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Investigative Advocacy: The Mechanics of Muckraking

Patrick Barry

University of Michigan Law School, barrypj@umich.edu

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Articles by

Robert E. Bacharach
John G. Browning
Joseph Kimble
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Book Reviews by

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Investigative Advocacy: The Mechanics of Muckraking

Patrick Barry

Before there could be action, there must be information and exhortation. Grievances had to be given specific objects, and these the muckraker supplied. It was muckraking that brought the diffuse malaise of the public into focus.¹

— Richard Hofstadter, *The Age of Reform* (1955)

A well-written legal complaint is like a good piece of investigative journalism. It's full of facts. It exposes injustice. And it tells a compelling story. The best can even trigger a favorable settlement. Faced with a powerfully made case, the other side might read the document and realize that going to trial isn't going to end well for them. That's when the complaint transforms into something powerful: leverage.

I use excerpts from one of these leverage-creating complaints to teach law students about the mechanics of muckraking, that longtime journalistic practice of using the printed word to target corruption and bring about reform. I tell them to summon their inner Ida Tarbell.

Most famous for her exposé of John D. Rockefeller's Standard Oil Company in the early 20th century, Tarbell remains synonymous with muckraking over a century later. Yet she was never really a fan of the label. "I had hoped that [my book on Standard Oil] might be received as a legitimate historical study," she wrote in her autobiography, *All in the Day's Work*, "but to my chagrin I found myself included in a new school, that of the muckrakers."²

¹ Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 186–87 (1955).

² Ida M. Tarbell, *All in the Day's Work: An Autobiography* 241 (1939).

To Tarbell, muckraking meant scandal and sensationalism. It trafficked in outrage and had all the integrity of gossip. Muckrakers had little interest, she lamented, in “balanced findings.”³ They were more concerned with aggressive attacks — the bigger (and juicier), the better.

This negative connotation of muckraking may be familiar to anyone who has spent time in Britain, where the term is often used to describe tabloid journalism.⁴ But in the United States, a more positive connotation lingers, thanks to the public-minded work of not just Tarbell but also Upton Sinclair, Lincoln Steffens, and many other journalists who helped give the Progressive Era of the 1890–1920s its name.⁵

A. Modern Muckrakers

Later, *muckraker* was attached admiringly to Rachel Carson, whose 1962 book, *Silent Spring*, helped launch the environmental movement.⁶ And the term continues to serve as a badge of

³ *Id.* at 242–43 (“This classification of muckraker . . . I did not like. All the radical element, and I numbered many friends among them, were begging me to join their movements. I soon found that most of them wanted attacks. They had little interest in balanced findings. Now I was convinced that in the long run the public they were trying to stir would weary of vituperation, that if you were to secure permanent results the mind must be convinced.”).

⁴ Here is a biography of one of the first British muckrakers, a not entirely scrupulous guy named W.T. Stead. Owen Mulpetre, *The Great Educator: A Biography of W.T. Stead*, <https://attackingthediabol.co.uk/bio.php> (last visited Apr. 10, 2018).

⁵ For an engaging overview of the role journalists played in the Progressive Era, see Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* (2013); see also Hofstadter, *The Age of Reform* at 186–97.

⁶ Pulitzer Prize-winning historian Jill Lepore sums up the impact of *Silent Spring* in the following way: “[*Silent Spring*] launched the environmental movement; provoked the passage of the Clean Air Act (1963), the Wilderness Act (1964), the National Environmental Policy Act (1969), the Clean Water Act and the Endangered Species Act (both 1972); and led to the establishment of the

journalistic honor in the 21st century. One of the most celebrated of the modern muckrakers, Pulitzer Prize–winner Seymour Hersh, was the subject of a praise-filled profile in the *Chicago Tribune* soon after Hersh’s story on the abuse of Iraqi prisoners at Abu Ghraib broke in May 2004. The title of the *Tribune*’s tribute piece: *The Muckraker*.⁷

Eric Schlosser’s 2001 book, *Fast Food Nation*, was called “a fine piece of muckraking” by the *New York Times*⁸ and drew many favorable comparisons to Sinclair’s *The Jungle*.⁹ More recently, Schlosser received a glowing review from another Pulitzer Prize–winner, Louis Menand, for *Command and Control*, Schlosser’s multiyear investigation of nuclear safety in America. “By a miracle of information management,” Menand wrote approvingly in *The New Yorker*, “Schlosser has synthesized a huge archive of material, including government reports, scientific papers, and a substantial historical and polemical literature on nukes, and transformed it into a crisp narrative covering more

Environmental Protection Agency, in 1970. The number of books that have done as much good in the world can be counted on the arms of a starfish.” Jill Lepore, *The Right to Remember Rachel Carson*, *New Yorker*, Mar. 26, 2018, <https://www.newyorker.com/magazine/2018/03/26/the-right-way-to-remember-rachel-carson>.

