

The American Tradition of Private Law Enforcement

By Paul D. Carrington*

A. The Role of Private Attorneys General**

The first thing for European lawyers to understand about American law is that the distinction between public and private law is in America seldom noticed. American judicial institutions, unlike those in most other countries, were not designed merely to resolve civil disputes, but were fashioned for the additional purpose of facilitating private enforcement of what in other nations would generally be denoted as public law. This purpose reflects widespread mistrust of the political institutions and government officials upon whom American citizens would have to depend if private law enforcement were not available, as generally it is. That shared mistrust has ancient roots and is reflected in state and federal constitutional provisions assuring the weakness and ineptitude of American political institutions other than courts,¹ and in the habit of Americans, observed in 1835 by the French observer de Tocqueville,² to litigate issues they care most about. As a consequence of these conditions, substantial reliance for the regulation of business is placed on private plaintiffs. Much regulation is done ex post the regulated business conduct in the form of civil money judgments rather than ex ante in the form of official approval or disapproval. It is provided by lawyers serving as private attorneys

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¹ On the deficiencies of American legislatures, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (New Haven 2001). It was just the best they could do in the 18th century. CAROL BARKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* (New York 2002).

² 1 *DEMOCRACY IN AMERICA: THE REPUBLIC OF THE UNITED STATES OF AMERICA AND ITS POLITICAL INSTITUTIONS REVIEWED AND EXAMINED* 306. This work was published in Paris in two volumes in 1835. It was promptly translated by Henry Reeves and republished in a single volume by A. S. Barnes & Co. in New York.

general. Its aim is to keep business executives alert to the risks their business decisions may impose on others.

Although it has roots in earlier times,³ this tradition of reliance on private regulation of business dates in America from the era of industrialization in the 19th century. An important 19th century example is the federal antitrust law providing for treble damages.⁴ The authors of that legislation recognized that the United States Department of Justice, then a mere fledgling, was at best an erratic mechanism for the enforcement of laws protecting small business from big business. The big commercial trusts that were the targets of that regulatory scheme were politically powerful institutions able to intimidate and subvert public enforcement often enough to make defiance profitable and enforcement demoralizingly uneven. Congress made the assessment that if it wanted the antitrust law enforced, it would have to rely primarily on private lawyers advising and representing the smaller businessmen whom the law was intended to protect. To provide them with an adequate incentive to take on their bigger adversaries, a bounty or prize was to be paid in the form of treble damages, an institution not unknown to English and Roman traditions. This bounty assures that a good case will yield sufficient proceeds to compensate the plaintiff's lawyer as well as the plaintiff. And it adds a deterrent effect. Any firm contemplating a violation of the antitrust laws must reckon not merely on the prospect of fighting off the federal government, but also of fighting off private plaintiffs and private lawyers who will be very difficult to influence or intimidate, except of course by paying what they demand.

In the United States today, private law enforcement is the primary method of enforcing the securities laws, the consumer protection laws, the civil rights laws, antitrust laws, and the environmental laws. While there are state and federal governmental agencies also having responsibilities in those fields, it is private plaintiffs represented by private lawyers who do most of the enforcement of those

³ Exemplary and treble damages have English origins going back to the 13th century, and probably Roman origins of an earlier time. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3 (2d ed Charlottesville 1989); BARRY NICHOLAS, INTRODUCTION TO ROMAN LAW 210 (Oxford 1975). And see, e.g., *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763).

⁴ Act of July 2, 1890, 26 Stat. 209. A judicial response of the same era was set in motion by an 1889 flood that destroyed the city of Johnstown, Pennsylvania and was caused by the failure of a dam erected for recreational uses by very wealthy notables who took no responsibility for the consequences. The outcry resulted in new judge-made law imposing strict liability on the owners of bursting dams. The rapid evolution of the case law is described by Jed Handelsman Sugarman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L. J. 333 (2000). The story of the flood is told by DAVID G. McCULLOUGH, *THE JOHNSTOWN FLOOD* (New York 1968).

forms of business regulation.⁵ Damages actions are also the primary means of enforcing standards of professional conduct for doctors, lawyers, accountants, and members of other professions.

Dependence of Americans on claims for compensation for harms to protect them from corporate wrongdoing in some measure relates with the rights of American businessmen to constitutional protection from excessive regulation by bureaucracy. For example, the Supreme Court of the United States in 2002 held that businesses selling prescription drugs have a constitutional right to engage in at least some forms of misleading advertising about their products without prior approval by the Food and Drug Administration.⁶ The decision invalidates in part the United States Food-and-Drug Laws first enacted in 1908 to inhibit false claims for medicines.⁷ What the Court did not do, however, is insulate businesses from liability for fraud in actions brought by private citizens represented by contingent fee lawyers and aggregated in class actions. Without private enforcement, Americans would be exposed to fraud in the sale of food and medicine by firms exercising their constitutional right to free speech while engaging in consumer fraud.

