the two men "the intellectual gurus of the tort-reform movement."³⁹ In 1991, the Institute accomplished a major feat when it lured Walter Cronkite, a veritable American institution, to narrate a video on tort "reform." Corporate and individual contributors provided \$200,000 for production of the video,⁴⁰ which begins with Cronkite describing the tort system this way: "If we were to ask the question, 'Does this country provide free nation-wide insurance coverage for accidents and injuries,' most Americans would probably answer 'no.' According to most legal experts, however, we do. It's called the tort liability system"⁴¹

Much of the publicity surrounding Huber and Olson is the result of sophisticated marketing by the Manhattan Institute. When published, their books were sent free-of-charge to state and federal appellate judges throughout the country. The Institute then used thank-you letters from appreciative judges in their promotional literature to prospective contributors.

The marketing of Huber has been especially successful. Syracuse law professor Peter Bell notes that "[m]emoranda from the Manhattan Institute discuss his extensive speaking tours, provide glowing reviews of his writings and even offer for sale audio tapes of Huber's performances on radio talk shows."⁴² A prime example of the savvy marketing occurred when Huber finished *The Legal Revolution*. Shortly before the book was published, Huber participated in the 1988 Yale conference on civil procedure. When the book subsequently came out, the Manhattan Institute sent complimentary copies to all of the Yale conference participants (including judges). The accompanying cover letter noted a number of upcoming events at which Huber would be appearing. One of those events was a "[d]inner for state and federal judges in Los Angeles."⁴³

Responses from some members of the judiciary to the Manhattan Institute's marketing efforts suggest that Huber and Olson's work is having an impact. In late 1991, several judges wrote to thank the Manhattan Institute for their complimentary copies of Olson's *The Litigation Explosion*. One, Judge B. Avant Edenfield, Chief Judge of the United States District Court for the Southern District of Georgia, noted that in order "[t]o inform" his court's Civil Justice Reform Committee "of the problems confronting" them, he had "instructed the Clerk of Court to purchase a copy of The Litigation Explosion for each [committee] member...."⁴⁴ (The Committee was created to develop and implement court reforms mandated by the Civil Justice Reform Act of 1990.)

Seventh Circuit Court of Appeals Judge Daniel Manion also expressed appreciation and praise for Olson's book, as well as for the overall work of both Olson and Peter Huber. Writing to Huber, Manion commented:

Many thanks for sending me a copy of Walter Olson's book, The Litigation Explosion. From where I sit, I see this as a very serious matter. Not only is the massive litigation doing great damage to our legal profession and to the court system, but it is also having a very negative impact on our society....

[C]ompanies are afraid to innovate or take risks, or make tough yet necessary economic decisions. For example, the [reduction-in-force] policies recently initiated at General Motors and IBM will no doubt generate numerous wrongful termination suits by those in the various "protected" classes.

Your message and that of Mr. Olson is very necessary. I hope it reaches the eyes and ears of the federal legislators who feel obligated to create new federal "solutions" for every interest group that wields power with money and votes. New laws that benefit a few generally create a much broader negative impact for everyone else.⁴⁵

During the 1980s, the Manhattan Institute's annual income grew from less than \$500,000 to over \$2 million.⁴⁶ Much of the money came from corporations and insurance

companies. In 1989, Aetna, Chase Manhattan Bank, Citicorp, and State Farm Insurance contributed at least \$50,000 each to the Institute.⁴⁷ Businesses providing between \$15,000 and \$50,000 included Bristol-Myers Squibb, Exxon, Pfizer, Philip Morris, Procter & Gamble, Prudential Insurance, RJR Nabisco, and United Parcel Service. More than 75 other companies also contributed, as did the Olin, Sarah Scaife, Smith Richardson, and Lynde and Harry Bradley foundations.⁴⁸

The close link between the Institute's reform agenda and its contributor list has not escaped notice. In 1990, a member of the judiciary expressed outrage when the Institute, through Peter Huber, sent him (and presumably other judges) a *Science* magazine article entitled "Innovation on Trial: Punitive Damages Versus New Products." The article was written by two Monsanto executives. In an accompanying memorandum, Huber stated that the two "are, of course, associated with a company that has a very direct stake in liability reform. But that association is also what enables [them] to discuss the problem with the insight of firsthand experience."⁴⁹ The judge (who wishes to remain anonymous) commented: "I am shocked and appalled at this veiled attempt by some public relations firm or organization obviously set up either by Monsanto Company, or corporations with similar bad records of outrageous conduct resulting in the deaths of thousands of people, to have a direct effect through total misrepresentation on punitive damages in the United States." Monsanto is a Manhattan Institute contributor.

The Brookings Institution - The Brookings Institution was "the first private, nonprofit organization devoted to analysis of significant public policy issues."⁵⁰ With 50 full-time scholars and a total staff of 200, the nearly 80-year-old think tank focuses on a wide variety of policy matters in the fields of economics, foreign policy, governmental studies, and the social sciences.⁵¹

Brookings is a venerable institution long known for its objective scholarship. In the area of civil justice research, however, it has generated heated criticism that it is increasingly biased in favor of its corporate contributors. Much of the research has been conducted by or under the direction of economist and lawyer Robert Litan, a senior fellow in Economic Studies and Director of the Center for Economic Progress and Employment. At least three major works on the liability system have been produced under the auspices of Brookings, all coordinated by Litan and heavily supported by corporations and insurance companies.

The first Brookings' publication was *Liability: Perspectives and Policy*, published in 1988. According to its editors, Litan and senior fellow Clifford Winston, the book is an effort to "evaluate" the debate about the "unprecedented growth in personal injury lawsuits" that has occurred in recent years.⁵² Contributing authors explore various "problem" areas of the tort system, including medical malpractice, environmental hazards, occupational hazards and illnesses, and product liability law. Among other things, the book concludes that the insurance industry should not be more stringently regulated and that tort law would be a more efficient deterrent if juries imposed a cost-benefit analysis to the behavior of both plaintiffs and defendants in determining who should "bear the loss of accidents."⁵³ The

AETNA AND "CIVIL JUSTICE REFORM"

No insurance company has contributed more significantly to the "civil justice reform" movement than Aetna Life and Casualty. Aetna established its own *Civil Justice Reform* program in the 1980s, and has since become a ubiquitous and powerful player in the movement. In addition to advertising and legislative lobbying, the company, through its corporate-funded foundation, has become a major financial backer of and participant in "scholarly" endeavors about the civil justice system, such as Yale's civil liability conferences and the Brookings Institution task force that produced *Justice For All*. A number of its representatives have testified before Congress and appeared at workshops and conferences on the civil justice system.

Aetna also generously supports the reform work of others. Between 1989 and 1991, it contributed more than \$1,500,000 for "reform of the civil justice system." Among its grantees were the American Law Institute (\$250,000), the Institute for Civil Justice (\$600,000), the Manhattan Institute (\$180,000), the State of Connecticut Judicial Department (\$45,000), and the University of Virginia Law School (\$60,000).

Aetna's contributions to civil justice "reform" efforts are not limited to groups with particular political or ideological viewpoints. The Institute for Civil Justice, for example, is widely respected as an independent organization that performs influential, objective research and policy analysis on civil justice issues. In supporting such groups, however, Aetna ensures itself a prominent and visible presence in the civil justice "reform" movement.

A. V. Starr Foundation, Dow Chemical Company, Bell Atlantic, the Alex C. Walker Foundation, and the Aetna Foundation (*see box above*) contributed to the project's funding.⁵⁴

Next came *Justice For All*, a 1989 report of a task force convened by the Brookings Institution and the Foundation for Change, an organization established by Senator Joseph Biden, Chairman of the Senate Judiciary Committee. The task force was charged with developing "a set of recommendations to alleviate the problems of excessive cost and delay" within the federal court system.⁵⁵ It was comprised of attorneys from diverse segments of the legal community, including defense and plaintiff attorneys, public interest lawyers, in-house corporate and insurance counsel, former judges, and law professors. The project was funded in part by the Aetna Foundation, the Association of Trial Lawyers of America, and Whittaker Corporation.⁵⁶ The task force made several recommendations for reducing costs and delays in the federal court system. Its report served as the precursor to the Civil Justice Reform Act of 1990.

In 1991, Brookings published *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, a book intended to "provide the first comprehensive look at the impacts of U.S. liability law on safety and innovation."⁵⁷ The book focuses on five sectors of the economy "where liability appears to have had the greatest effects: the automobile, chemical, general aviation, and pharmaceutical industries and the delivery of medical services."⁵⁸ Each industry was the focus of two chapters of the book, one on safety and one on innovation.

Authors included scientists, engineers, physicians, and attorneys. Litan and the Manhattan Institute's Peter Huber co-edited the book, which was funded by the A.V. Starr Foundation, the Sloan Foundation, and the Center for Economic Progress and Employment, whose contributors include American Express, AT&T, Chase Manhattan Bank, Cummins Engine, Ford Motor Company, Xerox, Aetna Foundation, Ford Foundation, General Electric Foundation, Prudential Foundation, and the Smith Richardson Foundation.⁵⁹

Two of the three Brookings' publications generated criticism that they were biased in favor of business interests, a criticism that echoes other opinions of creeping corporate bias in the organization's more recent work.⁶⁰ For example, Brookings held a special conference to discuss the authors' individual papers for *Liability: Perspectives and Policy*. In a subsequent letter to Litan, consumer advocate Ralph Nader lamented that none of the conference participants discussed the impact of tort law restrictions on the ability of victims to receive compensation for injuries from defective products. Moreover, Nader complained that both the conference and the book presented a one-sided view of the alleged liability crisis of the 1980s. He noted that there was no mention at the conference that many experts, and even some insurance industry executives, have concluded that the insurance crisis in the 1980s was the result of bad underwriting and management practices rather than a litigation explosion, as many corporate and insurance leaders alleged.⁶¹

The Liability Maze received even more heated criticism, in part because several of the authors have financial ties to the industry they studied. For instance, Robert Martin, who authored "General Aviation Manufacturing: An Industry Under Siege," does legal work for Beech Aircraft. Murray Mackay, author of the "Liability, Safety, and Innovation in the Automotive Industry" chapter, frequently serves as an expert witness (at a rate of \$300/hour) for automakers. And Louis Lasagna, who wrote the chapter entitled "The Chilling Effect of Product Liability on New Drug Development," heads a center funded primarily by pharmaceutical companies.⁶² Peter Huber's role as co-editor has also been questioned. Critics wonder why Brookings would ask such a partisan "reform" advocate to edit an ostensibly non-partisan book.⁶³

Most recently, in June 1992, Brookings co-sponsored with the American Bar Association Section of Litigation a symposium on the future of the civil jury system. The ABA decided to undertake the program because of the ongoing debate over the role and competence of the jury. Skepticism about recent Brookings output, however, led many plaintiff and consumer groups to express concern that the symposium would end up primarily

a forum for anti-jury rhetoric. Before it took place, therefore, consumer representatives organized to ensure that pro-jury sentiment was represented at both the symposium and each of its individual workshops. In the end, virtually unanimous pro-jury sentiment was expressed by participants.

Despite the success of the symposium, the subsequent report, written by Litan, has been criticized as downplaying the consensus about the jury system's strengths and highlighting its weaknesses. The Center for Study of Responsive Law, for example, asserted that the report "'inadequately reflect[ed] the powerful and uncompromising celebration of the civil jury system that surfaced at the Brookings June Conference.'"⁶⁴ Chicago-Kent College of Law Professor Richard Wright agreed, saying that "'[t]he Brookings report tremendously underplayed the unanimity of strong support for the system.'"⁶⁵ Aetna, the Ford Motor Company, and the General Electric Foundation contributed to the symposium's funding.⁶⁶

Effects

The "civil justice reform" movement appears to have substantially affected attitudes regarding the litigation process. Several scholars have written recently about the movement's effect on jurors and judges. University of Delaware sociologists Valerie Hans and William Lofquist, for example, conducted interviews with 141 jurors from 18 tort cases tried during a one-year period in a "state trial court of general jurisdiction." Each case involved at least one business or corporate party.⁶⁷ The authors found that corporate and insurance claims that juries contributed to the "litigation explosion" are greatly exaggerated. To the contrary, jurors actually were

suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. Despite insistence on product safety and high expectations of business, jurors were generally favorable toward business, skeptical more about the profit motives of individual plaintiffs than of business defendants, and committed to holding down awards.⁶⁸

Jurors also possessed strong, negative views about litigation. For example, roughly 80% of those interviewed believed that there are "too many frivolous lawsuits today" and that people "are too quick to sue, rather than trying to solve disputes in some way."⁶⁹

According to Hans and Lofquist, evidence suggests that the "concerted efforts of business and insurance companies to foster perceptions of a litigation explosion may have encouraged jurors to see plaintiffs critically."⁷⁰ At the very least, the "reform" propaganda reinforced jurors' anti-plaintiff sentiments. Hans and Lofquist believe that "litigation explosion rhetoric captured the public's (and jurors') attention because it resonated strongly with preexisting cultural standards of responsibility."⁷¹

Industry analysts have also found links between corporate anti-litigation efforts and juror perceptions. Dr. Sean Mooney, senior vice-president and economist for the Insurance Information Institute (an industry-funded trade association), has stated his view that the change in public opinion about the civil justice system is a direct result of tort "reform" measures. In a May 1992 monograph, Mooney concluded that while "the direct impact of statutory reform would appear to be small, the *indirect* effects of statutory tort reform were probably very significant."⁷² He explained:

There is another aspect to tort reform beyond the specific provisions of the law and that is the change in public opinion. Where tort reform measures have been enacted, rates for medical malpractice insurance have stabilized or decreased. The improvement is due not only to the enactment of the reforms themselves but also to the publicity surrounding passage of the reforms. The debate preceding enactment resulted in a greater awareness on the part of the public, and hence of juries and judges, of what the reforms were designed to correct.... Those that believed that some lawsuits were unjustified or that some victims were overcompensated carried their convictions to the courtroom.⁷³

At least some judges also appear to have been affected by the anti-litigation campaign. James Henderson made such a finding in his study on the decline of product liability cases (discussed above). He concludes that advertising has had a significant impact on the attitudes of judges. "A day doesn't go by without seeing advertisements in this area," he said. "And judges read the papers as well as citizens and legislat[ors]."⁷⁴ Henderson and co-author Theodore Eisenberg theorize that "[a]mong those apparently influenced [by the tort reform messages] were the appellate and district court judges who, at least since 1985, have increasingly favored defendants."⁷⁵

