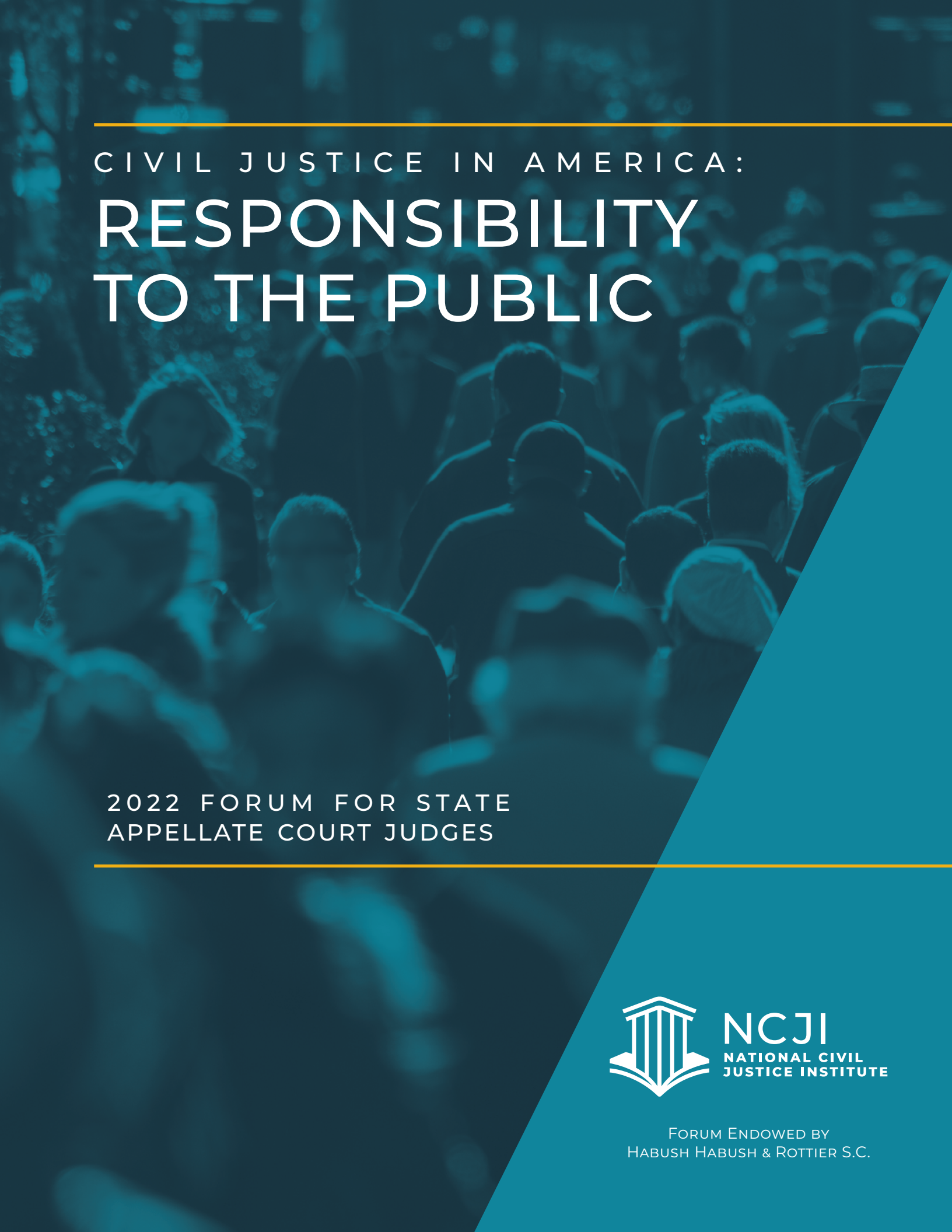


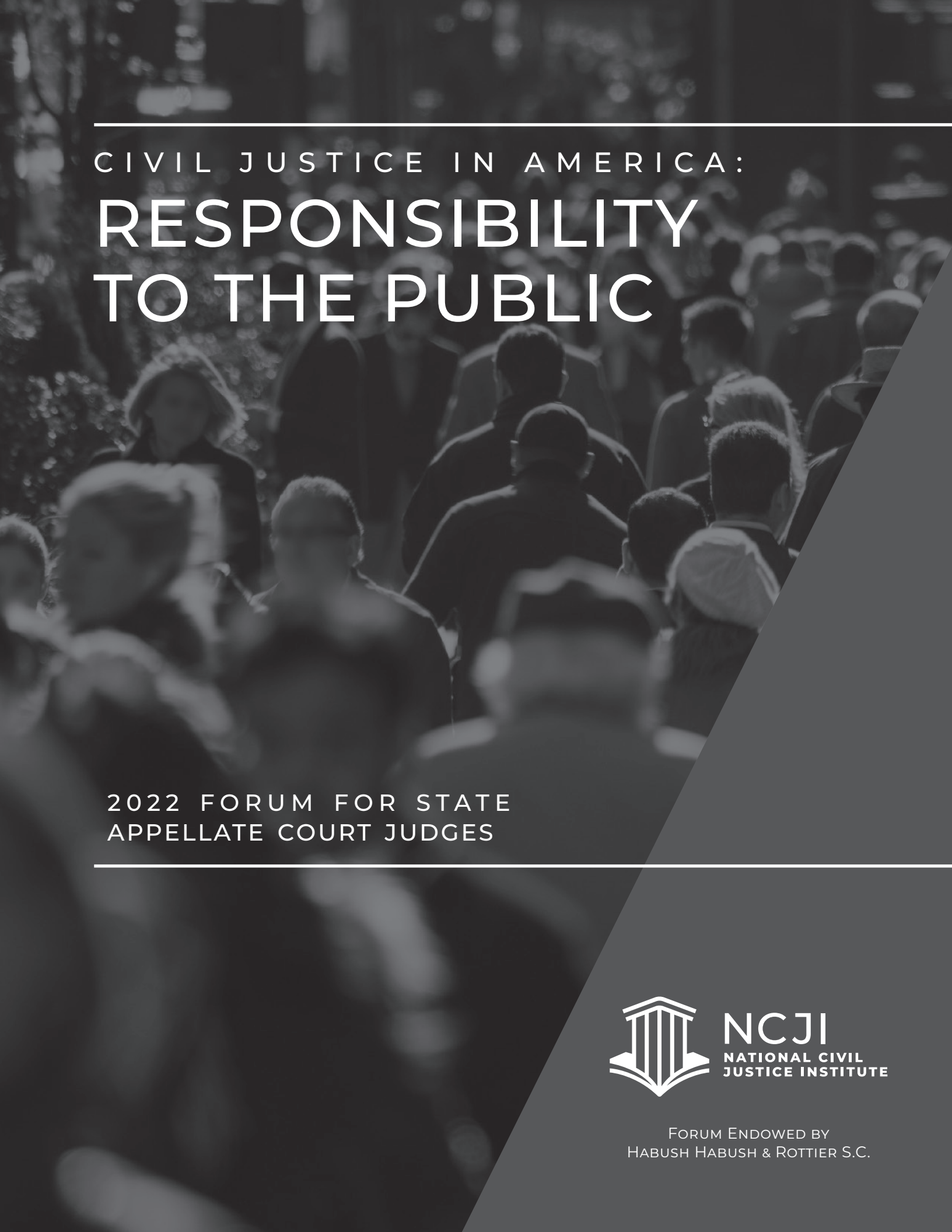
CIVIL JUSTICE IN AMERICA:

RESPONSIBILITY TO THE PUBLIC

2022 FORUM FOR STATE APPELLATE COURT JUDGES

NCJI
NATIONAL CIVIL JUSTICE INSTITUTE

FORUM ENDOWED BY
HABUSH HABUSH & ROTTIER S.C.



CIVIL JUSTICE IN AMERICA:

RESPONSIBILITY TO THE PUBLIC

2022 FORUM FOR STATE APPELLATE COURT JUDGES

NCJI
NATIONAL CIVIL JUSTICE INSTITUTE

Forum Endowed by
Habush Habush & Rottier S.C.

National Civil Justice Institute
777 Sixth Street, NW, Suite 200
Washington, D.C. 20001
www.ncji.org
info@ncji.org

The Endower, Habush Habush & Rottier S.C., the AAJ-Habush Endowment, and the Forum underwriters
have no control over the content of the Forum, the makeup of faculty or attendees,
the placement of information in Forum materials, or the editorial content of the 2022 Forum Report.
Library of Congress Control Number: 2023910618
ISBN: 978-0-933067-32-5

"We have the greatest job in the world. We get to solve people's problems for them. To have the ability and the authority to do that, there's nothing better."

—A judge attending the 2022 Forum

"I like discovery disputes, because that's where the justice is. And judges are supposed to participate in that. We have to allow the parties to get the evidence, particularly when it comes to the high-wealth groups that can hire the best attorneys to resist discovery."

—A judge attending the 2022 Forum

"Statistically speaking, I would say most civil cases are being lost at the procedural stage."

—A judge attending the 2022 Forum

TABLE OF CONTENTS

FOREWORD

The 30th Forum for State Appellate Court Judges of the National Civil Justice Institute (NCJI)[1] was held on July 16, 2022. As with all of our past forums, both comments and reviews clearly indicate that it was extremely well-received and thought-provoking. In continuing what has proven to be a very popular Forum setting, judges, practicing attorneys, and legal scholars this year considered crucial issues related to jury trial and the achievement of fairness in our civil justice system.

The Institute recognizes that state courts have an extremely significant role in the administration of justice in the United States, and that state court judges often carry the heaviest of judicial workloads. NCJI tries to support state court judges in their work by offering our annual Forums, so that judges, academics, and practitioners can have a brief, pertinent dialogue on civil justice issues through a varied day of presentations and small-group discussions. At times, the discussions lead to consensus, but that is not what is critical. Even when they do not, the exploration of varied experiences in multiple state court settings is inevitably fruitful. It is important that Forum participants bring a wide range of viewpoints and experience. We also make concerted efforts to include panelists with a wide range of outlooks, at times differing dramatically from those of many of the Institute's Fellows. We hope that this diversity of perspectives emerges in our Forum reports.

