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"The Rule of Law is Fragile: The Importance of Legitimacy and Access"*

by

Stephen Daniels
Joanne Martin

American Bar Foundation

Abstract

The rule of law is fragile. Our interest is the long-running rhetoric of the tort reform movement, with its goal of portraying the civil justice system as a dystopia thereby delegitimatizing it and undermining access. Four main considerations guide us. First, the importance of legitimacy in the civil justice context. Second, the source of the dystopian image – it didn't just emerge out of thin air. Third, that image itself, which animates our concern about legitimacy. Especially important is the representation of plaintiffs' lawyers -- who play a starring role as the villains in a rhetorical story of chaos and decline of a system losing its legitimacy, with dire consequences for society and economy. Finally, is the importance of access and how the reform rhetoric with its dystopian image affects access and even undermines confidence in the rule of law itself.

Keywords: Tort Reform; Access to Justice; Plaintiffs' Lawyers; Legitimacy; Politics; Dystopia

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> *"Tort reform was a major factor in my decision to close my practice. I found jury verdicts decreased due to the propaganda disseminated by insurance companies and big business and this resulted in insurance adjusters offering less money to settle cases. I began to decline representation in cases I used to accept and was working harder and receiving less money on cases I took."*

INTRODUCTION

We received this statement in a letter from a Texas plaintiffs' lawyer who was a part of our multi-year research project on tort reform, plaintiffs' lawyers, and access to justice. (Daniels and Martin 2015, xi) In an earlier interview he told us, "I thought that being a personal injury attorney, you'd be helping people." An everyday plaintiffs' lawyer, his was a small but successful practice, in a metropolitan area, built on workers' compensation cases. After changes in the early 1990s made those cases less profitable, he focused on auto accident cases and other kinds of personal injury matters. While not a big name, he was an experienced trial lawyer certified in personal injury trial law by the Texas Board of Legal Specialization – no mean feat given the requirements. But despite this apparent success, he ultimately decided to close his practice.

Why care about this ordinary lawyer's professional demise? From the perspective of our research, the answer was simple – fewer lawyers willing to take these types of cases translates into diminished access to justice. Without access to justice, the civil justice system cannot achieve any of its goals, like accountability and deterrence. The system is reactive. To work it needs litigants bringing cases into the system.

Litigants, in turn, need lawyers to represent them. Lawyers are the system's gatekeepers. Pro se access is a fool's access in any area of law. Lawyers provide meaningful access and meaningful access is not free. For tort matters, unlike others, there is the contingency fee and lawyers like our letter writer. As Professor Herbert Kritzer bluntly reminds us, the contingency fee is about access to the system for those without the means to pay a lawyer to represent them. He says, "From the perspective of the average citizen, contingency fees are about 'access to justice' through the mechanism of civil litigation, or the threat of civil litigation." (Kritzer 2004: 254) Our letter writer lawyers like him are key to ensuring access to civil justice and the legitimacy of the system as a whole.

The letter writer's short statement captures something important we learned from our research about the civil justice system's ability to serve its goals. While legislative actions or appellate court decisions are often the focus of attention in talking about tort reform and access to justice, there is more to the civil justice system than formal law. Like many of the plaintiffs' lawyers we studied, our letter writer would not tell us that such formal rules are unimportant, only that they are not all-important -- and maybe not always *the* most important factors.(Daniels and Martin 2016: 1472-75) Another key factor is the long-standing, insidious, aggressive public relations activities mounted by the tort reform movement over the years. These activities pose a threat to

the civil justice system's ability to serve its goals because they can curtail access by undermining lawyers' practices.

More importantly, those activities are aimed at undermining trust in the civil justice system itself (and not just the practices of plaintiffs' lawyers). Beyond the important formal rules allowing and supporting access, ensuring accountability requires something more subtle and fundamental: trust and confidence in the civil justice system itself, such that people will actually use it and trust its decisions. In other words, a sense of legitimacy. There is little reason to think people will support or make use of a system in which they have scant trust that it will treat people fairly.

Psychologists and law professors Jennifer Robbennolt and Valerie Hans note: "the dystopian image of tort law widely promulgated by tort reform groups may already have led to a decline in public perceptions of the tort system's legitimacy." (Robbennolt and Valerie Hans 2016: 209) This decline in legitimacy, "in turn, reduces a legal system's ability to control conduct." (Robbennolt and Valerie Hans 2016: 209) Like democracy, the rule of law is fragile.

We have been doing research in this area for almost 30 years. The letter writer's plight provides an entry point for looking back over our research and thinking about it in a different way – with concerns about legitimacy in mind. His complaint about "the propaganda disseminated by insurance companies and big business" prods us to think about the broader implications of tort reform rhetoric for legitimacy. That rhetoric has long presented a characterization of a civil justice system lacking legitimacy. Plaintiffs' lawyers themselves play a starring role in a rhetorical story of decline and are a key target of the reformers. They are the villain in the reformers' story of decline – of a civil justice system losing its legitimacy.

This chapter is about the letter writer's demise. Not literally his, but what it represents –the casualties of the tort reformers' efforts to erode legitimacy and access. Drawing heavily from our previous academic work and publications, this chapter is divided into four main parts. The first looks at trust, confidence, and the idea of legitimacy in the civil justice context. The second examines how a legitimacy-threatening dystopian image of the civil justice system arose. It didn't just emerge out of thin air, and this section looks at the long-term efforts to lobby the public mind as a part of the civil justice reform movement and the actors involved. The third part looks at the dystopian image itself and offers an overview of the ideas underlying the image that led us to be concerned about legitimacy. It pays attention to the strategic representation (Stone 1997:309) of the civil justice system and of plaintiffs' lawyers – especially the metaphors and created images mustered in the service of interventions that benefit the interests of reformers.

