



The Time for Legal Reform Is Now

William E. Simon, Jr.

William E. Simon, Jr., the 2001 Republican gubernatorial nominee in California, is a respected political leader, businessman, philanthropist, federal prosecutor, and social commentator. In 1988, Simon, his father, and brother founded the successful investment firm William E. Simon and Sons. A graduate of Boston College Law School, Simon served as Assistant United States Attorney for the Southern District of New York under then-U.S. Attorney Rudy Giuliani.

Nearly 170 years ago, a young Abraham Lincoln delivered an impassioned speech to the Young Men's Lyceum in Springfield, Illinois. Summarizing his theme, Lincoln said:

Let reverence for the laws be breathed by every American mother. Let it be taught in schools, in seminaries, and in colleges. Let it be written in primers, [in] spelling books and in almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in the courts of justice.

In short, let reverence for the law become the political religion of the nation.¹

What prompted Lincoln's stirring plea? He had been deeply affected by the recent outbreaks of mob rule and lynchings throughout the land. He was already anguishing over the question of slavery. He saw the storm clouds gathering and knew this question would one day split the nation apart.

But even given those weighty, historic issues, what troubled Lincoln equally was that law-abiding citizens were losing their respect for the rule of law. They were losing confidence in their system of justice. Lincoln knew that the failure to restore this respect and confidence would undermine the very foundation of America's democracy and civil society.

People have to believe in our justice system. They have to trust that it is fair. When justice becomes a game, a joke, a racket, or a private preserve for the privileged few, the foundation for a just, fair, and orderly society begins to rot.

We are now faced with this same challenge.

During the 1980s, after decades in which the rights of criminal defendants were exalted over the rights of law-abiding citizens, major reforms were enacted to address the imbalance and restore a measure of public faith in criminal justice. Inspired by victims and their families and volunteer groups such as Mothers Against Drunk Driving, new laws and tougher penalties were enacted, and they worked to help reduce crime rates in California and across the nation.

We must now act upon our civil justice system with the same sense of urgency, purpose, and passion that brought such welcome and long-overdue changes to our system of criminal justice two decades ago.

The plain truth is that our system of civil justice is out of control. It has been hijacked by a relatively small group of lawyers who have gamed the system for their own gain, often at the expense of their own clients.² These lawyers have been enabled and encouraged by a growing and troubling public attitude that ducks personal responsibility, seeks profit from every misfortune, and

creates scapegoats for every mistake. It is time to restore balance and common sense to our civil justice system. If we do not, California and America will be less competitive and less innovative, and we will see a spreading corrosive impact across our entire society.

Many, such as the Milken Institute and the Manhattan Institute, have been toiling in the vineyards of tort reform for many years. Their efforts have made a great difference, but important battles lie ahead. Because of their foundational work, we are now poised to realize the legal reforms necessary to maintain a prosperous, competitive economy, to fairly and speedily compensate genuine victims, and to ensure that public confidence in American justice is preserved.

America's tort system costs our economy \$246 billion per year.³ That's more than eight times what the federal government spends on homeland security and over four times what it spends on education.⁴ It's an amount that is greater than the GDPs of all but twenty-seven countries throughout the world.⁵ It amounts to a tax of \$3,300 on the average American family.⁶

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Where does this money go? Not where the American people think it does. A Rand study looking at state class actions, for example, found that, on average, attorneys' fees and administrative costs account for nearly half of any settlement or award.⁷ In some cases, plaintiffs receive only pennies on the dollar.

Recently, there was a nationwide class action filed in Beaumont, Texas, which sought \$10 billion for a “defect” in the floppy disk controllers of Toshiba laptops. Although not one Toshiba laptop customer reported a problem, much less any kind of injury, Toshiba settled the case by giving most class members cash or coupons worth from

\$210 to \$443; the lawyers received \$147.5 million in fees.⁸

Another class action suit, against Cheerios, was over a food additive. There was no evidence of injury, yet lawyers were paid nearly \$2 million in fees, which worked out to approximately \$2,000 per hour. Consumers received coupons for a free box of cereal.⁹