Dr. Mooney of the Insurance Information Institute apparently agrees. He concluded that "[s]tatutory tort reform, even when weak, plays a key role in influencing judicial thinking. It indicates clearly to judges that public sentiment favors a less expansive liability system."⁷⁶ He added that the

liability insurance crisis of 1985/86 served as a learning process for judges. Prior to 1985/86, many judges ... probably were not aware of the overall societal impact of their individual decisions.... The liability crisis dramatically showed judges that their individual decisions were leading to a general collapse of the entire liability system.⁷⁷

Perhaps the most direct evidence of the campaign's effect, however, comes from the Supreme Court. This (1992/93) term, the Court has agreed to decide at least two cases

involving issues that have long been part of the corporate drive for "civil justice reform." In *TXO Production Corp. v. Alliance Resources, Inc.*, the Court is considering whether the Constitution limits the amount of punitive damages that can be awarded in civil cases. Although punitive damages are awarded only in cases of egregious, willful misconduct, frequent tort defendants, including insurers and corporations, have continuously sought to limit their exposure to them. Several corporate and insurance groups filed *amicus curiae* briefs in the case, including American Council of Life Insurance, American Tort Reform Association, Business Council of Alabama, Arthur Andersen, Phillips Petroleum, Washington Legal Foundation, Center for Claims Resolution, American Automobile Manufacturers Association, Securities Industries Association, Product Liability Advisory Council, Continental Casualty Company, and CBS, Inc.⁷⁸

The other case before the Supreme Court, *Daubert v. Merrell Dow Pharmaceuticals*, involves the issue of so-called "junk science," the term Peter Huber coined for science that has not been "widely" accepted within the scientific community. Indeed, Huber argues with other industry-backed activists that juries are incapable of determining the reliability of most scientific expert testimony. Thus, he maintains, scientific testimony that has not been accepted by a majority of a potential expert's peers should be excluded in legal disputes. The Court's acceptance of this argument would potentially spell a significant retrenchment of the role of juries in complex civil litigation and severely hamper plaintiffs' efforts to present evidence and recover damages in toxic tort and other cases involving consumer health and safety. Corporations and industry-affiliated organizations filing *amicus* briefs in *Daubert* included Washington Legal Foundation, United States Chamber of Commerce, American Tort Reform Association, Pharmaceutical Manufacturers Association, American Insurance Association, American Medical Association, Defense Research Institute, and Product Liability Advisory Council.⁷⁹

TXO and *Daubert* were argued at the end of March, 1993. Decisions in both cases are expected by the end of the Court's 1992-93 term.

Conclusion

The apparent success of the "civil justice reform" movement is undoubtedly due in part to the unparalleled financial resources devoted to it. The business, professional association, and insurance money fueling the campaign dwarfs resources available for individuals and groups with opposing viewpoints. In a 1992 law review article on judicially-initiated changes in product liability law, George Washington University Law Professor Teresa Schwartz noted that business interests have been extremely adept at funding "studies of the [product liability] system that support their views and [getting] the results of their studies into the news media, even getting them characterized in the media as critical of the tort system when the results are, in fact, less than clear."⁸⁰ Public interest groups and legal scholars who question the anti-tort cries cannot match the financial resources of corporate

America, she added, and thus "have not been able to capture the public's attention to the same extent as the business community has."⁸¹

Given the enormous return on its investment, the business community will likely continue to devote substantial funds to the "reform" movement in the future. The Insurance Information Institute's Dr. Mooney noted the need for his corporate colleagues to continue its opinion-shaping campaign:

Trends in paid claims are influenced by developments in liability law. As liability law was expanded in the 1970s and 1980s, liability claims saw explosive growth. As liability law was constrained in the latter half of the 1980s, the liability insurance system stabilized. A common theme of both periods is the influence of public and judicial opinion on the system. Without continued pressure from the public and the judiciary to contain liability, the system may again explode.⁸²

Though powerful allies like George Bush and Dan Quayle no longer occupy the White House, the business community is unlikely to abandon its anti-litigation campaign now. The only question is how much further they will go to dismantle an already beleaguered civil justice system.

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JUDICIAL SEMINARS

Business must accept -- indeed, embrace -- the fact that the Judiciary must be lobbied as intensively as the Executive or the Legislature if business interests are to be given fair consideration in the adjudicative process.

Leslie Cheek, Senior Vice-President
Crum & Forster Insurance
Liability in the 1990's: A Risk-Taker's Perspective

Introduction

Educational programs for judges have mushroomed during the last few decades. Today, numerous public and private organizations sponsor seminars, workshops, or conferences specifically designed to enhance the knowledge of judges in particular areas of the law. The sponsoring groups run the gamut from the Federal Judicial Center, the governmental agency officially responsible for the continuing education of federal judges, to law schools, foundations, and advocacy organizations.

Corporate and foundation officials have capitalized on the growth of these programs. A review of the 1989 and 1990 federal judicial disclosure forms revealed that two of the more popular seminars for judges involve law and economics and "civil justice reform." Run by the Law and Economics Center at George Mason University School of Law and Yale Law School (respectively), and underwritten by corporations and like-minded foundations, these programs are offered completely free-of-charge -- the sponsors cover all travel, lodging, and meal expenses for the most powerful players in the legal system -- judges.

Members of the judiciary are more eager than ever to learn about increasingly complex areas of the law. Thus, all-expenses-paid programs -- which eliminate the need for judges to procure their own funding or undergo the bureaucratic red-tape of getting approval to attend -- can be particularly alluring.

All privately-run judicial education programs raise concern over program bias. Ideology can easily, and often does, penetrate the content and shape of such programs, whether intentionally or not. What may appear in theory to be objective and balanced "educational" offerings may often in actuality be closer to partisan lobbying opportunities. The judiciary's unique role in our society demands careful line-drawing between the two. When corporate sponsorship is involved, such line-drawing is especially important, because corporations are frequent litigants and thus have a significant financial stake in the judiciary's overall approach to legal decisionmaking.

Economics Institutes For Federal Judges

The Law and Economics Center at George Mason University School of Law (GMU) is dedicated to teaching the economic analysis of law to lawyers and judges. It was founded by Henry Manne in 1974 at the University of Miami School of Law, where he was then a professor. After a brief stop at Emory University, Manne brought the Center to Virginia in 1986, when he became dean of GMU's Law School. Manne is a passionate adherent of the Chicago School of economics and has transformed George Mason into a bastion of law and economics thinking.

Manne recognized early the importance of educating the judiciary in law and economics in order to make the theory the pillar of legal decisionmaking. Thus, in 1976 Manne's Center began hosting annual "economics institutes" for federal judges. Though it also runs "law institutes" for economists and "economics seminars" for law professors (who, the Center pointedly notes, "in turn have educated a whole new generation of lawyers"), federal judges remain the Center's most important audience. An appeal to funders included in the Center's 1990 annual report explicitly articulates the rationale for this focus on the judiciary:

Changes in the federal bench and the issues it confronts create a constant demand for our programs. An investment in the Law and Economics Center ensures that economic analysis remains an integral part of legal decisionmaking.¹

According to the Center's 1991 report, 376 judges had been schooled in economic theory through the Center's programs as of the end of 1991.² This number, though cumulative, represents approximately 40% of the current federal judiciary. (*See Appendix A* for a cumulative list of participants of the first through seventeenth basic "economics institutes.")

Although closely affiliated with GMU, the Law and Economics Center is run independently and is supported entirely by private donations.³ Corporate interests provide a significant share of the Center's funding. In 1991, for example, when the Center spent \$380,000 in "direct" expenses for federal judges' seminars, 31% of the Center's total income of \$967,917 came from corporate contributors. These donors included corporate giants Exxon, General Motors, Bethlehem Steel, ITT, and Pfizer, Inc., the General Electric and Mobil Foundations, and the Monsanto Fund.⁴ Most of the remainder of the Center's 1991 budget (65%) came from independent foundations, including Olin, Bradley, and Scaife, which have been key players in efforts to mold a jurisprudence more favorable to business interests.⁵

The Center's basic "economics institute" for federal judges is held once a year, spans a two-week period, and is designed to familiarize participants with the fundamental tools of microeconomic theory.⁶ Judges are instructed in such matters as "Prices, Markets,

Information Costs," "How Competitive Markets Work," "Statistical Inference," "The Modern Corporation," "Intractable Questions in Economics," and the like.⁷ Classes are held six mornings per week, with some afternoon and evening classes as well. Interchange between the judges and the faculty members is strongly encouraged; thus, all meals are taken as a group.⁸ Nineteen judges attended the 1991 basic seminar, which cost the Center \$106,356.⁹

The Center also offers several advanced economics courses for judges. In 1991, it conducted "The Economics of Risk, Injury, and Liability" and "Quantitative Methods," which 21 and 13 judges attended respectively.¹⁰ In addition, the Center augmented its traditional economics fare with the "Basic Science and Public Health" seminar co-sponsored by the Federal Judicial Center. Although the course was largely devoted to scientific principles (the topic of one lecture was A Historical Review of Physics), several legal issues were explored. One lecture, for example, was devoted to "mainstream" versus "junk" science, a topic receiving much attention recently from civil justice "reform" activists, such as the Manhattan Institute's Peter Huber, who seek to limit the use of expert testimony in court.¹¹ Other law-related lectures included Evaluating Expert Testimony by Scientists and Reasonable Risk Policy/Cost-Benefit Analysis, which was taught by tort "reform" proponent Professor Kip Viscusi of Duke University's Department of Economics.¹²

The Center's programs for judges are often held at resort locations. While housed at the University of Miami, for example, the Center frequently conducted its seminars in Key Biscayne, Florida. In 1991, the basic economics institute was held in Tucson, Arizona, the two advanced economics courses in Marco Island, Florida, and the science course in Naples, Florida.¹³ Hosting the seminars in such surroundings is expensive. According to 1990 judicial disclosure forms, the Law and Economics Center reimbursed several judges more than \$3,500 each for their seminar expenses. (Most judges did not list the amount of reimbursement, and some who were listed in the Law and Economics Center's 1990 annual report as participants of at least one seminar did not report any expense reimbursement.)

Whether the resort locations help in enticing judges to take courses is impossible to assess, but the programs are apparently quite popular, according to the glowing comments recited in the Center's promotional literature. One judge stated, "I am a great fan of [the] programs. I have urged all of our new judges to apply. Indeed, these courses have been most helpful to me in a number of cases that I have tried."¹⁴ Another added that "[t]he Center makes an important contribution to the competence of the whole judiciary through its programs."¹⁵ Still another was even more pointed about the Center's influence: "As a result of better understanding the concept of marginal costs," he said, "I have recently set aside a \$15 million anti-trust verdict."¹⁶

Critics long ago decried what they viewed as an exceptional bias in the Center's seminars toward advancing the financial interests of the Center's corporate funders. Nonetheless, the programs have received surprisingly little official scrutiny. In 1980, the Institute for Public Representation (IPR), a public interest clinical program at Georgetown

University Law Center, submitted a petition to the Judicial Conference of the United States regarding privately-sponsored judicial education programs. The petition singled out the Center's economics seminars, explaining that the Center, Henry Manne, and the majority of its lecturers "are committed to the view that the 'free market' should be left unregulated and that governmental intervention in the economy is rarely, if ever, justified."¹⁷ Moreover, as the petition pointed out, the legal and theoretical views dominating the seminars would, if adopted by judges, greatly benefit the Center's corporate sponsors.¹⁸

Citing several canons of the Code of Judicial Conduct, the IPR petition identified a number of ethical concerns raised by the law and economics seminars:

- ▶ whether the integrity and independence of the judiciary are compromised by permitting frequent litigants in federal courts to finance judicial education programs (Canon 1);
- ▶ whether attending opulent programs funded by potential (or actual) litigants creates an appearance of impropriety for judges (Canon 2);
- ▶ whether attending judges convey the impression that Center contributors are in a special position to influence them (Canon 2B); and,
- ▶ whether the value of the course (IPR estimated the last-held seminar as costing the Center \$5,470 per judge¹⁹) constituted a prohibited "gift" (Canon 5C(4)).²⁰

IPR's petition was referred to the Judicial Conference's Advisory Committee on Codes of Conduct, which declined to investigate the concerns raised. In response, Advisory Committee Chairman Judge Howard Markey wrote that "[t]he requested investigation of a private educational institution would be unauthorized, inappropriate, and productive of serious questions concerning academic freedom and First Amendment rights."²¹ Judge Markey cited Advisory Committee on Codes of Conduct, Advisory Opinion No. 67, "Attendance at Educational Seminars." The opinion states that payment of expenses to attend "non-government sponsored seminars" constitutes a gift under the Code of Judicial Conduct, and that judges may accept the gift as long as it is "awarded on the same terms applied to other applicants."²² Specifically, it explains that

[t]he education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation....

