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THE FEDERALIST SOCIETY, CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?, CONFERENCE DIALOGUE, DAY ONE, DINNER ADDRESS

Hon. David McIntosh

John Stossel

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DINNER ADDRESS

INTRODUCTION

THE HONORABLE DAVID MCINTOSH*

Good evening. Welcome to the Federalist Society's banquet for yet again one of our conferences on important subjects in the law. It is a delight to be here. I am David McIntosh, one of the co-founders and member of the board of directors of the Society. They don't usually let me participate in these discussions because, for the past year, I have put aside all pretension to academics and have been involved in the political realm.

First of all, I want to commend the staff of the Federalist Society. We now have fifteen thousand lawyer members and over ten thousand students who participate in our events throughout the year, and we are entering into our fourteenth year with exponential growth. In particular, I want to single out Leonard Leo, who did a wonderful job in presenting this program.

Now, to the business at hand: To abuse or not to abuse, that's the question that poses itself when one has to introduce a journalist. Indeed, the possibilities are endless and the temptation is great. But let me say that this assignment is easier than merely stretching for an excuse to start mentioning the likes of Dick Morris, Webster Hubble, Susan McDougal, David Hale, Lonnie Guinier or Jocelyn Elders.

And, certainly, all of us who are familiar with the writings of Thomas Jefferson would relish his lament that he would prefer a life of ignorance so long as it did not include reading the newspapers. Of course, Jefferson was far from ignorant and probably read the newspapers, and as he indicated in his *Notes on the State of Virginia*,¹ ignorance is preferable to error and man is less remote from the truth who believes nothing than he who believes what is wrong.²

I think all of us in The Federalist Society can agree that even better yet is the dogged pursuit of the truth, and that is what our speaker is all about. John Stossel, of ABC News, the man we present to you tonight,

* The Honorable David McIntosh represents Indiana's Second Congressional District as a member of the United States House of Representatives. Congressman McIntosh is also co-founder of the Federalist Society for Law and Public Policy Studies and is currently its national Co-Chairman.

1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (William Peden ed., 1955) (1801).

2. See *id.* at 157-61.

is truly different from his colleagues in the media. He is, I would say, a cut above.

Our usual misgivings about the media and their bias simply do not apply to John. He has been the recipient of nineteen Emmy Awards. He joined ABC's news magazine *20/20* in 1981, and since then he has received numerous accolades for his balance and fairness in journalism. Perhaps this is because he is a midwesterner. He was raised in the capital of the heartland, Chicago, and he managed to keep his good sense in spite of attending Princeton as an undergraduate. He then became an expert on consumer affairs in New York City while he was with *Good Morning America*. I am proud to say that Bryant Gumbel does not seem to have rubbed off on him.

John Stossel's first widely acclaimed presentation was a prime time special entitled *Are We Scaring Ourselves to Death?*,³ in which he took a look at pollution, toxic waste, and food safety. In particular, he contrasted the relatively trivial risks associated with these problems with the press's own exaggerated coverage of them and the government's corresponding wasteful spending. Then, in August 1995, John hosted *The Blame Game: Are We a Country of Victims?*,⁴ in which he looked at the tendency to blame misfortune on others. He also aired segments concerning how false sexual abuse charges have caused teachers to withdraw affection from students who might need it,⁵ and on the way special interest groups will use statistics to serve their own agenda⁶—which is something, by the way, we in Congress never do.

I have always been perplexed by what makes a good news story. John and I were talking about this a little bit at dinner. For example, I could never understand why the media was always picking on Richard Nixon. I remember the stories making fun of him for wearing a dark blue suit, a tie, and shoes while walking on the beach in Miami. I mean, doesn't everybody do that? Maybe he should have chosen a lighter color suit. (Well, perhaps this is something I ought to defer to my wife, Ruthie.) But then today, we see Bob Dole being picked on because he doesn't wear a dark blue suit, a tie, and shoes, but chooses to wear Hanes underwear and shorts; he gets ribbed by the media as well. If anything, these stories indicate that the media has a different set of standards for what they present to us.

3. *ABC News Special: Are We Scaring Ourselves to Death?* (ABC television broadcast, Apr. 21, 1994).

4. *ABC News Special: The Blame Game: Are We a Country of Victims?* (ABC television broadcast, Aug. 17, 1995).

5. See *20/20: Teach, But Don't Touch* (ABC television broadcast, Mar. 17, 1995).

6. See *20/20: Fact or Fiction?* (ABC television broadcast, Mar. 31, 1995).

On a serious note, I want to commend our speaker, John Stossel, for a segment that he took to the nation earlier this year. It is a topic that's of great concern to all of our membership and one of Ruthie's favorites. It is entitled *The Trouble with Lawyers*.⁷ That particular piece of journalism provided a fresh perspective on the topic of civil justice in the litigation process. Many who missed the initial showing called up and asked for a transcript or a taped copy. I don't know what the ratings were on that particular night, though John's assistant in New York shared with me that it did earn him a great deal of mail. Well, I can relate to that. John, just let me say I share your pain. In any case, it is useful to underscore just how many people see one of John Stossel's segments when he shares his findings with the public on these issues.

Recent ratings showed that *20/20* was the number two show of all television shows in the nation, second only to *Seinfeld*. Let me be a little more specific. When that rating came out, it showed that there were a potential eleven million households watching the show that night. Many weeks, it reaches thirteen to fifteen million households in the nation. To put this in perspective, for those of you who are political in your bent, that means roughly twice as many households as there are in the state of Indiana or twenty times as many households as there are in the average congressional district.