The abuses seen in the class action system are reflected throughout our tort system. We all have our favorite example of a silly, stupid, or outrageous personal injury claim. It's easy to find them—after all, a new lawsuit is filed in our country every two seconds!¹⁰ Over the last decade, class actions at the state level—where some of the worst abuses occur and where “forum shopping” by lawyers looking for the friendliest courts is rampant—have skyrocketed 1,000 percent.¹¹

What's worse is the broader impact that this litigation explosion is having on the cost and quality of health care, on the vibrancy of our capital markets, on small businesses and cutting-edge industries, and on our competitiveness in an increasingly tough global economy. Lifesaving drugs are being delayed and kept off the market over fears of liability.¹² According to the American Medical Association, we have a full-blown medical liability crisis in at least twenty states due to outrageous malpractice lawsuits and awards.¹³ In some states, doctors are leaving the profession, trauma centers and clinics are closing, and specialists such as OB-GYNs are fleeing, leaving many communities dangerously underserved.¹⁴

Excessive litigation has cost tens of thousands of Americans their jobs and stifled the creation of new jobs. In the case of asbestos litigation, no reasonable person argues that those truly sickened by exposure to this dangerous substance should not be fully cared for and compensated. But we have allowed asbestos litigation to become a multimillion-dollar lottery for lawyers and those with extremely limited exposure and absolutely no signs of sickness. As a result, more than seventy companies have been bankrupted and more than 70,000 jobs have been lost.¹⁵

The impact of the litigation explosion has been particularly severe in California—as Jim Copland of the Manhattan Institute noted in the recent comprehensive exposé *Trial Lawyers, Inc.: California*:

- California has more lawyers than any developed nation apart from the United States. While Britain has 1.49 lawyers per 1,000 citizens, Germany 0.83 and Japan only 0.11, California is home to 3.79 lawyers per 1,000 people.¹⁶
- “Creative” judging and a lawyer-friendly Sacramento legislature have given the state some of the loosest class action rules in the nation, have made the state a magnet for asbestos suits, and have developed employment laws that are globally notorious for their reach.¹⁷
- California’s punitive damage awards grew over 300 percent in the 1990s,¹⁸ and nonpunitive awards in large California counties increased 144 percent from 1996 to 2001 alone.¹⁹ Today, the average award in those counties—not counting punitive damages—comes to \$1.5 million.²⁰
- The escalating costs of lawsuit abuse in California are severely affecting the state’s economic prosperity. A California Business Roundtable survey found, not surprisingly, that fully half of all California businesses have explicit policies to halt job growth in the state; 40 percent are planning to move jobs elsewhere.²¹

Nonetheless, I believe that we are on the cusp of serious reform both nationally and in California. After years of trying, this past February Congress passed and the president signed the Class Action Fairness Act.²² This new law puts interstate cases into federal court, more closely scrutinizes coupon settlements, prohibits settlements that benefit class members based on their proximity to the courthouse, and discourages settle-

ments that would result in a net loss for class members.

There is progress on the state level as well—and this is both welcome news and a wake-up call for California. Beginning in 2002, the U.S. Chamber Institute for Legal Reform started releasing an annual state liability system rankings study, conducted by Harris Interactive, to rank states’ legal systems from best to worst. This study has become the primary benchmark by which business owners, elected officials, the media, and other opinion leaders measure their state’s legal environment and see firsthand how good, or bad, that environment is for businesses and consumers. California, I am sorry to report, ranked forty-fifth in the latest survey.²³

The business community has learned that simply informing people of where their state ranks is a strong agent of change in and of itself. For example, over the last two years, Mississippi, Texas, West Virginia, Missouri, South Carolina, Georgia, Florida, and Ohio have all enacted legal

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reform bills after being ranked in the lower half of the Chamber’s study.²⁴

America and California operate in a global economy. The tort tax—so well documented by the Manhattan Institute study—is driving away jobs, discouraging internal investment, and pushing up prices so that our products, services, and business opportunities are put at a severe competitive disadvantage. When you look at the rapid emergence of new economic competitors like China and India, you know that this is a handicap that we simply cannot afford. Californians must also realize that we are in competition with other states to match their legal reform records—and there are real-life impacts. For example, last year Toyota North America announced that it was locating a major facility in Texas, due in large part to the state’s reformed legal climate.²⁵