⁷ David Jackson, *The Muckraker*, *Chi. Trib.*, June 25, 2004, <http://www.chicagotribune.com/lifestyles/chi-040623hersh-story.html>.

⁸ Rob Walker, *No Accounting for Mouthfeel*, *N.Y. Times*, Jan. 21, 2001, <https://archive.nytimes.com/www.nytimes.com/books/01/01/21/reviews/010121.21walkert.html?mcubz=0>.

⁹ Kate Macarthur, “*Fast Food Nation*,” *The Kid’s Meal*, *Ad Age*, Apr. 3, 2006, <http://adage.com/article/100-leading-media-companies/fast-food-nation-kid-s-meal/108146>; Candy Sagon, *The Hamburger Critic (and His Own Critics): “Fast Food Nation” Takes a Scary Look Under the Bun. But Is It Just Fear-Mongering?*, *L.A. Times*, Mar. 14, 2001, <http://articles.latimes.com/2001/mar/14/food/fo-37251>.

than fifty years of scientific and political change.”¹⁰ “And,” Menand added, “he has interwoven that narrative with a hair-raising, minute-by-minute account of an accident at a Titan II missile silo in Arkansas, in 1980, which he renders in the manner of a techno-thriller. . . . *Command and Control* is how nonfiction should be written.”¹¹

B. Muckraking in Complaints

Lawyers drafting complaints can learn a lot from what earns Schlosser such high praise from Menand. They too must pull off a “miracle of information management.” That’s because the materials that go into complaints can be complex and far-reaching: cases, statutes, governmental reports, scientific studies, economic analyses, investigative interviews — pretty much anything. All these parts then need to be brought together in a clear, compelling way.

Take the complaint I mentioned earlier, the classroom sample that led to a very favorable settlement. The product of a pro bono partnership between the elite law firm Munger Tolles & Olsen and the equally elite public-interest organization Public Counsel,¹² it weaves together information from a wide variety of sources to show that farmworkers in California were being exploited — sometimes to the point of death — while the agency statutorily responsible for their protection did nothing. Here’s how the complaint opens:

¹⁰ Louis Menand, *Nukes of Hazard: Eric Schlosser’s “Command and Control,”* *New Yorker*, Sept. 30, 2013, <https://www.newyorker.com/magazine/2013/09/30/nukes-of-hazard>.

¹¹ *Id.*

¹² [Note: This footnote has been deleted to accommodate the “no identifying information” requirement of the blind-review process.]

“Heat illness is totally preventable and should not occur if proper procedures are followed.” Yet seven years after California enacted a regulation intended to protect outdoor workers from heat illness, farm workers throughout the state continue to suffer and die from the heat while the agency responsible for enforcing the regulation denies, misinterprets, and systematically fails to perform its statutory enforcement duties.¹³

That first sentence (“Heat illness is totally preventable and should not occur if proper procedures are followed.”) is a quote from the head of the agency being sued. It is used as a way to say, “Look, you yourself have said that what is happening to these farmworkers shouldn’t be happening if your agency is doing its job right.” The inference, of course, is that the agency isn’t doing its job right; otherwise, more farmworkers would be alive and healthy.

It’s a nice bit of muckraking.

So is the lawyers’ exposing the agency’s “pattern and practice of unjustifiably concluding that farm worker injuries and deaths are not heat-related.”¹⁴ Rather than relying on their own assertions to bolster this claim, they skillfully incorporate some rather damning third-party validation: the findings of the agency’s own expert medical examiner. “[I]n the September 23, 2011 death of a farm worker, [the agency’s] medical expert identified the cause of death as ‘congestive heart failure exacerbated by the physical exertion during hot humid weather’ and concluded that ‘performing work (even light work) in the heat DID contribute to his death.’ Notwithstanding this finding from its own medical expert, Cal/OSHA nonetheless chose to classify this death as not heat-related.”¹⁵

¹³ Complaint at 1, *Bautista v. State of Cal. Div. of Occupational Safety & Health*, No. BC494056, 2012 WL 5305185 (Cal. Super. Ct. Oct. 18, 2012).

¹⁴ *Id.* at 10.

¹⁵ *Id.* (citation omitted).

The lawyers then provide some background motive: “[This] classification allows [the agency] to claim greater enforcement success (by minimizing the total death or injury toll) but provides small comfort to the unprotected dead worker or that worker’s family and colleagues who must continue to risk their lives while picking in extreme heat conditions without meaningful regulatory enforcement.”¹⁶ Classifications of two of these deaths solidify the point.

