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Some Thoughts on Civil Justice Reform

Samuel C. Butler

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Cover Page Footnote

Samuel C. Butler has been associated with Cravath, Swaine & Moore, New York City, since 1956; he was elected a partner in 1960 and has been the Presiding Partner since 1980. He graduated from Harvard College in 1951, Phi Beta Kappa and magna cum laude, and from Harvard Law School in 1954, where he was a member of the Law Review and received his degree magna cum laude. He was a law clerk to Justice Sherman Minton in the October 1954 Term of the U.S. Supreme Court and then served in the U.S. Army. Mr. Butler was a trustee of Vassar College from 1969-77; an Overseer of Harvard College from 1982-88, serving as President of the Board in 1987 and 1988; a trustee of the New York Public Library since 1981; a trustee of the Board of the Culver Educational Foundation since 1981 (a Vice President since 1985); and a trustee of the American Museum of Natural History from 1989-93. He has been a member of the Securities Regulation Committee of the Bar Association of the City of New York and a Vice Chairman of its Committee on Minority Recruitment. Me. Butler has also served as a director of a number of public companies, including Ashland, Inc. since 1970, U.S. Trust Corporation since 1972, GEICO Corporation 1971-95, Olin Corporation 1975-82, and Millipore Corporation since 1992.

SOME THOUGHTS ON CIVIL JUSTICE REFORM*

*Samuel C. Butler***

I am very grateful for the honor being paid me, partly because I am joining a long line of distinguished members of the Bar who were earlier honorees, many of whom are old friends, colleagues, and esteemed opponents. But also because of my deep and longstanding admiration for Judge Learned Hand who, when I was in law school and starting practice, was by a wide margin the most respected judge in the United States. I never met Judge Hand, but I have the full measure of reverence of my generation for his wisdom and judgment and his strongly held views on judicial restraint. So it is with especial humility that I accept this award given in his memory.

When reading Gerry Gunther's wonderful biography of Judge Hand some months ago, I learned that on January 29, 1955, Judge Hand received an award from the American Jewish Committee and used that event as an opportunity to give a memorable speech on civil liberties, human rights, and the continuing evils of McCarthyism.[1] As a result, the AJC decided, after Judge Hand's death, to grant an award annually in his name.

While my concerns tonight are not as fundamental as was Judge Hand's defense of civil liberties to a similar audience forty-one years ago, I am troubled, and believe Judge Hand would be, by both the sharp decline in respect and trust that the general public has for lawyers and adverse developments in our legal system, all since his death more than three decades ago. Recent polls have suggested that thirty-

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* These Remarks were delivered upon the presentation of The American Jewish Committee's Judge Learned Hand Human Relations Award to Samuel C. Butler on February 28, 1996.

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1. *See* Gerald Gunther, Learned Hand: The Man and the Judge 591-92 (1994).

one percent of the American public think lawyers are less honest than other people, and only five percent want their children to become lawyers.[2]

I think the public generally resents the fact that our legal system has in some respects been converted into a lottery where a few lucky winners hit the jackpot but most face increased delays in the legal system and increased costs in using that system and in insuring against its risks. For example, it has been estimated that in California about twenty cents of every dollar paid for auto insurance goes to lawyers and another thirty cents for fraudulent or inflated claims, including excessive medical treatment.[3]

When an Alabama jury gives $4 million in punitive damages, and $4000 in compensatory, to a doctor whose BMW was found to have an undisclosed, partially retouched paint job which he didn't notice for the first nine months he owned the car.[4] When a New Mexico jury awards $2.7 million in punitive and $160,000 in compensatory damages to an eighty-one-year-old woman who sued McDonald's after having bought a scalding cup of coffee at a drive-in window and then spilled it when, while holding the cup between her knees, she tried to remove the top.[5] When a Texas jury awards Pennzoil $11 billion because Texaco's higher bid prevented Pennzoil from being able to follow through on a letter of intent to invest $2.5 billion for a minority interest in Getty.[6] Well then, everyone knows our legal system has gotten out of hand in some respects.