Building on those three parts, the last part considers how the reform rhetoric with its dystopian image can affect the access that is so important for the civil justice system to work – and even undermines confidence in the rule of law itself. It looks at electoral politics and legislation, litigating, and the role of plaintiff's' lawyers as gatekeepers to shed light on three key ways that reformers have eroded both legitimacy and access.

I. Trust, Legitimacy, and Shaping the Public Mind

The American Tort Reform Association (ATRA) -- a national organization "exclusively dedicated to reforming the civil justice system" (ATRA https://www.atra.org. visited August 10, 2023) -- devotes substantial space on its website touting the tort reform movement's legislative successes over the years. But ATRA doesn't stop there.

ATRA's mission statement says, in part:

> ATRA's goal is not just to pass laws. *We work to change the way people think about personal responsibility and civil litigation*. ATRA programs shine a media spotlight on lawsuit abuse and the pernicious political influence of the personal injury bar. ATRA redefines the victim, showing how lawsuit abuse affects all of us by cutting off access to health care, costing consumers through the "lawsuit tax," and threatening the availability of products like vaccines. (emphasis added) (ATRA https://www.atra.org/about/mission/. visited August 10, 2023)

ATRA's mission is about shaping and lobbying the public mind in the service of changes benefiting the reformers' interests. It is about molding the cultural environment surrounding the civil justice system by manipulating our commonsense notions of what the system is and should be. It is about trust and confidence in the system. In short, it is about legitimacy – or more accurately, undermining legitimacy by eroding trust and confidence.

Writing from a psychological perspective Tom Tyler argues, "The goal of law, legal institutions, and legal authorities is to regulate effectively the behavior of those within society." (Tyler 2003: 349) Legitimacy is necessary for that goal. By legitimacy he means "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just" and "provide a rationale for the appropriateness or reasonableness of differences in authority, power, status, or wealth." (Tyler 2006: 376) Simply, it's about getting and maintaining "buy-in" – the ongoing acceptance of the system and its actions. (Tyler 2003:286)

Legitimacy, in turn, depends on people's views on how the legal system works. People's views on whether and the degree to which fairness characterizes the system's operation are the key. People's law-related behavior and buy-in, says Tyler, are "powerfully influenced by people's subjective judgments about the fairness of the procedures through which the courts exercise their authority" and "their assessments of the fairness of the processes by which legal authorities make decisions and treat members of the public." (Tyler 2003:284)

There is another insight from psychology and law that is relevant – the idea of what psychologists call the availability heuristic – a cognitive bias that results from mistakenly relying upon examples that are readily "available" in the mind. Valarie Hans showed how this concept helps to explain attitudes toward the civil justice system in her study of jurors and jury decision-making in cases involving businesses. Her research included questions on attitudes toward the civil litigation process and its participants. She found that "that attitudes toward civil litigation help to shape the approach a person takes to interpreting evidence and deciding a lawsuit." (Hans 2000:76)

More generally, Hans also found "a widespread belief in a litigation explosion and acute concern about the legitimacy of civil lawsuits." She further noted that "[t]he omnipresence of these attitudes is remarkable" and that "the assumption of a litigation crisis pervades all sectors of society and consistently influences judgments in civil cases." (Hans 2000:74)

People accept this created view of the civil justice system, Hans explains, because of the availability heuristic. According to Hans:

> In estimating the frequency of an event, people rely in part on the ease with which examples of that event are recalled…. Thus, in forming an opinion about whether there are a large number of frivolous lawsuits, people are strongly affected by the easy recollection of such lawsuits. Media reporting and advertising campaigns together promote the easy recall of the Stella Liebecks [the plaintiff in the infamous McDonald's coffee case] … not the vast majority of us who quietly cope when we are injured. (Hans 2003:74; also see Haltom and McCann, 2004:196)

Reform groups like ATRA invest heavily in public relation relations campaigns that include a steady stream of press releases, briefings, reports, podcasts, and the like, so that cases like the McDonald's coffee case are constantly contributing to inaccurate perceptions of the civil justice system because of the availability heuristic.

II. Dystopia

a. Dystopia and Politics

Where does this dystopian characterization come from, who fosters it, and who gains? The questions are important because the claims are not, as Hans pointed out, an accurate picture of the system. (Hans 2000:52-58) The characterization has been created by those with certain policy changes in mind – changes needing a persuasive reason, a hook. It is a matter of solutions seeking problems. As political scientist John Kingdon observed in his study of agenda-setting in Congress, "people generate and debate solutions because they have some self-interest in doing so … not because the solutions are generated in response to a problem." (Kingdon 1995, 2nd ed: 91)

This is true of civil justice reform. Like any other policy arena, it is about the interests of those pushing for action. It is ultimately political in the sense of who gets what, when, and how. (Burke 2002:27) Almost 40 years ago Kenneth Jost, then the editor of a legal newspaper, wrote at the end of a series of stories on the reform movement, "the current tort reform movement seeks not neutral efficiency-enhancing procedural changes, but substantive legal revisions to rewrite rules more in their [the reformers'] favor." (Jost 1985:2) Jost's conclusion about tort reform in the middle 1980s still resonates today. Political scientists William Haltom and Michael McCann more recently observed that "the tort reform movement … developed to challenge, roll back, and otherwise reconstruct this expanded liability regime of tort law." (Haltom and McCann 2004: 38) Leading the effort, they said, were "corporate defendants and those who feared they would soon be civil defendants." (Haltom and McCann 2004:38)

Though not exclusively, our discussion moving forward will place emphasis on the 1980s into the early 2000s, with illustrative examples from the period. These years were the heyday of efforts to shape the public mind. It is during these years when the effort became more organized, more coordinated, better funded, and when the messaging was refined and finely tuned. Much has been invested in the effort to shape the public mind, including the creation of organizations in the 1980s and 1990s having that effort as a major part of their mission. However, even before the institutionalization of tort reform, individual corporations made significant investments in shaping and lobbying the public mind. Those investments set the foundation for what was to come later.

b. Individual Insurance Companies

A few examples can be used to illustrate the early efforts of individual companies. Most important are the themes they used to characterize the civil justice system which form the foundation of the reform rhetoric. Especially important is the theme "we all pay the price." It is the glue that holds the reform rhetoric together and makes the idea of the civil justice system as a dystopia work.