Judges who accept invitations to participate in such seminars, having been satisfied that no impropriety or appearance thereof is present, must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.²³

Judge Markey's letter noted that the "advice in Opinion 67 that judges invited to educational seminars inform themselves is deemed fully adequate."²⁴

Shortly after IPR submitted its petition to the Judicial Conference, the *Legal Times* reported that Manne had allegedly stopped using corporate money to fund the judicial seminars.²⁵ A recent list of Center contributors indicates that "[a]ll *direct* expenses for judges programs are paid by private foundations not affiliated with corporations."²⁶ This bookkeeping change, however, does not dispel concerns about the Center's programs. Questions linger about the relationship between the Center's overall funding and the bias framing its seminars, as corporations remain a mainstay of the Center's financial support. Moreover, many of the independent foundations that support the Center were initially established with corporate money and remain wedded to their creators' staunch "free market" ideologies. Olin, for example, is still run by founder John Olin's hand-picked successor and ideological soulmate, William Simon, and the young Bradley Foundation (created in 1985) is committed "to commemorat[ing] Lynde and Harry Bradley by preserving and extending the principles and philosophy by which they lived and upon which they built the company."²⁷

Manne categorically rejects the notion that either he or the Center promotes anything but a neutral approach to the economic analysis of the law. This disclaimer, however, is belied by the Center's own program descriptions. In an early annual report, the Center proudly touted its programs as avoiding "the monotonous political liberalism that has biased academic economics," and claimed that they focused instead on "considerations of individual choice, private property, freedom of contract, and the market allocation of resources."²⁸ Manne's more recent pronouncements regarding what constitutes "good" economics also have a distinct ideological edge. In an issues paper he prepared for the Washington Legal Foundation in 1985, Manne lamented that "few lawyers know how to develop effective economic arguments." This inability, he continued, "cut[s] two ways, since there is plenty of 'bad' economics available too. As it happens, however," he said, "the very best arguments in modern economic scholarship support the side of private property protection and open markets. Thus, a failure to develop the skills and techniques for integrating *good economic theory* into law in effect discriminates most against those who are opposed to government control of the economy."²⁹

The concern about seminar bias is particularly acute today. Both Presidents Reagan and Bush appointed a number of extremely young lawyers to the federal judiciary. Many, particularly those nominated to district courts, were chosen more for their political activism and financial contributions to the Republican Party than for their distinctive careers in the law. As such, they brought to the bench little by way of legal experience or judicial vision. According to one longtime federal judge, these individuals may be particularly susceptible to programs like the economics institutes, which are intellectually stimulating but subtly ideological. Of the 19 judges attending the 1991 basic economics institute, fourteen were Reagan/Bush appointees.³⁰

Yale Civil Liability Conferences

Yale Law School's civil liability conferences, funded by Aetna Life and Casualty Foundation, are also prime examples of efforts to "inform" the judiciary on matters of particular concern to business interests. The conferences are run by the Program on Civil Liability, which is headed by George Priest, the John M. Olin Professor of Law and Economics. A graduate of the University of Chicago School of Law, Priest was also a law and economics fellow at Chicago in the mid-1970s. He later served on President Reagan's Commission on Privatization, which reviewed federal government functions to determine which could be performed better by private entities.³¹ Priest is an avowed supporter of comprehensive reform of the tort system, and has published and lectured frequently on the topic. One of his more controversial suggestions is to limit the use of civil juries to only those cases in which decisions by lay people are truly necessary. These include, he says, suits against the government for violation of citizens' rights, defamation cases, and litigation involving uncommon and devastating injuries--cases which make up only about 5% of all civil jury trials.³²

The Program on Civil Liability has hosted civil liability conferences periodically since the mid-1980s. Judges comprise the majority of the audiences at the conferences, although academics and members of the bar also participate.³³ The last two conferences, held in 1988 and 1990, took place over two-day periods and consisted of several sessions. Each session included the presentation of a principal paper, followed by a critique by two commenters, and an open discussion with audience members.

"Issues in Civil Procedure: Advancing the Dialogue" was the subject of the 1988 conference, which more than 150 individuals attended. Topics discussed included the need for regulating scientific evidence, the "court congestion problem," and discovery abuse. The 1990 conference was entitled "Modern Civil Procedure: Issues in Controversy." Among the topics examined were mass toxic tort litigation and improving Congress's ability to regulate the use of judicial resources. Twenty-six federal district court, nine federal courts of appeals, and twenty-four state court judges attended the conference.³⁴ (*See Appendix A* for a list of participants at the 1990 conference).

"EDUCATING" FEDERAL JUDGES

To determine how pervasive the private funding of judicial education programs is, the Alliance reviewed the 1989 and 1990 financial disclosure forms of all federal judges. Every member of the federal judiciary must file an annual disclosure form, which must list all reimbursements or gifts from private organizations. Expenses to attend judicial education programs are considered gifts.

Several disparate organizations offer such seminars. Until recently, for example, the Aspen Institute hosted one in international human rights law. Funding for the programs came from various foundations. Additionally, since 1977 the Danforth Foundation, using its own funds, has run seminars for federal judges and educators entitled "Law and Education."

Vanderbilt University's Institute for Public Policy Studies (VIPPS) periodically hosts judicial seminars on health care issues. In 1989, it held a medical malpractice seminar which discussed such topics as "The Role of the Tort System in Providing Optimal Care and Compensation for Patients," and "Issues of Causation in Medical Malpractice." Until recently, the programs were funded by the Hospital Corporations of America (HCA) Foundation, an association of business organizations.

One of the more extreme privately-funded programs, at least in terms of ideological bias, is the Seminar on the Constitution periodically run by the Center for Judicial Studies. The Center is headed by James McClellan and publishes *Benchmark*, a conservative newsletter whose consulting editors include Robert Bork, Ed Meese, and William Bradford Reynolds. *Benchmark* is perhaps best known for its assault on the Reagan Justice Department's Supreme Court litigation strategies. It argued that the Department was sacrificing conservative principles in order to win cases.

The constitutional seminars bring together federal judges and constitutional scholars to discuss such issues as the original intent doctrine and the Federalist Papers. The Center hosted two such seminars between 1989 and 1990, both funded by the Liberty Fund, a libertarian think tank dedicated to the "study of the ideal of a society of free and responsible individuals." Judges listing the Center for Judicial Studies on their financial disclosure forms included appeals court judges Edith Jones (Fifth Circuit), Alex Kozinski (Ninth Circuit), Michael Kanne and Frank Easterbrook (Seventh Circuit), Bobby Baldock (Tenth Circuit), Emmet Cox (Eleventh Circuit), and Patrick Bowman (Eighth Circuit).

The 1988 and 1990 conference papers were published in the Boston University Law Review and the Law and Contemporary Problems journal, respectively. Aetna financed the distribution of these journals to all federal judges.

Like the Law and Economics Center seminars, questions about corporate bias have arisen about the Yale conferences. One Yale faculty member, for example, described the Program on Civil Liability as a "mouthpiece of the insurance industry."

Although Yale strives to provide a diversity of viewpoints at the conferences, Aetna's exceptionally visible role casts a decidedly pro-corporate shadow over the programs. Along with providing significant funding for the programs, Aetna's senior managers play an active role in seminar presentations. At the 1988 conference, for example, William O. Bailey, Aetna's Vice-Chairman, joined Humphrey Taylor, President of Louis Harris & Associates, Inc., in presenting the results of a Harris poll of federal and state judges on civil procedure issues.

Aetna financed the poll, which consisted of interviews with 200 federal and 800 state judges,³⁵ and helped develop its format, with the pollsters contacting "numerous representatives of Aetna Life and Casualty for their ideas and suggestions for issues to be addressed in the survey."³⁶ Bailey told the conferees that Aetna was involved in efforts to seek responsible change in the legal system and that the poll was part of Aetna's continuing civil justice reform work. He noted that previous polls showed public concern about the costs and delays in tort litigation. And he added that judges, rather than legislators, can have the most effect in addressing these concerns.³⁷

The poll's findings reported at the conference appeared to make the case for at least some of the tort "reforms" Aetna has long promoted. According to the report, many judges indicated they believe that discovery "abuse" accounts for most of the delays and excessive costs in litigation. Many also said they support the use of court-appointed experts, favor bifurcated trials (separating the issues of liability and damages), reject proposed limitations on the use of juries in complex cases, and find judicial education programs beneficial.³⁸ The polls' findings did not go without question, however. The report of conference proceedings indicates that several participants questioned the validity of the polls' findings regarding discovery abuses, suggested that questions should have been framed differently, and/or cautioned that "perceptions" should not be equated with "objective fact."³⁹

Even more illustrative of the concerns such programs raise is that, at the time of the 1988 conference (April 8 and 9), Aetna was a principal defendant in class action tort litigation involving hundreds of thousands of women injured by the Dalkon Shield intrauterine contraceptive device (IUD). The suit against Aetna, *Breland v. Aetna Casualty & Surety Co.*, originally filed in federal court in Minnesota, had been transferred to Judge Robert Merhige, Eastern District of Virginia, who was also handling the A.H. Robins' bankruptcy proceedings through which the latter's liability was being determined.

Aetna's potential liability derived from its role as Robins' insurer and, it was alleged, from independent actions the company had taken involving the Dalkon Shield. Though Aetna's ultimate liability was unknown, it was potentially staggering. The court valued the final settlement in *Breland*, including cash payments, additional insurance and attorney's fees, at more than \$400 million dollars.⁴⁰ Given the nature and scope of the claims against Aetna, successful litigation against the company could have multiplied that recovery substantially.

Two months before the Yale conference, Aetna filed a proposed settlement with Judge Merhige in which, among other things, the company asked the court to certify the case as a mandatory class action, thereby preventing claimants from "opting out" of the final settlement. According to attorney-author Richard Sobol, who published an award-winning account of the Dalkon Shield litigation, "[s]ome one hundred attorneys representing women injured by the Dalkon Shield opposed mandatory class certification in *Breland*."⁴¹ According to a summary of the 1988 conference proceedings, Judge Merhige was a participant in the program, formally responding to remarks by George Priest on "Private Litigants and the Court Congestion Problem." Also participating in the conference was Professor Francis McGovern, an expert Judge Merhige appointed in 1986 to oversee the process of estimating injury claims against Robins. McGovern delivered remarks about "Resolving Mature Mass Tort Litigation," and referred to the settlement proposals in the Dalkon Shield cases.

Three days after the Yale conference, Judge Merhige issued an order granting Aetna's request for certification of a mandatory class. According to Sobol, until then "efforts to maintain a mandatory class action for compensatory damages in a personal injury case had been unanimously rejected by the federal courts."⁴² The effect of the order was to eliminate "the individual rights of almost two hundred thousand women to bring actions for compensatory damages against Aetna"⁴³ Judge Merhige approved the *Breland* settlement on July 26, 1988.

Aetna's participation at the 1990 conference was also extensive. Yale Law School Dean Guido Calabresi opened the proceedings by stating "I am truly grateful to Aetna and to George [Priest] for doing the legwork" to make the conference possible. Priest then complimented Aetna for financing the conference, adding that "the participation of Aetna is a premiere model of how a corporation in the heat of the battle can underwrite an academic conference in an unbiased way." His remarks prompted Federal district court Judge Jack Weinstein to retort "I'm delighted that Aetna's interest in this conference is purely academic."⁴⁴ In addition, Stephen Middlebrook, Aetna Senior Vice President and General Counsel, and Judyth Pendell, Aetna Assistant Vice President, Law and Public Affairs, each moderated a session. Eight other Aetna representatives also participated in the conference.⁴⁵

Even assuming the Yale conferences are balanced, Aetna undoubtedly receives a valuable return on its investment. The conferences provide the insurance giant's

representatives with the opportunity to get to know attending judges in an informal, friendly atmosphere. They also are able to test various liability-limiting ideas on a captive audience in a congenial atmosphere.

Aetna has also received criticism for its sponsorship of other judicial "education" efforts. In 1990, the Aetna Foundation awarded the State of Connecticut Judicial Department a \$45,000 grant for judicial education in alternative dispute resolution.⁴⁶ Although alternative dispute resolution is a procedural reform with many backers, Aetna's direct grant to the judiciary was criticized. Connecticut Trial Lawyers Association president William Gallagher outlined his organization's reasons for objecting in correspondence to Connecticut Supreme Court Chief Justice Ellen Peters. Gallagher wrote: "Aetna represents a special interest. It's \$45,000 grant is perceived as a lobbying effort on its behalf and on behalf of the insurance industry. The Aetna is also the real party in interest in a great number of cases which may go through the proposed ADR system."⁴⁷

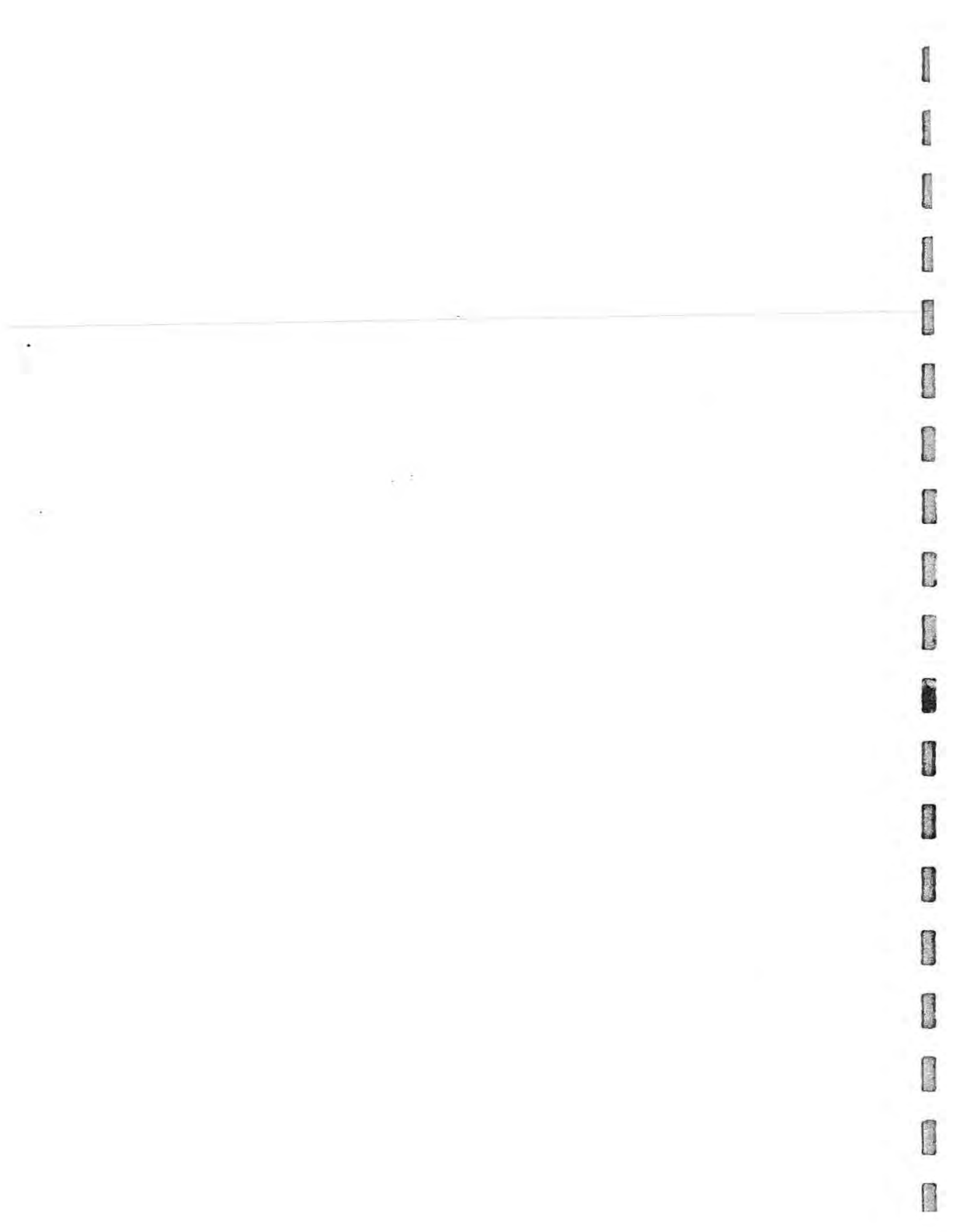
Conclusion

Privately-sponsored judicial training programs, and particularly those available free of charge, may reflect an improper and biased effort to sway judicial opinion. The potential for such abuse is real and significant, thus counseling careful examination of those programs -- their message, the messenger, and the motives underlying them.