I hasten to add that I am not opposed to all class action suits, product liability suits, or shareholder suits. There are many examples of great good that has come from each of those types of litigation. For example, there is no doubt that, in the area of shareholder suits, the fear of liability has significantly increased the quality of oversight by directors of public companies.

The common law, as developed in England and America, until fairly recently involved a system in which the courts established the legal rules, and the juries found the facts and prescribed damages for injured persons to whom duties had been breached. At the same time that legal system protected those persons whose non-negligent behavior nonetheless had led to injuries. However, in the last twenty or thirty years, this legal system has been radically altered. It has largely

2. *See* Randall Samborn, *Anti-Lawyer Attitude Up*, Nat'l L.J., Aug. 9, 1993, at 1, 20.

3. *See* Max Boot, *Will Tort Reformers Miss a Golden (State) Opportunity?*, Wall St. J., Feb. 21, 1996, at A15.

4. *See* Paul M. Barrett, *How a Bad Paint Job May Put Brakes on Big Punitive Awards*, Wall St. J., Mar. 9, 1995, at B1.

5. *See Jury Says Coffee Was Too Hot*, USA Today, Aug. 19, 1994, at 1B.

6. *See* Thomas C. Hayes, *Texaco Must Pay $11 Billion Award, Texas Court Rules*, N.Y. Times, Dec. 11, 1985, at A1. The award was the largest in the history of the United States civil justice system. *Id.*

moved away from its common law roots to become a non-fault based social insurance system interested in transferring vast resources from actors to passive victims. Rather than merely seeking to compensate injured persons, it has become an instrument capable of shutting down entire industries. Rather than being regulated by rules of law that precluded large numbers of cases from ever getting to juries, it has given juries, on an increasingly unsupervised basis, the ability to punish actors whose conduct juries find distasteful. And generally those juries are located in parts of the country where being a juror is a part-time, good job, where neither the plaintiff nor the defendant reside and where neither the injury nor the alleged wrongful activity occurred. Unhappily, the New York courts may be joining this trend. Did you see the article in today's *New York Times* that a Brooklyn court has ordered a Swiss canton to pay more than $125 billion for damages allegedly suffered by two felons as a result of the failure of a tiny bank in that canton in 1967?[7]

Moreover, despite its much greater role in our society, our legal system has ignored the decline in morals and the excesses of we lawyers who run the system. It has become a system that powerfully encourages charges of fraud. As a minor example, last August I worked on three mergers, ABC, CBS, and GEICO. Analysts and shareholders strongly applauded, and eventually overwhelmingly voted for, each of those transactions. Nonetheless, there were a total of twenty-two lawsuits filed against those companies, all shrilly charging, in the strongest terms, fraud and abuse of fiduciary duty. Most of these suits were filed within hours of the first press release announcing each deal; long before the plaintiffs, or more properly the plaintiffs' lawyers, knew anything about the matter other than the names of the parties. Since those suits were started, not one single step has been taken by the plaintiffs' lawyers to do anything about them, even though all three mergers have now closed. While not costly to my clients, this kind of unseemly professional, or may I say unprofessional, behavior cheapens our profession in the eyes of the public. All they see is an obscene rush to be first in line at the courthouse just in case anything remotely resembling a real claim should rear its head.

I think we must search for cures for these abuses which have grown up in our legal system, but cures which will not endanger the fundamental strengths of that system so that we can return to assuring everyone a swift and fair hearing for their legitimate claims. There are many possible improvements, and I would like to briefly mention three.

I believe the time has come for us to try some form of "loser pays." This so called English Rule is used in virtually every other Western

7. *See* John Tagliabue, *Poor Swiss Get U.S. Bill: $125 Billion and Change*, N.Y. Times, Feb. 28, 1996, at A4 .

country.[8] Perhaps that's why the English a few years ago had 82 lawyers per 100,000 people, the Germans 111, but we had 281.[9] This rule is based on fairness, the person who wins should be made whole. Even more importantly, it makes each side look more carefully at the merits of its case and more willing to compromise. At the least I would test the English Rule somewhere in our court system, perhaps in federal diversity cases or one or two states.