One of the earliest examples is a 1953 campaign conducted by the American-Associated Insurance Companies. It involved a series of four advertisements the publication of which alternated between *Life* and *The Saturday Evening Post.* Each was explicitly aimed at potential jurors in tort cases and the consequences of their awards. To emphasize the importance of "excessive" or "generous" jury awards, all have a message in a text box in the lower right corner of the advertisement. It is about the role juries play in setting the "going rates" for settlements short of trial. Each says: "such valuations are regarded as establishing the 'going' rate for the day-to-day out-of-court claims." In short, it is not just the individual case – your decision has far-ranging effects. (Daniels 2022:75, fn 46)

Perhaps the most evocative is the advertisement appearing in the February 14, 1953, issue of the *Saturday Evening Post*. It shows a woman standing at a grocery store checkout about to pay for her purchase. The surprised look on the woman's face reflects the question in the ad's title – "Me? I'm Paying for Excessive Jury Awards?" It was a stark reminder of the idea that the prices paid for goods and services depend on the decisions civil juries make. It says, "The next time you serve on a jury, remember this: When you are overly generous with insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy." (Daniels 2022:75, fn 46)

The "we all pay the price" theme has been a constant in the reform rhetoric. Psychologist Elizabeth Loftus notes the efforts of two more companies – St. Paul and Aetna. Writing in 1979 about insurance industry advocacy advertisements she observed that the companies

> spent at least $10 million on print advertisements in such varied publications as *Time*, *Newsweek*, the *Wall Street Journal, Sports Illustrated*, *National Review*, and *New Republic*. For example, one ad of the St. Paul Insurance Company begins, "You really think it's the insurance company that's paying for all those large jury awards?" and goes on to answer that question, "We all do." (Loftus 1979:69)

Efforts by Aetna Insurance are perhaps the most revealing illustration. It embarked on a full-fledged marketing campaign in the middle 1980s, built around a Harris poll conducted for Aetna on the civil justice system and tort reform. The campaign was titled, "Speaking Out for Civil Justice Reform." It involved an eight-part series of advertisements that appeared in several widely circulated publications along with a direct mail campaign to opinion leaders which included the results of the Harris survey, copies of the advertisements, and a personally addressed letter to the opinion leader signed by Aetna vice-chair William O. Bailey.(Daniels 1989: 281-292) We will have more to say about this campaign later.

Aetna ran a similar campaign in the later 1980s – "Lawsuit Abuse: Enough is Enough." A 1988 article in the *St. Louis Business Journal* described its test marketing. (Desloge 1988) Developed for Aetna by Minz and Hoke, Inc. a Hartford, CT advertising agency, this campaign was first test-marketed in four different sites in different parts of the country: St. Louis, MO, Rochester, NY, New Orleans, LA, and Denver, CO. This effort was a radio and newspaper campaign conducted between September and December of 1988, and according to an Aetna official was "designed to shift the tort reform battleground out of the courtroom and place it before the public." (Desloge 1988:1)

c. The Organized Effort

By the mid-1980s big campaigns by individual companies to shape the public mind gave way to the ongoing, organized efforts by trade groups, think tanks, and newly created tort reform advocacy organizations. These efforts are especially important because they are coordinated and have the support (financial and political) of broad coalitions wanting tort reform. They also allow individual corporations and other financial supporters (and their interests) to remain less visible. (Hilder and Wynter, 1986:1)

A 1986 national public relations campaign by the Insurance Information Institute provides an excellent example of trade group activity. Titled "We All Pay the Price: An Industry Effort to Reform Civil Justice," it had a $6.5 million budget ($18.1 million in 2023 dollars) with a purpose to present the industry's effort "to the broad general public. We must gain the widest possible awareness and support before we can expect political leaders to improve the legal system." (*Insurance Review* 1986:48: also see Daniels and Martin, 1995:34-35, 96-97)

The campaign was expected to reach 90% of adults through "a broad-based advertising campaign using network television, major newspapers and national news magazines." (*Insurance Review* 1986:48) Built around the idea of the "Lawsuit Crisis," the campaign employed a series of eye-catching dramatic graphics with titles including: "The Lawsuit Crisis is Bad for Babies;" "The Lawsuit Crisis is Penalizing School Sports;" and "Even the Clergy Can't Escape the Lawsuit Crisis." (*Insurance Review* 1986:59) The campaign also included press and speakers' kits, and "insurance agents and company personnel [were] being asked to participate in the campaign by placing additional advertisements in their local media to generate community interest." (*Insurance Review* 1986:58-59) As with the Aetna campaign, we will return to this campaign later.

An example of think tank activity around tort reform is the Manhattan Institute. The 1992 mission statement for the Institute's Judicial Studies Program (now called the Center for Legal Policy) is like ATRA's mission statement in explicitly wanting to shape the public mind. It is, however, more revealing of the nature of the strategy, saying, "An essential element of successful policy advocacy is taking the initiative: the side proposing change most often ends up setting the agenda … (and) have an easier time introducing fresh concepts." (Manhattan Institute, 1992:1) Specifically, the strategy was stated as: "If, sometime, during the present decade, a consensus emerges in favor of serious judicial reform, it will be because millions of minds have been changed." (Manhattan Institute, 1992:1)

Unlike the 1986 Insurance Information Institute campaign aimed at the general public, the Manhattan Institute targeted elites and opinion leaders. It held conferences that brought together its Senior Fellows (that have included reform advocates Peter Huber and Walter Olson), affiliated or visiting scholars (like Lester Brickman and Richard Epstein), and Institute staff with business and political leaders, members of the media, and members of the academy. It also helped generate and then aggressively disseminate key, pro-tort reform work by its senior fellows and others. (Haltom and McCann 2004:40-43)