B. The Cornucopia of Rights Afforded Private Enforcers

Associated with this idea of private law enforcement are numerous features of American law and civil procedure that are congenial to plaintiffs. These include the following rights frequently invoked by private attorneys general bringing claims against business defendants:

(1) *to bring suit in the plaintiff's home jurisdiction against a distant business that has caused foreseeable harm at that place, a feature known in American law as "long-arm" jurisdiction:*

(2) *to proceed without risk of liability to the defendant for its litigation costs if a claim fails, a right generally known as The American Rule;*⁸

⁵ CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW 141-43 (New York 2001).

⁶ *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002).

⁷ The specific provision at issue in *Thompson* was the promotion of "compounded drugs" made by local pharmacists and not approved by the FDA as required by 21 U. S. C. §353a enacted as §503 of the Food & Drug Administration Modernization Act of 1997, 111 STAT. 2328.

⁸ On its origins, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47-1 LAW & CONTEMP. PROB. 9, 17 (1984).

(3) *with respect to claims successfully enforcing civil rights and environmental laws to compel the defendant to compensate plaintiff's counsel, a device known as a "one-way fee shift";*⁹

(4) *to hire a lawyer who agrees to receive compensation only if he or she is successful on condition that he or she will take a substantial share of the recovery, thus liberating the individual plaintiff from any substantial financial risk in bringing suit;*¹⁰ *a device known as the contingent fee;*

(5) *to compel the defendant and others as well to disclose information in their possession that might be useful as evidence to prove the plaintiff's case, a device known to Americans as the right to discovery, a right enabling private counsel to investigate possible wrongdoing by business;*

(6) *to secure from the United States and from most state governments most information in their possession that might facilitate proof of the plaintiff's claim, a feature known as Freedom of Information;*

(7) *in most civil matters, to a trial by jury if that is preferred to trial before a judge;*

(8) *to compensation not only for medical expenses and lost earnings but also for mental anguish caused by a defendant's wrongdoing;*

(9) *to an award of punitive damages if a defendant can be shown to be reckless or malicious; and*

(10) *if the claim is small, to aggregate it with other like claims in a class action so that it will be financially worthy of pursuit by private lawyers.*

The effect of this cornucopia of procedural rights is to make American courts by far the most congenial in the world to plaintiffs. The system seeks to attract plaintiffs to courthouses not merely to seek compensation for an injury or disappointment they may have experienced, but to deter antisocial conduct by those who might escape accountability if we relied upon our clumsy governments to provide the deterrence and punishment needed to constrain corporate greed, a state of mind perhaps especially rampant in the United States.

⁹ See generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651.

¹⁰ See generally HERBERT M. KRITZER, *RHETORIC AND REALITY ... USES AND ABUSES ... CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION* (Madison 1996).

Three of the distinctive features of American civil procedure have roots in American constitutional law as well as English tradition. One of these is the right to jury trial in civil cases. That right is embedded in the Seventh Amendment to the federal Constitution,¹¹ and in each of the fifty state constitutions governing proceedings in state courts,¹² where over 90% of our civil litigation is conducted.¹³ Those constitutional provisions originated in the hostility of 18th century American colonists to the imperial British judiciary.¹⁴ Because of that hostility, the civil jury was embraced by those who were revolting against the Empire with much greater fervor than it was ever embraced by Englishmen¹⁵ or their more docile colonists in Canada or Australia.¹⁶

Those fifty-one constitutional rights to trial by jury in civil cases continue to reflect popular mistrust of judges, and the legal profession of which they are a part, a group exercising much political power in the United States. The right to jury trial in the courts of the federal government was a precondition to ratification of the Constitution. Had the Seventh Amendment not been agreed to, there would likely have been no United States of America because many of the former colonists viewed the prospect of a new federal judiciary with utmost suspicion.

The right to jury trial continues to serve in the 21st century to democratize our courthouses. By empowering citizens who hold no office and no professional status, it strengthens their confidence in the judicial system. Millions of Americans

¹¹ CONSTITUTION OF THE UNITED STATES, Amendment VII.