So perhaps our convention planners should pay attention to ABC and John Stossel a little bit when they put together our conventions. And, come to think of it, while we are talking about *The Trouble with Lawyers*, I think I will stop by McDonald's on my way home, buy one of those dangerous, steaming hot cups of coffee, and then come by and see about making a sequel with you to that earlier program. How does that sound?

But, ladies and gentlemen, it is my honor to present to you tonight a man from the highest rated television news program—a show that airs on Ronald Reagan's favorite television network. It is indeed my pleasure to present a man who is here to answer the question: Do the merits and the search for truth matter anymore?

7. ABC News Special: *The Trouble with Lawyers* (ABC television broadcast, Jan. 2, 1996).

DINNER ADDRESS

JOHN STOSSEL*

Thank you. I love the introduction, but I do have to make some statistical corrections here. Yes, we were number two, but that was August. For the rest of the year, we were in the top twenty. *60 Minutes*, I think, out-rates us.

I should also say that when we reach thirteen million households, that is actually about twenty million people, because several people watch in a household. So the reach of television is impressive. On the other hand, for the *New York Times*, circulation is one million. If a story is on page twenty, maybe forty thousand people will read it.

As successful as *20/20* has been, I should also make it clear that my specials, of which ABC has reluctantly given me four per year, are not *20/20*. They are John Stossel specials. They run whenever ABC chooses to put them on the schedule. They have surprised ABC and done well. Most have been top twenty shows, and the ABC executives say, "What?" And they only gave them to me because the market worked. Rupert Murdoch offered me a job and to keep me ABC said, "All right, we'll let you do these specials."

I should also say that I appreciate the compliment, but I should acknowledge that in the past I have been part of what many of you would call the problem; perhaps because of my Princeton education. For my first fifteen to twenty years of reporting, I was a consumer reporter. I was one of those annoying people on the news, whom I'm sure most of you hated.

It would be presumptuous of me tonight to try to tell you lawyers about civil law, so what I would like to talk about is my perspective from the point of view of what has happened to me as a reporter. Perhaps by coming at it from an odd direction, I can offer some new insights.

As I said, I started as a consumer reporter in Portland, Oregon, and my job was to do a consumer story every day, to find something that business was doing wrong. And I did. I was on the air every day criticizing business. My attitude was the attitude of most young reporters, which was that consumers are basically victims, preyed upon by business, and that the market is often cruel and needs intervention through plenty of government regulation. I would do stories, say, on the way companies misled people with their advertising.

Let me give you a few silly examples. When I started, I would ask people what they take for an upset stomach. What comes to mind? Alka-Seltzer was the best seller then, and they had a great ad campaign. So we

* Reports for the ABC news magazine, *20/20*.

asked twenty stomach doctors—gastroenterologists, they call themselves, because they like big, long names—if they would ever recommend Alka-Seltzer for an upset stomach. All twenty said no, never, because Alka-Seltzer is basically baking soda plus aspirin, for a lot more money. Aspirin is a great painkiller; baking soda is a good antacid. But the aspirin makes your stomach bleed a little. So say you have a bleeding ulcer, and your stomach hurts. You take Alka-Seltzer. The aspirin kills the pain. You feel good. But four hours later, your stomach is bleeding more. Now you are really in pain. What do you do? You take more Alka-Seltzer. It's great for them, bad for you.

Here is another example: The Coffee Association was running ads saying both that coffee picks you up and that it calms you down. So I called them up and asked, "How can you say this? This is contradictory?"

"Well," they would say, "we have research that backs that up."

"Really, what's the research?"

"Well, we surveyed thousands of people and asked them, 'What do you get out of your coffee break?' Some people said it picked them up and some people said it calmed them down."

Yet another example: Libby Owens Ford Glass Company ran ads saying, "Look how clear our car window glass is!" But, of course, the window glass looked clear because they shot the ads with the windows rolled down.

So this is why we reporters said that we have got to have regulation, we have got to police the ads, and we have got to have a Federal Trade Commission. I'm embarrassed how many years I believed this. But eventually, watching regulation at work, I saw the idiocy of it. It was not just the vast amounts of money that it takes to pay all the regulators. The real cost is the indirect cost: all the money that business spends trying to obey the rules, all the smoke they put up trying to confuse the regulators, all the energy lost paying the lawyers, filling out the forms, and forming all these trade associations to manipulate the leviathan. All that energy wasted.

I would also argue that there is something about the regulatory process that kills the spirit. In Moscow, before the fall of communism, people had that sort of dead-eyed look. What was that about? Was that fear of the KGB? I don't think so. I think it is just that dead feeling one gets when working in an all-bureaucratic state. I think we see the same thing over here at the Agriculture Department.

But that is another story. The main point is that regulation suffocates the economy. And what really got to me is that, as a consumer reporter, it quickly became clear that all these rules did not even affect the real crooks. The good companies, the ones that would be around for ten, twenty, or one hundred years, had to spend all the money doing the right

things, while the crooks just kept cheating. The people selling the breast enlargers or the lose-fat-while-you-sleep pills kept getting away with it.

After about three years, the attorneys general in some states or the Federal Trade Commission (FTC) would file a complaint, but the violators would continue while their lawyers would stall the regulators for another couple of years. Eventually, the violators would just move to a different state or change the name of their product. They kept getting away with it.

What happened when the regulators really did act? Let's take one example. When I started reporting, aspirin companies were lying in their ads. They were saying that Bufferin works twice as fast, Excedrin kills more pain, and, you may remember these ads, Anacin is a tension reliever. Anacin is merely aspirin plus caffeine; yet they call it a tension reliever. So the FTC sued and demanded corrective advertising in the form of contrary statements to prior ads¹—such as “Bufferin does not relieve more pain.” Obviously, we never saw any of those ads; we would have remembered them. After nine years of litigation, the companies and the government agreed on a consent order.² A consent order is where the company does not admit doing anything wrong, but agrees not do it anymore. And that was that.