It's website still features Professor Lester Brickman's 2011 book Lawyer Barons: What Their Contingency Fees Really Cost America. It says, "the book argues that the financial incentives for lawyers to litigate are so inordinately high that they perversely impact our civil justice system and impose other unconscionable costs. It thus presents the intellectual architecture that underpins all tort reform efforts." (Manhattan Institute, *https://manhattan.institute/book/lawyer-barons* visited August 10, 2023)

The most important of the national organizations specifically created to foster tort reform is ATRA. Founded in 1986, ATRA describes itself as "a nonpartisan, nonprofit organization with affiliated coalitions in more than 40 states." (*https://www.atra.org/about/*. Visited August 10, 2023) Haltom and McCann describe ATRA as a primary agent of tort reform with activities including lobbying, strategizing, coordinating among allied groups, and "providing a clearinghouse for reform ideas." (Haltom and McCann 2004:43-44)

An excerpt from ATRA's mission statement unabashedly sets out their goal:

> ATRA works to counter that influence [of plaintiffs' lawyers] by challenging this status quo and continually leading the fight for common-sense reforms in the states, the Congress, and *the court of public opinion*. (emphasis added) (https://www.atra.org/about/mission/ visited August 10, 2023).

ATRA has conducted an ongoing series of public relations campaigns on its own and in conjunction with other tort reform groups. They can involve everything from roadside billboards to television and radio spots, to lobbying the media with press releases and other materials to direct mail, and so on. They are an effort at "outside" lobbying – using public opinion to pressure for changes in addition to the usual "inside" lobbying. (Goldstein, 1999: 1-5)

Especially important are the state-level coalitions and groups ATRA has helped to create, fund, and often largely direct. (Deal and Doroshow 2000) They provide a local presence for ATRA's message and to have its agenda appear to be the result of grassroots interests and activity. A number of these so-called CALAs (citizens against lawsuit abuse groups) were formed across the country starting the 1990s, with ties to ATRA. According to ATRA critics Carl Deal and Joanne Doroshow:

> Throughout the 1990s, CALAs have targeted public opinion and community leaders – and potential jurors — through expensive public relations campaigns that deliver carefully packaged messages … CALA groups have helped make the supposed need for tort law changes a major political issue across the country. (Deal and Doroshow 2000:6)

More pointedly, Deal and Doroshow said the CALAs' efforts included trying "to undermine public support for a strong civil justice system by promoting [in Deal and Doroshow's estimation] myths about the legal system, demonizing the opposition (in particular, trial lawyers who represent consumers in the court room), and generating constituent pressure on law makers." (Deal and Doroshow 2000:9)

ATRA, however, may not represent the first effort at organizing state and local grassroots organizations. A 1986 article in the trade journal, *Journal of American Insurance* (1986:1-5), talked about state-level organizations already in existence with ties to the American Alliance of Insurers. Titled "When You Need a Coalition: How-to-Do It Examples from Tort Reform," it listed examples from nineteen states and offered practical advice for forming and running a successful organization.

The efforts to shape the public mind have not gone unchallenged, but not on a scale or level of sophistication to match the reformers' efforts. Plaintiffs' lawyers have pushed back. Even the earliest efforts did not go unnoticed. In 1954 the president of the Texas Trial Lawyers Association made a presentation to the Tyler, TX Lions Club. It was, he said, a "rebuttal to one earlier given by the claims manager of an insurance company. It seems the good brother had earlier in the year regaled the Lions with stories of fraudulent insurance claims and the danger of higher insurance rates coming from so-called big verdicts." (Laird 1968:14)

Consumer groups also challenged the reformers' characterization of civil justice. (Hunter 1986) There were journalistic challenges in specialty publications as well as local newspapers. (Jost 1985; *Charleston (W.Va.) Gazette-Mail* 1986) But, again, there was nothing to match the sustained, well-organized, and well-funded campaigns by the reformers.

Even in the wake of the reformers' legislative successes in a number of states, shaping the public mind continues until today, but with an emphasis on social media rather than print media. It's now 24/7, 365, one-stop shopping. Reform groups have their own websites and utilize Facebook, Twitter (now X), and Instagram with regular content. They have blogs and produce podcasts. Social media provides a way to communicate with voters and urge political activity. It is a much more efficient means to saturate the public sphere with messaging and continually amplify it.

Far from coming out of thin air, the dystopian image is a matter of strategic representation – created, funded, fostered, and disseminated by interests wanting "to rewrite rules more in their [the reformers'] favor." (Jost 1985:2) The next section addressees the substance of the dystopian view of the civil justice system. Again, it will emphasize the 1980s into the early 2000s, and paying particular attention the stories, metaphors, and images used. Each is essential to creating the sense of the civil justice system's illegitimacy using the "we all pay the price" theme.

III. Civil Justice as Dystopia

a. Dystopia and Legitimacy

A dystopia is an "imagined world or society in which people lead wretched, dehumanized, fearful lives."(Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/dystopia. visited August 10, 2023) Dystopias are not legitimate – the very idea of a dystopia is to highlight illegitimacy in dramatic and stark terms. Tort reformers have been deeply engaged in trying to shape the image of the civil justice system in dystopian terms. They do so because the challenge for any movement wanting significant policy change is convincing the public and policy-makers there is a "problem" – or even a "crisis" -- that must be "solved" and "solved" by the desired changes. (Daniels and Martin 1995:29-59)

The discussion above reflects the scope of the reformers' investment in strategically creating a convincing, dystopian image of the civil justice system. The idea is to make it real for people, primarily by playing to anxiety and fear. And to provide a scapegoat to help focus and mobilize people, one that shifts blame to avoid critical examination. (Bailey 1983:139)

The image of the civil justice system promulgated by the reformers is the antithesis of the values Tyler says are crucial to legitimacy. There is, and has been, a consistent message with three main themes. The first characterizes the system as a seriously destructive negative force. By its very operation its failings are too profound to serve the public interest. It is a story of decline from a better world in the past.

