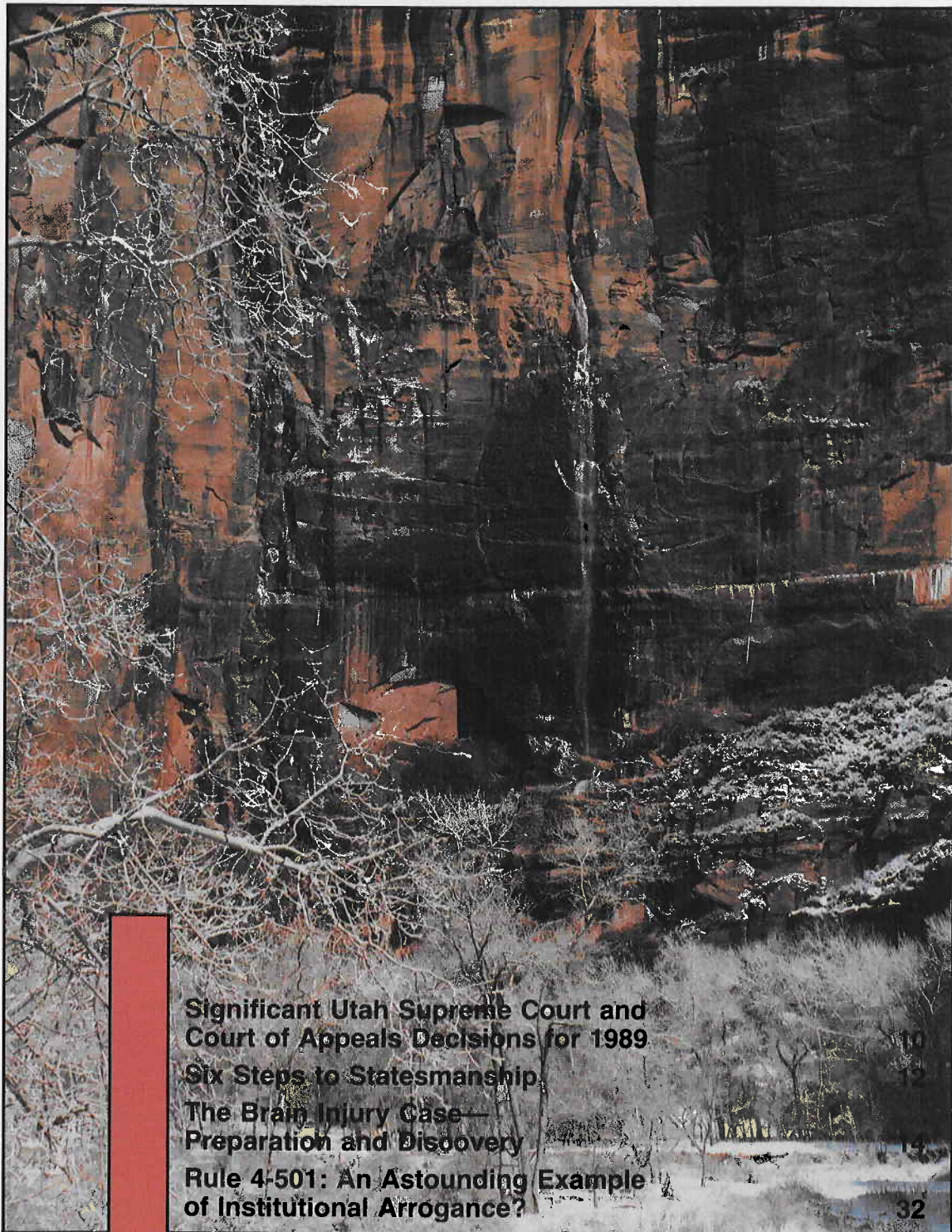


UTAH BAR JOURNAL

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Editor's Note: Following are two additional letters received in response to former Colorado Governor Lamm's comments about the legal system and lawyers, published in the November 1989 issue of the *Journal*.