¹² Indeed, each of the eleven states that had promulgated state constitutions before the federal constitution was ratified had embraced the constitutional right to jury trial in civil cases before there was a Seventh Amendment. A compilation is *THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA* (E Dycinck ed., New York- 1820). There has is in no state ever been a serious discussion of its elimination.

¹³ About 14 million matters were handled by state courts in 1998. NATIONAL CENTER FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS, 1998: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 17-23* (Williamsburg 1999).

¹⁴ Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 730 (1973); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999).

¹⁵ William Blackstone affirmed that the civil jury "ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 COMMENTARIES ON THE LAW OF ENGLAND *379 (London 1768). The "glory" was largely extinguished by 1914. Michael Lobban, *The Strange Life of the English Civil Jury 1837-1914* in "THE DEAREST BIRTHRIGHT OF THE PEOPLE OF ENGLAND" (John W. Cairns & Grant McLeod, eds. Oxford 2002); Joshua. Getzler, *The Fate of the Civil Jury in Late Victorian England*, id. at 217

¹⁶ Neil Vidmar, *Canadian Criminal Jury: Searching for Middle Ground*, 62-2 LAW & CONTEMP. PROB. 141 (1999); MARK FINDLAY & PETER DUFF, *THE JURY UNDER ATTACK* (London 1988) (re Australia).

have served as jurors, and most who have would attest to the integrity of the process in which they participated and to that of the judge who presided over their trial, keeping the lawyers under control and providing the jurors with advice and instructions on the law. It is said that the jury is the only institution of government having no ambition of its own, and on that account is most worthy of trust. Indeed, a civil jury is virtually immune to bribery because its members are numerous and disassociated in their lives and careers. It is equally immune to intimidation, for its members will upon the rendering of their verdict return to their normal daily lives where they are not at risk of harm imposed by the losing party. Juries are therefore always free of direct personal interest in their verdicts, and can afford to enforce law (as explained to them by the judge) without fear. Moreover, a jury trial is a public event calling public attention to the alleged misdeed of the defendant and affords the parties who seek it the satisfaction of telling the world about their side of a dispute, and alerting them to the alleged avarice of the defendant. It is largely because of the civil jury trial that astute observers have remarked that American law, unlike that of most other countries, comes more from the bottom up and less from the top down.¹⁷

The second constitutional dimension of privatized law enforcement is that constitutional lack of authority of the federal government over the legal profession and its conduct. To the extent that the American legal profession is regulated, it is with rare exception not by any legislature, but by the highest courts of each of the fifty states.¹⁸ Those institutions make virtually all the law governing lawyers.¹⁹ And the judges who sit on those courts are very much themselves a part of the legal profession in which they practiced until they acquired the stature as a lawyer required to become an American judge.

There are a million lawyers in the United States. While they are far from a cross-section of American society, there are many lawyers coming from every class, race, and subculture. While they have diverse interests and diverse political views, they are united in the position that the legal profession and the courts should enjoy independence from control by politicians and bureaucrats. So it is fair to say that

¹⁷ P. S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* 38 (New York 1987).

¹⁸ CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 20-47 (St. Paul 1986). A recent controversy has arisen over the power of state courts to punish lawyers serving the federal government for violations of standards of professional conduct established by state law. The Congress of the United States has recently enacted legislation to assure that state law applies. For discussion, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 *VAND. L. REV.* 381 (2002).

¹⁹ That body of law is synthesized in *AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS*.

the American legal profession is almost entirely self-regulated. Thus it is that lawyers enjoy almost complete freedom of contract with respect to fee arrangements and are themselves regulated primarily by their clients and others who may sue them for alleged misconduct.

The third constitutional dimension of privatization is the identity of the American judiciary. Because American courts were from the beginning commissioned to review the constitutionality of legislation, they have always been political institutions to be distinguished from the courts of either the common law or civil law traditions that strive more vigorously and with more success to maintain the apolitical professional discipline of faithful adherence to legal texts made by others. While merit is of course also considered, very few persons have ever attained judicial office in America who did not have significant political contacts. Appellate judges, especially, are recognized on all sides as makers of public policy as well as technicians, and they are selected in part for their political views.²⁰ This recognition is reinforced by the practice originated in the United States in the early years of the 19th century of publishing opinions of the court that explain and justify appellate decisions, often by reference to first principles of democratic politics.²¹ With respect to trial judges, about eighty percent of them can continue in office only by standing for re-election.²² The fact that our judges are politicians is an additional reason why the right to jury trial in civil cases is a treasured right of citizens who may be in political opposition to the judge. But it also qualifies the judges to make law and policy to an extent not regarded as permissible in most other nations.