1. Law and Economics Center, 1990 ANNUAL REPORT, inside back cover.
2. Law and Economics Center, 1991 ANNUAL REPORT, at 2.
3. Law and Economics Center, 1990 ANNUAL REPORT, inside back cover.
4. Law and Economics Center, 1991 ANNUAL REPORT, inside back cover.
5. *Id.*
6. George Mason Univ. School of Law, Law and Economics Center, Seventeenth LEC Economics Institute for Federal Judges, program brochure (undated and non-paginated).
7. George Mason Univ. School of Law, Law and Economics Center, LEC Economics Institute for Federal Judges (March 1990), Preliminary Schedule.
8. *Id.*
9. Law and Economics Center, 1991 ANNUAL REPORT, at 8.
10. *Id.* at 2-4.
11. George Mason Univ. School of Law, Law and Economics Center, and The Federal Judicial Center, Basic Science and Public Health, Tentative Schedule (May 21, 1991).
12. *Id.*
13. Law and Economics Center, 1991 ANNUAL REPORT, at 2-4.
14. George Mason Univ. School of Law, Law and Economics Center, brochure (undated).
15. *Id.*
16. Institute for Public Representation, *Petition for the Adoption of Guidelines for Judicial Participation in Privately Sponsored Educational Programs for federal Judges and Other Relief*, Before the Judicial Conference of the United States, Aug. 29, 1980 [hereinafter IPR Petition] (quoting Law and Economics Center Contributor's Report, Third Economics Institute for Federal Judges (Apr. 16-30, 1978)).
17. *Id.* at 1, 7-8.
18. *Id.* at 12.
19. *Id.* at 5.
20. *Id.* at 13-16.

21. Letter to Charles Halpern, Institute for Public Representation, from Judge Howard Markey, Chairman of the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States (Mar. 13, 1991).
22. Attendance at educational seminars, Op. Advisory Comm. on Codes of Conduct No. 67 (Aug. 25, 1980) (quoting Op. Advisory Comm. on Codes of Conduct No. 6).
23. *Id.*
24. Letter to Charles Halpern, Institute for Public Representation, from Judge Howard Markey, Chairman of the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States (Mar. 13, 1981).
25. *Institute's Analysis of Privately Funded Judicial Seminars*, Legal Times, Sept. 15, 1980, at 19.
26. George Mason Univ. School of Law & Law and Economics Center Contributors List, (undated) (emphasis added).
27. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 6.
28. IPR Petition, *supra* note 17, at 7 (quoting the Center's fifth annual report).
29. Manne, *A New Perspective For Public Interest Law Firms*, (Washington Legal Foundation, Nov. 1985), at 14 (emphasis added).
30. *See* Law and Economics Center, 1991 ANNUAL REPORT, at 2.
31. Cannon, *Reagan Picks Privatization Panelists*, The Washington Post, Sept. 4, 1987, at A23.
32. Quoted in Rohrlich, *Professor's Solution: Limit Use of Juries*, The Los Angeles Times, May 19, 1990, at 26.
33. *See* Invitation letter from George Priest, John M. Olin Professor of Law and Economics, Yale Law School (undated) (discussing civil liability conference to be held June 15-16, 1990).
34. Modern Civil Procedure: Issues in Controversy, List of Participants.
35. Issues in Civil Procedure: Advancing the Dialogue, Synopsis, at 8.
36. Louis Harris and Associates, Inc., *Judges' Opinions on Procedural Issues*, at 3 (conducted Oct.-Dec. 1987).
37. *Id.*

38. *Issues in Civil Procedure: Advancing the Dialogue*, Synopsis, at 8-9.
 39. *Id.* at 10.
 40. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 266 (1991).
 41. *Id.* at 254.
 42. *Id.* at 251.
 43. *Id.* at 255.
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44. From the notes of Alliance for Justice participant.
 45. *Modern Civil Procedure: Issues in Controversy*, List of Participants.
 46. *Why not settle before Trial?*, *The Hartford Courant*, Dec. 17, 1990, at C10.
 47. Letter from William F. Gallagher, President, Connecticut Trial Lawyers Association, to the Honorable Ellen A. Peters, Chief Justice of the Connecticut Supreme Court (Nov. 29, 1990).



THE FEDERALIST SOCIETY

Introduction

In 1979, legal activist Michael Horowitz exhorted his conservative colleagues that successfully shifting the law in a rightward direction rested on capturing the next generation of lawyers. Horowitz, who later became Ronald Reagan's legal counsel to the Office of Management and Budget and is now a Manhattan Institute senior fellow, wrote that "real impact on public policy decisions and the law can only come if [the] talent and enthusiasm" of young lawyers could be cultivated.¹ He implored conservatives to stop funding students only at small and obscure schools where conservative ideas were already warmly received. Arguing that there is "no substitute for intelligence," he concluded that conservative ties should be established to the brightest students at the best law schools in the country.

Horowitz's vision began to materialize less than four years later, when the Institute for Educational Affairs (IEA), the conservative "foundation for foundations" co-founded by William Simon and Irving Kristol, provided seed money for the creation of a new student group called the Federalist Society (*see box* on next page about IEA's focus on "the next generation").² Dedicated to purging law schools and the legal system of the "orthodox liberal ideology which advocates a centralized and uniform society,"³ the Society is now the principal organization for recruiting, educating, and mobilizing conservative students on law school campuses and showcasing conservative legal scholarship.

Foundations such as Olin, Bradley, Scaife, and Smith Richardson apparently view the Federalist Society as a way to carry the campaign to reshape the law into the future. They have invested hundreds of thousands of dollars in the Society, thereby helping groom law students to embrace and promote their agenda into the next decade and beyond. The Smith Richardson Foundation's William Bodie summed up conservative funders' interest in the Federalist Society: they have a big membership, get good coverage, and they further the foundation's goal of winning the next generation.⁴

The Origins

The Federalist Society was founded in 1982 by Yale law student Steven Calabresi and University of Chicago law students Lee Liberman and David McIntosh. Calabresi, the nephew of Yale Law School Dean Guido Calabresi, explained that he was unhappy with the liberal bias he perceived at Yale, and with the way he felt conservative views were being stifled.⁵ With encouragement from Robert Bork and Ralph Winter, Yale professors who were later appointed to the federal bench by Ronald Reagan, Calabresi decided to launch a conservative student organization. His undergraduate friends from Yale, Liberman and McIntosh, formed a similar group at the University of Chicago, with future Supreme Court Justice Antonin Scalia serving as advisor.⁶

IEA: HELPING TO BUILD THE NEXT GENERATION OF LEADERS

Since the late 1970s, the Institute for Educational Affairs (IEA) has focused much of its philanthropic attention on students. Law and other graduate students receive some of the largesse, but undergraduates appear to be the primary recipients via a project called The Collegiate Network. According to IEA, the project began when two University of Chicago undergraduates asked the organization

for a small grant to help them publish a magazine they had started out of dissatisfaction with the left-wing bias of the main campus newspaper and other student publications. The Institute gave them support, not realizing that this was the start of a 'grassroots' student movement that seeks to call higher education back to its roots of academic freedom, intellectual integrity, and a respect for the lasting values of Western civilization....

By expanding the range of viewpoints expressed on campus and national issues, these publications are playing an increasingly important role in shaping the future of American higher education. They are also developing a new generation of thoughtful and fair-minded journalists, many of whom have already gone to work at professional newspapers, magazines, research institutes, and other organizations throughout the country.... (IEA, 1989 ANNUAL REPORT, at 9).

As of 1989, IEA's support included direct financial assistance, "visits to see each paper on its campus," sponsorship of a series of "regional conferences," a toll-free hotline ("established to make it easy to call in for quick advice"), and a monthly newsletter addressing such topics as "values and objectivity in journalism, fund raising and cost-cutting, and the influence of the students of the 1960's on campuses in the 1980's." (*Id.*) Members of the "alternative" student newspaper network include the Amherst Spectator, Vassar Spectator, Columbia's Federalist Paper, and the Dartmouth Review, which has generated much publicity in recent years over its staunchly conservative and frequently controversial views on the rights of blacks, women, Jews, and homosexuals. In 1990, IEA merged with the Madison Center to become the Madison Center for Educational Affairs, through which it continues its leadership of the Collegiate Network. The Olin, Bradley, Sarah Scaife, and Smith Richardson foundations are all supporters of the Center and its Collegiate Network.

At the suggestion of Winter, Calabresi contacted IEA about funding an initial conference to kick off the organization. Shortly thereafter, the group received \$25,000 (mostly from IEA) for their first symposium, which was held under the name "The Federalist Society."⁷ The symposium addressed the issue of conservative legal thought, featured a

number of conservative stars, including Bork, Scalia, Winter, and Richard Posner, and attracted two hundred students from twenty different law schools.

The Olin Foundation was so impressed with the symposium that it agreed to fund a speakers bureau, a program which gave the fledgling organization credibility and respectability. Accordingly to Eugene Meyer, Executive Director of the Society, "[t]he ability to send speakers around increased the academic credibility of the organization.... We were helping to increase the diversity of views from dinner table conversation to classroom discussion."⁸

Shortly after the Yale symposium, the organization received a tremendous boost when a small group of conservative Harvard law students working on the *Harvard Journal of Law and Public Policy* agreed to form a chapter. Denied funding by the administration because it was thought to be too political,⁹ the journal then became officially associated with the Federalist Society. Olin and IEA subsequently infused the publication with needed cash.¹⁰

Marketing and Road Shows

By 1983, when the original founders graduated, the Society had a national office and executive director in Washington, D.C., about 40 members at both Yale and the University of Chicago, and chapters at 15 other law schools.¹¹ Undoubtedly, its surprising growth was due in part to the members' common and unifying belief that they were a beleaguered minority, but sophisticated planning and marketing contributed significantly as well. The group's marketing strategy is exemplified by a booklet offering advice to students about forming law school chapters and converting new members. The booklet suggests that chapters avoid controversial topics, explaining that "[t]here are some topics that tend to be viewed in very emotional terms, where adopting deliberately controversial rhetoric may close minds further rather than opening them a crack."¹²

The Society's avoidance of divisive issues has enabled it to escape the ideological infighting that often splinters partisan groups. By marketing itself as an "inclusive" organization, it has pulled in members of many conservative ideologies, including traditional jurisprudence ("original intent") advocates, social conservatives, libertarians, and Chicago School law and economics scholars. In addition, it has attracted a number of moderate law students and lawyers, who have used the organization to network and cultivate job prospects with conservative-leaning judges and lawyers.

The Society advises new student chapters to run debates rather than lectures, because "you are more likely to convince people of your viewpoint if they feel the other side has been given a fair hearing."¹³ This marketing strategy has paid off handsomely for the organization. Its 1984 national symposium featured a lively debate between Duncan Kennedy, a leader of the Critical Legal Studies movement at Harvard, and Richard Epstein, a libertarian academic at the University of Chicago Law School. The symposium was such a

success that the group staged it again for 250 Harvard law alumni in New York, and eventually led to the creation of a New York lawyers chapter.¹⁴

Among the most popular events during the 1991-92 school year was "The Agony and The Ecstasy," an intellectual touring performance by Ninth Circuit Judges Alex Kozinski and Stephen Reinhardt. Kozinski is one of the Society's best draws--one reporter referred to him as the group's version of a rock star because he attracts a huge following wherever he appears.¹⁵ He has impeccable conservative credentials, and even wears a tie displaying little portraits of James Madison,¹⁶ whose silhouette is the Society's logo. The judges' act is a spirited interchange on judicial and political philosophy, with Kozinski, a Reagan appointee, playing the role of Ecstasy, and Reinhardt, a Carter appointee, taking the part of Agony. The show performed at several Federalist Society chapters, including Harvard, Stanford, and Yale.¹⁷

Capturing the Legal Establishment

The Society's Lawyers Division was created in 1985 in an effort to keep hold of student members once they graduated. With 25 chapters, the division is also a potent force for recruiting new members who either graduated law school before the Society began or who realized only later the importance of membership to their legal careers. The Washington, D.C. lawyers chapter is the largest and most active.

Although the Society is still considered a fringe group at many law schools, its influence appears to transcend the entire legal community. By 1986 it was dubbed "the Right's primary instrument for capturing the legal establishment."¹⁸ It has chapters at roughly 120 law schools, a growing Lawyers Division, a yearly budget of more than \$700,000,¹⁹ and approximately 10,000 members.²⁰ Society members have become clerks to federal judges, including Supreme Court Justices, and some held influential positions in the Reagan and Bush Administrations. In 1987, the *National Review* wrote that "[i]t is no accident that the excellence of the Justice Department and the judiciary in the last six years has coincided with the establishment of one of the most effective centers of conservatism outside the government: the Federalist Society."²¹

The group's influence is perhaps best exemplified by the success of its three co-founders. As a member of the White House Office of Legal Counsel, Lee Liberman was considered the "ideological gatekeeper for the Bush Administration's process for selecting judges,"²² David McIntosh served as Executive Director of Vice-President Quayle's Council on Competitiveness, and Steven Calabresi, now a professor at Northwestern University School of Law, was a special assistant to Attorney General Ed Meese during the Reagan Administration.