The first involved Ramiro Carrillo, who died of heatstroke on July 10, 2008, after falling ill while picking nectarines in 112-degree weather in Fresno County. The agency cited Carrillo’s employer on the day he died for violating the Heat Illness Prevention regulation. Yet when it came time to record its own findings, the agency did not classify Carrillo’s death as heat-related. “Four years later,” the complaint adds, “the citation remains under appeal, tolling his employer’s obligation even to pay the Cal/OSHA citation for the employer’s failure to satisfy its obligations to Mr. Carrillo and the other workers present that day all those years ago.”¹⁷

The second involved Maria de Jesus Bautista. The mother of one plaintiff in the suit and the aunt of another, Bautista died on August 2, 2008, from health complications after she fell ill while picking grapes in 110-degree heat in Riverside County. The complaint points out that the agency “cited her employer for violating the Heat Illness Prevention regulation when she died, yet did not classify her death as heat-related, and fined her employer only \$420.”¹⁸

That’s not exactly the most consistent or condemning response by a regulatory agency. A \$420 fine for the death of an employee doesn’t scream “Occupational Safety,” which is a phrase built into

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Id.*

the agency’s official name: “The California Division of Occupational Safety and Health Administration.”

C. The Power of “For Example”

The complaint’s attention to Carrillo’s and Bautista’s stories highlights something that the lawyers who drafted it do very well: they include specific examples. That’s incredibly important, particularly if you are in a federal court where the pleading standards require that the complaint supply “enough facts to state a claim to relief that is plausible on its face.”¹⁹ But even if you are in a state court, as the lawyers in the farmworkers case were, offering particular details significantly strengthens your claim.

Which is why I tell my students to try to always find a place in their complaint for two simple but powerful words: “For example.”

No phrase is more important, especially early in the drafting process. “For example” reminds you to move beyond conclusory allegations. It forces you to marshal particular facts and ultimately protects you (and your client) against a quick dismissal. Think of it as a preemptive strike against a 12(b)(6) motion, that defendant-friendly maneuver that sinks so many factless complaints. The lawyers in the farmworkers case seem to be big fans of “For example”: they put the phrase in their complaint 13 times.

It’s possible, however, to have “For example” overkill. So as you get closer to the filing deadline, you might decide to remove some of them. Having too many can mess with the flow and force of your sentences. But I highly recommend that you plant at least a few in your first draft. Facts drive cases. You want structures in place that remind you to include as many important details as possible.

¹⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

D. The Justice Gap

One way to evaluate which details are important is to think about the justice gap. This is the gap that my students and I use to identify the space between the conduct that the law requires and the much worse conduct that the defendant actually engaged in.

The better we can communicate the size and severity of this gap, I tell them, the more likely our chance of convincing the judge to try to close it and give our clients the relief they deserve. Courts don't have investigative arms. They can't go out and find injustice on their own. But if we bring injustice to them — and package it well in a persuasively written complaint — they are uniquely positioned to right some important wrongs.

The lawyers in the farmworkers case counted on that institutional authority. But again, their complaint produced something potentially even better than a court judgment: a very favorable settlement.

It's tough to know which of the many strong elements of the complaint brought about this outcome. Yet it's worth mentioning, particularly in the context of muckraking, that the complaint included not just powerful words but powerful pictures. Here's one. It shows the only heat protection offered on one farm site: a ragged tarp, hung just a few feet off the ground, that was somehow supposed to be shared by the 18 workers toiling in close to 90-degree heat.



Another photo shows a similar inadequate contraption: a small umbrella and water cooler that was supposed to accommodate 26 workers who were working in even hotter conditions.



Pictures like these recall Jacob Riis's 1890 book, *How the Other Half Lives*, which brought much-needed attention to the horrible living conditions in New York City's slums. As much a work of muckraking photography as it was a work of muckraking

journalism, Riis's book captured the grime and degradation of tenement life in frame after frame after frame.²⁰

The New York Legislature took notice, eventually passing the Tenement House Act of 1901, which established housing requirements for light, ventilation, space, and fire safety.²¹ The Department of Labor also took notice, later publishing its own study called "The Housing Conditions of the Working Poor." And perhaps most important, Theodore Roosevelt took notice.