Dear Editor:

I share Richard Lamm's concern about our overly litigious society and the impact this may have on the United States' ability to compete in the international marketplace. However, I do not share his optimism about solutions.

Lamm suggests that if we modify some of our present rules of litigation, we can bring the U.S. in line with Western Europe and Japan and be competitive and efficient. In my view, however, the primary cause of our litigiousness is not the rules we employ but the character of our society. Our justice system is no more litigious than our society and lawyers are no more adversarial than their clients.

In contrast to the other industrialized nations, the U.S. is young, heterogeneous and strongly emphasizes individualism over collective or social consciousness. Regardless of the rules governing conflicts, our national character traits will continue to produce more disputes and fewer amicable solutions. Our record on crime and violence and inability to implement meaningful gun control underscores this fact.

However, this is not to say that Lamm's suggested solutions should be rejected. We may adopt them while recognizing they are palliatives not panaceas.

For example, a prevailing party attorneys' fee provision is a good idea. It ups the stakes for clients and should discourage cases which are litigated primarily because of a party's wealth as opposed to the merits of the action. Clients may give greater attention to pre-litigation settlement or to using less adversarial methods of dispute resolution such as mediation.

Lamm suggests that damage awards be restricted. I would eliminate punitive damages and eliminate or greatly restrict damages for pain and suffering. Such changes might reduce the "lottery" effect of our judicial system and might encourage earlier settlements by reducing the uncertainty about potential recovery.

Another positive change would occur if judges and legislatures curbed their tendencies to create new causes of action for individuals. The statement that "hard facts make bad law" continues to prove true. Too often legislators or judges presented with a set of particularly sympathetic facts will create a right of action designed to solve that particular problem. Overlooked, however, are the consequences that new right will have for persons whom the legislature or court did not have in mind. As an attorney who represents employers, I have observed this phenomenon on many occasions. Influenced largely by isolated cases involving egregious conduct by a few employers, implied contract and tort causes of action have sprung up all over the country, seriously eroding, if not altogether eliminating, the traditional "at will" doctrine. State and federal

legislatures have also joined in this activity by creating numerous statutory causes of action for employees.

No doubt justice has been done in individual cases such as where an employee successfully sues his employer after being fired for refusing to commit a crime at his boss's behest. However, causes of action which enable such an employee to seek justice also have the effect of increasing the cost of enforcing discipline in the workplace. California employers have suffered greatly from the existence of the many common law and statutory rights available to California employees who disagree with their managers' decisions. My experience suggests that most employers are rational profit maximizers, meaning they usually fire bad employees not good ones. As a result, it most often is the inefficient or unproductive employee who asserts these new rights and who contributes most substantially to the increased cost of managing a workforce and making it competitive.

No doubt the solutions advocated by Lamm will result in some injustice at the margins of our society. Some people will be wronged without having an adequate remedy. Nevertheless, I think we have tended in the U.S. to overemphasize the margins without giving adequate attention to what is between them, i.e., the vast majority of Americans who, for example, are much less likely to be hurt by an arbitrary employer who fires them for no cause, than by a sharp decline in their standard of living or job loss resulting from our country's inability to compete for goods and services in the international marketplace.

Some may think these suggestions draconian and that they will accelerate the "rich get richer" trend of the Reagan era. However, as often as not, the person or party at the margin aided by the court or legislature's creativity is not part of society's underprivileged or underrepresented class. Rather, they are persons of status or circumstances with whom middle-class judges and legislators most easily identify, e.g., discharged corporate executives as opposed to minimum wage workers. Also, the people benefiting most from the creation of new causes of action and expansion in available damages are lawyers—a group which, if overly blamed for society's ills, is hardly underprivileged or underrepresented.

In short, with the frontier conquered, and with the demise of imperialism and colonialism, it now may be time for our society in general and our legal system in particular to change their basis for decision-making. We need to place more emphasis on utilitarian ideals of maximizing the greatest good for the greatest number of persons and less on upholding the rights of the individual without regard to cost or consequence.