Ever since their inception, our Forums for State Appellate Court Judges have been devoted to cutting-edge topics, ranging from the court-funding crisis, to the decline of jury trial, to separation of powers issues, rulemaking, forced arbitration, judicial transparency, state constitutionalism, aggregate litigation, confidentiality in our public courts, and the general subject of fairness in civil jury trials. We at NCJI are proud of our Forums, and we are quite gratified by the growth in interest and attendance we have experienced since their inception. Not just for this past year's forum, but consistently, the Forums have been broadly well received with numerous positive comments from judicial attendees and participating faculty members. A full listing of our prior Forums is provided in an appendix to this report. Their reports and research papers—along with most of our other publications—are available for free download on our website: www.ncji.org.

The Institute is indebted to a number of people who contributed to the success of the 2022 Forum, listed below in order of their presentations:

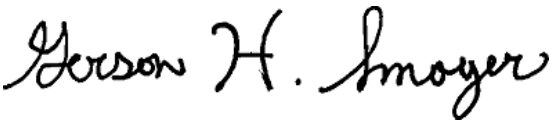
- Hon. Steven C. González, Chief Justice, Washington State Supreme Court, who delivered welcome remarks to the Forum participants;
- Stephan Landsman, who wrote and presented the morning's academic paper that initiated the first panel's discussions;
- Our morning panelists were Professors Andrew Bradt of UC Berkeley School of Law, Hon. Martha Walters, Chief Justice of the Oregon Supreme Court, Lana A. Olson, President-Elect of DRI—Lawyers Representing Business, and N. John Bey, then-Parliamentarian of the American Association for Justice;
- Dean Erwin Chemerinsky of UC Berkeley School of Law, who delivered our lunch keynote address;

1 The National Civil Justice Institute was formerly the Pound Civil Justice Institute. The name was changed in 2022 to better reflect the Institute's work.

- Professor Steven Daniels, who wrote and presented the afternoon's academic paper that initiated the second panel's discussions; and
- Our afternoon panelists were Dean Mary J. Davis of the University of Kentucky Rosenberg College of Law; Hon. Dori Contreras, Chief Justice, Texas 13th Court of Appeals; and attorneys Randy Aliment and Michael Withey.

We appreciate the considerable assistance we received from the following attorneys who moderated our small-group discussions: David Arbogast, David Berger, Michael Doyle, Deborah Elman, Misty Farris, Karen Barth Menzies, Wayne Parsons, Gale Pearson, Ellen Presby, Ellen Relkin, Rosemary Rivas, and Peggy Wedgworth. And, finally, NCJI commends our inimitable dedicated and talented staff—Executive Director Mary Collishaw and Forum Reporter Jim Rooks—who worked tirelessly to make the Forum and this report a reality.

Lastly, and most of all, NCJI needs to say how much we appreciate the participation of the distinguished judges who gave of their time so that we might all learn from each other. We certainly hope you enjoy reviewing this report of the Forum and that you will find it useful in your consideration of matters relating to civil justice in America.



Gerson H. Smoger, J.D., Ph.D.
President, National Civil Justice Institute (NCJI), 2021-2022

INTRODUCTION

On July 16, 2022, 68 judges, representing 25 jurisdictions, as well as academics and attorneys, took part in the National Civil Justice Institute's 30th annual Forum for State Appellate Court Judges.

The judges examined the topic "Civil Justice in America: Responsibility to the Public." Their deliberations were based on original papers written for the Forum by Professor Stephan Landsman of DePaul College of Law ("Civil Justice and Accountability: The Challenge of Grave Corporate Misconduct"), and Professor Steven Daniels of the American Bar Foundation ("The Rule of Law is Fragile: The Importance of Legitimacy and Access"). The papers were distributed to participants in advance of the meeting, and the authors made less-formal presentations of their papers to the judges during the general sessions.

The paper presentations were followed by discussion by panels of distinguished commentators: Professor Andrew Bradt of UC Berkeley School of Law; Hon. Martha Walters, Chief Justice of the Oregon Supreme Court; and attorneys Lana A. Olson and N. John Bey appearing in the morning panel. Dean Mary J. Davis of the University of Kentucky Rosenberg College of Law; Hon. Dori Contreras, Chief Justice, Texas 13th Court of Appeals; and attorneys Randy Aliment and Michael Withey appeared in the afternoon panel.

The judges also heard a lunchtime keynote address by Dean Erwin Chemerinsky of the UC Berkeley School of Law, who critiqued a number of the United States Supreme Court's decisions of the 2021-22 term. He observed that, with the Supreme Court taking away the rights of Americans, the state constitutions and the state courts provide an essential vehicle for enforcement of rights at the state level.

After each general session, the judges participated in small-group discussions, with Fellows of the Institute serving as group moderators. The paper presenters and commentators joined the groups to share in the discussions and respond to questions. The common ground achieved during the discussion groups, as well as discussion of any new concepts, appear in the "Points of Convergence" sections of this report.

At the concluding general session, all of the Forum faculty members had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Landsman and Daniels, on reports of discussion group moderators, and on the transcripts of the Forum's general sessions.

James E. Rooks, Jr.
Forum Reporter

The Honorable Steven C. González
Chief Justice, Washington Supreme Court

Buenos dias, bienvenidos! Good morning. Welcome to our beautiful State of Washington and thank you for spending some of your precious time here with us.

I am going to share three very short poems in my introduction. The first one is on a woodblock print that was given to me decades ago when I lived in Japan. It embodies the dream of a city kid like me who has come to love nature.

Yama oku ni sumitai
Machi ni shika
Kurasenai

In translation, it goes something like this:

I dream of living deep in the mountains,
though equipped only to live in the city.

Exploring nature is one thing Seattle gives us—the ability to see it around us and to explore it, while still recognizing my inability to live out there all on my own. Please enjoy this nature and let us make sure that we preserve it for future generations.

My court is arguably the most diverse supreme court in the nation, and that means that we are good at just about every objective measure (except perhaps efficiency). Homogeneity might lead to quicker decision-making, but I do not think it is as rich and as deep as decisions when you have a mixed group.

The second poem is also a haiku. It speaks of having defense and plaintiffs' attorneys together and indeed a variety of views.

Uchitokete
Koori to mizu no
Nakanaori

In translation, it means,

While melting, ice and water resolve their differences.

That is what we are doing today as we come together and share opposing views and learn how close we actually are to each other's nature.

Finally, I will share a poem that is less well known, written by my grandfather:

Soy el badajo
De mi propia campana
Doblando dignidad para todos

I am the tongue of my own bell, ringing dignity for all.

And that is what we must do with the special license that we have as lawyers—speak about the constitutional values we hold so dear, and speak out as the tongue of our own bell, not just for ourselves, but for those who are different from us.

And when we think about that, and when we think about the need in our democracy to have a robust civil justice system, it must be from the perspective of those who have not enjoyed it and have not had access to it before. That is because those with means will always be able to buy private adjudicative services. It is the rest of us that we need to be concerned with.

Those with means will always be able to buy private adjudicative services. It is the rest of us that we need to be concerned with.

When I hear folks say it is time, for example, to restore faith in the police or restore faith in the civil justice system, I think it misses the misses the mark. For some parts of our communities, there has never been that faith, and you cannot restore what never was.

The joke that I tell to try to exemplify this different perspective is that I am often asked, "Why are people of color so angry?" I think that is a majority perspective, and it is the wrong question. The right question is, "Why do you keep pissing us off over and over again?" I urge you to take the perspective of the person who has never had faith in the civil justice system and create a system that welcomes them and gives them trust and confidence that their disputes can be adjudicated fairly and efficiently in our civil justice system.

Thank you, and good luck to each of you.

Civil Justice and Accountability: The Challenge of Grave Corporate Misconduct

Stephan Landsman[1], DePaul University College of Law

I. Introduction

It is frequently assumed that the executive branch of government is responsible for the enforcement of laws designed to curb serious misconduct, whether by individuals or corporations. The methods employed by the executive branch include administrative regulation and oversight as well as criminal prosecution. These, it is anticipated, will effectively identify harmful acts, punish them, and deter repetition. In this view, privately initiated litigation is, at most, an adjunct to executive action—an after-the-fact calculation of the monetary cost of the particularized harms suffered by individual victims, the interests of society having already been addressed.

This is, obviously, a simplistic conceptualization of law enforcement in American society. It misses a number of points, most particularly about the role of privately initiated action in the courts. It does not account for tort and other legal claims as front-line tools of policing to address harmful activity. Nor does it address executive failure to act because of a lack of resources, conceptual bias, or the exercise of political or financial influence.

Judicial action at the instance of civil litigants takes on heightened importance, not simply as a form of financial redress for the injured, but as a critical tool in controlling misconduct.

In light of the possibility of executive branch failures, judicial action at the instance of civil litigants takes on heightened importance, not simply as a form of financial redress for the injured, but as a critical tool in controlling misconduct, most particularly by large well-heeled and politically influential corporations. The absence of such enforcement can have tragic consequences, including death and serious injury. This paper will focus primarily on the potential policing effect of civil litigation, especially in response to mortal risk and the obstacles to its efficacy.

In section II, the paper presents a case study involving the Massey Coal Company, for decades one of the largest and most powerful energy and resource companies in the United States. Massey was, for many years, perhaps the dominant economic player in the coal fields of Appalachia. Its misdeeds with respect to pollution, political manipulation, and worker safety raise the most serious questions about government failure to control corporate misconduct.

The discussion of Massey is followed, in section III, by briefer examinations of several other large corporate lawbreakers, Purdue Pharma and General Motors (GM). The paper then turns to consideration of why administrative regulation and criminal prosecution have been stymied, how civil litigation might serve as an effective alternative, and steps that ought to be taken to enhance litigation's effectiveness. Many of these steps are grounded in the belief that corporations are not the equivalent of human beings and should not be treated as if they were.

Section IV of the paper will examine the benefits that may accrue if civil litigation is understood to be a critical means of societal defense against corporate misconduct. Points to be considered will include the value of public disclosure of wrongdoing and the pressure such disclosure can generate for reparations and reform. Some have doubted the social value of civil litigation, but one need look no further than the impact of civil proceedings in the global fight against the scourge of institutionally based pedophilia to appreciate the importance of such actions.

II. Massey Coal Company—A Case Study in Corporate Misconduct

A. Pollution in the "Forgotten Communities"[2]

At the height of its success, Massey Coal was, by revenue, the fourth largest coal company in the country, employing thousands of workers in more than 50 mines. It shipped 40 million tons of coal a year, was the largest operator in central Appalachia, and held one-third of all coal reserves in the region. From 1992 to 2010, its CEO was Donald Blankenship, a hard-driving entrepreneur, single-mindedly devoted to increasing corporate profits.