The Federalist Society's relationship with the federal judiciary is among its most important assets. Former judge Robert Bork is co-chairman of the Board of Trustees, while

Supreme Court Justice Scalia, and federal appeals Judges Richard Posner, Frank Easterbrook, Alex Kozinski, and Ralph Winter are frequent speakers at Society events. Supreme Court Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy have also spoken at symposia and conferences. In addition, several Reagan/Bush nominees to the federal judiciary improved their chances of becoming judges by joining the Society. They included Dennis Jacobs (Second Circuit), David McKeague (Western District of Michigan), and Gordon Quist (Western District of Michigan), who were confirmed in 1992. Whether or not the affiliation actually helped nominees, it created a definite perception that it did. When Jacobs was confirmed, the *New York Law Journal* surmised that his "affiliation with the conservative Federalist Society" was one factor helping him win confirmation in September 1992²³ -- after the Democratic-controlled body had all but stopped acting on Bush nominations. The Journal added that White House Assistant Counsel Lee Liberman, a Federalist Society co-founder, backed the nomination.²⁴

Most recently, the Society began a new Continuing Legal Education (CLE) program (many states require attorneys to take a certain number of CLE courses each year to retain active bar status). The first CLE workshop was entitled "Takings and the Environment: The Constitutional Implications of Environmental Regulation." Attracting 150 lawyers from the District of Columbia area, the workshop "investigated the taking implications of wetlands regulation, the Endangered Species Act, coal regulation, historic preservation law, Superfund, and the Clean Air Act Amendments."²⁵

Not one representative of an environmental group was among the workshop lecturers, who included Michael Greve, Executive Director of the Center for Individual Rights, and Nancie Marzulla, President & Chief Legal Counsel of the Defenders of Property Rights. Both organizations strongly support the argument that many environmental regulations constitute "takings" of private property (a position which could lead to the erosion of hundreds of regulations designed to protect the environment). The Center for Individual Rights receives 90% of its \$300,000 annual budget from conservative foundations,²⁶ including Olin (\$100,000 in 1991²⁷), Smith Richardson (\$90,000 in 1990²⁸), and Bradley (\$25,000 in 1990²⁹).

A summary of the takings workshop indicated that "CLE credit was granted by jurisdictions having continuing legal education requirements."³⁰ On May 7, 1992, the Society hosted its second CLE program, "Commerce and the Constitution," which "explore[d] how much and under what circumstances state or federal regulation of commerce is permissible."³¹ The workshop focused on Congressional power to regulate banking, employment relations, consumer transactions, and environmental matters -- raising questions about well-settled law regarding the exercise of Congress' authority under the Constitution.

THE OLIN LECTURES IN LAW

The Federalist Society credits the Olin Foundation for much of its success, calling the John M. Olin Lectures in Law "the cornerstone of our success on the law school campuses, which in turn is the cornerstone to the success of the Society as a whole." The lecture series is dedicated to "inject[ing] ideas of limited constitutional government, separation of powers, and economic freedom into legal discourse, thereby enhancing the intellectual life of school after school." Olin contributes generously to the Society, giving \$70,000 in 1988, \$85,000 in both 1989 & 1990, and \$90,000 in 1991, most of which was in support of the lectures.

During the 1991-92 academic year, the nine-year-old Society held 72 Olin lectures across the country. A particularly noteworthy aspect of the lectures is the prominence of the speakers. Several federal court of appeals judges served as lecturers, including Supreme Court Justice Anthony Kennedy, Frank Easterbrook (Seventh Circuit), Douglas Ginsburg (District of Columbia Circuit), Edith Jones (Fifth Circuit), and Alex Kozinski (Ninth Circuit). Other lecturers included former Attorney General Ed Meese, the Wall Street Journal's Gordon Crovitz, former Solicitor General Charles Fried, and Senator Orrin Hatch.

The lecture series also serves as a way for students to network with the speakers, other Federalist Society members, and professors. The 1991-92 program summary boasted that "the chapters frequently have dinners or receptions with the speakers, which offer students the chance to meet our speakers personally. Local faculty members are often invited as well to these after-meeting chats which can be as valuable as the meetings themselves because they permit the type of personal contact that can have a lasting impact."

Funding Appeals

The organization's success undoubtedly stems from the tremendous support it receives from conservative foundations, including Olin (*see box above*), Scaife, Bradley, and Smith Richardson. Bradley has provided more than \$400,000 since its own creation in 1985,³² Scaife contributed \$100,000 in both 1990 and 1991,³³ and Smith Richardson gave \$59,750 in 1990 and \$40,250 in 1991.³⁴

The group generated some controversy in the late 1980s when it accepted a \$150,000 grant from the National Endowment of the Humanities (NEH). *The American Lawyer* reported that Executive Director Eugene Meyer admitted "to the hypocrisy of taking money from the same big government that his society regularly denounces. 'In the best of all

possible worlds we wouldn't have taken [the grant]," he said, but the funds were needed for the Society's symposia on the bicentennial of the Constitution.³⁵ The grant was dispersed over a two-year period (\$73,835 in 1986 and \$76,165 in 1987).³⁶

Despite its fundraising success, the Federalist Society continues to market itself as an oppressed minority. In a September 30, 1992 letter to prospective contributors, Robert Bork spoke of the critical need for a group like the Federalists: "[w]ith an organized bar pressured and increasingly controlled by the left, we need an organization which counters the political seduction of the law by focusing on the fundamental principles of limited constitutional government, individual freedom and responsibility, and the rule of law."³⁷

The Future

In an April 1990 newsletter, the Society indicated that "[w]ithin the next five years the Society intends to have a significant impact on national legal policy by fulfilling four basic objectives. They are to:

- ▶ "promote discussion of the rule of law and conservative legal principles in academia by increasing the number of strong law school chapters to 100;
- ▶ "educate the general public and legal community about the rule of law by increasing the lawyer and non-lawyer member base to between 50,000 and 100,000;
- ▶ "encourage and assist Federalist Society members and others who are sympathetic to the principles of the Federalist Society to pursue legal academic careers; [and]
- ▶ "encourage and assist Federalist Society members and others who are supportive of Federalist Society principles to pursue careers in public service and legal policy organizations[.]"³⁸

George Bush's defeat has not deterred the Society from its mission to rid the law of its allegedly liberal orthodoxy. Indeed, the Reagan era's demise has increased the group's resolve to win the next generation of law students. In December 1992, Robert Bork exhorted potential donors:

With developments of this past year, which range from last month's elections, to the courts, to the bar, the Society's role is becoming even more vital.

Consider the radical nature of the legal academy.... The Federalist Society remains the only organization capable of

getting our ideas heard in law schools....

Restoring the primacy of the Constitution must begin with the education of law students and lawyers, an ongoing task that cannot be completed overnight. Each year it requires exposing thousands of new law students to these ideas while they are forming their views about the courts and the legal profession.³⁹

Bork explained that funding is key to convincing law students to join the Federalist cause:

To strengthen and increase our impact ... we need to do more than simply identify and encourage the enthusiastic students who support the principles we embrace. Our student leaders must have the means to bring leading and articulate advocates of conservative legal ideas to speak and debate on law school campuses.

The Society already is funding such efforts. But much more needs to be done....

Your support for these student efforts, as well as for the lawyers programs described in my last letter, is truly vital to the future of our legal culture and the education of the new generation of law students.⁴⁰

1. Horowitz, The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms, 1979, at 5.
2. Abramson, *Right Place at the Right Time*, THE AMERICAN LAWYER, June 1986, at 100.
3. The Federal Society for Law & Public Policy Studies, informational brochure (undated and non-paginated).
4. Telephone interview with William Bodie, former program officer for international projects, Smith Richardson Foundation, Inc. (May 25, 1990).
5. Coulson, *The Federalist Pipers*, THE NEW REPUBLIC, Dec. 1, 1986, at 23.
6. Abramson, *supra* note 2, at 101.
7. *Id.* at 100.
8. *Id.* at 101.
9. *Id.*
10. *Id.*
11. *Id.*
12. How to Form and Run a Federalist Society Chapter, informational brochure, at 6.
13. *Id.*
14. Abramson, *supra* note 2, at 101.
15. Lewis, *Conservative 'Outsiders' Now at Hub of Power*, The New York Times, Mar. 29, 1991, at 16.
16. Chambers, *Robes Doffed, Two Judges Speak Out*, The National Law Journal, Jan. 13, 1992, at 13.
17. *Id.* at 13-14.
18. Coulson, *supra* note 5, at 23.
19. Lewis, *supra* note 15, at 16.
20. Samborn, *The Disaffected Leave the ABA*, The National Law Journal., Oct. 12, 1992, at 24.
21. *Federalists All*, NATIONAL REVIEW, Jan. 30, 1987, at 23.

22. Lewis, *supra* note 15, at 16.
23. Pines, *Jacobs to Ascend Second Circuit Bench With Democrats' Aid*, New York Law Journal, Nov. 10, 1992, at 1.
24. *Id.*
25. *The Federalist Paper* (Federalist Society newsletter), Apr. 1992, at 5.
26. Kornhauser, *The Right Versus the Correct*, Legal Times, Apr. 29, 1991, at 14.
27. John M. Olin Foundation, Inc., 1991 ANNUAL REPORT, at 10.
28. Smith Richardson Foundation, Inc., 1990 ANNUAL REPORT, at 4.
29. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 16.
30. *The Federalist Paper* (Federal Society newsletter), Apr. 1992, at 14.
31. *The Federalist Paper* (Federalist Society newsletter), Aug. 1992, at 3.
32. Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1985 - July 1988, at 26; Report of the Lynde and Harry Bradley Foundation, Inc., Aug. 1988 - July 1990, at 21.
33. Sarah Scaife Foundation, 1990 ANNUAL REPORT, at 13; 1991 ANNUAL REPORT, at 21.
34. Smith Richardson Foundation, Inc., 1990 ANNUAL REPORT, at 4; 1991 ANNUAL REPORT, at 5.
35. Abramson, *supra* note 2, at 101.
36. National Endowment for the Humanities, 1986 ANNUAL REPORT, at 67; 1987 ANNUAL REPORT, at 74.
37. Letter from Robert H. Bork, Trustee Co-Chairman, Federalist Society, to prospective contributors (Sept. 3, 1992).
38. *The Federalist Paper* (Federalist Society newsletter), Apr. 1990, at 11.
39. Letter from Robert Bork, Trustee Co-Chairman, Federalist Society, to prospective contributors (Dec. 1, 1992).
40. *Id.*

CONCLUSION

The preceding pages recount a highly sophisticated and coordinated campaign by several corporations and ideologically-compatible foundations to reshape the law. Their objective is to create a legal system that elevates corporate profits and private wealth over principles of fairness and equal justice. To accomplish that objective, the campaign's leaders have pursued a host of strategies designed to make conservative economic theory the cornerstone of legal decisionmaking and to derail virtually all governmental regulation -- particularly that involving the workplace, the environment, and consumers -- that restricts corporate autonomy or imposes accountability for corporate negligence or misdeeds.

The campaign's principals have moved along parallel but integrated tracks in order to achieve both immediate and long-range success. First, they created and sustained the campaign with a steady flow of prodigious funding. Since the mid-1970s, major players in the business world and sympathetic foundation leaders have contributed tens of millions of dollars to the effort. Second, they have combined conventional tools of the trade -- lobbying, litigation, and advertising -- with innovative and somewhat unprecedented tactics -- the bankrolling of legal scholarship and training of judges and practitioners. This has allowed them to build a seemingly objective foundation for their more visible public relations undertakings. Finally, they have nurtured the creation of an institutional network that will advance and sustain their cause well into the future. Integrated and inter-generational, this infrastructure includes representatives from all segments of the legal establishment -- judges, scholars, practitioners, and young apprentices hailing from the Federalist Society -- in sync with the cause and each other.

The campaign's sophistication -- from its breadth throughout the legal community to its clever capture of sympathetic and appealing terminology such as "efficiency" and "reform" -- masks the profound and deleterious implications it holds for our civil justice system. As recent bicentennial celebrations of the Bill of Rights remind us, the constitutional principles those amendments embody are the bedrock of our democracy, defining our character both as a people and as a nation. The campaign we have discussed, however, threatens to supplant those cherished principles with considerations of corporate "freedom" and financial self-preservation.

The campaign's overall strategy, and each component of it, raises troubling and provocative concerns about the direction in which the legal system has been driven and the money and motives fueling that drive. Law school communities, for example, should address the extent to which funding for law and economics programs has influenced academic scholarship, curriculum design, and educational choice, and whether this is a desirable effect from a public policy standpoint. Law schools occupy a unique and critical role in the legal system, educating virtually all of the country's lawyers, lawmakers and judges and serving as the crucibles in which most legal theory is formed. Full disclosure and informed debate

within law schools is thus essential not only for preserving academic freedom, but for preserving our system of justice as well.

It is also imperative that decisionmakers -- legislators, judges and juries -- apply exacting scrutiny to the message and messengers of the so-called "civil justice reform" movement. Expensive and sophisticated marketing must not continue to obscure the fundamental rights and issues at stake in the debate this movement invites. Many of the movement's claims are grossly exaggerated, if not entirely false. Nevertheless they are being used, with apparent success, to promote a host of "reforms" that, in reality, operate *only* to limit the access and remedies of *victims*. As such, they implicate basic constitutional concerns and enhance corporate interests at the expense of individual rights. Demands for reform, however, will no doubt escalate, especially in the wake of health care reform. Thus, it is critical that any fine-tuning of the civil justice system be based on accurate, relevant data, and that it be rendered with an eye toward preserving the system's primary, if not sole, objective: dispensing justice.

Additionally, the litigation strategy pursued by the business-funded "public interest law firms," complemented by the scholarship flowing from law schools and think tanks, ultimately seeks to effect fundamental change in constitutional and statutory interpretation. Their ongoing efforts mandate a corresponding vigilance of their actions in the courts, in "judicial seminars," in the law schools, and in the legislatures.

Justice for Sale chronicles a campaign that has the potential to profoundly affect all members of our society. The threat it poses to our legal system is simply too large to ignore. The Alliance for Justice believes that we are, above all else, a nation dedicated to equality, fairness, and justice. Our legal system is not *and should not become* a marketplace. Fairness is not synonymous with efficiency, equality is not always readily amenable to cost-benefit analysis, and justice must never become simply another commodity for sale to the highest bidder.