Within these constitutional parameters, the cornucopia of procedural and other rights have been fashioned over two centuries to enable American courts to perform an important political role as managers of a vast array of social issues. To that end, rules of procedure are designed to draw socially significant disputes into

²⁰ See HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* (New Jersey 1998).

²¹ The first appearance of the opinion of the court came in the first decision rendered after the appointment of Marshall. The story is told in G. HASKINS & H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815* at 207-245 (New York, 1981). There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution, at least until the Privy Council Appeals Act of 1832. *REPORT OF THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE APPELLATE JURISDICTION* 27 (London 1872). See also John P. Dawson, *The Privy Council and Private Law*, 48 *MICH. L. REV.* 627 (1950).

²² The best statement of the case for electing judges is still FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 444-475 (John William Ward ed., Cambridge 1968). Grimke was a member of the Ohio Supreme Court; his book was first published in 1841,

court. So it is that Lord Denning of the English House of Lords was moved to say that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.”²³

Even foreign governments now choose to bring their claims in American courts when they can. A striking example was the case brought by the Republic of India against the Union Carbide Corporation for the 200,000 deaths and personal injuries resulting from the explosion of a fertilizer plant in Bhopal in 1984.²⁴ The plant was owned and operated by a company in which the Republic of India shared ownership with Union Carbide, an American firm that had designed and built the plant. Everyone employed in the plant and everyone harmed by the explosion was Indian. Many American lawyers went to Bhopal to sign up clients authorizing them to bring suit in American courts against the American defendant having the deep pocket able to pay the claims. At first, the Republic of India was offended by the suggestion that it could not deal with the matter without the help of private law enforcers coming from the United States. However, it soon reckoned that it might in an American court, although perhaps not in its own court, secure information suggesting that the tragedy was the result of bad design of the plant by Union Carbide. The reason for this hope was the discovery procedure available in an American court that would enable lawyers representing India to inspect the otherwise private files of Union Carbide in New York City and to compel its employees and officers to give evidence under penalty of perjury. Those rules are a secondary consequence of the right to jury trial dictating that proceedings shall be conducted orally and without substantial interruptions, and that the adversary lawyers must therefore have access to possible evidence before trial. Thus, if the case were to proceed in New York as the Republic of India desired, it and Union Carbide would each have to open their files to scrutiny by the other. And American or Indian lawyers might go to Bhopal to interrogate and cross-examine victims in depositions that might be recorded on videotape and played at trial in New York. In exchange, Union Carbide would be entitled to have each claimant subjected to a medical examination by doctors nominated by it, and to see any existing information, such as income tax returns, that might shed light on claims for economic losses.

If by such discovery, the Republic of India could find evidence of wrongdoing by Union Carbide, it might be sufficient to persuade an American jury that the company should be held responsible for all the harm. And, if that liability could be established, damages might be assessed in the traditional American manner. If so,

²³ *Smith Kline & French Lab. Ltd v. Bloch*, [1983] 2 All ER 72, 74 (C. A.).

²⁴ An account of the Bhopal tragedy is DAN KURZMAN, *A KILLING WIND: INSIDE UNION CARBIDE AND THE BHOPAL CATASTROPHE* (New York 1987).

compensation would extend to all medical and economic costs to the workers and their families, and compensation for emotional losses as well. On the other hand, if the Republic of India could prove no case against Union Carbide, it would nevertheless not be obliged to pay Union Carbide's legal expenses as it would if it lost the case in India. For these reasons, the settlement value of the case would be much greater if it were scheduled to be decided in the United States. Union Carbide fought desperately and successfully to get the case out of a court that was situated a few blocks from its world headquarters, and into the courts operated by its adversary, the Republic of India.²⁵ The irony is obvious.²⁶ The case was settled for \$400 million., a minor fraction of its value in the United States.

C. Punitive Damages

As troubling to Europeans as the American practice of discovery is the award of punitive damages to be paid by firms found guilty of malicious wrongdoing.²⁷ Most familiar is the celebrated case of the cup of hot coffee.²⁸ The Wall Street Journal and the business press a few years ago decried a 2.7 million dollar jury award to a plaintiff claiming that she had been scalded when she spilled a cup of coffee purchased at McDonald's.²⁹ Facts not revealed in the journalism and generally unknown were that (1) McDonald's vigorously enforced a company rule requiring that coffee be served at a temperature in excess of ninety degrees centigrade, a temperature that its officers acknowledged to be capable of causing very serious burns, but which elevates the pleasant odor of the drink and makes patrons (at least those who do not scald themselves) prefer McDonald's breakfast to that of its rivals; (2) McDonald's had a file containing 700 hundred complaints about serious injuries received from scalding coffee; (3) McDonald's had not warned its customers that its coffee was dangerously hot; (4) the 79-year old

²⁵ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F. 2d 195 (2d Cir. 1987).