So who won after nine years of litigation? Well, the lawyers won, as usual. Some nice houses were built here in D.C. based upon that litigation. The public won, you could say, because the aspirin companies don't lie in their ads anymore. Now they just say that nothing works better than Bayer. If you think about it, that just means “we're all the same,” which is true. So at least the ads are truthful. But what became clear to me is that it would have happened anyway, because the market polices itself. The Better Business Bureau gets involved; the companies knock each other or sue each other or the press makes fun of the liars. Eventually, the market sorts out these problems on its own.

The more I watched the market work, the clearer it was that it was so much more efficient, more flexible, cheaper, and quicker than the government-imposed solutions. The market worked even in places where one would never expect market forces to be effective. Look, for example, at the “greedy profit-driven companies” that have employed me. I have now worked for all three networks. They earn all their income from advertising. You would think they would let their advertisers do anything. Why not tell all kinds of deceitful stories to get the money? And yet each network has a board of censors that reviews each ad and rejects half—rejects a few outright, demands changes in most of them. If a company wants to make a medical claim, it has to have two good studies

1. See *Bristol-Myers Co. v. Federal Trade Comm'n*, 469 F.2d 1116 (2d Cir. 1972).

2. See *In re Bristol-Myers Co.*, 102 F.T.C. 21 (1983).

before the networks will accept it. The networks censor their own advertising, and turn some of the money away. Why? Because they want their ad time to be thought of as a good climate for advertisers, not as an environment for sleaze. It is not good business to accept bad advertising.

Another example of the irony of the market is that I was allowed to be a consumer reporter; I was allowed to bite the hand that fed me. I did a story like the aspirin one I told you about, and Bristol-Meyers, which made Bufferin and Excedrin, sued me for twenty-three million dollars. You would think CBS, where I worked at the time, would say, "Stossel ain't worth that," but they did not. The real threat to them was the loss of advertising; sometimes companies would pull out half-million dollar accounts.

So the networks put up with consumer reporting. Ralph Nader, when consumer reporting was just beginning, said that we would never see consumer reporting on commercial television because stations would not want to offend their advertisers; we would only see it on public television. But what has happened? There is no consumer reporting on public television because the bureaucrats are too uptight about offending anybody. But there are annoying consumer reporters on almost every local commercial station. Why? Because the market works in surprising ways. The customers liked it. More people would watch a news program that did honest consumer reporting, and the television companies made enough money from that to compensate for what they lost in lawsuits or ads. So long as there is free information, the market solves these problems.

When I did the Alka-Seltzer story, I asked doctors what one should take for an upset stomach, and they said the aluminum-magnesium compounds. Sure enough, now that the information has gotten out, products like Mylanta and Maalox are the best sellers. Similarly, the Coffee Association stopped making their stupid claim after my report.

However, many people still say, "Well, the market works fine for us, for the educated, we can deal with that, but what about the poor and the uneducated? We've got to have major regulation to protect them." But again, the market works in surprising ways. Look at cars. Cars are complicated. Few of us understand them and understand what makes one safe or dependable. I sure don't. Yet the worst you can buy in America is better than the best the planned economies could produce. Remember the Trabant, the prize of the Eastern Bloc? It disappeared immediately when the wall fell.³ Why does this happen? Not everybody has to be an expert, we just need a few people who read *Consumer Reports* or car magazines or pay attention to things, and they in turn lead the market.

3. See generally Stephen Kinzer, In "East Germany," *Bad Ol' Days Now Look Good*, N.Y. TIMES, Aug. 27, 1994, at A2.

We cannot really get into trouble buying a car in the West. The competitive market protects the ignorant, too.

Of course, there is one exception to the self-protection of the market, and that is the environment. Often, your smoke goes into somebody else's yard, and no market incentive exists to behave well. But for everything else, there is.

This brings us to civil litigation. Actually, I should like lawsuits; private lawsuits are a market solution; they are the invisible fist to supplement the invisible hand. Lawsuits will protect consumers. Those of us who revere freedom should be excited about civil litigation; it is not just to protect us from the tyranny of the state and abuses of the police, it also relieves us from depending on the states' armies for our protection. We can hire our own individual soldier to protect our freedom.

Yet something has gone wrong. We are at this conference today to talk about what factors underlay the suspicions many have about the civil justice system. Suspicions? What about hatred and fear? There is a reason for all these jokes about lawyers; it is a good monitor of the culture that there are so many lawyer jokes.⁴ People are scared and angry, and they have good reason to be. And, while the cost is just part of it, it is a big part. The median savings of somebody fifty years old in America is twelve thousand dollars. What that means is that most people who have any experience with a civil lawsuit will end up broke. Even if they win, they're broke. Just defending themselves would take all their money. Even for those of us who are more prosperous, any lawyer can take all our money and all our time.

People have a good reason to be angry. My experiences being sued and suing have astounded me. I am a layman at this, so I do not approach it with your expertise. But as someone who has looked at all forms of businesses, what blows me away is the extravagant indifference to waste. For example, O.J. Simpson is now going to testify for nine days, and nobody even asks if it is necessary or what it costs. Every other enterprise in America in the last years has found ways to do things quicker and cheaper than law.

Let us talk about the side effects of civil litigation and all the products we don't have: the swimming pools, the diving boards, the gymnastics programs. You have heard about those. How about the vaccines? You may have heard about those, too. We once had twenty companies making vaccines in America, and now we have four. I asked Joe Jamail on *The Trouble with Lawyers*⁵ if we are safer with only four vaccine makers. He

4. See, e.g., LARRY WILDE, LIBRARY OF LAUGHTER 159-76 (1988) ("Did you hear about the lawyer who was hurt in an accident? The ambulance backed up suddenly.").