The mining process Massey used required the washing of mined coal to remove impurities. This produced hundreds of millions of gallons of contaminated wastewater, or slurry. The wastewater presented a serious environmental challenge, because it contained toxic quantities of heavy metals and other contaminants. For many years, Massey disposed of its slurry by injecting it into previously mined underground seams of coal. Disposal by injection had significant attractions. The alternative was impoundment and eventual purification behind earthen dams. That approach is more costly and, if improperly managed, poses grave danger to downstream communities. In 1972, an impoundment dam owned by Pittston Coal Company burst.[3] The ensuing flood released 132 million gallons of slurry that killed 125 residents, injured 1,121 more, and left 4,000 homeless—eventually resulting in private litigation yielding awards of almost $100 million (in 2006 dollars).

More than 300 million gallons of slurry poured out of the mine's entrances, inundating local streams and fouling hundreds of miles of waterways.

Massey itself was no stranger to slurry floods. On October 11, 2000, the floor of a company-controlled impoundment dam gave way and flooded an abandoned mine in Martin County, Kentucky.[4] More than 300 million gallons of slurry poured out of the mine's entrances, inundating local streams and fouling hundreds of miles of waterways. Among other things, the slurry contained arsenic and mercury. It killed all aquatic life where it spread and contaminated the water supply of 27,000 residents. The federal EPA called this event one of the worst environmental disasters ever in the southeastern United States. The government's response was, however, anemic. There was a fine of $5,600 against Massey and in 2008 (eight years after the event), a $20 million settlement with the EPA, though pollution-related damages were estimated to be far higher. The Bush administration cut short an investigation of Massey Coal, and an investigator who sought evidence of other Massey-caused harm was himself investigated and eventually removed from his job.[5]

Water Contamination

While impoundment is no panacea, if properly managed, it poses fewer environmental risks to surrounding communities than the alternative. Slurry injection presents a particularly insidious danger, the pollution of the ground water used by local residents for drinking, cooking, and washing. Mingo County, West Virginia, was particularly vulnerable to this threat because it was pockmarked with old mines, had only limited municipal water supplies, and residents had to rely on ground water drawn from individually dug wells. In the late 1980s, residents of four Mingo County communities (Lick Creek, Rawl, Merrimac, and Sprigg—often referred to locally as the "Forgotten Communities") noticed a sharp decline in the quality of their well water. Massey Coal had a major ore processing plant in the area, and from 1977 until at least 1987 (and probably into the 1990s), it discharged its slurry into worked out and abandoned local coal mines. Concern about water contamination led state officials, as early as 1978, to press Massey to consider impoundment. The company did not act, injection being far cheaper than building impoundment facilities ($2 million versus $5 million by one expert's estimate). In 1983 the state sought to order Massey to switch, but the company resisted on financial grounds. Within a year there was a slurry injection accident resulting in a flood of toxic wastewater. The accident led to further official calls for impoundment but Massey, claiming a threat to production and jobs, kept on pumping slurry into the ground until at least 1987. Between 1977 and 1987 it is estimated that Massey pumped more than a billion gallons of slurry into the ground in Mingo County.

Well water contamination grew from the late 1980s on. Eventually, the water was linked to a wide array of health problems in the Forgotten Communities. These ranged from skin rashes and boils to kidney stones, chronic diarrhea, stomach problems, cognitive difficulties (especially for children), liver failure, kidney failure, miscarriages, and cancer. Massey stoutly refused to acknowledge that its slurry pumping had anything to do with the water quality or public health.

One might expect that state and federal regulators would have acted more vigorously to block Massey's slurry pumping.

One might expect that state and federal regulators would have acted more vigorously to block Massey's slurry pumping. After all, state officials knew about the problem from the late 1970s, had pushed for a switch to impoundment in 1978, and had ordered it in 1983. Despite all this, Massey was allowed to continue to pump slurry into the ground until at least 1987. The federal EPA, too, did nothing, although it had been informed of the problem no later than 1984. To make matters more difficult, a state official from the West Virginia Department of Health and Human resources, in 2004, found Massey's activity "no public health hazard,"[6] and the slurry no threat to the local water. This analysis clashed sharply with evaluations by outside experts. Though there were numerous regulatory citations regarding Massey's slurry spills and other activities, they led to no criminal proceedings nor to any regulatory interdiction.

In 2004 the residents of the Forgotten Communities filed a civil suit against Massey, seeking damages for the physical harms suffered and an immediate Massey-underwritten supply of clean drinking water. Eventually more than 700 residents joined the suit. Although this appeared to be a promising context for class action treatment, the presiding judge, at the instance of the coal company, rejected such a designation. This eventually meant 700 or more depositions, hundreds of thousands of pages of medical records, chaotic mass mediation proceedings, and a cumbersome process that made it likely that trial would be turned into a slow and torturous process, likely to stretch for months.

The plaintiffs were represented by Kevin Thompson, an enterprising attorney with limited resources and only modest experience. Opposing him was the West Virginia firm of Jackson Kelly. Jackson was perhaps the oldest firm in the state and one of its largest. It had represented coal interests since the 1870s and was reputed "to be as arrogant and cut-throat as any powerful defense firm in the nation."[7] The defense adopted a hardball approach to the case. It fought every issue tooth and nail. It made dozens of motions for dismissal relying on any available argument, from strained statute of limitations claims to nit-picking arguments about individual plaintiffs' compliance with discovery requests. It deposed every plaintiff and sought to explore their medical problems in excruciatingly intimate detail. Jackson fought discovery and was, in the plaintiffs' view, not forthcoming with respect to its discovery obligations. At the start of the case, in 2004, the plaintiffs sought maps and other materials identifying slurry injection sites and volume records. Very little was provided, and defense counsel repeatedly asserted that there had not been voluminous slurry injection. However, depositions and documents eventually surfaced describing more than a billion gallons of slurry injection. With trial one week away in 2011, Jackson attorneys finally admitted that there were maps of the sort the plaintiffs had been seeking for years. Thompson declared, "Defendants have finally realized they can no longer hide these key documents which Plaintiffs have been chasing for the better part of a decade."[8] Though the plaintiffs sought sanctions for this late disclosure, none were ordered.

"SLAPP" Suits

Perhaps nothing better illustrates Jackson Kelly's approach to the litigation than its preparation and commencement in April, 2007, of a defamation suit against plaintiffs' counsel, Thompson. The claim was that Thompson had written a letter containing libelous remarks to a Mingo County Commissioner. Upon investigation, it appeared to Thompson that his letter, to a public official, (he had written one) had been intercepted and tampered with. The Commissioner signed an affidavit that he did not recall ever receiving the letter. The Commission's log of correspondence gave the appearance of having been interfered with. When challenged, defense counsel accused Thompson of "a defamatory tirade" despite the dubious circumstances and sought the court's permission to depose Thompson to explore counsel's alleged malice.[9] The judge hearing the defamation action stayed proceedings pending the pollution case trial but it hung over Thompson's head until 2011, when it was voluntarily dismissed. Thompson spent $28,000 on his defense. This certainly had the appearance of being a SLAPP case—a "strategic lawsuit against public participation."[10]

The water litigation had been filed in 2004. With the hardball tactics and non-class procedure, it crawled along for more than five years.

The water litigation had been filed in 2004. With the hardball tactics and non-class procedure, it crawled along for more than five years. Then the trial judge insisted on a mediation proceeding in which each of the more than 700 plaintiffs was called before the judge and asked whether she or he would accept what plaintiffs' counsel saw as a low-ball settlement offer. The mediation process turned chaotic. Failure to appear was expressly declared by the court to be grounds for dismissal. More than 180 of the plaintiffs accepted offers, though the proceedings stalled over a dispute about a $5 million medical monitoring fund.

The structure of that fund, along with other questions about a judicial conflict of interest, eventually led to the trial judge's removal from the case by the West Virginia Supreme Court of Appeals. The proposed monitoring fund was set forth in a 50-page document prepared by defense counsel and not shown to the plaintiffs until the day it was to be approved. The approval hearing was held in a sealed courtroom from which all members of the press and public had been excluded. The plan designated three individuals to direct a trust and a local bank to be its trustee. The judge

had business connections with both the bank and the doctor selected to be the trust's administrator. The same doctor had previously served as the judge's campaign manager.

Plaintiffs' counsel had not been privy to the preparation of the document offered to the court and felt that improper ex parte communications may have taken place between the court and the defendant's representatives. Moreover, defense counsel, with the support of the court, pressed plaintiffs' counsel to relinquish all fee claims related to the medical monitoring fund. This was an ethically troubling gambit[11] and one that seemed designed to deprive counsel of funds to which they had a proper claim. On the strength of the judge's connections to the proposed fund, Thompson filed his recusal motion with the high court. The trial judge, Michael Thornsbury, responded, denying wrongdoing and declaring, "The easiest course might be to voluntarily recuse given the present environment and to avoid the judicial responsibilities attendant with a very contentious matter, but it is not the right course, nor fair to any of the parties in this case."[12]

No Recusal

Despite the serious questions raised, the West Virginia Supreme Court of Appeals refused to order recusal. That decision was reversed when it was discovered that Judge Thornsbury had previously represented the defendant, Massey, in litigation involving somewhat-related issues concerning slurry contamination subsequent to blasting activities in Mingo County. The pollution case was reassigned to another judge but, in short order, he recused himself because his daughter had won a beauty contest sponsored by Massey. In 2013, Judge Thornsbury would be indicted for unrelated offenses, would plead guilty to one count of conspiracy, and be sentenced to 50 months in federal prison.

Despite the serious questions raised, the West Virginia Supreme Court of Appeals refused to order recusal.

With the administration of the pollution case now in disarray and delay of trial now approaching seven years, the West Virginia Supreme Court of Appeals chose to turn the matter over to a team of five judges from the state's so-called Mass Litigation Panel. Once again, a mediation effort was ordered. This time a global settlement was reached. The figure agreed upon was $35 million with an additional $5 million provided for medical monitoring—all, apparently, coming from Massey's insurance carriers. (The coal company was said to have more than $600 million in insurance protection.) The court conducted a fairness hearing, and although the vast majority of the plaintiffs accepted the result, many were dissatisfied at not having had a day in court. The average award, after seven years of litigation, worked out to about $50,000 per claimant. The final order in the case was entered on December 7, 2011—seven years after the litigation had begun.

The average award, after seven years of litigation, worked out to about $50,000 per claimant. The final order in the case was entered. . . seven years after the litigation had begun.