²⁶ UPENDRA BAXI, INTRODUCTION: TOWARDS THE REVICTIMIZATION OF THE BHOPAL VICTIMS, IN *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* 1, 1 (U. Baxi, ed., Bombay 1986). For an account of the availability of tort remedies in India fifteen years later, see J. N. PANDEY & VIJAY KUMAR PANDEY, *LAW OF TORTS* 3 (Allahabad 2002).

²⁷ Punitive damages were provided in the Code promulgated by Hammurabi four millennia ago.1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 3 (2d ed Charlottesville 1989); BARRY NICHOLAS, *INTRODUCTION TO ROMAN LAW* 210 (Oxford 1975). And see , e.g. *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763)

²⁸ *Liebeck v. McDonald's Restaurants, Inc.*, 1995 WL 360309 (D.N.M. 1994) (on remand).

²⁹ See Michael McCann, William Haltom, & Ann Bloom, *Java Jive: Genealogy of a Judicial Icon*, 56 U. MIAMI L. REV. 113 (2001).

plaintiff, a retired waitress who had never before been a litigant, suffered serious burns causing acute and enduring pain requiring skin grafts and other expensive treatments that put her life at risk; (5) McDonald's refused even to pay the plaintiff's medical bill, much less other unavoidable costs of treatment, and (6) the trial judge, finding that \$2.7 million was excessive, ordered a new trial unless the plaintiff agreed to accept \$480,000, which she did. A third of that sum and more went to pay her lawyer and legal expenses. Given the substantial cost of skin grafts and the time-value of money enjoyed by McDonald's when it refused to pay her medical expenses, the plaintiff receiving \$320,000 may have received little more than her out-of-pocket expenses and modest compensation for her pain and suffering. The judgment and the threat of others like it apparently sufficed, however, to cause a modest reduction in the temperature at which coffee is sold by McDonald's.

It is reasonable to conclude that the right result was reached with respect to hot coffee, and that no apology for the extravagance of American law in that case is in order. It may be that European business executives are more humane than American executives when contemplating the social consequences of their decisions respecting such matters as the temperature at which coffee will be sold. Or it may be that in Europe it is reasonable to expect administrative departments of government to protect the people from the sort of reckless business judgment made by the management of McDonald's. It is also likely in Europe that the plaintiff's injuries in such a case would be given medical treatment at public expense. That is generally not so in the United States and it is not unimaginable that a badly scalded customer would be required to pay a hundred thousand dollars or much more for her medical care as a result of a severe scalding. Maybe she was privately insured at her own expense, but maybe it is not likely, given the cost of health care in the United States. McDonald's did not care about that. At least its executive officers did not care until her lawyer took them to court to enforce their public duty to protect McDonald's patrons from needless risks and thus reminded them that when they deliberately created risks of scaldings, McDonald's is the insurer liable for resulting medical costs of its patrons. If they continued to sell coffee at ninety degrees centigrade, the next judge and jury might be even more punitive. They would be asked, how much must McDonald's be required to pay before they will forego the additional margin of commercial advantage resulting from the occasional needless scalding of its patrons? Sooner or later, an American jury was likely to give McDonald's the message that we disapprove its brutal indifference to the safety of its patrons. No other government agency would be likely to do so. To an American, it seems unlikely that such a message would or could be transmitted to a corporate management in any other way but by this draconian means.

Americans would, of course, want, indeed insist, on sending the same message to a European firm selling scalding hot coffee in the United States. So a European court refusing to enforce an American judgment imposing punitive damages liability on a European firm doing business in the United States is insisting on immunizing the European firm against enforcement of the only American law against reckless scalding of American consumers. The obvious effect is to give them an unjust competitive advantage in that market.

It may surprise a European audience to hear that a majority of American corporate officers, excepting most of the very top managers, may approve of the use of punitive damages to deter business decisions of the kind made by McDonald's.³⁰ The reason is that even American businessmen are sometimes afflicted with humanitarian concerns. Without the risk of punitive damages, the calculus of such business decisions is left to a cold-hearted comparison of the cost in money damages of scalding patrons with the additional profits to the corporation to be gained from selling coffee that smells a little better than Burger King's.