5. See ABC News Special: *The Trouble with Lawyers* (ABC television broadcast, Jan. 2, 1996).

said that we are as long as they are making them right. But that's bull. We are not safer; we are safer with twenty companies looking for ways to make us healthier.

Look at some other things we have lost because of the threat of litigation. Fresno, California, ordered volunteers who were cleaning the streets to stop because there might be a lawsuit.⁶ We don't have honest job references anymore because people are afraid of lawsuits. We passed this oppressive Americans With Disabilities Act.⁷ Forget what it costs, look at the result: Fewer disabled people are being hired now. Since that law was passed, the number of disabled getting into the work place is, based upon one poll, the same;⁸ according to another poll, slightly less.⁹ Why? It is because businesses now view disabled people as lawsuit bombs. If you hire them, you can never fire them. The law backfired.

Look at bankruptcies. In America, if a company goes bankrupt, it appoints a trustee, a lawyer who makes sure all the creditors get the right amount of money. A story in the *Houston Post* claimed that the amount of legal work that will determine how much the creditors should get is almost exactly the same as the amount of cash the company has left in the till.¹⁰ That is, often, two million dollars might be in the till, but the creditors would get nothing because all the legal work would cost that much.

In Canada, accountants do the bankruptcy work. Bankruptcy proceedings are faster and more money is left for the creditors. Even so, I'm not criticizing the lawyers directly. They are doing their job. They are trying to arbitrate fairly. They are doing what they were taught in law school: to follow the dictates of the law carefully.

Another side effect is that information flow is corrupted. For the market to work, we need clear information. I want clear labels on dangerous products. For example, I am glad the label on Drano says, "Don't pour it in the sink with hot water, because it will blow up in your eyes and blind you." Yet for the most part, nobody reads labels because the lawyers have so clouded them up. Now we get prospectuses for stock purchases that are so thick that nobody reads them.

6. See John Stossel, *Protect Us from Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8.

7. 42 U.S.C. §§ 12101–12213 (1994).

8. See LOUIS HARRIS & ASSOCS., INC., THE N.O.D./HARRIS SURVEY ON EMPLOYMENT OF PEOPLE WITH DISABILITIES 41 (Study No. 951401 conducted for The Nat'l Org. on Disability, July 7, 1995).

9. See WALTER OLSON, THE EXCUSE FACTORY 86 (1997).

10. Marty Graham, *Rodriguez Nearly Out of Money; Accounting, Legal Fees Drain Estate*, HOUSTON POST, Mar. 31, 1995, at A1.

Have you read any birth control pill labels lately? Look at this thing. This is what comes with the birth control pill: complex boilerplate on both sides of the paper. Does this make the product safer? Is it supposed to protect people? Now the doctors don't even read it. If you did read it, you wouldn't need the pill anymore.

Litigation meant to make us healthier may make illnesses worse. I once sued because I got beaten up by a professional wrestler while I was doing a story on how wrestling is faked. He said, "Oh yeah? You think it's fake? Well, you think *this* is fake?" He then pushed me. Now, this guy was six-foot-eight and 280 pounds. I went right down, but I stupidly got up again and he said, "You're not convinced? Well, what about *this*?" and he hit me in the ear with an open hand. I had ear pain after that, and I thought I should teach the wrestling federation that they can't beat up reporters, so I sued. As part of the suit, of course, the defendant sent me to his doctor for an examination. The doctor examined me and said, "You know, I think this is a juro-somatic illness." I asked him what that was, and he said, "I think you're holding onto your pain because you're involved in a lawsuit." I was extremely insulted and screamed at the guy, and he backed down. But sure enough, as soon as I got paid, the pain went away.

Now, I don't know how true that is for how many people, but I have to believe that this culture of victimhood perpetuated by the lawyers is what makes people sick, women feel they have horrible autoimmune symptoms from breast implants, and people think they are being poisoned by the electromagnetic field from the power lines near their houses. Yet most of these people may have made themselves sick. The mind is powerful. I think it prolongs these illnesses.

Are the suits at least punishing the bad guys? Is the invisible fist working? No. Most cases that the tort lawyers are so proud of—such as the asbestos¹¹ and Dalkon shield¹² cases—were filed after the products were already off the market. And who gets punished? The bad guys do not get punished because by the time it is finally sorted through, it is twenty years later. The people who end up paying are the innocent, the little old ladies who own the pension funds who own the companies now. The so-called bad guys are long gone. The lawyers come in like vultures after the beast is dead.

Is America at least safer because of these suits? I don't think so. The vaccine companies are one example. Or, take the television show that I

11. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990); *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

12. See, e.g., *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

did on risk. This was the first special that I did, and it was one that ABC did not want me to do. They were afraid no one would watch. Instead, they wanted me to do a piece on a topic that would get a rating, such as raising children or on diets. But, I insisted that my show on risk be the first one because the subject had been bugging me for some time.

I guess it started to hit me when a lot of these stories that we consumer reporters did came from trial lawyers. Trial lawyers are the perfect source for a consumer reporter. They come to you with the victim in the wheelchair right there. They have already taken discovery from some poor company and have, inevitably, found some dirt somewhere. You have a ready-made story. You don't even have to make the phone call to find the victim. For example, one producer wanted me to do a story on BIC lighters. The lighters were exploding in people's pockets and catching fire and had killed four people in four years. However, by that time, I was getting sick of these stories. Fortunately, I had assembled a list from the government and medical sources of what kills people in America, and I was able to say to the producer, "I'll do that story if you first do a story on garage door openers, because they kill not one person a year, as the lighters do, but six people a year; or plastic bags, because they kill eleven people a year; or five-gallon buckets, because they kill fifty Americans a year, mostly children who fall into them and drown."