However, limits on the English Rule are certainly needed. One approach would be to cap the amount a losing party would have to pay to a sum equal to the legal fees that party paid to its own counsel in that litigation. Without doubt, trial judges must be authorized to limit or disallow the rule by exercising their discretion in appropriate cases. There are some types of suits where the Rule should perhaps never apply, civil rights cases, for example.

There is an interesting variation on the English Rule in which the defendant, at an early stage in the litigation, would be required to make a settlement offer. If the plaintiff ultimately collects less than that offer, it must pay the defendant's legal fees for the period after the offer was made; on the other hand if the plaintiff collects more, the defendant must pay the plaintiff's legal fees for the post-offer period. Even the ABA has, to the best of my knowledge, not yet opposed this formulation.

As mentioned earlier, a second area of concern to me is the vast increase in the number and size of punitive damage awards. For example, in Alabama the total amount of punitive damages awarded sky rocketed 225 times between 1973 and 1993.[10] Obviously, in egregious factual circumstances, punitive damages are appropriate as an effective punishment and a strong deterrent to knowingly bad behavior. A sensible proposal would be to assess punitive damages only in a separate hearing by the trial judge after the jury verdict, to require some finding of actual intent and to fix a dollar limit. Legislation adopted by the House of Representatives last year would have limited punitive damages to the greater of $250,000 or triple the economic loss, but would have confined that cap solely to product liability cases.[11] Surely in this day of concern about medical costs, at least punitive damage claims in malpractice suits against doctors and hospitals should also be capped. I hope the Senate will join the House this year in passing compromise legislation on at least this aspect of tort reform.

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8. *See* Werner Pfennigstorf & Spencer L. Kimball, Legal Service Plans: Approaches to Regulation 508-09 (1977).

9. *See* A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America 2 (Aug. 1991) [hereinafter Council on Competitiveness Report].

10. *See Dr. Gore and Mr. Slick*, Wall St. J., Oct. 11, 1995, at A14.

11. *See* Neil A. Lewis, *House Passes New Standards Limiting Awards in Civil Suits*, N.Y. Times, Mar. 11, 1995, at A1.

Finally, we have all heard about or seen "junk" science in the courtroom, so-called expert witnesses whose principal expertise is in serving frequently as a witness. Last November I chaired a dinner at which a distinguished Second Circuit judge suggested in his speech that, even without legislation, trial judges could reduce this growing problem by simply retaining on their own authority an independent, truly qualified expert. This court-appointed, neutral expert would listen to both parties' expert witnesses and then give the jury his or her frank appraisal of the medical, scientific, or technical testimony they had heard from the parties' experts. Last Monday a *Wall Street Journal* editorial picked up this concept and urged its use in breast implant litigation.[12]

There are many other actions that could be taken, such as speeding up and limiting discovery, imposing sanctions on lawyers who file frivolous lawsuits, but neither time nor knowledge permits me to go further.[13] I am afraid there has been an implicit conspiracy of silence among lawyers on the topic of abuses in litigation. All lawyers benefit from lawsuits, whether one principally represents plaintiffs or defendants, but if we don't speak out and encourage fair reforms, something worse than the current public dislike and distrust of lawyers may occur.

12. *See Truth, Justice and Implants*, Wall St. J., Feb. 26, 1996, at A12.

13. Some suggested reforms for speeding up and limiting discovery include a "loser pays" rule for discovery motions, mandatory early disclosure of core information, and amending the Federal Rules of Civil Procedure to establish clear standards for imposing sanctions upon attorneys who abuse discovery. *See* Council on Competitiveness Report, *supra* note 9, §§ 4-6, at 16-19.