Was Massey called to account for its pollution in Mingo County? It is hard to conclude that it was. It successfully resisted government regulation regarding slurry for more than a decade. It dragged out the pollution case for seven years. It imposed more than $2 million in costs on plaintiffs' counsel. Its insurers paid the settlement finally agreed upon. The lesson for Massey, if there was one, was that stubborn resistance pays off. The settlement agreed upon could hardly be said to have made the sick plaintiffs whole or to have cleaned up the environmental mess made by slurry injection. On a cost/benefit basis, Massey had every reason not to be deterred from continuing business as usual.

B. Massey as Business and Political Bully[13]

Massey and its CEO, Don Blankenship, not only played hardball with pollution victims but in business dealings as well. Blankenship was widely regarded as one of the leading coal executives in West Virginia. His 2003 salary was reported to be $6 million and was said to be the highest in the state. It only grew from there. *FORBES* reported it to be $18 million in 2010, his last year in charge.[14] He became prominent in his industry through obduracy and sharp dealing. Both were on display from the beginning of his career. In 1984, he assumed a leadership role in a Massey Coal subsidiary, Rawl Sales and Processing. Almost immediately, he was faced with a bitter strike by coal miners. He hired replacements, the first mining company to do so in 60 years, and fought the strikers for 15 months. Although he faced striker violence and public condemnation, he persisted and, eventually, broke the strike. As a manager, he was ruthless about cutting expenditures, and sought every possible financial advantage for Massey. When underlings disagreed with him, he was likely to leave a can of Dad's Root Beer on their desk—a not so subtle message to "Do As Don Says." His approach won him the support of Massey's owners and, in 1992, they made him the first non-family member CEO and President of the company.

Massey and its CEO, Don Blankenship, not only played hardball with pollution victims but in business dealings as well.

Perhaps no case better illustrates Blankenship's approach to business than his dealings with Hugh Caperton and Harman Mining Company. Massey and Harman were competitors in the sale of high-quality coal to the steel industry. In the early 1990s, Harman entered into a ten-year contract with a coal supply company, Wellmore Coal Corporation, which agreed to purchase the bulk of Harman's production.[15] In 1997, Massey bought Wellmore and assumed its contract with Harman. The contract had a force majeure clause excusing the parties from performance if an extraordinarily disruptive event, like a war or natural disaster, beyond the control of the parties, prevented compliance. Under questionable circumstances, Massey invoked the force majeure clause and cut the purchase of Harman coal by more than half. This had the financial effect of crippling Harman and its primary owner, Hugh Caperton. Massey timed its notice to Harman and its subsequent negotiations with its one-time rival so that Harman could not find another buyer. Faced with bankruptcy, Harman sought a Massey buyout. Massey strung Harman along and at the last minute scuttled the deal, resulting in Harman's collapse. Not only was Harman ruined, but Massey, according to later trial court findings, "ultimately collapsed the transaction in such a manner so as to increase [Harman's] financial distress."[16]

Caperton and Harman Mining sued Massey, claiming both contractual breaches and business tort injuries. Pursuant to a forum-selection clause in the underlying Wellmore/Harman agreement, the contractual claims were brought in the Circuit Court of Buchanan County, Virginia, where a $6 million judgment was eventually secured. Caperton split off its tort claims and filed them in an action begun in Boone County, West Virginia, where there was no cap on punitive damages. Caperton's causes of action included tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment. A Boone County jury, in 2002, rendered a $50 million judgment in Caperton's favor. It was noted by a reviewing court that Massey "intentionally acted with utter disregard to Caperton's rights, and ultimately destroyed Caperton's business because, after conducting a cost-benefit analysis, Massey concluded it was in its financial interest to do so."[17] Massey appealed the verdict to the West Virginia Supreme Court of Appeals.

Judicial Elections

During the time the appeal was pending (in 2004), West Virginia Supreme Court Justice Warren McGraw came up for re-election. McGraw, a Democrat, was thought likely to be unsympathetic to Massey. Blankenship embarked on a campaign to unseat him and replace him with Brent Benjamin, a lawyer with no judicial experience. Blankenship contributed $2.5 million of his own money to fund a Section 527 Super PAC called "And for the Sake of the Kids."[18] The PAC took its name from its central claim, which was that McGraw was soft on pedophiles because he had voted, along with other members of the court majority, to continue the parole of a man convicted of sexually molesting his half-brother—the defendant, himself, having been molested as a child. Blankenship spent an additional $500,000 on campaign literature and mailings. Although it is unclear, it appears that the U.S. Chamber of Commerce assisted in the anti-McGraw effort in support of Blankenship, who was a Chamber board member. In 2005, the Chamber established a pro-business newspaper in West Virginia, the *WEST VIRGINIA RECORD*, to promote its views. All this activity was unprecedented in West Virginia politics.[19] In a close contest, Benjamin defeated McGraw.

> In 2006, while the Caperton $50 million verdict was before the Supreme Court of Appeals, Blankenship vacationed with Supreme Court Justice Elliott "Spike" Maynard on the French Riviera.

Benjamin was not the only West Virginia Supreme Court Justice Blankenship cultivated. In 2006, while the Caperton $50 million verdict was before the Supreme Court of Appeals, Blankenship vacationed with Supreme Court Justice Elliott "Spike" Maynard on the French Riviera. Despite the connections, and in disregard of Caperton's recusal motions, both Benjamin and Maynard chose to sit on the 2008 panel deciding the Massey appeal. The two, along with Justice Robin Davis, formed a 3-to-2 majority that voted to overturn the Caperton judgment. At this juncture, photos of Blankenship and Maynard together on their Riviera holiday surfaced.[20] A motion for rehearing was made and, with its granting, the case returned to the West Virginia Supreme Court of Appeals for reconsideration. Justice Maynard this time recused himself. Benjamin, however, insisted that he was not biased, and continued to sit. A newly constituted panel of five reviewed the case and again split 3-to-2 with Benjamin once again a critical third vote for reversal.

The West Virginia Supreme Court decision was appealed to the United States Supreme Court in 2009. In a 5-to-4 decision, the Court, in an opinion written by Justice Anthony Kennedy, found that Blankenship's contributions, which were more than the amounts contributed by all other Benjamin supporters combined, and three times what the Benjamin campaign itself spent, were "extraordinary," had the potential to create a "debt of gratitude," implied the possibility of "significant and disproportionate influence," and created a "serious objective risk of actual bias."[21] On the basis of the Due Process Clause, the court overturned the West Virginia decision. That sent the case back to West Virginia. This time Justice Benjamin could not sit. Justice Robin Davis selected judges to fill in for recused court members. The new panel voted 4-to-1 to overturn the jury's verdict, finding that the Harman/Wellmore contract's forum selection clause mandated a filing in Virginia, not West Virginia. A spirited dissent argued that this was a novel reading of West Virginia law, and particularly inappropriate in light of Massey's tortious behavior.

> In the end, Blankenship prevailed. He made good on his threat to Caperton: that Massey would "spend a million dollars a month on attorneys and . . . tie you up for years in court."

In the end, Blankenship prevailed. He made good on his threat to Caperton: that Massey would "spend a million dollars a month on attorneys" and that he would "tie (Massey) up for years in court."[22] More than that, he had prevailed, vindicating ruthless business tactics, including misstatements and fraud, in combination with the expenditure of large sums to influence judicial politics. The courts charged with sitting in judgment of such conduct had been made painfully aware of the consequences of bucking such a well-heeled and ruthless litigant. The recusal process had proven ineffective as a curb on assaults on the perceived integrity of the judicial system. As in the pollution case, it appeared that the law could be bent to the wishes of wealthy bullies—corporations with vast assets and few scruples.

C. Massey and the Deaths of 29 Miners at the Upper Big Branch Mine on April 5, 2010[23]

From 2000 to 2010, Massey had a wretched safety record. For the two-year period between January 1, 2000, and December 31, 2001, it was cited for 501 serious safety violations of mining laws while its top three competitors, combined, had a total of 175.[24] That pattern continued throughout the decade. In both 2003 and 2004, the company was cited for serious methane leaks—potentially lethal in underground coal mines. Massey's view about safety was rather clearly set out in an October 19, 2005 memo: "If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal . . . you need to ignore them and run coal."[25] Blankenship added, for those who may have missed the point, "This memo is necessary only because we seem not to understand that the coal pays the bills."[26]

"This memo is necessary only because we seem not to understand that the coal pays the bills."

That philosophy relegated safety to the margins, far from any serious impact on Massey's behavior. A bit less than three months after the "run coal" memo, safety questions loomed larger. On January 19, 2006, a conveyor belt caught fire in the Aracoma Alma Number 1 mine. The fire generated smoke that, despite safety requirements, was allowed to pour into a designated escape route. Twelve miners were caught in the smoke, and two died. The fire and deaths triggered an in-depth safety investigation. Inspectors were "shocked by the deplorable conditions"[27] at Aracoma. Federal officials from the Mine Safety and Health Administration (MSHA) concluded that "Aracoma was a mess," and the safety violations had caused "preventable deaths."[28] Massey entered into a plea deal with federal prosecutors and paid a $2.5 million fine. Four foremen pleaded guilty to failure to take mandated safety precautions, were fined, and were placed on probation for a year. A follow-up MSHA investigation of the mine led to 1,300 violation citations and an additional $1.7 million penalty for Massey, "the largest fine imposed on a coal company in the history of the mine safety laws."[29] There was evidence that Blankenship, a micromanager by temperament, knew of the dangerous conditions at the mine. The judge who presided over the wrongful death trial brought by the miners' widows commented during the trial that, "It could be argued that Mr. Blankenship was personally overseeing operations at Aracoma."[30]

It might have been anticipated that change would come to Massey as a consequence of all this, but the corporation and its CEO went on with business as usual.

"Running" Coal

It might have been anticipated that change would come to Massey as a consequence of all this, but the corporation and its CEO went on with business as usual. Coal was "run" and safety ignored. Between 2008 and early 2010, one

of Massey's biggest and most profitable mines, the Upper Big Branch, was cited for 835 mine safety violations, including poor ventilation and coal dust accumulations—potential precursors to explosion. In 2009, alone, there were 515 mine safety violations and 48 withdrawal orders barring entry into specified areas within the mine.[31] These led to MSHA fines of $1.1 million, but no decisive action to force a change in safety behavior. In Massey's case, what was perhaps most troubling was another statistic—Massey had the worst fatality record in the coal industry.