Several notable punitive awards have been made against automobile manufacturers, including at least two against foreign manufacturers. Relative calculations of risks and benefits to consumers are, of course, unavoidable for those making products that are inherently dangerous. But the risk of punitive liability may make those calculations more sensitive to the moral dimensions of risk-taking where the harms at risk are to be borne by others. Punitive damages serve to foster the attention of executives to the human consequences of what they are doing to protect and improve the corporate bottom line.

In one case, General Motors' executives decided to locate the fuel tank of many of its trucks outside the basic frame of the vehicle. It was obvious that a few people would be killed in explosions caused by collisions crushing the gas tanks thus located, but it was calculated that the damages to be paid to compensate the heirs of the deceased victims was a lesser sum than the cost saving to General Motors of that dangerous but economic design. Fidelity of management to the bottom line required the executives to sacrifice a few lives. Punitive damages serve to legitimate the concerns of executives who want to be respectful of the bottom line but who prefer to advocate truck designs manifesting an appropriate humane respect for life and safety.

³⁰ The data is old. GALLUP ORGANIZATION, ATTITUDES TOWARD THE LIABILITY AND LITIGATION SYSTEM: A SURVEY OF THE GENERAL PUBLIC AND BUSINESS EXECUTIVES 54-55 (New York 1982).

It is a problem that this role requires the court as well as the manufacturer to place a monetary value on human life and limbs. In the General Motors case, the jury unanimously awarded the plaintiff \$200 million to punish the company for taking inexpensively avoidable risks. Both the trial judge and the appellate court agreed that General Motors had been too brutal in undervaluing the lives it put at risk, and that the punishment assessed was reasonable in light of the evidence. The unanimous agreement of the jurors with that of the trial judge and the appellate court is usual with respect to the question whether the conduct of a defendant is so morally degraded that a deterrent punitive award is justified.

Agreement is much more difficult in setting monetary values on the evils that they detect. This may be especially true for juries lacking experience in damage assessment. Hence, we sometimes see spectacular verdicts that excite the interest of business journalists. A California jury not long ago awarded a plaintiff \$4.8 billion against Ford Motor Company in a case involving deaths occurring in one of its ill-designed vans that tend to roll over. The misconduct of Ford was aggravated not only by its continued manufacture and sale of a dangerous product, but by its successful effort to suppress public knowledge of the defect by privately settling cases that would have called public attention to the design defect on condition that plaintiffs and their lawyers make no disclosures to other prospective plaintiffs or to journalists who might inform the public of the dangerous defects. Apparently, a juror reckoned the amount of Ford's advertising budget for the year, and the jury of which he was a member irrationally concluded that this would be a reasonable measure of the appropriate punishment for selling an inexcusably dangerous product without publicizing its defect. That verdict was set aside by the judge as excessive, as are most of the highly publicized verdicts.

As that case illustrates, there are constitutional restraints on punitive awards that serve thus to correct the most extraordinary awards that are celebrated by journalists. In *Honda v. Oberg*,³¹ an Oregon state court awarded an injured plaintiff \$1 million for injuries suffered in an accident that occurred when he was driving a three-wheel vehicle up a sand dune. It was contended by the plaintiff that the vehicle was inherently too dangerous to drive, and in fact three-wheel vehicles are for that reason now seldom marketed. The jury concluded that Honda had recklessly endangered the lives of Oregonians by selling such contraptions. They imposed an additional \$5 million punitive award to discourage their sale, and the Supreme Court of Oregon affirmed. But the Supreme Court of the United States reversed, holding that the Oregon procedure embedded in the Oregon constitution, too closely restrained the judges from reviewing the calculation of the punitive

³¹ *Honda Motor Co. v. Oberg*, 517 U. S. 1219 (1996).

award. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires the judiciary to sign on its approval of a punitive award as reasonable in amount and no larger than needed to serve the deterrent purpose of such awards.

In *BMW v. Gore*,³² the plaintiff, a medical doctor in Alabama, complained that BMW had sold him for \$40,000 an automobile that appeared to be new, but had been repainted to conceal rust acquired while the car was in transit across the Atlantic. This was said to cause the car to lose 10% of its value and to be a violation of Alabama law. The plaintiff was on this account wrongfully harmed and he claimed damages in the amount of \$4,000. The jury agreed, and to deter such frauds in the future, it awarded the plaintiff \$4 million in punitive damages. The Supreme Court of Alabama reduced the award to \$2 million, a sum deemed adequate to deter BMW from selling repainted automobiles as new. The Supreme Court of the United States reversed that judgment, holding that even \$2 million was excessive. It noted that what BMW had done would not be regarded as fraudulent in many states that it had in its history sold only 14 repainted automobiles in Alabama, and that the amount was irrationally disproportionate to the harm and to the frequency with which it had been imposed on Alabamians.