It's a big country and many things kill people, but we cannot do stories on all of them. This finally led to my show comparing risk. How does one compare risk? Something that kills sixty-year-olds is less socially tragic than something that kills children. So risk specialists compare risk by how many days each risk takes off the average life. And for my show on risk, I looked at some of the "risks" the press obsesses about and the lawyers sue over, and I then applied this type of risk analysis: How many days does each risk take off the average life?

Air crashes: Even with the TWA incident, assuming two hundred deaths a year—which has been about the average over the past ten years—flying takes less than one day off the average life.¹³

Toxic wastes: Making the worst assumption from the most bizarre environmental group I could find, I estimated that one thousand people die per year because of Love Canal-type toxic waste, which is what justified

13. See Bernard L. Cohen, *Catalog of Risks Extended and Updated*, 61 HEALTH PHYSICS 317, 320 (1991) (stating that the average American traveling on scheduled airlines has a loss of life expectancy of 0.4 days); see also ABC News Special: *Are We Scaring Ourselves to Death?* (ABC television broadcast, Apr. 21, 1994) [hereinafter *Are We Scaring Ourselves to Death?*].

Superfund and the billions spent there.¹⁴ Most people say we have no proof anybody even got a cold from Love Canal.¹⁵ But assuming a thousand Americans dying a year, that's four days off the average life.¹⁶

House fires: Five thousand people die from house fires in America per year,¹⁷ which is eighteen days off the average life. A ten dollar smoke detector makes sense.

Pesticides: Again, I took the weirdest, most extreme study I could find, which was somebody claiming that six thousand people die from pesticide residues a year, and I added another ten thousand people. Therefore, pesticides take twenty-seven days off the average life.¹⁸

And then there is murder, which leads the local news every night. Twenty-seven thousand murders occur per year in America, which takes 113 days off the average life.¹⁹

Now, let us compare these figures to activities that we as a society accept: driving a car takes 182 days off the average life.²⁰ Compare that to smoking, which takes seven years off the average man's life, and four

14. See Frank Viviano, *Superfund Costs May Top S & L Bailout*, S.F. CHRON., May 29, 1991, at 1 (stating that the Superfund was established to solve the nation's toxic waste crisis and was intended to cost less than five billion dollars; however, rising litigation costs could raise the Superfund bill to one trillion dollars).

15. See, e.g., Malcolm Gladwell, *Greenpeace Digs Deep into Dioxin Debate: Armed with Analysis, Group Attacks Monsanto Epidemiology Studies as 'Cooked.'* WASH. POST, Nov. 30, 1990, at A27 (stating that animal tests used to determine human safety when exposed to dioxins like those at Love Canal have been discredited and that epidemiological studies of people exposed to dioxins have shown no harmful effects).

16. See Cohen, *supra* note 13, at 324.

17. See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *National Fire Prevention Week - October 6-12*, 45 MORBIDITY & MORTALITY WKLY. REP. 813 (1996) (reporting that the United States has the highest annual death rate from fires of all developed countries at 2.1 per 100,000 which is equivalent to 5250 per 250 million people) [hereinafter *Fire Prevention*].

18. See Cohen, *supra* note 13, at 323; see also *Are We Scaring Ourselves to Death?*, *supra* note 13.

19. See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Homicides Among 15-19-Year-Old Males*, 43 MORBIDITY & MORTALITY WKLY. REP. 725 (1994) (reporting that 26,513 homicides occurred in 1991); see also *Are We Scaring Ourselves to Death?*, *supra* note 13.

20. See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Update: Alcohol-Related Traffic Fatalities - United States, 1982-1993*, 43 MORBIDITY & MORTALITY WKLY. REP. 861 (1994) (stating that 40,115 people were killed in traffic accidents in 1993); see also *Are We Scaring Ourselves to Death?*, *supra* note 13.

years off the average woman's life.²¹ This data clearly shows the idiocy of the smoker worrying about the health effects of using his cellular phone.

But what are the lawyers suing about? Asbestos,²² breast implants,²³ electromagnetic fields.²⁴ For asbestos, there is proof that if you smoked cigarettes and were exposed to high levels of industrial asbestos, it would give you these horrible diseases. But there is very little proof that if you didn't smoke that it would, or that the low levels that many people are suing over now are hurting anybody.²⁵

There is no consensus that breast implants have caused diseases.²⁶ Regarding electromagnetic field suits, some people now want us to bury the powerlines because, supposedly, people are being poisoned and we must pay them.²⁷ Burying the powerlines alone would cost fifty thousand

21. See Cohen, *supra* note 13, at 323 (stating that for people smoking at least one pack each day the loss of life expectancy is 6.6 years for a man and 3.9 years for a woman); see also Centers for Disease Control, U.S. Dep't of Health & Human Servs., *State Specific Prevalence of Cigarette Smoking - United States, 1995*, 45 MORBIDITY & MORTALITY WKLY. REP. 962 (1996) (reporting that approximately 400,000 deaths were attributable to smoking in 1990).

22. See generally Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDZOZ L. REV. 1819 (1992) (stating that "[n]o litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation").

23. See, e.g., Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995); *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098 (N.D. Cal. 1992).

24. See, e.g., Florida Power & Light Co. v. Jennings, 518 So. 2d 895 (Fla. 1987); Selective Resources v. Superior Ct., 700 P.2d 849 (Ariz. Ct. App. 1984).