> [On April 5, 2010] a massive explosion ripped through the Upper Big Branch mine. A total of 29 miners died.

Things got a lot worse on April 5, 2010. On that day, a massive explosion ripped through the Upper Big Branch mine. A total of 29 miners died. This was the deadliest mine accident in 40 years. According to the West Virginia Governor's Independent Investigation Panel, "The explosion was the result of failures of basic safety systems identified and codified to protect the lives of miners. The company's ventilation system did not adequately ventilate the mine. As a result, explosive gases were allowed to build up."[32] The Panel concluded that the explosion could and should have been prevented.

After the disaster, the dilatory MSHA finally took a hard look at the Upper Big Branch mine. It found 12 mine safety violations directly related to the 29 deaths, 9 of which were "flagrant."[33] It also cited Massey for 360 other safety infractions, of which 12 were "flagrant."[34] The MSHA levied a fine of $10,825,368. Like the Governor's Panel, the MSHA concluded that the deaths were preventable. It further found that Massey had intimidated miners not to report safety problems, utilized a system of providing miners advance warning of safety inspections so that they could hide problems, and kept two sets of books in order to conceal safety problems from reviewing inspectors. "PCC/Massey promoted and enforced a workplace culture that valued production over safety, including practices calculated to allow it to conduct mining operations in violation of the law."[35] Even after all of this, it appeared that Massey was still not inclined to conform to mine safety laws. On April 29, 2011, the MSHA conducted a surprise "impact inspection" and found 20 instances of "aggravated misconduct."[36]

> At long last, in November of 2015, Don Blankenship was brought to trial for his part in the corporate scheme that thwarted safety efforts and hid Massey's failure to comply with law.

In 2011 and 2012, a Massey mine superintendent and a head of security pleaded guilty "to conspiracy to impede MSHA efforts."[37] They admitted to providing advance notification about safety inspections as well as to the destruction of safety-related documents. And, at long last, in November of 2015, Don Blankenship was brought to trial for his part in the corporate scheme that thwarted safety efforts and hid Massey's failure to comply with law. On December 3, 2015, Blankenship was convicted of one misdemeanor count of conspiracy to prevent enforcement of the mine safety laws. He was sentenced to a year in federal prison. The presiding judge found him responsible for a "culture of non-compliance" and condemned the "pervasive nature of violations allowed to fester."[38] Blankenship denied responsibility and, while incarcerated, wrote a 67-page blog post calling himself a "political prisoner,"[39] a point made somewhat more comprehensible because of a subsequent federal magistrate judge's post-conviction assessment that a substantial volume of documentary material had not been provided to the defense before trial.[40]

> Blankenship denied responsibility and, while incarcerated, wrote a 67-page blog post calling himself a "political prisoner."

D. The Wages of Corporate Overreach

What should be said about the Massey saga? It displays the rapacious behavior of a major corporation bent on generating profits regardless of the cost. During its reign of despoliation, neither administrative regulation nor criminal prosecution effectively curbed its criminal behavior. West Virginia's environment was plundered for years, and only the most feeble objections were raised. Sanctions were little more than a slap on the wrist or a part of the cost of doing business.

The only potentially effective counter was civil litigation, but it was seriously hampered by judicial procedures that denied class consideration, allowed excessive delay, permitted discovery obstruction, and failed to address attempted intimidation through what appeared to be a SLAPP filing. Had there been a timely and substantial verdict, with a punitive damage award, perhaps corporate shareholders might have been motivated to consider the removal of a corporate sociopath.

The Caperton episode displays how the executive and even the judiciary were neutered through financial pressure. Favorable treatment was purchased by cash contributions and the threat of job losses.

The Caperton episode displays how the executive and even the judiciary were neutered through financial pressure. Favorable treatment was purchased by cash contributions and the threat of job losses. What was absent from the process was any effective means of removing decisionmakers who could reasonably be suspected of bias. This meant that potentially prejudiced administrators and judges rendered opinion after opinion in Massey's favor. With respect to the courts, the absence of judicial campaign expenditure controls and effective recusal mechanisms yielded a process seemingly open to purchase, or, at a minimum, cronyism. When asked, 67 percent of polled West Virginians said they did not believe their Supreme Court could be fair to Caperton.[41] A quiescent judicial process invited Massey to engage in contract breaking, business fraud and misrepresentation. Juries recognized Massey's misconduct for what it was, but were given scant opportunity to punish it. The award of punitive damages in the *Caperton* case was overturned on three separate occasions. The message to Massey could hardly have been clearer: keep spending and litigating, and you'll get your way in the end.

All of this was troubling enough, but it did no more than set the scene for the tragedy of April 5, 2010. Almost twenty years of unfettered pollution, repeated violations of commercial law, and disregard for safety regulation yielded an "entirely preventable" explosion that took the lives of 29 miners. The miners did not have to die, nor did the residents of the Forgotten Communities have to suffer poisonous pollution. What was needed was timely, law-based compensation for harm and punishment for wrongdoing. The required awards needed to be large enough to make it clear to regulators and stockholders that Massey's corporate behavior was unacceptable. That remedy was available in the pollution case, with respect to the Caperton punitive damages claim and in the wrongful death actions of the widows and children of those killed at Aracoma and Upper Big Branch. It was what society needed. Instead, what the community got was a far-too-late set of prosecutions and a far-too-small set of fines.

III. Massey Was Not an Anomaly

It might be argued that Massey was an outlier, a corporation that, unlike others, had gone off the rails. Unfortunately, recent history provides a great many more examples of profit-maximizing corporations that have disregarded regulation, manipulated litigation, and managed to carry out what has amounted to deadly activity. While a substantial number of examples of corporate misconduct might be presented, this section will focus on two of particularly large scope that have been the subject of careful recent examination: the behavior of the opioid manufacturer Purdue Pharma, as reported in Patrick Radden Keefe's book, *Empire of Pain*,[42] and the General Motors (GM) ignition switch scandal, as analyzed by outside counsel, Tony Valukas and his Jenner & Block legal team in their investigative report to the GM Board of Directors on May 29, 2014.[43]

> Recent history provides a great many more examples of profit-maximizing corporations that have disregarded regulation, manipulated litigation, and managed to carry out what has amounted to deadly activity.

A. Purdue Pharma

Purdue Pharma introduced into the opioid analgesic market a supposedly long-acting opioid pain suppressant named OxyContin. The claimed benefits of this pharmaceutical included hypothesized resistance to abuse and alleged reduced risk of addiction. It is suggested by Keefe that Food and Drug Administration (FDA) caution about opioids was overcome by substantial Purdue lobbying of an FDA official named Curtis Wright, who was in charge of the opioid approval process.[44] After OxyContin was approved in 1995, Wright resigned from the FDA and, within a year, joined Purdue with a first-year compensation package of $400,000.[45] What came out of the FDA's approval process was a declaration that OxyContin was "believed to reduce" the risk of abuse related to the drug.[46] This was a unique endorsement and one that was both unproven and, eventually, shown to be inaccurate.

> [Purdue Pharma's] claimed benefits of [Oxycontin] included hypothesized resistance to abuse and alleged reduced risk of addiction.

With the FDA-approved endorsement of OxyContin, Purdue, directed by its President, Richard Sackler, and overseen by a board of directors dominated by members of the Sackler family, swung into action to promote the sale of Oxy. It hired a large sales force, offered an array of promotional programs, and cultivated congenial experts to speak and write on behalf of opioid therapies. The company concentrated on encouraging prescriptions to non-cancer patients (opioid pain therapies had previously been focused primarily on cancer sufferers), and solicited prescribing by non-specialists who neither concentrated on pain management nor oncology. To help break down resistance to the use of potentially addictive narcotics, Purdue developed a "playbook" of arguments. Besides reference to the FDA's blessing, these included blaming addicts for drug abuse and championing opioids for all sorts of chronic non-cancer pain.

> To help break down resistance to the use of potentially addictive narcotics, Purdue developed a "playbook" of arguments. . . . Purdue fought its critics, and denied that there was any serious risk of addiction.

The sales program succeeded spectacularly, and OxyContin became a blockbuster drug with more than $1 billion in annual sales. As the drug's use spread, so did reports of a dangerous rise

in addiction. By 1999 (three years after Oxy's introduction), evidence of widespread addiction was apparent and, in 2000, the United States Attorney for the District of Maine sent a letter to all physicians in the state warning of the risks of prescribing opioids. The plague of abuse had already begun, and it was taking root in impoverished parts of the country, from rural Maine to western Pennsylvania, eastern Ohio, and Appalachia. In 2001, Francis X. Clines and Barry Meier of *The New York Times* wrote a front-page story detailing the spreading opioid epidemic.[47]

Purdue fought its critics and denied that there was any serious risk of addiction. It adopted a "gladiatorial posture"[48] in litigation, spent lavishly on the legal defense of its product, and defeated the claims of all 65 victims who sued because of the harms they had suffered.[49] Yet the tide of suffering and death caused by OxyContin continued to mount. In Virginia, federal prosecutors began the process of developing a criminal case against the company and its officers. In 2007, the federal charges were filed, accusing Purdue and three of its executives of "misbranding"—seeking to defraud by marketing Oxy as less addictive and less subject to abuse than other opioids.[50] The charges filed were actually a watered-down version of what the prosecutors had proposed to their superiors in the Bush Administration Department of Justice (DOJ). The final indictment featured only one felony count of misbranding against the company and misdemeanor misbranding charges against the corporate officers. The reduced gravity of the charges was, according to Radden Keefe, the product of company lobbying of the DOJ at the highest levels, and it assured that jail time for the executives was extremely unlikely.

Plea Bargaining

In the end, Purdue and its officers pled guilty to these charges and the company entered a plea agreement that resulted in a $600 million fine and removal of the officers from the pharmaceutical industry for a period of years. At first glance, this might have appeared to be a major success for law enforcement, but it was not. The company that pleaded was Purdue Frederick, not Purdue Pharma. This meant Purdue Pharma was free to continue its opioid business. While the three officers were ousted, they were not jailed, and they were handsomely compensated by Purdue. No member of the Sackler family suffered any adverse consequences.

[Purdue] entered a plea agreement that resulted in a $600 million fine and removal of the officers from the pharmaceutical industry for a period of years. . . . [The officers] were not jailed, and they were handsomely compensated by Purdue. No member of the Sackler family suffered any adverse consequences.