Jathan W. Ganove

Dear Editors:

Former Colorado Governor Richard Lamm, in his editorial, laments that the U.S. legal system (and litigation in particular) "is a form of economic cancer." Moreover, he asserts that the "legal system is draining talent from our society that is desperately needed elsewhere."

It must be remembered that former Governor Lamm has a penchant for publicly espousing unorthodox views on controversial current issues. You may recall public outrage several years ago at his statement that older people have a duty to die.

Actually, I wholeheartedly endorse most of his recommended solutions. They would improve our legal system and reduce economic costs to society. The problem is that the solutions he recommends do not seem to be related to the problems he describes—that of too many lawyers.

In fact, the entire editorial is full of unsubstantiated claims, false premises and illogical reasoning. For example:

1. He points out that the U.S. has 2½ times as many lawyers per capita as Britain and 25 times as many as Japan. I suspect that these ratios are not substantially different than 20 years ago or 40 years ago—when the U.S. was the sole economic power in the world. Our higher percentage of lawyers then did not create economic catastrophe—so why does he think it will now? If his objective was to demonstrate that lawyers were destroying the economy, he would need to show a relationship over time; that over 20 or 40 years, the percentage of U.S. lawyers increased faster than other countries and that those countries developed better economics and that the large number of lawyers in the U.S. was responsible for our poor economics.

He has failed to demonstrate any causal relationship—nor can he.

2. The editorial wants us to believe that the fact that the U.S. has 25 times as many lawyers per capita as Japan is proof that lawyers are the cause of U.S. economic ills (rather than the deficit, savings rates, aging factories, etc.). If the high percentage of lawyers is truly the cause of economic problems, then Ethiopia, Bangladesh, Cambodia, Nepal and Albania must all be world economic powers because I imagine they have similar percentages of lawyers as Japan—perhaps fewer.

3. The fact that with 5 percent of the world's population, we have 70 percent of the world's lawyers is urged as proof that we have

economic cancer. I am sorry, but I fail to see the connection. We also have 70 percent of the McDonald's restaurants and 70 percent of the Domino's Pizza outlets. Why aren't they also proof of the economic cancer.

4. The editorial opens with wonderful praise of efficient economics and competitiveness; hallmarks of our free enterprise system. He goes on to say the legal system is draining talent from society that is needed elsewhere.

I don't understand. I thought our free enterprise, capitalistic system was based on the premise that, because of the law of supply and demand, people would be induced into all needed sectors of our society. But now, Lamm says the talent is needed elsewhere. If the economy needed that talent elsewhere (demand), would not salaries rise until a sufficient number of employees responded (supply)? Why is he advocating artificial intervention in the economy to keep it free and competitive?

5. Mr. Lamm avers that the growth of lawyers threatens capitalism and democracy. He goes on to explain that wealth will not flow to the nation with the most lawyers.

These claims lack any substantiation or logic. Over the past 40 years, the U.S. has been the unquestioned leader in wealth, capitalism and democracy. At the same time, the U.S. has had the greatest number of lawyers. I fail to understand how Lamm suddenly wants to blame lawyers for all of our economic ills.

Despite these flaws in analysis and logic, former Governor Lamm may have actually proved his point. He argues that there are too many lawyers. If we, as lawyers, cannot prove our views by logic, verifiable facts and compelling persuasion, our clients are not well served. Such lawyers are not fulfilling their duties toward their clients. Some of these should not be lawyers.

Governor Lamm, if you feel there are too many lawyers and that this is the cause of our economic ills, you should demonstrate the strength of your convictions by surrendering your law license. As for me, I will work to ensure that the laws are enforced, that citizens have an adequate system of dispute resolution that they do trust and that improvements are made in the system. But, I will not do away with the system.

Wayne Klein
Boise, Idaho