APPENDIX A

George Mason University

Law and Economics Center (LEC) First - Seventeenth Economics Institutes for Federal Judges Cumulative List of Participants by Court

U.S. COURT OF APPEALS

1st Circuit

Bruce M. Selya - Providence, RI
Juan R. Torruella - San Juan, PR

2nd Circuit

Henry J. Friendly - New York, NY (Deceased)
Thomas J. Meskill - New Britain, CT -s,a,c
Roger J. Miner - Albany, NY
*James L. Oakes - Braintree, VT
Lawrence W. Pierce - New York, NY (Senior)
George C. Pratt - Uniondale, NY -s
John M. Walker, Jr. - New York, NY
+Ralph K. Winter, Jr. - New Haven, CT

3rd Circuit

Edward R. Becker - Philadelphia, PA
Leonard I. Garth - Newark, NJ (Senior)
William D. Hutchinson
Max Rosenn - Wilkes-Barre, PA (Senior)
Walter K. Stapleton - Wilmington, DE -s

4th Circuit

John D. Butzner, Jr. - Richmond, VA (Senior)
Robert F. Chapman - Columbia, SC
Kenneth K. Hall - Charleston, WV -f
Clement F. Haynsworth, Jr. - Greenville, SC
(Deceased)
James M. Sprouse - Lewisburg, WV
Harrison L. Winter - Baltimore, MD (Senior)

5th Circuit

W. Eugene Davis - Lafayette, LA
John M. Duhe, Jr. - Lafayette, LA
Thomas G. Gee
E. Grady Jolly - Jackson, MS -s,r
Thomas M. Reavley - Austin, TX -s
Albert Tate, Jr. - New Orleans, LA (Deceased)

6th Circuit

Danny J. Boggs - Louisville, KY -s,r
Ralph B. Guy, Jr. - Ann Arbor, MI -s,a,c,f,r
Damon J. Keith - Detroit, MI
Cornelia G. Kennedy - Detroit, MI -s,c
Boyce F. Martin, Jr. - Louisville, KY -s,r
*Gilbert S. Merritt - Nashville, TN -s,a
Harry Phillips - Nashville, TN (Deceased)
James L. Ryan - Farmington, MI
Harry W. Wellford - Memphis, TN -s,a

7th Circuit

Robert A. Sprecher - Chicago, IL (Deceased)
Harlington Wood, Jr. - Springfield, IL -s,a,c,f

8th Circuit

Myron H. Bright - Fargo, ND -s,f (Senior)
Floyd R. Gibson - Kansas City, MO -s,a,c,f (Sr.)
Frank J. Magill - Fargo, ND -s,c

9th Circuit

+William C. Canby, Jr. - Phoenix, AZ
Jerome Farris - Seattle, WA -s
Betty B. Fletcher - Seattle, WA -s,c
*Alfred T. Goodwin - Pasadena, CA -a
Cynthia H. Hall - Pasadena, CA
Diarmuid F. O'Scannlain - Portland, OR
Pamela Ann Rymer - Los Angeles, CA -s
Joseph T. Sneed - San Francisco, CA -f (Senior)
Eugene A. Wright - Seattle, WA (Senior)

10th Circuit

Bobby R. Baldock - Roswell, NM
David T. Lewis - Salt Lake City, UT (Deceased)
Monroe G. McKay - Salt Lake City, UT -s,a

11th Circuit

Albert J. Henderson - Atlanta, GA (Senior)
*Gerard Bard Tjoflat - Jacksonville, FL -s

DC Circuit (Washington, DC)

+Robert H. Bork (American Enterprise Inst.)
+Douglas H. Ginsburg
Ruth Bader Ginsburg -s
Harold Leventhal (Deceased)
Malcolm Richard Wilkey -s,a
(U.S. Ambassador to Uruguay)

Federal Circuit (Washington, DC)

Glenn L. Archer, Jr.
Jack R. Miller (Senior)
Pauline Newman -s,r
Helen W. Nies
+S. Jay Plager

LEC Advanced Courses

s = statistics
a = antitrust economics
c = corporate governance
f = refresher
r = risk, injury & liability

*Chief Judge
+attended program
for law professors

U.S. DISTRICT COURT

ALABAMA - Northern District

James H. Hancock -s.a.c.
*Sam C. Pointer, Jr.
Robert B. Propst -s

ALASKA

James M. Fitzgerald -s.a (Senior)
James A. von der Heydt (Senior)

ARIZONA

Charles L. Hardy -s
Mary Anne Richey (Deceased)
Paul G. Rosenblatt -s

ARKANSAS - Eastern District

*G. Thomas Eisele -s.a.c.f

ARKANSAS - Western District

*Morris W. Arnold
H. Franklin Waters

CALIFORNIA - Central District

William P. Gray -s.a.c (Senior)
Terry J. Hatter, -s.a.c.f
A. Andrew Hauk -s.a (Senior)
Irving Hill (Senior)
Robert J. Kelleher -s.a.c (Senior)
Ronald S. W. Lew
Malcolm M. Lucas-s.a.c.f (Cal. Supreme Ct)
Lawrence T. Lydick -s.a.c.f (Senior)
Edward Rafeedie
*Manuel L. Real -s.c.f
Alicemane H. Stoller
Dickran M. Tevzian, Jr.
Laughlin E. Waters -s.a (Senior)
Francis C. Whelan (Senior)

CALIFORNIA - Eastern District

*Robert E. Coyle -s
Edward Dean Price -s.a.c (retired)

CALIFORNIA - Northern District

Robert P. Aguilar
Samuel Conu -s.a.c.f (Senior)
Thelton E. Henderson
Eugene F. Lynch
William H. Orrick, Jr. (Senior)
Marilyn Hall Patel
Charles B. Renfrew -s.a.f (Chevron Corp)
Robert H. Schnacke -s.a (Senior)
William W. Schwarzer-s.a.f (Fed. Judicial Ctr)
Vaughn R. Walker
Stanley A. Weigel (Senior)
Spencer M. Williams -s.a.c.f,r (Senior)

CALIFORNIA - Southern District

Rudi M. Brewster
William B. Enright -s.a.c.f
Earl B. Gilliam -s.c
Judith N. Keep
Leland C. Nielsen -s.a (Senior)
John S. Rhoades
Edward J. Schwartz (Senior)
*Gordon Thompson, Jr.
Howard B. Turrentine -s.a (Senior)

COLORADO

Jim R. Carrigan
*Sherman G. Finesilver -s.f
Zita L. Weinstienk

DELAWARE

James L. Laichum (Senior)
Murray M. Schwartz (Senior)

DISTRICT OF COLUMBIA

June L. Green (Senior)
Norma H. Johnson
George H. Revercomb

FLORIDA - Middle District

*William Terrell Hodges
John H. Moore II
G. Kendall Sharp -s

FLORIDA - Northern District

*William H. Stafford, Jr. -s
C. Roger Vinson -s

FLORIDA - Southern District

C. Clyde Atkins -f (Senior)
Edward B. Davis -s.c
Jose A. Gonzalez, Jr. -s
James C. Paine -s
Norman C. Roetger, Jr. -s
Kenneth L. Ryskamp
William J. Zloch

GEORGIA - Northern District

Orinda D. Evans -s.a
Richard C. Freeman
Robert H. Hall -s.a.c,r
*William C. O'Kelley -s.a
Marvin H. Shoob -s.a
G. Ernest Tidwell -s.a.c.f

GEORGIA - Southern District

*Anthony A. Alaimo -s.a.c.f/f
B. Avant Edenfield

HAWAII

Dick Yin Wong (Deceased)

ILLINOIS - Central District

J. Waldo Ackerman -s.a (Deceased)
*Harold A. Baker -s.a.c
Michael M. Mihm
Richard H. Mills
Robert D. Morgan -s.a (Senior)

ILLINOIS - Northern District

James H. Alesia
Suzanne B. Conlon
Brian B. Duff
William T. Hart
George N. Leighton (Retired)
Harry D. Leinenweber
Thomas R. McMillen (Bell, Boyd & Lloyd)
John A. Nordberg -s.c
Charles R. Norgle, Sr. -s
Milton I. Shadur -s.c

ILLINOIS - Southern District

*James L. Foreman -s

INDIANA - Northern District

William C. Lee
Rudy Lozano
Phil M. McNagny, Jr. (Deceased)
Robert L. Miller, Jr.
James T. Moody -s.a.c.f
*Allen Sharp -s.a

INDIANA - Southern District

S. Hugh Dillin -f

IOWA - Northern District

Edward J. McManus (Senior)

IOWA - Southern District

William C. Stuart (Senior)
*Harold D. Vietor
Charles R. Wolle

KANSAS

*Earl E. O'Connor -s
Richard D. Rogers -s.a.c.f (Senior)

KENTUCKY - Eastern District

William O. Berelsman -s.c
*Eugene E. Siler, Jr. -s.c.f
G. Wix Unthank -s (Senior)

KENTUCKY - Western District

*Edward H. Johnstone
Ronald E. Meredith
Charles R. Simpson III

LOUISIANA - Eastern District

Peter H. Beer -s.a.c.f
Patrick E. Carr
Robert F. Collins -s.a
Adrian G. Duplantier -s.a.c.f
Martin L.C. Feldman -s
Jack M. Gordon (Deceased)
Fredrick J.R. Heebe
A. J. McNamara -s
Lansing L. Mitchell (Senior)
Charles Schwartz, Jr.
Veronica D. Wicker

LOUISIANA - Western District

Nauman S. Scott -s (Senior)
*Tom Stagg
Earl E. Veron

MAINE

*Gene M. Carter

MARYLAND

Frank A. Kaufman (Senior)

MASSACHUSETTS

Andrew A. Caffrey (Senior)
W. Arthur Garrity, Jr. -s.a (Senior)
A. David Mazzone -s.a
Walter Jay Skinner -s.a.f
Joseph L. Tauro
Douglas P. Woodlock

MICHIGAN - Eastern District

Patricia J. Boyle (Mich. Supreme Ct.)
Julian Abele Cook, Jr. -a
Robert E. DeMascio (Senior)
John Feikens -s.a (Senior)
Horace W. Gilmore -s
Charles W. Joiner -s.a.f (Senior)
Stewart A. Newblatt -s.a.c.f
Philip Pratt -s.a (Deceased)
Richard F. Suhrheinrich
Anna Diggs Taylor -s.a

MICHIGAN - Western District

Richard A. Enslen -s.a.c
Noel P. Fox (Deceased)
Benjamin F. Gibson -s.c.f
*Douglas W. Hillman
Wendell A. Miles -s.a (Senior)

MINNESOTA

*Donald D. Alsop
Paul A. Magnuson -s.c
Diana E. Murphy -s.c
James M. Rosenbaum

NEVADA

Philip M. Pro

NEW JERSEY

Harold A. Ackerman -s.a.c.f
Stanley S. Brotman
Frederick B. Lacey -s.a.c.f (LeBoeuf, Lamb)
Alfred J. Lechner
Herbert J. Stern (Hellring, Lindeman, et al)

NEW MEXICO

Juan G. Burciaga -s.c
*Santiago E. Campos
John E. Conway
James A. Parker

NEW YORK - Eastern District

Henry Bramwell (Senior)
Mark A. Costantino -s.a.c.f (Senior)
Raymond J. Dearie
Edward R. Neaher -s.a.c (Senior)
Eugene H. Nickerson -s.a.c.f
*Thomas C. Platt, Jr. -s.a.c
Jack B. Weinstein -s.f

NEW YORK - Northern District

Thomas J. McAvoy
*Neal P. McCurn -s.a.c
Howard G. Munson -s.c

NEW YORK - Southern District

*Charles L. Briant -a
Vincent L. Broderick -s.a.c.f (Senior)
Robert L. Carter -s.a.f (Senior)
William C. Corner -s.a.c.f (Senior)
Kevin Thomas Duffy -s.a.c.f.r
David N. Edelstein -s.a.f
Lee P. Gagliardi -s (Senior)
Gerard L. Goettel -s.a.c.f.f
Thomas P. Griesa -s.a.c.f/f

NEW YORK - Southern District (cont'd)

Whitman Knapp -s.f (Senior)
Pierre N. Leval -s.a
Mary Johnson Lowe -s.c
Michael B. Mukasey
Milton Pollack (Senior)
Leonard B. Sand
+Abraham D. Sofaer -s (U.S. State Dept.)
Louis L. Stanton
Charles E. Stewart, Jr. -s.a.c.f (Senior)
Robert W. Sweet
Henry F. Werker -s.a.c.f (Deceased)

NEW YORK - Western District

John T. Curran -s (Senior)
*Michael A. Telesca

NORTH CAROLINA - Eastern District

*W. Earl Britt -s.c
Malcolm J. Howard

NORTH CAROLINA - Middle District

Frank W. Bullock, Jr.

NORTH DAKOTA

Bruce M. Van Sickle -s.c.f (Senior)

OHIO - Northern District

Ann Aldrich -s
Alice M. Baichelder
David D. Dowd, Jr. -s
*Thomas D. Lambros -s
John M. Manos -s
Richard B. McQuade, Jr. (resigned)
Nicholas J. Walinski -s.a (Senior)
George W. White

OHIO - Southern District

Robert M. Duncan (Jones, Day et al)
*John D. Holschuh
Joseph P. Kinneary -s.a (Senior)
*Carl B. Rubin
S. Arthur Spiegel -s.c

OKLAHOMA - Eastern District

David L. Russell -s (also N. & W.D.)

OKLAHOMA - Northern District

Thomas R. Bredt -s
*H. Dale Cook
David L. Russell -s (also E. & W.D.)