The second theme focuses on the dire consequences of those failures. It is a big problem (perhaps even a crisis) demanding a significant response because "we all pay the price" in immediate and essential ways. The story demands our attention and response because it deals in fear and anxiety. It makes the dystopia real, and stories are an important source of evidence.

To work, dystopian stories need to suggest or show a way out – a return to legitimacy or a restoration to a previous state of grace. This is the third theme. Rather than hopelessness this means having a knowable cause for the dystopia – a target to attack and vanquish. The key causes for the reformers can vary – plaintiffs, their lawyers, juries, or the erosion of traditional norms like personal responsibility. But the lawyers are the key because they are the gatekeepers.

b. A Failing Civil Justice System – Chaos and Decline

The first theme presents a vision of a chaotic system run amok -- one eerily familiar in today's political climate. It is full of evocative metaphors and threatening images that are the antithesis

of fairness and rationality. Metaphors are an important part of strategic representation, "(o)n the surface, they simply draw a comparison between one thing and another, but in a more subtle way they usually imply a whole narrative story and a prescription for action." (Stone 1997:148) Indirectly, the reform rhetoric plays off what Stone calls "motherhood issues:" symbolic ideas like equity, efficiency, security, and liberty. (Stone 1997:37) These are issues everyone is for when stated abstractly. The dystopian story of tort reformers is that these values are being threatened by the civil justice system.

With the underlying theme of "we all pay the price," it is a system in which the number of personal injury suits is significantly higher than in the past (the litigation explosion); in which more people bring lawsuits than should (frivolous lawsuits); in which the size of awards is increasing faster than inflation (skyrocketing awards); in which the size of most awards is excessive (outrageous awards); in which the logic of verdicts and awards is capricious (the lawsuit lottery); in which the cost of lawsuits is too high and the delays too great (a wasteful, inefficient system); in which there is no longer a fair balance between the injured person and the defendant (exploiting deep pockets); and ultimately in which the cost to society is unacceptably high (we all pay the price). (Daniels and Martin 1995:4-15)

Creating this image of an illegitimate civil justice system involves symbolic politics -- appealing to shared values, preferably deeply held fundamental values to manipulate those values to achieve political gain. (Edelman 1985 2nd ed) In essence it is an appeal to emotion rather than reason, an attempt to "eliminate the mind and critical faculties from the evaluation process. The "tactical use of passion" which provokes "feelings rather than thought." (Bailey 1983:26)

1. Stories

Stories make things real. As Walter Olson said in responding to criticism that evidence of a litigation explosion was lacking – it's the stories that really matter, not the empirical data. (Cox 1992: 1, 37) By the middle 1980s, a series of anecdotal horror stories began appearing in the reform rhetoric and in the press, among them the "Psychic and the CAT Scan," The Ladder in the Manure," "The Drunk and the Phone Booth," and the "Fat Man and the Lawnmower." (Daniels and Martin 1995:43-46) The same story could appear five or six times in different places over the course of a year. Both Peter Huber, in *Liability*, (Huber 1990) and Walter Olson, in *Litigation Explosion*, (Olson 1991) used horror stories extensively. In effect, the reform rhetoric created a folklore of illegitimacy surrounding the civil justice system, which included some tales that were simply not true. (Hunter 1986:546)

Their use continues today, although in somewhat more sophisticated ways. The CALA website, for example, has an open invitation to visitors: "Has lawsuit abuse victimized you or someone you know? CALA wants to hear from you! Share your story below to have your voice heard." (CALA, https://cala.com/share-your-story/. visited August 10, 2023) Such stories may then appear on the website and in social media and become another story of a system run amok. Stories may also appear on Facebook and Twitter feeds, largely unfiltered.

2. Metaphors

Key words play an important role in the storytelling. Evocative metaphors can efficiently encapsulate a whole story. "Explosion" has been a powerful metaphor for describing the civil justice system and its constituent parts, a metaphor of chaos. It suggests the opposite of Tyler's idea of quality decision making, which means neutrality and decisions based on rules consistently applied across people and situations.

Long before Manhattan Institute Senior Fellow Walter Olson chose it as the title of his 1991 book, *The Litigation Explosion,* reformers had made use of the term. Law professor Marc Galanter found it used as early as 1970 by those concerned about the alleged change in the litigiousness among the populace. (Galanter 1983) By the middle 1980s, the litigation explosion was an accepted and lamented fact in the public realm, even though the best empirical evidence, as Hans noted, showed no such thing.

The explosion metaphor has also been used to describe the supposed increases in the size of jury awards. It is usually used in the form "explosive growth" or "explosive increase." Another frequently used and related metaphor is "skyrocketing," a term conjuring up an image of abrupt and rapid increase as well as of events out of control. Perhaps the most common use of the term is to describe alleged changes in the size of jury awards. This metaphor has also been with us for a while, appearing as early as 1962 in an article about jury verdicts in automobile accident cases. (Appleman 1962:714) It too persists despite empirical evidence to the contrary.