Undeterred by the prosecution and the guilty plea, the Sackler-controlled board of directors voted to expand the sale of OxyContin. In 2007, the year of the plea deal, it hired the preeminent consulting firm of McKinsey and Company to "turbocharge" sales.[51] With McKinsey's help, that is exactly what happened. Between 2007 and 2013, Oxy sales tripled. Purdue continued to rake in the profits and deflect regulation. It has been reported that, between 2006 and 2015, Purdue and other opioid manufacturers spent $700 million on lobbying.[52] They managed to stall the Centers for Disease Control's (CDC) restrictive opioid use guidelines from 2011 to 2016, despite the CDC director's declaration that, "We know of no other medications routinely used for nonfatal conditions that kill so frequently." About Purdue, he added: "The company knew damn well what it was peddling, and I think that's the right word—peddling."[53]

Neither the FDA nor the Drug Enforcement Administration (DEA) were effective in addressing the risk posed by Oxy and other opioids. One well-informed expert concluded that the FDA was "missing in action."[54] The DEA

was supposed to restrict the flow of opioids. Between 1994 and 2015, it raised the quota for production of oxycodone (the key ingredient in OxyContin) repeatedly. The Inspector General for the Department of Justice found that "the DEA was slow to respond to the significant increase in the use and diversion of opioids since 2000."[55]

> Neither the FDA nor the Drug Enforcement Administration were effective in addressing the risk posed by Oxy and other opioids.

Tens of thousands, perhaps even hundreds of thousands, of Americans have died in the Oxy-triggered opioid epidemic. The regulatory process was compromised, and the criminal process did far too little, and it did it far too late. Civil litigation took too long to focus on Purdue. The company's litigation tactics and its brigades of highly skilled lawyers bought the company valuable time to reap extra profits and move those profits out of Purdue and into the Sackler family coffers. By 2018, however, the company was facing thousands of suits by states, counties, hospitals, Indian tribes, and others. These were consolidated into a Multidistrict Litigation (MDL) in the federal district court in Cleveland, Ohio.[56] The Sacklers, for the first time, began to feature as defendants, most particularly in litigation brought by Massachusetts Attorney General, Maura Healy.[57]

> Tens of thousands, perhaps even hundreds of thousands, of Americans have died in the Oxy-triggered opioid epidemic.

The Sacklers, however, had one more card to play. Though not named as defendants in the vast majority of opioid cases, they, along with Purdue Pharma, in September 2019, sought bankruptcy protection.[58] Although the Sacklers were not, by any means, bankrupt, they exploited legal loopholes to seek protection of their family fortune. To make the deal palatable, they offered to contribute $1.5 billion to the bankruptcy estate. This offer was accepted by the Federal Bankruptcy Court, but it was rejected by a reviewing federal judge.[59] That led the parties back to the negotiating table and resulted in an enhanced deal worth between $5.5 and $6 billion. That deal seems likely to be accepted, but it protects the bulk of the Sackler family fortune.[60]

B. General Motors

While it cannot be said that GM killed or harmed on a scale as great as Purdue Pharma, the story of the car manufacturer's failure to acknowledge or correct the deadly ignition switch flaw in its Cobalt and similar models is troubling in a strikingly similar way. GM's failure was painstakingly laid out by former U.S. Attorney Tony Valukas and his Jenner & Block investigative team, in an internal investigation report to GM's Board of Directors, dated May 29, 2014. What led to that investigation was a tragic series of driver fatalities and injuries tied to GM's willful blindness regarding a substantial safety defect. When GM finally acknowledged the Cobalt problem in 2014, it accepted responsibility for 124 deaths and 271 injuries, and it provided compensation through a program run by mass disaster compensation administrator Ken Feinberg. That acknowledgement of liability was, in all likelihood, far short of the actual harm done. Feinberg rejected 90 percent of the claims filed, compensating only those killed or hurt in head-on collisions where airbags

> The story of the [GM's] failure to acknowledge or correct the deadly ignition switch flaw in its Cobalt and similar models is troubling in a strikingly similar way [to Purdue Pharma's].

failed to deploy because of ignition switch failure.[61] Other GM victims pressed their claims in an MDL, heard in the federal district court for the Southern District of New York, involving the claims of 658 plaintiffs.[62] The risks associated with the Cobalt went well beyond head-on collisions. According to the Insurance Institute for Highway Safety, between 2005 and 2008 the Cobalt had the highest fatality rate in the small four-door car category with 117 deaths per million cars sold.[63]

The Cobalt story began in 2002, when a GM engineer . . . decided to use a substandard ignition switch in the new line of cars then being developed.

The Cobalt story began in 2002, when a GM engineer, Ray DeGiorgio, decided to use a substandard ignition switch in the new line of cars then being developed. The Cobalt line, which began sales to the public in 2005, was, from early on, reported to be subject to stalls while the car was in motion.[64] This, it would be learned, was because the switch could be turned off by a mere brush from a driver's knee. The result was a stall in which all power steering was cut off, all power braking was interrupted, and no acceleration was possible. What would be learned later was that such stalls also prevented activation of airbags, so that any head-on collision would be exceptionally dangerous.

"Consumer Satisfaction" Problems

GM reacted to complaints about the stalls with what can only be described as willful blindness—flight from any willingness to face the facts or address the problem. The company had developed language rules designed to eliminate use of the word "stall" because it was a "hot button" word connoting a safety problem.[65] Of course, where a Cobalt might stall on a crowded highway at 65 miles per hour and lose power for steering, braking and acceleration, a safety problem was all but inevitable. GM, however, categorized the stall risk as a "customer satisfaction problem" and rather than seeking to fix it through investigation and, if necessary, recall, issued a technical bulletin to dealers. Drivers got no information unless they consulted dealers after an incident. While this may not be as grave a misbranding or misleading as that engaged in by Purdue, it had the same elements: a serious, perhaps deadly, risk known to the manufacturer, arising out of normal use of a product, but never communicated to the customer, let alone remedied.

GM began to investigate, but with no sense of concern or urgency. No conclusions or solutions were forthcoming.

Once the stall had been classified as a customer satisfaction problem, GM began to investigate, but with no sense of concern or urgency. No conclusions or solutions were forthcoming. According to Valukas, the investigation was "neither diligent nor incisive."[66] By 2007, GM was receiving a significant number of reports of fatal Cobalt head-on collisions, in which airbags that might have saved lives or prevented serious injuries did not deploy. In the same year, an insightful Wisconsin State Trooper analyzed a fatal accident and concluded that the protective airbag had not deployed because the over-sensitive ignition switch had been turned off, powering down the airbag triggering mechanism. This insight was confirmed by a research team at Indiana University (IU). In addition to the Wisconsin accident, the IU team noted six power-off complaints on the National Highway Traffic Safety Administration (NHTSA) website.[67]

GM did not take note of the Wisconsin report, the IU study, or the six complaints. The death toll continued to rise. However, when the 2008 Cobalt models were introduced, there was a marked decrease in new car non-deployment accidents and deaths. Faced with this further mystery, GM still did little to try to resolve the problem. All the while,

drivers with 2005, 2006, or 2007 models continued to face catastrophic harm because of the possible failure of airbag protection. It would later be learned that Ray DeGiorgio, the erring engineer, apparently having learned of his mistake, ordered a change to a sturdier ignition switch. However, he did so in a way that disguised his original misstep—he told no one, and he hid the ignition change by giving the new ignition mechanism the same part number as the old, faulty, one (something not approved by GM guidelines or by practice).[68] This meant that older Cobalts remained deadly traps just waiting for an inadvertent knee brush.

Older Cobalts remained deadly traps just waiting for an inadvertent knee brush.

The GM Bankruptcy

At this point, GM, for reasons unrelated to the Cobalt (though one can certainly speculate about the quality of GM's management on the basis of the Cobalt fiasco), declared bankruptcy. Amidst the ensuing financial turmoil, tort claims against the company were stayed, and eventually dismissed. The respite was not long, and by 2010, with the "new" GM in business, reports of deaths related to airbag failures resumed. Outside counsel for the company began to warn that the company's inaction regarding the problem was "egregious," and might warrant an award of punitive damages.[69] This reference to punitive damages awarded by a jury was one of the few things capable of garnering any serious company attention. But the new cases were far from trial, and the company continued in its dilatory ways—showing, as Valukas said, "a lack of urgency."[70] Despite outside counsel's concern, GM refused discovery requests for ignition switch documents, and in a Georgia case it took a court order to compel their production.[71]

People were continuing to die because of the deadly ignition switch and the airbag cutoffs, but GM stuck with its slow-motion "customer satisfaction" response.

People were continuing to die because of the deadly ignition switch and the airbag cutoffs, but GM stuck with its slow-motion "customer satisfaction" response. Still, the litigation pressure mounted, and experts for victims brought to the company's attention the Wisconsin analysis and IU confirmation. The remaining mystery for GM was why the 2008 and later Cobalt models were not as deadly as earlier models. Both mysteries were resolved by a plaintiff's expert who discovered, that despite DeGiorgio's denials and coverup, the ignition switch had been secretly changed. Now, after eight years of foot dragging, GM finally recognized that it had a deadly safety problem on its hands regarding 2005-2007 Cobalts. It began to recall the older vehicles and remove defective ignition switches. The recall would eventually stretch to millions of vehicles.

Despite willful blindness, shocking negligence that exposed hundreds of thousands of drivers to deadly risks, and lies and coverups by corporate employees, no one was prosecuted, let alone jailed.