Although much needs to be done, California has not been standing still. Last November, voters approved Proposition 64, which eliminates “shakedown lawsuits” by stipulating that only the state attorney general and local district attorneys—and not any plaintiffs’ attorney—can sue on behalf of the general public.²⁶ Thanks to Governor Schwarzenegger’s leadership, our state also passed significant workers’ compensation reform, which is lowering rates and reducing workers’ comp-related lawsuits.²⁷

The United States Supreme Court has weighed in as well. Last year, the court issued a landmark development in the *State Farm* case,²⁸ which created a template for the reduction of excessive punitive damage awards—a template that has since been applied many times by lower courts to rein in outrageous awards.²⁹ So the momentum is with those who want to make our country’s legal sys-

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tem simpler, fairer, and faster. But a great deal of work remains to be done.

On the federal level, asbestos litigation legislation passed the Senate Judiciary Committee in May but has yet to be approved by the full Senate.³⁰ A bill is desperately needed to help the sick and save American jobs. In addition, the Lawsuit Abuse Reduction Act is now moving through the House.³¹ This bill would help curb frivolous litigation by imposing mandatory monetary sanctions against attorneys who file frivolous lawsuits. Nearly every modern legal system in the world has some kind of “loser pays” provision. This bill takes a modest step in that direction, but stronger legislation is still required. It’s something we need both on the federal level and in California in state court.

Also starting to move through Congress is the Personal Responsibility in Food Consumption Act,³² which would limit obesity-related lawsuits against the food industry. These suits allege that people are fat because they are forced to go to McDonald’s every day and eat a Big Mac and fries!

Finally, the explosion of securities-related lawsuits is yet another problem area, especially in California, where a disproportionate share of that type of litigation is filed.³³ While there may be cases where lawsuits are meritorious, the idea that shareholders should be able to sue simply because a stock price goes down is just ludicrous. The number of suits settled in 2004 increased over 24 percent from 2003, and the total costs to settle these cases more than doubled, to \$5.5 billion.³⁴

Just as important as legislation, however, is having judges able and willing to enforce sensible legal rules. We know that the quality and philosophy of those we elect to office in the legislative and executive branches of government is all-important. The same is true in the judicial branch.

Many states elect their judges to the bench. Legal reform advocates used to cede this territory to the trial bar, but in the last several years there has been a major effort, led by the business community, to educate voters in key state supreme court and attorney general races. The strategy has worked. Since 2000, fifty of fifty-nine pro-legal reform candidates in targeted races have been elected to office.³⁵ But there are forty-six state supreme court justices and twenty-eight attorneys general up for election in 2006. The outcome of these races, as well as in governor’s races in states where the chief executive appoints the judges, will have an enormous impact on the legal environment in California and across the nation. To have any hope of genuine success, legal reform advocates must be engaged in this process.

The overwhelming majority of attorneys are men and women of great integrity who perform valuable services. Neither our criminal nor our civil justice systems could operate without them. I am proud—most of the time—to be a lawyer. I strongly believe that there should be swift and certain justice for those who have been wronged and that every Californian should have fair access to our justice system.

But rather than stubbornly defend the excesses of the status quo, those of us who are lawyers should be in the vanguard of reform. We know the system. We know what works and what is broken.

California’s lawyers should be the agents for change in reforming California’s legal system by advocating for:

- The tightening of class action standards, so that appellate courts can review class certifications before defendants are forced to the settlement table;
- Adopting inactive dockets and other mechanisms such as medical criteria, to ensure that the sickest victims of asbestosis and other diseases get compensation first and to prevent unimpaired claimants from clogging the courts;
- Scaling back wage-and-hour laws and reducing the role of courts in the employment process;
- Cutting the incentive for lawyers to file meritless lawsuits by adopting a “loser

pays” rule, like that enjoyed by the rest of the developed world; and

- Stopping unscrupulous attorneys from taking advantage of unsophisticated clients.

Abraham Lincoln was right those many years ago. Reverence for the law is and must always be a cornerstone of life in America. To make this happen, we need a justice system that acts swiftly on behalf of genuine victims but that embraces the uniquely American values of personal responsibility, fairness, and simple common sense.