When Roosevelt became New York's police commissioner in 1895, he chose Riis as his personal guide to the slums. "The sights Riis explored shocked the upper-class Roosevelt," the historian Tom Buk-Swienty explains in *The Other Half: The Life of Jacob Riis and the World of Immigrant America*. "The horrid conditions, previously unfathomable to Roosevelt, would influence him throughout his political career, shaping his distinctive brand of progressivism."²² Roosevelt would even, while president, celebrate Riis as "New York's most useful citizen" and "the ideal American."²³ In Buk-Swienty's words: "Riis had, according to Roosevelt, been instrumental in creating a better, more equitable America by exposing the atrocious conditions under which the other half lived."²⁴

Riis's account of their partnership shows that the feeling was mutual. "It could not have been long after I wrote *How the Other Half Lives*," he shared in his 1901 autobiography, *The Making of*

²⁰ Riis is now often better remembered for his photography than for his writing. But during his lifetime, the opposite was true. "Although the photographs taken for *How the Other Half Lives* were an important tool in Riis's reform work, they were viewed as secondary to his books and articles. When Riis died, none of the obituaries mentioned his photographs." Jacob Riis, Tom Buk-Swienty, and Annette Buk-Swienty, *The Other Half: The Life of Jacob Riis and the World of Immigrant America* 215 (2008).

²¹ *Id.*

²² *Id.* at 8.

²³ *Id.* at 9.

²⁴ *Id.*

an American, “that [Roosevelt] came to the *Evening Sun* office one day looking for me. I was out, and he left his card, merely writing on the back of it that he had read my book and had ‘come to help.’ That was all, and it tells the whole story of the man. I loved him from the day I first saw him; nor ever in all the years that have passed has he failed of the promise made then. No one ever helped as he did.”²⁵

E. Public Good

Few complaints are going to have the impact of *How the Other Half Lives* or any of the other classic works of muckraking. And many, it must be remembered, are meritless, mean-spirited, or both. You can even find Top 10–type lists of terrible lawsuits if you visit the websites of *Time* magazine,²⁶ *USA Today*,²⁷ *Above the Law*,²⁸ the U.S. Chamber of Commerce,²⁹ and many other organizations.³⁰ None indicate a dearth of worthy candidates.

²⁵ Jacob Riis, *The Making of an American* 328 (1919).

²⁶ *Top 10 Outrageous Legal Battles*, *Time*, http://content.time.com/time/specials/packages/article/0,28804,1899500_1899502_1914603,00.html (last visited Apr. 10, 2018).

²⁷ Sean Rossman, *Sue Me! 10 Most Ridiculous Lawsuits of the Year*, *USA Today*, Dec. 21, 2016, <https://www.usatoday.com/story/news/nation-now/2016/12/21/latte-litigation-starbucks-lawsuit-most-ridiculous/95706020>.

²⁸ Joe Patrice, *Top 10 Frivolous Lawsuits List Is . . . Frivolous, But Funny*, *Above the Law* (Dec. 23, 2015), <https://abovethelaw.com/2015/12/top-10-frivolous-lawsuits-list-is-frivolous-but-funny>.

²⁹ *Here Are the Top 10 Most Ridiculous Lawsuits of 2017*, U.S. Chamber of Commerce (Jan. 2, 2018), <https://www.uschamber.com/series/above-the-fold/here-are-the-top-10-most-ridiculous-lawsuits-2017>.

³⁰ Katla McGlynn, *The Most Frivolous Lawsuits of All Time: Blowing Your Mind with Stupidity*, *HuffPost* (last updated May 25, 2011), https://www.huffingtonpost.com/2010/05/11/the-most-frivolous-lawsui_n_570512.html; Marianne Bonner, *Most Ridiculous Lawsuits*, *The Balance* (last updated Dec. 27, 2017), <https://www.thebalance.com/most-ridiculous-lawsuits-of-all-time-4110919>.

Yet as big a problem as frivolous and unfactual lawsuits are,³¹ a well-argued complaint remains a powerful public good. *Brown v. Board of Education* started out as a complaint.³² *Loving v. Virginia* started out as a complaint. Countless other important cases will as well. Little bits of paper, if filled with the right facts and allegations, can help people of all kinds get the justice they deserve.

Which is why Roosevelt, who is credited with coining the term *muckraker*,³³ should have included a certain kind of lawyer when he hailed “as a benefactor every writer or speaker, every man who, on the platform, or in book, magazine, or newspaper,” exposes injustice.³⁴ These lawyers will be committed to facts, allergic to hyperbole, and skilled enough to tell stories that are at once accurate, accessible, and arresting. They will be, in short, Ida Tarbell — with a law degree.

³¹ Deborah Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 *Duke L.J.* 447 *passim* (2004); Fed. R. Civ. P. 11; 26 U.S.C. § 6673 (a)(1).

³² Complaint (archival version), *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955), <https://www.clearinghouse.net/detailDocument.php?id=9313>.

³³ See Merriam-Webster’s definition of *muckrake*, <https://www.merriam-webster.com/dictionary/muckrake>.

³⁴ Theodore Roosevelt, *The Man with the Muck-Rake* (Apr. 14, 1906), in *The Works of Theodore Roosevelt: American Problems* 415–24 (1926).