Related to the litigation explosion idea is the characterization of suits as frivolous. Frank Luntz' 1997 guidebook for Republican activists -- *Language of the 21st Century* -- says his polling shows that most people think "too many people are abusing the legal system in order to get large damage awards." (Luntz 1997:27) In the book outlining the Contract with America (in which Luntz played a role), the chapter on legal reform begins by presenting a familiar picture: "Isn't it time to clean up the court system? Frivolous lawsuits and outlandish damage awards make a mockery of our civil justice system. Americans spend an estimated $300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs." (Gingrich, et al 1994:143)

ATRA has long emphasized the idea of frivolous lawsuits, saying. "According to a 2003 ATRA survey, 85% of Americans believe too many frivolous lawsuits clog our courts. ATRA successfully translates that frustration into action and reform." These suits reflect a problem with responsibility-- that is, a lack of personal responsibility on the part of the people bringing those lawsuits and their lawyers. These suits "undermine the notion of personal responsibility." The concern with responsibility, a key symbolic norm, is not ATRA's alone and has long been a part of the reform rhetoric. (ATRA https://www.atra.org/about/mission/. visited August 10, 2023)

In retrospect, Aetna's "Speaking Out for Civil Justice Reform" campaign appears as the most sophisticated use of metaphors in conveying the message of an illegitimate civil justice system. It touches on almost everything thematic in the reform rhetoric. Five of the campaign's eight parts included something on responsibility, mostly on bringing back an apparently missing norm of responsibility (the dystopian story coupled with hope and restoration to an earlier, better time). "Life without Risk" (#3 in the series) says, "We need to crack down on frivolous, harassing lawsuits. And we need to accept some risk and responsibility for ourselves." "Golden Rule Fails

Court Test (#4) adds a hint of the effects of the system's corruption and perverse incentives saying, "Somehow we've managed to create a system that makes good people behave badly … we need to return to the basic American principle of personal responsibility for one's actions." (Daniels 1989:288-91)

"Sue City, USA" (#5) says, "All Americans must be willing to accept more personal risk and responsibility. Remember, we *all* pay for the excessive cost and inequity in our present civil justice system." "Sue-icidal Impulse" (#6) complains of a corrosive "entitlement mentality" saying, "We teach our children to be responsible for their own actions. Then we turn around and show them a system which rewards irresponsibility … It's time to restore the principles of self-reliance and personal responsibility to our civil justice system."

The Aetna campaign also highlights balance as a metaphor. Throughout the Aetna campaign the idea is that the civil justice system is out of balance – balance being a stand-in for fairness. The first advertisement in the series, "Justice for All?" says, "Our civil justice system was created to balance individual rights with society's needs. But it has strayed from this objective."

The same is true for the term restore and synonyms like return or bring back. As noted earlier, a dystopia needs to suggest or show a way out – a return to legitimacy or a restoration to a previous state of grace. "Justice for All?" also says, "Americans have a demonstrated capacity to fix things that go wrong.… We can restore balance to this system."

In *Liability,* after laying out the contours of the dystopia, Huber says that while the situation is dire there is still hope. The civil justice system can be reformed and there are solutions available. In his words, "The path we have been traveling is not inevitable, and there is yet time for a serious change in course." (Huber 1990:224) Rather than speaking of experimentation, the rhetoric tells a story of hope through restoration. The closing lines of Olson's book offer a combination of hope and restoration. He wrote "we are most of us terribly vulnerable to the perils of litigation. Yet as a society, we are in no sense helpless to move against its evils. All it takes is the will. The will may not be here yet, but it is coming. When it does, we will again make litigation an exception, a last resort, a necessary evil at the margins of our common life." (Olson 1991:384)

c. Making Dystopia Real – Dire Consequences

An important aspect of strategic representation is causality. The glue holding the reform rhetoric together is its causal theory connecting a failed civil justice system to a set of dire negative consequences that readily resonate for people. Hard evidence is not the connector, it's the stories. Anecdotes and horror stories about lawsuits that strain credulity – often amplified by press coverage – can make the connection real by showing how we all pay the price and doing so in ways that play to fear and anxiety.

Visual imagery is an especially efficient and powerful means of telling a story about the consequences of a failed civil justice system. The 1986 Insurance Information Institute discussed earlier – the "Civil Justice Campaign" – provides an example. The campaign conveyed a sense of urgency and anxiety. Built around the concept of the "Lawsuit Crisis We All Pay the Price," it

employed a series of eye-catching dramatic print advertisements intended to drive home the idea of who pays the price for the system's failures. Advertisement titles included "The Lawsuit Crisis is Bad for Babies," "The Lawsuit Crisis is Penalizing High School Sports," and "Even the Clergy Can't Escape the Lawsuit Crisis." (*Insurance Review*,1986:58-60).

The first advertisement focuses on obstetricians saying, "The number of lawsuits Americans file each year is on the rise. Obstetricians are among the hardest hit.… Many have decided it isn't worth the risk." The second blames the civil justice system for local schools closing their sports programs, saying "It's part of the lawsuit crisis. … Some may think the risk may not be worth it." The third advertisement (as if to say, is nothing sacred!) faults the system for making clergy reluctant to counsel members of their congregations. "What's going on? It's all part of the lawsuit crisis." (*Insurance Review*,1986:58-50) Each undermines any idea of legitimacy.

What's important is the stark and threatening imagery of each advertisement. Each appeals to symbolically powerful issues, and each is clearly intended to convey a message of the civil justice system threatening the everyday lives of ordinary Americans. Each includes an image superimposed on the print. The first depicts a helpless, newborn baby being held by its mother. The second depicts a forlorn high school football player in his uniform holding a ball. The third shows a worried clergyman in clerical garb. The print tells the reader of problems like too many lawsuits, high awards and the like, and their everyday consequences. The imagery clearly intends to instill fear and anxiety, which can be eliminated only through civil justice reform. These advertisements appeared in the Sunday magazine sections of major newspapers across the country, as well as in *Readers Digest*, *Time* and *Newsweek*.

And then there are the billboards depicting these themes. A 1996 *Texas Lawyer* article reported that one Fort Worth lawyer complained about a "billboard by tort reform group Citizens against Lawsuit Abuse. The sign recently went up on Airport Freeway, right where potential jurors who live north of the city will see when they drive to the Tarrant County Courthouse." (Calve 1996:5) Today, we are less likely to see these types of campaigns with foreboding visual imagery in the print media. They have given way to social media as means of sending the message about the dire consequences of the civil justice system. The message, however, stays the same.