OKLAHOMA - Western District

Lynn R. Phillips
David L. Russell -s (also N. & E.D.)
Lee R. West

OREGON

Robert C. Belloni -s (Senior)

PENNSYLVANIA - Eastern District

Louis C. Bechtel -s
Raymond J. Broderick -s.a.c (Senior)
Edward N. Cahn -s.a
*John P. Fullam -a
James T. Giles -s
Clifford S. Green -a (Senior)

Daniel H. Huyell, 3rd -s.a.c (Senior)
James McGirr Kelly
Joseph L. McGlynn, Jr. -s.a (Senior)
Clarence C. Newcomer -s.a.c.f (Senior)
Norma L. Shapiro
Charles R. Weiner

PENNSYLVANIA - Middle District

*Richard P. Conaboy

PENNSYLVANIA - Western District

*Maunce B. Cohill, Jr. -s
Gustave Diamond
Paul A. Simmons
Hubert I. Teitelbaum -s.a.c (Senior)
Gerald J. Weber -s.a.c (Deceased)

PUERTO RICO

Herman G. Pesquera (Deceased)
Jose V. Toledo (Deceased)

RHODE ISLAND

*Francis J. Boyle -s.a
Ronald R. Lagueux
Ernest C. Torres

SOUTH CAROLINA

G. Ross Anderson, Jr. -s
Falcon B. Hawkins -s.c.f
Charles E. Simons, Jr. -s (Senior)

TENNESSEE - Eastern District

James H. Jarvis II

TENNESSEE - Middle District

*Thomas A. Wiseman, Jr. -s.a

TENNESSEE - Western District

*Odell Horton -s
James D. Todd

TEXAS - Eastern District

Howell Cobb

TEXAS - Southern District

James DeAnda
Lynn N. Hughes
John V. Singleton, Jr. (Senior)

TEXAS - Western District

William S. Sessions (Director, F.B.I)

UTAH

Aldon J. Anderson -s.a (Senior)
*Bruce S. Jenkins -s.c

VERMONT

Albert W. Coffrin -s.a

VIRGIN ISLANDS

Almeric L. Christian (Senior)
Warren H. Young (Deceased)

VIRGINIA - Eastern District

Robert G. Doumar -s
Robert R. Merhige, Jr. (Senior)
James R. Spencer
D. Dorich Warriner -s.a.c (Deceased)
Richard L. Williams -s.c.r

VIRGINIA - Western District

Jackson L. Kiser -s.c
James H. Michael, Jr. -s.c
*James C. Turk -s.a.c.f
Glen M. Williams -s.a

WASHINGTON - Western District

Robert J. Bryan
Jack E. Tanner

WISCONSIN - Eastern District

John W. Reynolds -s.c. (Senior)

WYOMING

*Clarence A. Brimmer -s.a
Alan B. Johnson

COURT OF INTERNATIONAL TRADE

Gregory W. Carman -s.c
Dominick L. DiCarlo
Herbert N. Maletz (Senior)
R. Kenton Musgrave
Bernard Newman (Senior)
Jane A. Restani
Nicholas Tsoucalas
James L. Watson

U.S. BANKRUPTCY COURT

MISSOURI - Western District

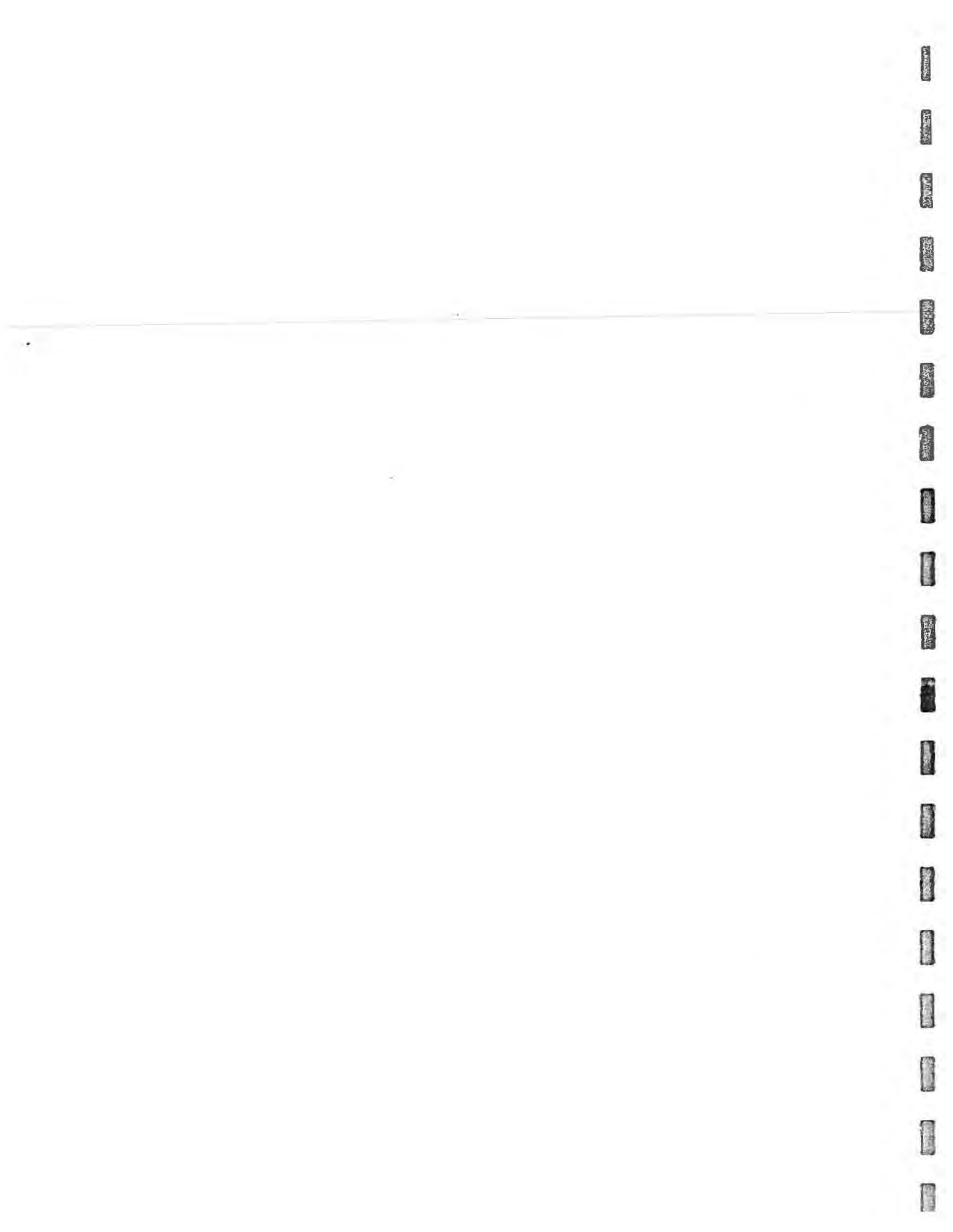
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MODERN CIVIL PROCEDURE: ISSUES IN CONTROVERSY

YALE LAW SCHOOL

June 15-16, 1990

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APPENDIX B

#1 in a Series on Civil Justice Reform

Justice for all?

The right to sue is as essential to a free and fair country as any right guaranteed in the Constitution.

But when a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong.

And when a man can drag a liquor company into court because he has become an alcoholic, something is wrong.

Americans have a strong foundation for resolving disputes. Our civil justice system has served us well for many years. But the system's original purposes have become distorted with the passage of time.

Our civil justice system was created to balance individual rights with society's needs. But it has strayed from this objective.

It used to provide an efficient way for the injured to be compensated. Now, too often, it is intolerably slow—and costly.

It used to make judgments primarily based on fault. Now, too often, it makes judgments based on who can pay when something goes wrong.

And the system used to compensate people fairly when they were injured by someone else's wrongful act. Now, too often, it can hand out big awards that have no logical relationship to the injuries suffered.

Our civil justice system is bloated with unnecessary costs and delay, played without clear rules, and capable of producing verdicts that truly offend the conscience. But Americans have a demonstrated capacity to fix things that go wrong. We've been doing it for 200 years.

We can restore balance to this system. Public demand has put this on the agenda for change in state after state. I hope you will join me in working for meaningful reform of our civil justice system.



William O. Bailey
Vice Chairman
Aetna Life & Casualty
Hartford, CT 06156

“Our civil justice system is bloated with unnecessary costs and delay, played without clear rules, and capable of producing verdicts that truly offend the conscience.”

William O. Bailey

#2 in a Series on Civil Justice Reform

55¢ on the dollar

That's how much typically reaches a victim in a personal lawsuit.

The other 45¢ never gets to the person who got hurt.

Where does that 45¢ go? To the lawyers on both sides. For legal expenses on both sides, for court costs—copies, records, transcripts, witness fees, ad infinitum. And this terrible measure of waste doesn't even take into account the cost of the defendants' and plaintiffs' time.

Imagine a charity that spends nearly as much on overhead as it gives to the needy. Would you keep on supporting it? Wouldn't you insist that it clean up its act before you'd contribute again? That is exactly my judgment about our civil justice system in America, and it is a judgment that millions of Americans share.

It is time to clean up an act which is bloated with unnecessary costs and delay, played without clear rules, and capable of producing verdicts that truly offend the conscience.

Don't let anybody tell you that such waste is inevitable. We have far more efficient models. Workers' Compensation, for instance, handles workplace injuries with far fewer lawsuits, and much less administrative

expense. Better ways of resolving disputes outside the regular legal system should be pursued. Many enlightened adversaries are using neutral parties to arbitrate their disputes as an alternative to expensive and time-consuming lawsuits.

There is a ground swell of support for reforms of our civil justice system in America today. But these reform efforts may die unless those of us who know the faults of the system firsthand keep the pressure on. For everyone's sake, let's restore efficiency to our civil justice system.

"Imagine a charity that spends nearly as much on overhead as it gives to the needy. Would you keep on supporting it?"

William O. Bailey
Vice Chairman
Aina Life & Casualty
Hartford, Connecticut 06156



William O. Bailey

#3 in a Series on Civil Justice Reform

Life without risk

What would it be like to live in a country where the penalty for taking risks becomes so astronomical and unpredictable that people stop taking them? It isn't hard to imagine. We Americans are dangerously close to being there already.

A manufacturer of health care equipment recently abandoned its development of a home kidney dialysis unit. "The size of the damage claims and the probable costs of defending ourselves would make the whole project uneconomical," reported its chairman.

Since 1961, the number of all U.S. companies making measles vaccine has dropped from six to one; those making oral polio vaccine, from three to one. Their reasons for withdrawing? Fear of being sued. One manufacturer alone faces \$3 billion in liability claims.

And there are even lawsuits pending against the clergy—suits alleging that this or that priest, minister or rabbi has been "negligent" in his private counsel.

It may shock you that even the clergy are within reach of this long legal arm, but in a way it's inevitable. Wherever there is risk, today there are lawsuits.

Directors resign from boards in response to expensive lawsuits from shareholders. Publishers consider dropping important stories as the fear of libel suits grows. YMCAs cut back gymnastics and diving programs. Schools abandon sports.

What if there were no risk? We might avoid lawsuits, but without risk there would be no innovation, no challenge of new ideas, no development of new products. There would be fewer jobs. And there would be no progress.

I don't want to live in a world where a minister, priest or rabbi is afraid to help the suffering. Nor one in which a doctor takes an extra test or X-ray—not for medical reasons—but for file-building against a possible lawsuit.

I want to see genuine fault restored to our concept of liability. We need to crack down on frivolous, harassing lawsuits. And we need to accept some risk and responsibility for ourselves.

I welcome your thoughts and ideas on how we can work together to restore balance and fairness to our civil justice system. And I would be pleased to send you information about some of the efforts that already are underway.

"I don't want to live in a world where a minister, priest or rabbi is afraid to help the suffering."



William O. Bailey
Vice Chairman
Axa Life & Casualty
Hartford, CT 06156

William O. Bailey

#4 in a Series on Civil Justice Reform

Golden Rule fails court test.

A man may have been honest and decent and fair his whole life, but let him rub up against our civil justice system the way it works today, and he may begin to change.

People who would never think of trying to cash in on someone else's bad luck start wondering how they can cash in on their own.

People who have always taken responsibility for their own actions don't dare admit responsibility—because the cost of admitting it may be unreasonable and unfair.

Companies who've always honored their obligations start looking for loopholes or excuses.

Lawyers who were trained to find fair solutions to complex problems develop an appetite for confusion and delay.

And insurers, whose reason for being in business is to pool risks so that they are affordable, start looking for reasons *not* to take risks.

One way or another, every one of us is demeaned by this process. Somehow we've managed to create a system that makes good people behave badly.

Of course our civil justice system can be fixed, and it must be. In some states a good start has been made, but we have a

long way to go. We need to say "no" to state laws which allow people to collect twice for the same injury. We need to assure that awards for pain and suffering are reasonable. And we need to return to the basic American principle of personal responsibility for one's actions.

When nearly seven out of ten Americans say that a plaintiff should not be compensated twice for the same injury and that there should be limits on the amount awarded for pain and suffering, it is clearly time for change. I hope you will join me in working for meaningful reform of our civil justice system.

I welcome your thoughts and ideas on how we can work together to restore fairness and balance to this system. And I would be pleased to send you information on some of the efforts that already are under way.

"Somehow we've managed to create a system that makes good people behave badly."

William O. Bailey
Vice Chairman
Erie Life & Casualty
Hartford, Connecticut 06156



William O. Bailey

#5 in a Series on Civil Justice Reform

Sue City, U.S.A.

Of all the victims of the lawsuit crisis, none are more helpless than our towns and cities. With or without insurance, our local governments are sitting ducks for every legal sharpshooter.

Every personal injury—whatever it is—has to happen *somewhere*, and a clever litigant can often find a way to blame the “what” on the “where.” Town roads, sidewalks and other public property make great scapegoats.

Parks, playgrounds and other recreational facilities are closed out of fear of high and unpredictable liability costs. Highway departments are blamed for careless automobile accidents. Even schools are faulted for failing students.

What's happening? As taxpayers, we willingly give our money for better roads, police and fire departments and other services. But, more and more, this money goes to defend our towns and cities against lawsuits.

This mess is not an insurance problem. It has been caused by the excesses in our civil justice system.

Take the biggest town of all—New York City, where personal injury claims shot up *five* times from 1978 to 1985. New York is self-insured. So when part of the city's budget goes out of control over personal injury claims, we can't blame the insurance companies.

Small towns suffer, too. In South Tucson, Arizona, a single injury claim ended up costing the town \$461 for each citizen. Who's to say it can't happen in your own hometown?

What will our lives be like when needed services are reduced, amenities

we now enjoy disappear, and taxes are continually raised because of the impact of personal injury lawsuits?

When will it end? In my view, only when sensible citizens decide enough is enough. It will take legislation and a new attitude on the part of our courts toward developing lasting reform.

All Americans must be willing to accept more personal risk and responsibility. Remember, we *all* pay for the excessive cost and inequity in our present civil justice system—a system that today, too often, is barely civil and no longer just.

Join me. Please send me your thoughts and ideas. Together, we will make a difference.

“We all pay for the excessive cost and inequity in our present civil justice system—a system that today, too often, is barely civil and no longer just.”

William O. Bailey
Vice Chairman
Aetna Life & Casualty
Hartford, Connecticut 06156



William O. Bailey

Sue-icidal impulse

A woman attempts suicide by locking herself in the trunk of her car. Upon changing her mind and (luckily) being found, she sues the car maker.