25. See Charles Mount, *Court Revives School Asbestos Suit*, CHI. TRIB., June 2, 1988, § 2, at 1 (stating that Cook County school officials were unable to show that low-levels of asbestos in the air were harmful).

26. See generally Jack C. Fisher, *Sounding Board: The Silicone Controversy—When Will Science Prevail?*, 326 NEW ENG. J. MED. 1696 (1992); Zoe Panarites, *Breast Implants: Choices Women Thought They Made*, 11 N.Y.L. SCH. J. HUM. RTS. 163 (1993).

27. See Roy W. Krieger, *On The Line*, A.B.A. J., Jan. 1994, at 40; Stanley Pierce & Charlotte A. Biblow, *Electromagnetic Fields Attract Lawsuits*, NAT'L L.J., Feb. 8, 1993, at 20.

dollars per affected customer in some places;²⁸ these are enormous costs. We continue to sue over these trivial risks, while we ignore what to me is the most interesting comparison: poverty.

Reputable studies in America and other countries show that if you are below the poverty level in America, or in the lowest quintile of income in other countries, your life is shortened by an average seven to ten years.²⁹ Some of that is self-induced; poor people drink and smoke more. But some of it is because poor people cannot afford some of the good things that keep us alive—for example, they drive older cars with older tires, they cannot afford the best medical care, they live in more dangerous housing, and so forth.

What this means is that if, because of a lawsuit over asbestos, the factory is not opened or closes, people are thrown out of work. People are made poor. That kills people, too. We can argue forever about how much the lawsuits take out of the economy: Is it the two hundred billion dollars or the six hundred billion dollars Thomas Hopkins says? I don't know, but it makes America poor and that kills people.

In Bangladesh, floods kill hundreds of thousands of people. Yet in America, we have hurricanes and floods in the Mississippi, and they kill only a dozen people. What's the difference? The difference is that we are a wealthy country. People can afford radios and cars. They can find out about the flood and drive away from it. Wealthier is healthier.

Another side effect of these lawsuits and the moronic press coverage of all these trendy, mysterious risks—forget car accidents, that's old news—is that we make people fear innovation, fear the new. Let us do a thought experiment here. I would argue that even a sophisticated group like you is already prone to fear the new. Assume that you are both jury and regulator, and you are totally in control. You can decide what products should be allowed to be sold in America. I have a new product I want to introduce: It's a new fuel. My product is no cheaper than oil, no better really, but at least it will reduce our dependence on the OPEC countries. The only disadvantage is that, while oil is flammable, my fuel is highly flammable. Assume also that it is highly explosive, invisible, odorless, and poisonous, and I want to pump it into your house.

All right, you are the controller. Do you want this new fuel? Congressman McIntosh, as the ranking politician here, do you want this new fuel here? Many would be hesitant. What if I could promise you

28. See generally Philip S. McCune, *The Power Line Health Controversy: Legal Problems and Proposals for Reform*, 24 U. MICH. J.L. REFORM 429 (1991); Martin R. Rosenberg, *Burying Power Lines Would Cut Outages—At Cost of \$1.5 Billion*, KAN. CITY STAR, Nov. 2, 1996, at A1 (stating that burying power lines will cost \$3500-4000 per customer if the entire cost is paid upfront, or \$70 a month for seven years).

29. See Cohen, *supra* note 13, at 329.

that it would only kill ten Americans per year? Assume we have done lots of studies and, at most, it would kill ten Americans per year—ten Americans, tops. What if I told you we can control it, and we can add something to it so that you would smell it before it blows you up. Well, what kind of stove do you have? Is it gas? That is my point. The fuel I'm talking about is gas, and half the country uses it. Moreover, it does not kill ten Americans a year, it kills over four hundred Americans a year.³⁰ But we accept it because it's old technology; we're used to it; we accept the old.

How about something even less useful than oil? I want to introduce a toy, a recreational device. We will have fun with it, but it will kill six hundred Americans a year, and it will leave two thousand with brain damage—children become vegetables and die slowly over two years. Bicycles kill a thousand, but they do not cause the brain damage. Roller skates? Nowhere near that high. Baseball? No. I'm talking about swimming pools.³¹ Would they be approved today if we tried to introduce swimming pools and we knew that data? Probably not. How about fire? Fire kills five thousand Americans a year.³² Would that be approved if the government had control? Maybe Zeus was right to punish Prometheus. Remember what he did to Prometheus? He chained him to a rock and a bird would come down every night and peck out his liver, which would grow back during the day and then at night it would happen again. This seems very similar to the current regulatory system.

It is just much tougher for new good ideas now. Would cars be approved today? They are going to kill forty thousand people.³³ I have a new form of transportation, and it is great. It will pollute, but in a different way than horses, and you can drive it at fifty-five miles per hour, inches from pedestrians, and we are going to let sixteen-year-olds drive them. I don't think it would be approved today. General Motors would be in court every day defending against those forty thousand deaths if cars were introduced today.

But how do we get to this? Let's go back to the lawsuits. Europe does not have all these lawsuits. In Holland, they have wonderful

30. See *id.* at 319 (stating that, in 1988, gas poisoning killed approximately 600 people).

31. See U.S. CONSUMER PROD. SAFETY COMM'N, NEWS SPLASH FOR SAFETY: DROWNING PREVENTION FOR PARENTS WITH POOLS 2 (1993) (stating that more than 300 children drown in residential pools each year, and more than 2000 children are injured, some suffering permanent brain damage).