Finally, I note the still pending case involving the award of \$5 billion against Exxon to deter corporate recklessness such as that leading to the enormous oil spill off the coast of Alaska. The trial judge heard the evidence and concluded that the verdict was correct. The federal appeals court, however, concluded that the award was excessive in amount and directed the trial judge to reconsider. He did so, and entered judgment for \$4 billion.³³ That decision is presently undergoing another review.

These cases suggest a trend toward heavier involvement of professional (but not apolitical) judges in making the calculation of the measure of a punitive award. The Supreme Court has very recently held that appellate courts must review punitive awards *de novo* to assure their reasonableness. This seems to be a prudent development for the reason that appellate courts are better able to compare awards and assure that they are reasonably even-handed.

It is a demerit in the punitive damages system that awards can be so radically disparate, although given its deterrent purpose, it may not be desirable to fix too precisely the adverse consequences of business misconduct. While it may be hoped

³² *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1995).

³³ *In re Exxon Valdez*, 270 F. 3d 1215 (9th cir. 2001).

that the mechanisms in place can enable appellate courts to make punitive awards somewhat less erratic and more even-handed in their measurement, absolute predictability would at least partially defeat the purpose of the punishment to deter business from making brutal calculations that assign only economic value to the welfare of consumers, workers, and the environment.

It seems therefore that foreign firms selling dangerous goods or oversold investments in America, or who hire American workers and violate their rights, or who emit noxious fumes in American air will have to endure the hardships of exposure to punishment imposed in suits brought by private citizens and private lawyers, and no government agency will be able to immunize them from that risk. If evidence is found indicating that corporate greed has so overcome common decency to give profound offense to an American court, a foreign business, like an American one, may be required to pay such sum as the court deems sufficient to prevent a recurrence, at least to the extent that it has assets within reach of any American forum.

D. Citizen Suits

As I mentioned, one important feature of American practice is the invitation to plaintiffs to aggregate their claims. In this brief paper, I will mention only one form of aggregation. It is the citizen suit authorized by federal environmental laws such as the Clean Air Act³⁴ and the Clean Water Act.³⁵ A purpose of such laws is to enable citizens and non-governmental organizations to apply the lash of the law to protect the environment.

In fact, very few "citizen suits" are brought by individual citizens. They are generally brought by organizations such as the Environmental Defense Fund or the Natural Resources Defense Council that have managed to raise private money for the purpose of defending the environment. Some of their money comes from settlements of citizen suits brought by them against alleged offenders. The most common sort of case is one brought against a corporate polluter by an environmental group after the United States Environmental Protection Agency (the EPA) has decided that the case was not worth pursuing. For example, a business firm may have failed to keep the kind of records required by the EPA. An environmental organization can bring suit to impose on the firm a civil penalty

³⁴ 42 U. S. C. §7604.

³⁵ 33 U. S. C. §1365. For a summary of the different provisions, see MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS, APPENDIX A (Salem NH 1991).

prescribed by the statute, and then settle the case for a payment somewhat less than the penalty would be. Those funds are then used to support other private enforcement activities conducted by non-profit private organizations.

Citizen suits are also brought against the EPA and other governmental agencies. Perhaps the most common form is a suit against the agency to compel it to meet a statutory deadline that it has failed to meet. But more significant have been the numerous cases brought to challenge EPA policy; often the substance of the issues at stake has been the propriety of cost-benefit analysis, the environmentalists generally taking the position that the statute required the elimination of pollution no matter what the cost. The Supreme Court has held, however, that deference to the agency's sense of the aims and values expressed in the statute is appropriate even when challenged in a citizen's suit.³⁶

Many citizens' suits are inconsequential. But the effectiveness of the device might be measured by the lengths to which parties have sometimes gone to suppress them. A spectacular example has recently been provided in the state of Louisiana. The state agreed to provide millions of dollars in tax relief and other subsidies to a Japanese petrochemical company to locate a new plant in the town of Convent.³⁷ Convent already had the worst air in the United States, because of the presence of other polluters; the town is known to those who reside there as Cancer Alley. The population is poor and mostly black. They acquired legal counsel from an office maintained at Tulane University for the dual purpose of providing training for law students and services for needy clients, and they filed a citizens' suit to enjoin further poisoning of their air.