I am tired of California being known as the lawsuit capital of the world. It is time to reform the legal system, to make it work better for all, and to once again lead America and the world in innovation, opportunity, entrepreneurship, and a quality of life that is second to none.

END NOTES

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2. See generally MANHATTAN INSTITUTE, TRIAL LAWYERS, INC. CALIFORNIA: A REPORT ON THE LAWSUIT INDUSTRY IN CALIFORNIA, 2005; available at <http://www.triallawyersinc.com/ca/ca01.html>; MANHATTAN INSTITUTE, TRIAL LAWYERS, INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA: 2003, available at <http://www.triallawyersinc.com/html/part01.html>.
3. See U.S. TORT COSTS: 2004 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 5 (Towers Perrin [Tillinghast] 2005).
4. Cf. President's 2005 Budget, available at <http://www.whitehouse.gov/omb/budget/fy2005/tables.html> (showing 2005 homeland security spending at \$30 billion and 2005 education spending at \$57.3 billion).
5. Cf. International Monetary Fund list of countries by GDP, 2005, available at [http://www.nationmaster.com/encyclopedia/List-of-countries-by-GDP-\(nominal\)](http://www.nationmaster.com/encyclopedia/List-of-countries-by-GDP-(nominal)) (showing twenty-seven countries with GDP greater than \$246 billion).
6. See U.S. TORT COSTS: 2004 UPDATE, *supra* note 3, at 2 (showing per capita U.S. tort cost of \$845).
7. See generally DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (RAND Inst. for Civ. Just. 1999), available at <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf>.
8. See Press Release, *Toshiba Reaches Settlement of U.S. Lawsuit Regarding Floppy Disk Controllers in Notebook PCs*, Oct. 29, 1999, available at http://www.toshiba.co.jp/about/press/1999_10/pr2902.htm; Andy Pasztor and Peter Landers, *Toshiba to Pay \$2B Settlement on Laptops*, THE WALL ST. J. ONLINE, Oct. 31, 1999, available at http://news.zdnet.com/2100-9595_22-516294.html.
9. See Press Release, *Congress Approves Goodlatte Class Action Reform Legislation*, Feb. 17, 2005, available at http://www.house.gov/apps/list/press/va06_goodlatte/021705.html.
10. See BRIAN J. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 10 (National Center for State Courts, 2003), available at http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Main_Page.html (showing 15.8 million civil lawsuit filings in state court in 2002).
11. See Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 5 (1999).
12. See PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 14, 157–58 (Basic Books, 1988) (“Under jury pressure, the new touchstones of technological legitimacy have become age, familiarity, and ubiquity. It is the innovative and unfamiliar that is most likely to be condemned. . . . People everywhere underestimate the risks they know well and face every day and overestimate those that are new and foreign. The familiar is safe, or at least bearable enough, no matter how appallingly dangerous it may be in reality. The unfamiliar is suspect, intrusive, and probably dangerous, no matter how reassuring the statistics may be.”).
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14. See OFFICE OF THE ASST. SECY. FOR PLANNING & EVALUATION, U.S. DEPT. OF HEALTH & HUMAN SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 3 (July 24, 2002).
15. See Lester Brickman, *Asbestos Litigation*, Center for Legal Policy Forum, Mar. 10, 2004, available at <http://www.manhattan-institute.org/html/clp03-10-04.htm>.
16. See American Bar Association, *National Lawyer Population by State*, available at <http://www.abanet.org/marketresearch/2004nbrolawyersbystate.pdf> (last visited Mar. 3, 2005) (measuring 2003 resident and active attorneys in California as 134,468); U.S. Census Bureau, available at <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Mar. 3, 2005) (estimating California's 2003 popula-

tion at 35,484,453); *Snapshot of America*, U.S. NEWS & WORLD REP., June 28, 2004, at 40 (citing Frank B. Cross, *America the Adversarial*, VA. L. REV. 189, 198 (2003)).