32. See *Fire Prevention*, *supra* note 17 (stating that house fires kill 5250 per 250 million people each year).

33. See U.S. DEP'T OF TRANSP., HIGHWAY STATISTICS 197 chart (1990) (reporting that 44,529 Americans were killed in automobile accidents in 1990).

playgrounds for kids, and water parks where there are hanging ladders for people to climb up and dive down into the water—amazing water slides that go into and out of buildings and into the water. Ask them, “Well, aren’t you worried about a liability problem?” They would look at you and say, “Liability problem? What are you talking about?” There are wonderful things we don’t have in America because we have been taken over by this fear.

Are Americans so different? I don’t think so. I think the difference is just this American rule.³⁴ The lawyers like to call it the English rule, but it really is the “rest of the world rule” that says if you sue somebody and you lose, you must pay for the damage you caused.³⁵ Only America has the American rule, which invites abuse. It invites extortion suits; it invites one to sue, and sue, and sue the implant maker until you win. And the plaintiffs’ lawyers don’t have to pay for the damage they cause. They can torture people and walk away.

Now, many lawyers say we can’t have it another way in America; it would discourage this wonderful method of compensating people. I say great. What kind of insane, idiot method of compensating people is it where most of the money goes to the lawyers, where a huge tort tax is imposed on all people, and where it takes five or even ten years to get a result. It’s not even good for the plaintiffs. The guys who sued me for libel took five years just to get to court, and it cost them a ton of money. It doesn’t work for them either.

I think lawsuits, like nuclear weapons, are necessary. We need tanks and weapons to protect our rights. But, like nuclear weapons, we ought to avoid using them. They are horribly damaging.

I’m not comfortable with these other reforms: I don’t like the punitive damage caps, and I think all believers in freedom would have trouble with it. However, I like the idea of limiting how much the lawyer can receive from these awards, perhaps by allocating a portion of the punitive damage awards to the state treasury. But, it seems arbitrary to say there should be limits on punitive damages. If someone behaves truly egregiously, in a free system, and if there’s going to be free market remedies, maybe he should have to pay an egregious fine.

I am also not comfortable with the special laws and exemptions we have created for special industries. The General Aviation Revitalization

34. See generally P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002 (1987).

35. See *id.*

Act³⁶ was a good bill on its face. The small plane business was going and now it is back. The vaccine injury compensation program was a good thing.³⁷ At least the vaccine makers can keep making vaccines. The Private Securities Litigation Reform Act³⁸ protected innovative companies from vulture lawyers. But, is it right to pass special laws for politically connected industries on a case-by-case basis? I thought we should all be equal under the law. Isn't that a simpler, better system?

And I'm not at all impressed by the reform I see coming from you legal groups. I went to a meeting in Orlando—some of you were there—called “The Mass Tort Conference.” The reforms they were talking about were so trivial that they were astonishing. I guess you could say the defense bar thrives on this system, too.

This conference looks like you are really talking about the important issues. But, will changing the insurance rules, fixing the political scams in Alabama or changing the junk science rules really make much of a difference given how horrible the problem is?

People in your field are all excited about the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁹ ruling on junk science, but will that really make much difference? Judges still have to make a decision, and they will still get bamboozled into letting junk in. And, even if the defendant gets off, he will still pay zillions of dollars defending himself. The trial lawyers will continue to take away our money and our choices and our freedom.

My hope is that the English rule—the “rest of the world rule”—will come here, or maybe the public will get so disgusted that it will take the whole civil litigation system out of your hands and just junk it.

If you are injured and it's an accident, I am sorry, but we already have remedies. We have social security and disability to take care of you; if you are poor, we have Medicaid to pay your medical bills; and if you're not poor, insure yourself against an accident—protect yourself. If people really misbehave for venal reasons, then prosecute them criminally. We can do that already.

36. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. §§ 40101-40120 (1994)); see Timothy S. McAllister, *A “Tail” of Liability Reform: General Aviation Revitalization Act of 1994 and the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301 (1995).

37. See 42 U.S.C. § 300aa (1994); see also Mary Beth Neraas, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149 (1988).

38. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 28 U.S.C.); see also Marc I. Steinberg, *Symposium: Securities Law After the Private Securities Litigation Reform Act—Unfinished Business*, 50 SMU L. REV. 9 (1996).

39. 509 U.S. 579 (1993).

Maybe we should just throw the whole system out. The current system is so destructive that if we let it keep going, the lawyers will soon have all our money and all our freedom. I hope you fight against that.

DINNER ADDRESS:
AUDIENCE DISCUSSION

QUESTION: Many of the issues that you brought up are really questions of individual responsibility. People constantly try to find scapegoats for their problems. Do you really feel that lawyers are completely to blame for this, or does the problem stem from something more fundamental, such as a cultural problem?

JOHN STOSSEL: I certainly do not think there is anything inherent about Americans that makes us look for scapegoats and not take responsibility. This country was built by immigrants who took total responsibility. So what happened? We screwed it up with systems. And I do think it is both the tort law system and the welfare state that invites you to be a victim, that allows you to get money if you're a victim; the longer you are helpless, the more money you get.

You read about the lawsuits, the McDonald's lady, and you start to feel like you are a sucker if you don't play the victim, you're a sucker if you don't sue, and that just builds on itself. I don't know how we get out of it without junking the whole system. You probably cannot sue McDonald's, by the way, because they were beaten down. They lowered the temperature of their coffee from 180° to 160°. So now it's cold by the time you get it to your office.

QUESTION: How can you reconcile your criticism of the civil litigation system with your view that we don't need punitive damage caps? To me, both are symptoms of the same general problem. I do not see how you could not be concerned about punitive damages.