IV. How Dystopia Threatens Access

The civil justice system is reactive, needing litigants bringing cases. Without meaningful access for these litigants, the civil justice system cannot achieve any of its goals, like accountability and deterrence. A dystopian view of the civil justice system aims to reduce this access. As Professor Brickman says, "most tort reforms will deprive some number of claimants of access to courts, and some of these claimants would have prevailed had their cases gone to trial. That, of course, is precisely the purpose of tort reform: to curtail tort litigation." (Brickman 2011:121) Delegitimizing the system is intended to inhibit access in at least three key ways: most obviously through electoral politics and legislation; by discouraging litigation; and by undermining the gatekeepers – lawyers like our letter writer.

a. Electoral Politics and Legislation

The tort reform movement has always had a strong focus on elections. It seeks support for candidates (legislative and judicial) that share the reformers' view of the civil justice system and the formal changes they want. The focus is state level because state legislatures and supreme courts are where the important battles take place. State elections, the reformers say, provide an opportunity for people to meaningfully participate in the reform effort by voting for candidates supporting the reformers' agenda.

Many of the formal changes, of course, will undermine access. Some make procedural changes causing litigation to be difficult and costly (e.g., rules dealing with timelines, discovery, burdens of proof, expert requirements, or even immunities for certain parties). Others make more substantive changes. Non-economic damage caps are and have been a particular favorite for reformers in certain types of cases, especially medical malpractice cases.

Caps, supposedly, will make insurance readily available at reasonable rates, thereby keeping professionals home, keeping small businesses afloat, and making needed products available at reasonable prices. In practice, however, caps can freeze certain potential litigants out of the civil justice system altogether – what Professor Lucinda Finley calls tort reform's "hidden victims." (Finley 2004). These are people for whom non-economic damages make up the bulk of potential damages – among them women, the elderly, children, and low-wage workers.

At issue is the contingency fee business model, or as law professors David Hyman and Charles Silver bluntly put it, "it's the incentives stupid." (Hyman and Silver 2006:1085) Plaintiffs' lawyers must always balance cost, risk, and potential return in deciding what cases to handle. (Kritzer 2004:1-8) Capping non-economic damages limits the potential return and makes that balance more problematic. It is especially so in already precarious and complex cases like malpractice that are costly to bring. As a Texas lawyer told us, "If you take the average working-class guy (sic)… And if you're capped on your emotional anguish damages, you know, you have extraordinary expenses related to litigation, catastrophic litigation, then you really hafta weigh whether or not, you know, you're gonna take that case." (Daniels and Martin, 2018:664)

Regardless of the stated purposes of caps, their proponents appeared to have understood all too well their effect on access. Then Texas Governor Rick Perry made the following comment at the signing ceremony for 2003 Texas legislation capping non-economic damages in malpractice cases at $250,000: "We are removing the incentive that personal injury lawyers have to file frivolous lawsuits and run health care professionals out of business." (Daniels and Martin, 2018:635)

Tellingly, one of the most important opponents of those Texas caps was Deborah Hankinson, a Republican and former Texas Supreme Justice originally appointed by to the court by then-Governor George W. Bush. Hankinson told a journalist, the caps weren't "designed to cut-off bad—that is frivolous—lawsuits; it was designed to cut-off lawsuits by people with legitimate claims by restricting access to the courthouse . . . this tort reform went too far." (Swartz 2005)

The success of the 2003 caps legislation highlights why tort reform organizations encourage voting. For example, Texans Against Lawsuit Abuse posted an election reminder on its website in early 2022, saying, "In our 'It Starts With You' campaign, we say that preventing lawsuit

abuse starts with you. The same is true for choosing candidates in the next election. The upcoming primary elections and the November general election provide opportunities for voters to elect leaders that understand the importance of lawsuit reform." (Texans Against Lawsuit Abuse, https://www.tala.com/the-polls-are-open/#wpcf7-f15-o1. visited August 10, 2023)

The tie to electoral politics is long-standing and tends more and more to reflect partisan differences seen today. Political scientist Tom Burke sees the politics of tort reform as relatively straightforward. "Groups aligned with plaintiffs fight groups aligned with the defendants … [the] battles are thus highly partisan, with most Republicans on the anti-litigation side and most Democrats lined up with the plaintiffs. These are struggles over distributional justice— who gets what." (Burke 2002:27)

Tort reform was one of the 10 national policy areas in the Republican's 1995 *Contract with America* -- The Common Sense Legal Reform Act. As we saw above, civil justice reform was also an issue in Lutz' 1997 guidebook for Republican activists. Its discussion of reform includes a section "The Villain." It advises activists, "Unlike most complex issues, the problems in our civil justice system come with a ready-made villain: the lawyer … individuals who live off the misfortunes of others." (Luntz 1997:128)

b. Litigating

The delegitimization of the civil justice system also affects access by encouraging people *not* to use the system. To an extent, this message is subtle and a part of casting doubt on the motives and personal responsibility of those who do litigate. Why would you want to turn to a malfunctioning – even corrupt – system? One that enriches plaintiffs' lawyers and for which we all pay the price? Instead, as Citizens Against Lawsuit Abuse-Florida says, "be part of the solution, not part of the problem.… Stopping lawsuit abuse starts with each of us doing our part to ensure the legal system is used for justice rather than greed." (Citizens Against Lawsuit Abuse-Florida, https://cala.com/florida/. visited August 10, 2023) It's about personal responsibility.