The delay and GM's "troubling disavowal of responsibility" in the face of the mounting death toll was fatal for hundreds of consumers.[72] Belatedly, the federal NHTSA fined the company $35 million. Congress held hearings, excoriating both the company and a lax federal bureaucracy. Criminal prosecution was once again undertaken, but far too late for the hapless victims. GM entered into a deferred prosecution agreement with U.S. Attorney Preet Bharara's office in the Southern District of New York, paid a fine of $900 million, and was let off the hook. Despite willful blindness, shocking negligence that exposed hundreds of thousands of drivers to deadly risks,

and lies and coverups by corporate employees, no one was prosecuted, let alone jailed. As counsel for one of the Cobalt victims said, "When individuals through their reckless conduct, cause someone to die, they go to jail. When large corporations, such as GM, through their reckless conduct cause hundreds of people to die, they simply pay a fine . . . and move on."[73]

IV. What Problems Can Civil Litigation Help Avoid and What Changes in Civil Litigation Do We Need?

A. Regulatory Failure

The foregoing case studies suggest that conventional regulatory supervision is simply insufficient to control potentially lethal corporate misconduct. Administrative effectiveness is limited by a number of factors. Three are particularly salient in light of the dangerous behavior of Massey, Purdue, and GM. First, agency personnel sometimes seemed incapable of recognizing the seriousness of the risks involved—a conceptual or intellectual failure. Even when extremely toxic groundwater pollution was documented by outside experts in West Virginia's Mingo County in the early 2000s, West Virginia Department of Public Health officials opined that there was "no public health hazard."[74] Assuming the absence of corruption, this analysis can only be explained as failure to recognize and understand powerful evidence. Something similar can be said to have been at work in 2001, with respect to the FDA's and DEA's reactions to the growing opioid epidemic. By that time, concerned experts and well-informed journalists were already sounding the most serious and well-supported alarms. The belief in the need for ever-larger quantities of potentially lethal opioids can only be viewed as a sort of intellectual blindness—a refusal to grasp the import of the available evidence. The same, on a smaller but still-deadly scale, can be seen in the sluggish reaction of the NHTSA to reports of power-failure-connected fatalities in GM Cobalt and similar models. The agency mindset in all these cases was in favor of corporations that were pursuing activities that posed demonstrated danger to the public.

> Conventional regulatory supervision is simply insufficient to control potentially lethal corporate misconduct.

The regulators' intellectual or conceptual failure was far from the only stumbling block over which agencies tripped. The evidence suggests that even when agencies became alarmed, they did not have the resources or the will to challenge serious corporate misconduct. West Virginia environmental regulators knew, from the late 1970s on, that Massey's slurry posed a serious health and environmental hazard. They began calling for impoundment instead of subterranean injection in 1978. They ordered it in 1983, yet they repeatedly waived compliance. With respect to mine safety, the facts are even more troubling. In 2000-2001, Massey had 500 or more serious safety violations while its three largest competitors had 175. Massey had the worst fatality record in the industry. It also had suffered the needless deaths at the Aracoma Alma mine. Though literally thousands of violations were cited at Upper Big Branch, nothing was done to compel safety improvements. The result was the deaths of 29 miners in the worst American coal mine accident in 40 years.

> Even when agencies became alarmed, they did not have the resources or the will to challenge serious corporate misconduct.

If anything, the FDA and DEA story regarding Purdue is even more distressing. The FDA, from the early 2000s on, knew of the rising toll of deaths related to OxyContin. The drug's distribution was not curtailed. Instead, a string of inept monitoring programs was adopted. For its part, the DEA kept increasing the limits on the amount of oxycodone that was allowed to be produced. The espoused rationale appears to have been the fear that some unidentified group of patients would be left without medication if limits were imposed—a line out of the Purdue playbook.

Political Influence

Finally, and perhaps most troubling, the corporate wrongdoers seemed to get their way through the exercise of political and financial influence. Massey and its CEO, Blankenship, seized virtually every opportunity to use clout to get their way, both with regulators and the courts. Any serious efforts to curb pollution or improve safety were met by company declarations that jobs would be cut—an existential threat in Appalachia. The $3 million Blankenship spent on Brent Benjamin's election was an unambiguous signal that "friends" would be supported and "enemies" punished. Purdue, according to Radden Keefe, spent lavishly to get its way with regulators, hiring FDA retirees and, with other manufacturers, reportedly spending $700 million on lobbying.[75] Its minions managed to stall CDC safety regulations for five years. Through top-level DOJ intervention, Purdue succeeded in substantially softening the charges levelled against the company in 2007.

Corporate wrongdoers seemed to get their way through the exercise of political and financial influence.

The implication of all this is that regulators are, frequently, ill-prepared to take on the regulated when the latter are flush with cash and have the will to use it to get their way. In such situations (especially when lives are at risk), deference to agency action should not be demanded. Civil litigation as an alternative, then, seems critically important, and the requirement to exhaust administrative remedies should be restricted.

Regulators are, frequently, ill-prepared to take on the regulated when the latter are flush with cash and have the will to use it to get their way.

It was a policing mantra in the 1980s and 1990s that law enforcement in urban areas should be guided by a "broken windows" policy—law, safety, and environmental integrity are, in this view, best defended by an energetic response to minor infractions. As the authors of this argument, James Q. Wilson and George L. Kelling, put it in their pathbreaking article in *The Atlantic*: "[O]ne unrepaired broken window is a sign that no one cares and so breaking more windows costs nothing."[76] That idea has been controversial in the inner city where it has, sometimes, been used to excuse serious violations of minority citizens' rights. Yet, in the corporate context, with rational corporate calculators carefully scanning government reaction to regulatory violations, it has substantial appeal. If agencies cannot address the broken windows they find, the courts should, when possible, allow private litigants to help them do so—and, in addition, allow consideration of the regulatory violations in a wide range of private suits. Whether that would have saved the 29 miners, let alone the tens of thousands of opioid poisoning victims, is hard to say. But it offers a means of making patterns of corporate misconduct clearer and, perhaps, more costly.

B. Criminal Prosecution: Too Little and Too Late

The logical alternative to administrative action concerning dangerous corporate behavior is criminal prosecution. Unfortunately, it has not served as an effective barrier to risky conduct. The record in our case studies indicates that if prosecution is used at all, it is employed far too sparingly and long after corporate misconduct has taken a deadly toll.

The logical alternative to administrative action concerning dangerous corporate behavior is criminal prosecution.

Massey is, perhaps, a paradigm. For more than a decade, the coal company evaded safety regulations. It faced trivial fines and no criminal prosecutions. Things changed only modestly when 29 miners were killed in 2010. Their deaths triggered heightened safety scrutiny but, even after the tragedy, hundreds of safety violations, many of them life-threatening, were still found. In the months after the Upper Big Branch disaster, a mine superintendent and a security official were prosecuted, entered guilty pleas, and were punished. This had the appearance of the usual pattern—relatively low-level employees were sacrificed or, in the white-collar argot, "were thrown under the bus." Massey's story only deviated from the usual script in 2015 when CEO Blankenship was prosecuted and convicted. However, that conviction was for a misdemeanor and resulted in a one-year sentence. This hardly seems adequate either as to timing (five years after the 29 deaths) or gravity (there was considerable evidence of top-down resistance to safety precautions). The Massey case does not signal swift or sure justice.

As the death toll mounted, Purdue denied any responsibility and dodged steps to protect the public.

The Purdue experience is even more disturbing. As the death toll mounted, Purdue denied any responsibility and dodged steps to protect the public. In 2007, the company was prosecuted for misbranding, but serious charges against the corporation and its officers were watered down at the highest levels of the DOJ. The company pleaded guilty to one count of misbranding, and its executives faced only misdemeanor charges. Onlookers might say that the $600 million fine levied against the company, and the removal of three executives from the pharmaceutical industry, were an appropriate response. They were not. Again, what amounted to non-essential employees were "thrown under the bus." The Sackler family, which owned and controlled Purdue Pharma, was untouched. The fine may seem eye-popping, but between the time of its imposition and the end of 2013, the company tripled its sales of OxyContin. The real winners were the Sacklers who, in the post-prosecution period, were able to siphon billions of dollars from the company into financial safe havens.

GM . . . ignored a fatal flaw in its Cobalt ignition system for almost a decade, calling it a "customer satisfaction question."

The story is much the same with respect to GM. It ignored a fatal flaw in its Cobalt ignition system for almost a decade, calling it a "customer satisfaction question." Hundreds died. A careful internal investigation identified a number of employees who had put the public at risk. One in particular, Ray DeGiorgio, was identified as the orchestrator of a long-running deadly coverup. Yet, no one was prosecuted. No criminal responsibility was fixed. The company paid a $900 million fine as part of a deferred prosecution agreement and moved on.

Fines as Costs of Doing Business

Two observations seem in order. First, fining is a tool that does not seem to curb serious but profitable risk taking. The $600 million fine did not stop Purdue and the $900 million fine seems to have been forgotten at GM. If money really matters, and stockholder attention is to be secured, more substantial sums are required. It is interesting to note that in GM's case the ignition problem only seemed to gain notice when, in 2011-2012, outside litigation counsel, hired by GM, started to warn of the potential for punitive damage awards. But the punitive damages prospect was then still a long way off, and it did not get serious corporate attention until three or four years later. Second, the sacrifice of corporate employees seems to be a routine ritual in serious corporate misconduct cases. What is remarkable is that really key decision makers are seldom the ones removed. Others may be sacrificed, but, as in the Purdue case, often with generous severance packages.

> Fining is a tool that does not seem to curb serious but profitable risk taking.

> If prosecutions were begun earlier, and leading corporate officers were targeted, perhaps deterrence would be more effective.

Again, the "broken windows" point seems relevant. If prosecutions were begun earlier, and leading corporate officers were targeted, perhaps deterrence would be more effective. The criminal justice system is not geared either to act quickly or to focus on appropriate targets. It was once commonly accepted that criminal prosecution led the way, and civil litigation tagged along on its coattails. That pattern no longer seems to hold, and it is civil litigation that offers the prospect of swifter and more effective justice.

C. The Importance of Recusal

The Massey Coal narrative underscores a significant vulnerability in civil litigation that needs to be addressed if private action is to fulfill its potential to police serious corporate misconduct. That vulnerability arises because of corporate manipulation of political or financial influence to help secure favorable court rulings. At every turn in the Massey story, favoritism undermined the integrity of the judicial process. The original trial judge in the pollution case had professional connections to the coal company, and there was circumstantial evidence of his pecuniary interest in the settlement drafted by the defendant. When the judge's interest was brought to the attention of the West Virginia Supreme Court of Appeals, it refused to remove him. This response was unsatisfactory. Whether the judge's interest was clearly proven or not, the *appearance* of justice had been undermined. The trial judge's declaration that the "easiest course might be to voluntarily recuse given the present environment" signaled an awareness of a serious problem. That problem was brushed aside. Considering the facts of the case, the trial judge's attitude—to press on, appearances be damned—was simply wrong. The reviewing court's hands-off approach, too, seems at odds with the preservation of the appearance of justice. There the matter would have ended but for the fortuity of an instance in the trial judge's past when he represented the defendant in somewhat similar circumstances. The appellate court seemed to grasp at this opportunity to reverse itself and order recusal. That was an inadequate reaction to considerable evidence regarding taint. The

> The Massey Coal narrative underscores a significant vulnerability in civil litigation [, namely] corporate manipulation of political or financial influence to help secure favorable court rulings.

eventual criminal conviction of the trial judge because of other corrupt dealings serves to confirm the merit of the plaintiff's concern.