MR. STOSSEL: I think if you had a loser-pay rule, there would be so many fewer wild shots at punitive damages that you would have to have a damn good case against an egregious company. Even then, if the jury is wild, there are protections. The judges ratchet these things down. And if you also had a rule that all the windfall profit did not go to the plaintiff and his lawyer, but to the state treasury, I think it would be a manageable democratic way of punishing bad guys.

QUESTION: I am a lawyer from England and I have been talking today about the English system and the "rest of the world rule," as you call it. I think it is important to stress that a "loser-pay rule" in America would not tone down excessive litigation as much as you think it would. For example, in England, an exception to the loser-pays rule exists. We have a legal aid scheme that allows less wealthy plaintiffs to bring cases to court; but in those cases, there is never a cost reversal against the

government's legal aid scheme.¹ If they lose, they still don't pay. Yet even without a "loser-pay" deterrent for plaintiffs' legal aid in England, we still don't see them involved in as much litigation as the plaintiffs' bar here in America. In this sense, I do not believe that the lack of a loser-pay rule is what is responsible for so much litigation in America; I believe it is the possibility of earning huge sums of money from lawsuits that makes the difference.

We cannot earn phenomenal sums in England because we do not have punitive damages. We only have compensatory damages. So I suspect that the real key difference between our two legal systems is the potential for earning money that, frankly, has no bearing whatsoever on the result. There is a terrible side effect to this as well: you have an artificial inflation of prices on imported goods in this country because, as many of my clients indicate, foreign companies are concerned about protecting themselves from all this litigation in America. Unfortunately, the advice I give to many of my clients is simply not to sell their products in America. I believe all this results from these punitive damage awards more than any other element.

MR. STOSSEL: Well, I can't attack your argument except to say that foreigners still do sell plenty of products here in America. Extreme cases don't happen that often. I also want to say that the idea that in America there should be a special protected group of public service lawsuits, which would not have to pay for the damages they cause, seems very scary. We already, in a way, have that with these treble damages for civil rights suits filed by do-gooders. With respect to punitive damages, awards of punitive damages are still rare in this country, at least so far. (Knock on wood.) In that sense, the fact that we have punitive damages here in America, while England does not, may not be as big a factor as you think.

However, if we had "loser-pays," it would not deter all of these rich foundations like the Ford Foundation and Stewart Mott from subsidizing all kinds of poverty cases that would be brought anyway.

QUESTION: So with a "loser-pay" system, who is going to pick up the tab when the plaintiff is too poor to pay?

MR. STOSSEL: We have three choices: as I just mentioned, the foundation that backs him or her; the lawyer, many of whom can afford it; or the judge can say this is the kind of case we are not going to nail you for. Judges always have discretion on this kind of thing.

1. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

QUESTION: I have two questions. First, why do you think media coverage continues to focus on those things that realistically do not present much risk, like plane crashes and toxic waste, as opposed to those things which you mentioned constitute a great risk, yet we as Americans find socially acceptable? Is it simply that some kinds of stories sell better than others? Second, what is it about lawyers and journalists that makes them so anti-capitalist, and, for lawyers especially, so inefficient? Is it the nature of their industries, or is it the type of person that gravitates toward those industries?

MR. STOSSEL: I have thought a lot about this and I don't have a great answer why the media coverage is the way it is. Some of it is just that we are in a hurry. Many of us are not educated. It's easier to cover the plane crash. It's harder to cover a lot of car accidents; you have to be in a lot of places at once.

I have this wild theory, which goes to the left brain-right brain dichotomy, that journalists and lawyers are basically the kind of people who emote, who talk well, who feel other people's pain; and they were the ones I went to college with, who were the good talkers. And then there are the scientists and the businessmen; they are the left brainers, the people who analyze things critically, and they just don't go into law and journalism. And nobody in my business, and I would say few in yours, understands or cares about markets. Business is just evil, greedy, white guys in suits who want to oppress people. That is just the way most reporters think. And the idea that business could make people live longer by making America richer, it is just off the radar screen.

How you change that? How you educate people about how capitalism works? I don't know. I thought that the fall of communism would have made a dent, and it has made a little dent, but not much.

QUESTION: First, what are your thoughts on the tobacco litigation issue? And second, what will your next special focus on?

MR. STOSSEL: I have nothing in particular planned on the tobacco issue. I have been amazed, given the success of the trial lawyers, that they have not beaten the tobacco companies before. And I would think that the principle to just sue and sue until you get a jury to go with you would eventually consume the tobacco companies. I assume that that will eventually happen, but it seems to be the wrong way to set public policy.

Ultimately, if we wish, the end result will be that each cigarette will cost a buck ten, and sixty cents of it will go to lawyers and forty cents will go to people with emphysema. But it would be far better for the legislature to require these tobacco companies to compensate us, rather than the courts. Let the legislature hit them with some cigarette tax. Of course, then you will have more bootlegging. Some people argue that the

cigarette companies do us a favor because they kill people sooner, so we won't have the social security crisis quite as soon. This issue has so many variables that I've stayed away from it.

To answer your second question, the next special I have scheduled is "Junk Science." I cover some of the obvious ones, like breast implants, agent orange, and multiple chemical sensitivity. The government is building special houses for these people who say they are allergic to the world. I also cover fun things like spinach. Did you know that spinach got this wonderful reputation because a scientist misplaced the decimal point by one digit when they were measuring the iron content, and then Popeye came? Another is the salt program. The government has this big bureaucracy saying, "Don't eat salt; it will cause heart disease and high blood pressure." Yet there is no medical consensus that most people need to cut back on salt. However, the government's program, once it gets going, goes forever.

After that, we hope to do something on freeloaders and something on the permanent government, though they want to interrupt all these political subjects with something on monogamy. That is what is coming. Thank you for inviting me here tonight.