Their suit was greeted with rage by business interests in the state. It is pertinent that the economy of the state of Louisiana was languishing relative to that of surrounding states. It may also be pertinent that Louisiana is the one state that was settled initially by French immigrants; its code was influenced by the Napoleonic Code and the accompanying "Gallican habits" (as Francis Lieber would have denoted them), including that of a strong Governor. The Governor launched a vigorous public attack on Tulane University, a state university, for providing the citizens with counsel in a case that could mean a loss of new industry for the state. The Supreme Court of Louisiana, sensitive to the judges' dependence on campaign contributions from the concerned business groups, changed its rules governing the practice of law in state courts to exclude the student clinic from representing the

³⁶ *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984).

³⁷ The story is told by Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J. L. & POLICY 33 (2000).

plaintiffs. Law firms in the state, under pressure from their clients, announced that they would not employ graduates of the Tulane Law School if its clinic did not drop the case.

In the end, the federal Environmental Protection Agency exercised its jurisdiction to disapprove the Louisiana air standard. The petrochemical plant has not been constructed. Moreover, the Supreme Court of the United States held in 2001 that the federal Legal Services Corporation providing legal services to the poor may not restrict its lawyers in the political objectives they seek on behalf of their clients.³⁸ The Court concluded that the poor client has a right protected by the First Amendment of the Constitution of the United States to express his or her grievances to a court, and that the legislature providing funds for legal services must accept the duty of the lawyers to pursue the objectives of their clients. It is a fair inference from this recent decision of the Supreme Court that the rule of the Louisiana Supreme Court providing some legal services to the citizens of Convent, but denying them lawyers when they wish to challenge the air quality associated with the petrochemical factory, is unconstitutional.

Perhaps reasonable minds may differ on the utility of citizen suits such as that brought by the citizens of Convent. Such suits are not an economically efficient mode of law enforcement. The EPA could do the job more efficiently without the help of citizens, if only we could trust the federal government to take care of the people of Convent without the prodding of citizen suits. On the other hand, citizen suits do provide a forum and an activity for the many people and organizations who are deeply concerned about the environment. They reflect the moral judgments of a culture that assigns a very high value to procedure and to the opportunity to be heard. Moreover, people who are litigating are generally found indoors and are not out in the streets arousing fellow citizens to disorder. That is a useful function for any legal system to perform.

E. Conclusion

In defending American practices to the extent that I have, I do not recommend that European nations adopt them. If business decisions affecting consumers, workers, and the environment can be adequately restrained by other means that are satisfactory to the people who need the law's protection, there is little to be said for costly American devices. If, however, multinational business firms manifest in Europe the traits exhibited in the cases I have mentioned, and if they can

³⁸ *Legal Services Corporation v. Velazquez*, 531 U. S. 533 (2001).

successfully resist regulation imposed *ex ante*, as American firms often do, then perhaps Europeans may need to consider some of the American experience to see if there are features you might borrow.

Many American business executives dislike the American legal system for the same reasons that European business executives do.³⁹ However, when asked if they would prefer the establishment of a bureaucracy sufficiently empowered to protect consumers, workers, and the environment, few would make that choice. Even fewer would opt for a political system that also took pressure off the liability system discussed here by providing for publicly provided health care. At the end of the day, American business, while it will continue to whine about such injustices as that said to have been done to McDonald's, and will propose various forms of deregulation, will not favor any scheme that requires it to pay higher taxes or endure the unwelcome attention of government regulators. For these reasons, Europeans considering investments in the American economy should generally proceed in the expectation that private law enforcement will continue to be an indispensable means by which the United States protects consumers, workers, and the environment, and that such enforcement will be brought to bear on them to the extent that they participate in that marketplace.

³⁹ For a particularly acid comment on the features of American law that are the subject of this paper, see Richard W. Dusenberg, *Views on the American Legal System*, in UNITED STATES/JAPAN COMMERCIAL LAW AND TRADE 431 (V. Kusuda-Smick ed., Ardsley-on-Hudson 1989). Dusenberg quotes an American CEO: "If we can take the lawyers in America –and I speak for all CEOs – and move them to Japan, the U. S. could be competitive in 24 hours. Twenty four hours later, Japan's productivity would go down, its trade balance would go down, and its legal bills would go up." This comment was made at a time when the Japanese economy was at its apex; it has not been repeated in more recent times. The Manhattan Institute is funded by multi-national enterprise to pursue the aim of protecting business from American law by perpetuating the myth that America would prosper even more if only Americans would put greater faith in business management. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (New York 1991). Some responses are STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 101-145 (Durham 2001); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109-1112 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147 (1992). Not all who disdain the system are business managers or their delegates at the Manhattan Institute. See, e.g., PATRICK ATIYAH, *THE DAMAGES LOTTERY* (Oxford 1997).