17. *Compare* *Blue Chip Stamps v. Superior Court*, 18 Cal.3d 381 (1976) (determining that a grant of class certification is not a final order and not appealable, only challengeable with a writ of mandamus), *with* 28 U.S.C. § 1292(f) (2005) (providing for interlocutory appeal of class certifications in federal court), and Ill. S. Ct. R. 307(a)(8) (2005) (same for Illinois courts); *see* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 1–2 (2004); *see also* *Gardner v. Charles Schwab*, 267 Cal. Rptr. 326 (1990); *cf.* CALIFORNIA BUSINESS ROUNDTABLE, CALIFORNIA COMPETITIVENESS PROJECT: ASSESSMENT OF CALIFORNIA COMPETITIVENESS 3 (2004), available at <http://www.cbirt.org/economy.html> (last visited Mar. 4, 2005).

18. *See* J. CLARK KELSO & KARI C. KELSO, AN ANALYSIS OF PUNITIVE DAMAGES IN CALIFORNIA COURTS, 1991–2000 16, tab. 9 (Capital Center for Government Law & Policy 2001) (showing 223 verdicts with punitive damages in 1991–95, with a mean punitive award of \$5,671,942, and 266 verdicts with punitives in 1996–2000, with a mean punitive award of \$19,273,391).

19. *See* Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties*, 2001, BUREAU OF JUSTICE STATISTICS BULLETIN app. F (Apr. 2004); *Civil Trial Cases and Verdicts in Large Counties*, 1996, BUREAU OF JUSTICE STATISTICS BULLETIN app. D (Sept. 1999).

20. *See id.*

21. *See* California Business Roundtable, *supra* n. 17, at 3.

22. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

23. *See* 2005 ILR/Harris State Liability Systems Ranking Study, available at <http://www.instituteforlegalreform.org/harris/>.

24. For state rankings, *see* <http://www.instituteforlegalreform.org/harris/pdf/OverallStateRanking.pdf>; for a summary of recent state-level tort reforms, *see* <http://www.atra.org/states/>.

25. *See* Emily Wagster Pettus, *Legal Climate Hurt State in Push for Toyota Plant, Barbour Says*, AP Apr. 27, 2004 (“In February 2003, Toyota chose to build a new plant in Texas rather than in Mississippi or several other states that courted the company. [Toyota senior vice president Dennis] Cuneo said he led the site selection for the Japanese automaker’s newest plants and was impressed by Texas Gov. Rick Perry’s commitment to changing that state’s civil justice system”).

26. *See* Carolyn Said, *Citizens’ Right to Sue Limited*, S.F. CHRON., Nov. 4, 2004, at C1.

27. *See* CAL. LABOR CODE §§ 4060(b)(1), 4656(c)(1) (West 2005); Jim Wasserman, *California Lawmakers Approve Overhaul of Workers’ Compensation*, AP, Apr. 16, 2004.

28. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

29. *See, e.g.,* *Simon v. San Paolo U.S. Holding Co.*, No. S121933 (Cal. June 16, 2005); *Johnson v. Ford Motor Co.*, No. S121723 (Cal. June 16, 2005).

30. *See U.S. Senate’s Frist Intends to Pass Asbestos Bill*, REUTERS, July 29, 2005.

31. *See* Lawsuit Abuse Reduction Act of 2005, H.R. 420, Rep. No. 109-123, June 14, 2005.

32. *See* Personal Responsibility in Food Consumption Act, H.R. 554, Rep. No. 109-130, June 14, 2005.

33. *See* PRICEWATERHOUSECOOPERS, 2003 PRICEWATERHOUSECOOPERS SECURITIES LITIGATION STUDY 7 (2004); LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, POST-REFORM ACT SECURITIES SETTLEMENTS, UPDATED THROUGH DECEMBER 2004 16 (2005).

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35. *See* U.S. Chamber of Commerce, Elections-Policy Accomplishments for 2004, Jan. 14, 2005, available at http://www.uschamber.com/issues/accomplishments/04_elections.htm; Thomas J. Donohue, *State of American Business 2004*, Jan. 7, 2004, available at http://www.uschamber.com/press/speeches/2004/040107tjd_stateofamericanbusiness.htm; Thomas J. Donohue, *Illinois Chamber PAC Dinner Keynote Address*, Mar. 11, 2002, available at http://www.uschamber.com/press/speeches/2002/020311tjd_illinois.htm.

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