When his electric power mower gets clogged with wet grass, a man turns it over and, without turning it off, reaches into the blade area and begins removing the clotted grass. He loses several fingers, sues the manufacturer...and wins.

A man stalls on an interstate highway. A woman stops to push him from the road, but she is rear-ended by a third and then a fourth car. She sues everybody. But only the original, stalled driver can pay. So the jury holds him liable. Judgment against him: \$885,000.

Today, the object is to collect—from someone. If the unlawful are bankrupt, the unethical have disappeared, or the careless are dead, there is usually someone else around with a "deep pocket" to pay.

This entitlement mentality has a terrible, corrosive effect on American society. We teach our children to be responsible for their own actions. Then we turn around and show them a system which rewards irresponsibility. The system seems to be saying, "No matter what happens, somebody must pay—preferably somebody rich!"

It's time to restore the principles of self-reliance and personal responsibility to our civil justice system, and there are some practical reforms that will do this. A majority of Americans agree that we should restore fairness to our product

liability laws so that manufacturers who comply with standards of good practice and warn of all known hazards aren't held liable for misuse or abuse of their products.

And nearly three-quarters of Americans believe we should limit liability to a defendant's own share of the damages suffered by an injured person. Clearly, it is time for change. I hope you will join me in working for meaningful reform of our civil justice system.

I welcome your thoughts and ideas on how we can work together to restore fairness and balance to this system. And I would be pleased to send you information on some of the efforts that already are under way.

"The system seems to be saying, 'No matter what happens, somebody must pay—preferably somebody rich!'"

William O. Bailey
Vice Chairman
Aetna Life & Casualty
Hartford, CT 06156



William O. Bailey

Meanwhile, the judge died.

If you're planning to sue someone, you might be smart to hire a young lawyer. Your case may drag on for years.

In Illinois and Rhode Island, for instance, average jury cases take more than four years to resolve, but that's hardly unusual. In Los Angeles, between the day you file the papers and the day the jury trial begins, you can expect 54 months to pass.

This is absurd. A man could be injured under President Ford, sue under President Carter, and collect under President Reagan! There's a real injustice here. For anyone who's in serious pain, or suffering serious financial hardship, justice delayed four or five years isn't justice anymore.

But if it's exasperating for a plaintiff to wait that long to find out if a jury thinks he's right, imagine the frustration of a defendant who may be sued for a product his company made 40 or 50 or 60 years ago! Yet this happens, again and again. In many states, the makers of machinery manufactured long in the past can be held liable for their products' performance according to today's safety standards. And this can be true even if the machinery has been misused, abused or altered, and even if the person injured was clearly negligent.

There are straightforward reforms that would protect both plaintiffs and defendants from such long-delayed injustices. Certainly we should penalize those who clog up our court calendars

with frivolous or harassing suits. And certainly, we should insist that those sued for the performance of their product be judged by the standards that existed at the time it was made and sold.

It's time we listened to public opinion.

When a majority of Americans agree that a manufacturer should not be liable by today's standards when his product was made years ago, we are ready for change.

And manufacturers—if they are to market useful products that the public needs and wants—are desperately in need of that change.

I welcome your ideas on how we can work together to restore fairness and balance to this system. And I would be pleased to send you information on efforts that already are under way.

"A man could be injured under President Ford, sue under President Carter, and collect under President Reagan!"

William O. Bailey
Vice Chairman
Eino Life & Casualty
Hartford, Connecticut 06156



William O. Bailey

Responsibility Repealed

In order for someone to haul you into court today, the product you make doesn't have to be defective or shoddily made. It just has to have some kind of inherent risk.

The classic example is the vaccine manufacturer who makes a product essential for millions, but harmful to a few. The constant threat of liability and the astronomical costs associated with litigation have stopped many manufacturers from producing life-saving vaccines.

And in today's legal environment, you can even be held retroactively liable for conduct that was considered careful, responsible and acceptable at the time it occurred.

Consider the Federal Superfund law. Should a company be liable for clean-up costs when it had followed accepted procedure at the time it disposed of waste? And should one company have to pick up the whole tab even if it was only marginally responsible?

I've been dealing with the civil justice system for more than 30 years. In years past, I saw this system play a very valuable role in deterring careless and irresponsible behavior. The system once protected the careful and responsible from legal harassment, but not anymore. Our civil justice system has lost the ability to distinguish between the good guys and the bad guys.

We can have a liability system that recognizes responsible behavior. Let's restore the notion of fault to the system. Let's crack down on frivolous suits. And

let's not impose liability and added costs on those who exercise due care in making a product.

The American people are ready for reforms like these and America is desperately in need of them. I hope you will join me in working for meaningful reform of our civil justice system.

I welcome your thoughts and ideas on how we can work together to restore balance to this system. And I would be pleased to send you information on efforts that already are under way.

"Our civil justice system has lost the ability to distinguish between the good guys and the bad guys."

William O. Bailey
Vice Chairman
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Hartford, Connecticut 06156



William O. Bailey

Aetna on the Lawsuit Crisis and Your Insurance

Wall Street Journal
Apr. 8, 1986
Page 9

"The nation, once proud of its frontier individualism, has gradually adopted a no-risk mentality based on the belief that if anything bad happens, someone should be made to pay. But as damage awards lose any connection to actual damages and insurance companies flail around anxiously, that someone is turning out to be everyone."

-Time cover story, March 24, 1986

Aetna agrees. America's civil liability system has gone berserk, and every American is paying the price.

No wonder insurance companies are "anxious." Some people who want liability insurance find it's not available, at any price. When it is available, many people simply can't afford it. And these people are our customers.

The *Time* cover announced, "Sorry, America, Your Insurance Has Been Canceled." By whom? By the insurance companies, naturally; most people would assume. In fact, some critics have charged that insurance market conditions caused the current situation.

It's easy to blame insurers, but we're not the real problem. The major cause of the present mess lies squarely within our legal system.

America's civil liability system is no longer fair. It's no longer efficient. And it's no longer predictable. As a result, insurance companies are shying away from covering certain risks. Any smart businessperson would do exactly the same thing.

Look at what's happening today:

- Juries are handing out damage awards the size of lottery jackpots.
- In many cases, more dollars are going to pay lawyers and legal costs than to compensate people who are injured.
- Defendants are being held liable for conduct that is

reasonable and responsible by any measure.

- Businesses are being forced by our civil justice system to pay for past conduct that was totally acceptable to everyone at the time.
- The level of personal injury awards coming out of our courts is erratic, with judgments differing dramatically even among similar people with similar injuries.
- Insurance contracts are being interpreted by the courts in strange and unexpected ways.

Everyone has heard or read the horror stories. Newspapers, magazines and television programs all over America have featured examples of outrageous awards in liability lawsuits.

Restoring fairness, efficiency and predictability to our civil liability system should concern all Americans. Not just those who participate first hand in the process, but those of us who have to pay for the inadequacies of the current system through higher insurance premiums, higher prices, higher taxes and fewer goods and services.

Predictability is of special concern to insurance companies. If we can't predict the likelihood of our customers being sued, how can we run our business properly? What risks should we cover? Which ones should we avoid?

Erratic, uncertain results in lawsuits clearly have disrupted our efforts to give our customers what

they need—affordable liability insurance. And Aetna has been around long enough to know that if we don't continually respond to our customers' needs, we won't be around much longer.

Time said the lawsuit problem "threatens the very character of American life."

Aetna agrees, again.

That's why we are running this ad.

That's why we want people to understand the problem—all sides of it.

That's why we are glad to see the problem publicized, in *Time* and elsewhere.

That's why we are heartened by the debate taking place on the lawsuit crisis in Washington and in state legislatures across our land. We are committed to working out a balanced approach to this issue, and the time to act is now.

Americans must decide what kind of society they want in the years ahead. If we insist on living in a risk-free society, it's not just America's insurance that will be canceled. Our hopes and dreams for ourselves, our children and our country will be canceled at the same time.

On the other hand, if we want our society to operate on the sound principles and basic beliefs that made us what we are today—the present problems can and will be resolved, by reasonable people, working together, toward rational solutions. The way we've always done it.



If you have strong feelings about this issue, or if you want some free information on how you can help, write James T. Lynn, Chairman, Aetna, 151 Farmington Avenue, Hartford, CT 06156.



An expectant mother has a right to expect more than this.

It's getting harder for pregnant women to find maternity care—especially in rural areas and inner cities. One key reason: The increase in medical malpractice lawsuits is causing many obstetricians to abandon their practices. The lawsuit crisis is so severe that 1 out of every 8 obstetricians in the U.S. has stopped delivering babies.* What's more, so have 19% of all family doctors.** It's time we spoke out against lawsuit abuse. Write for our free pamphlet: American Tort Reform Association, Dept. B, 1212 New York Avenue, N.W., Washington, D.C. 20005.

*American College of Obstetricians and Gynecologists

**American Academy of Family Physicians

**LAWSUIT
ABUSE!**
*Guess who
picks up the tab?*

(B) AD SLICK, 85 line screen, if 2nd color is used — Lawsuit Abuse logo is Toyo CF 8098, red



Next time you're at a swimming pool, you better look before you leap.

Schools, Boys & Girls Clubs and cities and towns across America are removing their diving boards. One key reason: They're afraid of being sued in case of injuries. Coaches, trainers, school boards—even volunteers—worry that despite responsible supervision, they could become the target of lawsuits. And it's our kids who get left standing high and dry. It's time we spoke out against lawsuit abuse. Write for our free pamphlet: American Tort Reform Association, Dept. C, 1212 New York Avenue, N.W., Washington, D.C. 20005.

**LAWSUIT
ABUSE!**
*Guess who
picks up the tab?*



Now their good deeds won't come to a bad end in court.

Too many people are reluctant to volunteer these days. They're afraid of being sued. ☐ Fortunately, many states have passed legislation to protect volunteers from personal liability lawsuits. But even more must be done. Nobody should be made to feel bad for doing good. ☐ It's time we spoke out against lawsuit abuse. Start by writing for our free pamphlet: American Tort Reform Association, Dept. F 1212 New York Avenue, N.W., Washington, D.C. 20005.

**LAWSUIT
ABUSE!**
*Guess who
picks up the tab?*



You've read about all those multi-million dollar product liability lawsuits. Now read who pays for them.

The threat of lawsuits and excessively large jury awards forces manufacturers to add a hidden "tort tax" to the price of their products. A tax that costs the American family, on average, about \$1,200 a year. We think that's too high a price for anyone to pay. It's time we spoke out against lawsuit abuse. Write for our free pamphlet: American Tort Reform Association, Dept. A, 1212 New York Avenue, N.W., Washington, D.C. 20005.

LAWSUIT ABUSE!
Guess who picks up the tab?



What makes it so funny is what makes it so serious.

Too many drivers today would rather sue than honk. They see an auto accident as a means to gain a financial windfall. No matter who's at fault. It's time we started taking responsibility for our own actions and stopped using the legal system as a way to strike it rich. Otherwise, we'll all be the poorer. It's time we spoke out against lawsuit abuse. Start by writing for our free pamphlet: American Tort Reform Association, Dept. D, 1212 New York Avenue, N.W., Washington, D.C. 20005.

**LAWSUIT
ABUSE!**
*Guess who
picks up the tab?*

(D) AD SLICK, 85 line screen, if 2nd color is used -- Lawsuit Abuse logo is Toyo CF 8098, red

EVEN THE CLERGY CAN'T ESCAPE THE LAWSUIT CRISIS.

"Thou shalt not counsel" isn't a commandment yet. But with clergy being sued for their advice, it could become one.

Religious leaders are becoming reluctant to counsel their congregations. One California reverend was sued for "religious malpractice." Church elders in the Southwest face an invasion of privacy suit. And pastors in Texas are afraid to counsel parishioners at home.

What's going on? It's all part of the lawsuit crisis.

Clergy, businessmen, doctors—everyone is affected by America's growing number of lawsuits.


Reforms are under way to make our civil justice system more fair. To protect the right to sue, but discourage irresponsible lawsuits. To keep legal costs reasonable.

You can help. Our report, *The Lawsuit Crisis*, reviews the principal reforms. It tells how you can get involved.

Insurance Information Institute, Dept. LC
110 William Street, New York, NY 10038

Please send me a free copy of *The Lawsuit Crisis*

Name _____
Address _____
City _____ State _____ Zip _____

 Insurance Information Institute
A nonprofit action and information center

**THE LAWSUIT CRISIS.
WE ALL PAY THE PRICE.**



THE LAWSUIT CRISIS IS PENALIZING SCHOOL SPORTS.

One of the most important courses in school isn't taught in a classroom. It takes place at a football field Or a basketball court. Or a swimming pool.

But a lot of schools are thinking about closing down their sports programs.

Why? It's part of the price of the lawsuit crisis. The number of lawsuits filed in America is on the rise. And school sports programs are increasingly vulnerable. Some think the risk may not be worth it.


What can be done? Groups of lawyers, doctors, business leaders and government officials are working together on civil justice reforms.

You can do your part. Our free report, *The Lawsuit Crisis*, details the reforms being proposed. It tells how you can get involved. Write for it.

Insurance Information Institute, Dept. LC
110 William Street, New York, NY 10038

Please send me a free copy of *The Lawsuit Crisis*

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 Insurance Information Institute
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**THE LAWSUIT CRISIS.
WE ALL PAY THE PRICE.**



These ads were part of the Insurance Information Institute's \$6.5 million campaign against the so-called "lawsuit crisis" of the mid-1980s.

THE LAWSUIT CRISIS IS BAD FOR BABIES.

Doctors say the birth of a baby is a high point of being a doctor. Yet a medical survey shows one out of every nine obstetricians in America has stopped delivering babies.

Expectant mothers have had to find new doctors. In some rural areas, women have had to travel elsewhere to give birth.

How did this happen? It's part of the price of the lawsuit crisis.

The number of lawsuits Americans file each year is on the rise. Obstetricians are among the hardest hit—almost three out of four have faced a malpractice claim. Many have decided it isn't worth the risk.


What can be done? Reforms are being proposed to make our courts more fair and keep legal costs reasonable. Reforms supported by lawyers, doctors, business leaders and government officials.

You can play a part, too. Get involved. Write for our report, *The Lawsuit Crisis*. It's free.

Insurance Information Institute, Dept. LC
110 William Street, New York, NY 10038

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