Sometimes subtlety is cast aside. Writing in the October 2, 2014, issue of *The Journal* (Friendswood, TX), reform advocate Connie Scott reminded readers that despite tort reform legislation (of which there had been much in Texas), the dangers of abuse were still out there and vigilance is needed. She tells readers that "(s)topping the abuse of courts really starts with each of us … [and] the choices we make determine whether we are part of the solution or contribute to the problem of lawsuit abuse." (Scott 2014) She offers the following advice:

> If you're wronged or suffer a loss, the kneejerk reaction may be to sue, but filing a lawsuit might not be your best course of action. Some personal injury lawyers make their living by urging people to file lawsuits regardless of the merit of the lawsuit. Alternative options, such as arbitration, can frequently offer easier, faster, and less stressful ways to resolve a dispute and provide appropriate compensation. (Scott 2014)

c. Juries and Plaintiffs' Lawyers

One key reason that efforts to shape the public mind have implications for access is influencing the pool of people from which jurors are chosen. Or, as a defense lawyer speaking to the jury in a 1999 trial in Houston said: "What used to be the American dream has turned into the American scheme.… The best tort reform is the 12 of you." (Daniels and Martin 2000:472)

This takes us back to our letter writer. More than just jury decisions in individual cases, the letter writer shows us how this can affect access. Jury verdicts, as the 1953 advertisements told potential jurors, are the foundation of the "going rate," which helps shape settlements that dispose of most matters. (Ross 1980 2nd ed.) In turn, decreasing verdicts can eventually make it more difficult for lawyers like him to maintain their practices. He said,

> jury verdicts decreased due to the propaganda by insurance companies and big business, and this resulted in insurance adjustors offering less money to settle cases I began to decline representation in cases I used to accept and was working harder and receiving less money on cases I took.

In short, it puts the squeeze on the gatekeepers and their contingency fee business model. As Hankinson might say, it's about removing the incentive to file lawsuits for people with legitimate claims by restricting access to the courthouse. More directly, reform proposals to change or eliminate the contingency fee in the name of consumer protection or ethics are about undermining that business model altogether. ATRA's proposal on contingency fee reform, for example, would practically end the practice. (ATRA, https://www.atra.org/issue/contingent-fee-reform/. visited August 10, 2023)

As we would expect, we found that plaintiffs' lawyers in Texas felt that the changes they perceived in verdicts indicated that juries were becoming less likely to decide for plaintiff; less likely to award economic damages (or would award less in damages); and less likely to award non-economic damages.

They were not alone. A defense lawyer we interviewed called the campaigns his "silent helper." In his experience, jurors

> have heard about tort reform because there's been a lot of heavy advertising by business groups … So they're aware of it, and of course part of that being aware of it is the "insurance crisis" ... Most of the people who are going to take the time and come down and serve on a jury are going to have insurance ... and they know they are paying. I think it affects them.

Changes in jury verdicts -- real or perceived -- reverberate throughout the civil litigation process and may affect lawyers' practices in a variety of ways. Most plaintiffs' lawyers adjust their practices to what they believe juries are saying with verdicts – the going rates. They do so particularly through their selection and handling of cases. For instance, one Texas plaintiffs' lawyer said the following regarding soft tissue injury cases:

> I read the trial reports all the time and the truth is ... the juries are so ... they start off with a presumption that the plaintiff's gold-digging.... Most of them are getting zero verdicts.

> So, yeah, I hear about them in the trial reports. I read them all the time. That's why I don't really want to go to trial on a soft tissue case.

Defense lawyers and insurance adjustors also adjust their practices to what they believe juries are saying. For instance, the defense lawyer quoted above said that the insurance companies who hire him "are now taking the position of we ain't paying nothing ... they are real tight with the money ... because juries are real tight now."

The law's practical effect depends on the extent to which people can make it work for them, which typically requires access to a lawyer's services. That need, however, does not guarantee that lawyers will be available to handle a particular legal matter. Lawyers make choices about the markets -- legal and geographic -- in which they will work on the basis of whether they believe they can practice profitably in those markets. As a result, the possibility of making law work may depend on whether a set of lawyers believes that a profit can be made providing a particular service in a given locale.

Not all plaintiffs' lawyers are following the letter writer's path, but some are leaving the practice area. Others are seeking out opportunities in other states. For those remaining in the practice area or entering for the first time, the ways in which they balance cost, risk, and reward will affect access. We found that a common response was downsizing their practices to better control costs.

Greater attention is paid to case and client screening because juries and insurance adjusters are tougher. This results in fewer cases being taken. As one lawyer simply put it: "we're getting increasingly selective because the process of taking a case to court is getting enormously expensive.... I front all the costs and if we lose, I eat the costs." As a result, the client with a small, but legitimate claim may not be able to find a competent lawyer or have their claim successfully settled. A Houston judge/mediator in a 1998 Texas Department of Insurance study commented on the real-world consequence: "I think there'll always be people who have little causes of action, or marginal causes of action who can't get representation. there always have been those cases, and when the attitude of the public is like is it is today, it will be more difficult." (Daniels and Martin 2000:485)

CONCLUSION

We started this paper wanting to understand our letter writer's professional demise. He was a good lawyer who handled the kinds of everyday cases that everyday people would have. We wanted to know if his predicament could tell us something important about the civil justice system's ability to serve its goals. Most immediately his demise speaks to access – to meaningful access. Pro se access, as we said earlier, is fool's access. Few injured people can pay a lawyer out of pocket, so it's the plaintiffs' lawyers contingency fee business model that makes access possible. The demise of lawyers like our letter writer and changes in plaintiffs' lawyers' practices in response to the tort reform movement and its rhetoric affect access.

At its heart, the reform rhetoric is an effort to portray the civil justice system as a dystopia and thereby delegitimate the system and unravel it for political gain. As the reform movement

developed it became deeply intertwined with partisan politics and the increasingly dystopian characterization of our society that one set of interests uses with great success. This connection reminds us that the rule of law, like democracy itself, is fragile. Fragility is at the heart of a retired judge's advice for those wanting to be a good judge. As excerpted on the National Judicial College's website, its title shows the heart of the advice: "The Rule of Law is Powerful and Fragile: It's Your Job to Protect It." (Small 2020) As Robbennolt and Hans said, "Compliance with the law, then, is linked to its moral credibility … Declining legitimacy, in turn, reduces a legal system's ability to control conduct." (Robbennolt and Hans 2016:209) This is the real reason for understanding the letter-writer's professional demise in the face of tort reform.

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