Massey was not done wielding its influence. CEO Blankenship spent upwards of $3 million to remove a Supreme Court of Appeals justice and replace him with someone more inclined to sympathy for the defendant. After Blankenship succeeded, the new justice, Brent Benjamin, refused to recuse himself regarding Massey's appeal of Caperton's $50 million judgment against it. Again, the appearance of unfairness argument was rejected on the pretense of a "duty" to sit. Benjamin's decision led to review by the U.S. Supreme Court, which found Blankenship's contributions simply too large to ignore. It ruled, in *Caperton v. A.T. Massey Coal Co.*,[77] that the Due Process Clause imposes limits, and the appearance of justice really counts. In an era when the U.S. Chamber of Commerce, in coordination with people like Blankenship, pours millions of dollars into state supreme court contests,[78] it is essential that the appearance of justice be protected.[79]

Another West Virginia Supreme Court justice, too, ignored the appearance of fairness and chose to participate in the original Caperton/Massey appeal. Justice Elliott "Spike" Maynard vacationed with Don Blankenship while the appeal was sub judice. Despite a motion to recuse, he sat and voted for Massey. It was only when a photo of Maynard and Blankenship vacationing together on the French Riviera surfaced that Justice Maynard decided to step aside. Benjamin's and Maynard's approach is simply inadequate to preserve the appearance and, in all likelihood, the reality, of fairness. In an era of big-money judicial elections, extra care must be taken to preserve the integrity and reputation of the courts.

D. Discovery—The Lynchpin of Private Enforcement

Among civil justice scholars, there is something of a consensus that discovery is critical to private enforcement.[80] It is only through the careful examination of corporate records that intentions become clear, that prior knowledge of serious risk is identified, and that misconduct is uncovered. It has long been understood, by those like Harvard Professor Benjamin Kaplan, the Reporter to the Judicial Conference's Advisory Committee on Civil Rules during the 1960s, that, "[t]he much criticized discovery function and class action remain together the scourge of corporate and governmental malefactors."[81] In the era of e-mail and other electronic evidence, this observation has even greater power.

Among civil justice scholars, there is something of a consensus that discovery is critical to private enforcement.

The key criticisms of discovery are that it has been abused by plaintiffs to increase innocent defendants' costs and has been employed as a "fishing expedition" to ferret out embarrassing but irrelevant material. These arguments were most forcefully put forward by Judge Frank Easterbrook, erstwhile member of the University of Chicago law faculty, in a 1989 *Boston University Law Review* article, entitled "Discovery As Abuse."[82] Without any significant data to support his claims, Easterbrook tore into the discovery concept. Not only was his argument unsupported by evidence, it was strikingly one-sided, focusing on the supposed wrongdoing of plaintiffs' lawyers pressing frivolous claims. The secreting of critical information by defendants was not addressed, nor was the incentive for hourly-billing defense counsel to make discovery as arduous and expensive as possible. Despite its intellectual shortcomings, Easterbrook's piece has had an outsized effect. It has been repeatedly cited by the U.S. Supreme Court to justify the curbing of access to justice in cases like *Bell Atlantic Corp. v. Twombly*[83] and *Ashcroft v. Iqbal*.[84]

Empirical data actually indicate that there is little plaintiff-side discovery abuse. The story of rampaging plaintiffs is simply a myth, albeit one that serves the interests of those who would rather not divulge what their corporation is aware of or has been doing.[85]

Empirical data actually indicate that there is little plaintiff-side discovery abuse. The story of rampaging plaintiffs is simply a myth.

Obstructing Discovery

The real discovery problem in a number of recent high-profile cases appears to have been corporate non-compliance with discovery obligations. Massey Coal hid what it knew about slurry injection. It destroyed records concerning safety. Only the most dogged effort by plaintiffs' counsel uncovered the details of Massey's misconduct. Purdue pursued a similar strategy. It kept the Sackler family's hegemony under wraps through resistance to discovery and protective orders. A key deposition of erstwhile Purdue CEO Richard Sackler, containing critical information about awareness of harm and aggressive marketing tactics, took four years to liberate from defendant-secured secrecy.[86]

It might be suggested that these examples are "cherry picking," and do not reflect reality. But one needs do little more than read the newspapers or advance sheets to see reports of corporate disobedience to discovery obligations. Wells Fargo was recently found by a Georgia judge to have withheld arbitration-related documents and misled an opponent about its conduct.[87] Within the past year, the pharmaceutical manufacturer Endo admitted that it and its prestigious defense firm, Arnold & Porter, had failed to produce available but damaging documentary material in not one, but several cases.[88] Exposure of this activity led to defense counsel's dismissal as well as substantial settlement payments by the defendant company.

Perhaps no recent matter better illustrates the problem than *Goodyear Tire & Rubber Co. v. Haeger*.[89] There, Goodyear knowingly suppressed information about critical tests that demonstrated its knowledge of the danger of the overheating of some of its tires. On the basis of the company's misleading assertions, the Haeger family settled their extremely serious claims. They then discovered that they had been deprived of critical information. The trial court reopened the case and awarded a $2.7 million attorney's fee against Goodyear and its lawyers. The U.S. Supreme Court granted cert and cut the award substantially, declaring that the fee had to focus exclusively on proceedings about the hidden piece of evidence, thus demonstrating the court's unwillingness to firmly discipline corporate discovery misconduct.

If private enforcement is to provide effective policing of corporate harm, discovery and public dissemination of litigation-generated information is essential.

If private enforcement is to provide effective policing of corporate harm, discovery and public dissemination of litigation-generated information is essential. This was the conclusion reached by the Sixth Circuit in the opioid MDL, when it overruled Judge Polster's decision to keep ARCOS (the DEA's online reporting system for opioid drug sales) information about excessive opioid distribution secret.[90] Disclosure of this information strengthened both journalist and lawyer insight about improper opioid sales and pushed the MDL toward settlement. Not only is information the life's blood of successful litigation to curb misconduct, it is a key element in preserving respect for the courts and the Rule of Law. As a number of scholars have noted, transparency and legitimacy go hand in hand. Judicial credibility and respect for judicial adjudications require effective disclosure.[91]

E. Access to Court

Obviously, it is impossible to get civil justice accountability if access to courts is barred or made so difficult as to deter all but the heartiest or wealthiest of claimants. I believe that my colleague, Professor Daniels, will be examining this question in some detail. Here it might be useful simply to note in passing the Massey and Purdue strategies used to thwart access. In both the slurry pollution litigation and the Caperton business tort case, the coal company went to extraordinary lengths to delay and increase the expense of litigation. It undercut efficiency in the slurry case so that class action status was denied, and more than 700 lawsuits had to be managed both by plaintiffs' counsel and the courts. The upshot was obstruction and expense. Plaintiffs' counsel in the Forgotten Communities case, by his own admission, flirted with bankruptcy several times during the inexcusable seven years that the litigation lingered. One is reminded of a similar story from the Woburn, Massachusetts, pollution case described by Jonathan Harr in his prize-winning book, *A Civil Action*.[92] In that case, the plaintiffs' counsel, Jan Schlictmann, was forced to declare bankruptcy. His clients' victory, such as it was, was pyrrhic for him and demonstrated how corporations with vast resources can undermine injured plaintiffs and their counsel.

It is impossible to get civil justice accountability if access to courts is barred or made so difficult as to deter all but the heartiest or wealthiest of claimants.

Beyond case balkanization and foot-dragging, Massey appeared to seek to intimidate its opponent by filing a questionable defamation suit against counsel. This had the earmark of a SLAPP filing designed to discourage zealous advocacy and distract counsel. The use of such ploys raises the specter of the well-heeled trampling poorer opponents notwithstanding the merits of underlying claims. This is the sort of misconduct that calls for the sharpest discipline—something that was not forthcoming in the Massey case, despite West Virginia precedent recognizing the need for protection against SLAPP actions.[93]

Litigation as Warfare

Massey's war against access extended to the Caperton proceedings. There, too, expense, procedural hardball, and threats were used to intimidate what a jury concluded was a worthy claimant. Massey's CEO committed extensive corporate assets to litigation in an eventually successful effort to thwart meritorious business tort claims and drive a competitor into bankruptcy.

Massey certainly had no lock on hardball litigation tactics and intimidation in civil proceedings. Throughout much of the time that Purdue Pharma was pumping out OxyContin, it fought any and all claims tooth and nail. At one point, it boasted of being 65-and-0 in cases alleging harm caused by Oxy. One is reminded of the tobacco saga where cigarette companies threw huge resources into defeating smokers' claims, only losing when public officials joined private counsel to call the industry to account for suppressing information about cancer, targeting underage smokers, and boosting nicotine to increase smoker addiction.[94] These strategies, executed through litigation manipulation and information suppression, were far too successful for far too long because of abusive steps taken to stifle complaints and smother opponents.

The challenge for courts is to preserve access by improving litigation efficiency, recognizing abusively dilatory tactics, and punishing attempts at intimidation like SLAPP filings.

The challenge for courts is to preserve access by improving litigation efficiency, recognizing abusively dilatory tactics, and punishing attempts at intimidation like SLAPP filings. As to this last, a New York judge perhaps said it best: "Short of a gun to the head, a greater threat [to First Amendment expression] can scarcely be imagined."[95]

F. Recognizing the Potential Breadth of Common Law Claims

One of the strengths of the common law is its ability to adapt to new societal needs. That adaptability has been on display in the opioid litigation. There, Judge Polster recognized the validity of a public nuisance claim against Purdue, other opioid manufacturers and drug distributors.[96] While the application of public nuisance might be viewed as novel in such circumstances, it provides an important tool for private litigants focusing on public health, welfare and safety. The profound failure of FDA/DEA regulation, and the absence of effective criminal prosecution, have been directly linked to the tragic opioid epidemic which has taken hundreds of thousands of American lives. The need for private means to challenge broad-ranging corporate misconduct seems clear.

One of the strengths of the common law is its ability to adapt to new societal needs.

Preemption

In a string of court decisions, most particularly from the U.S. Supreme Court, there have been suggestions of a need to curb traditional judicial willingness to accept the growth of judicially-enforced common law remedies. High court constraints have featured most prominently with respect to preemption of state law claims by vaguely worded federal statutory statements said to occupy an entire field of activity—so-called "field preemption"—and by reinterpretation of notions about arbitration that block huge swaths of consumer complaints. As to field preemption, the Supreme Court's opening salvo was its interpretation of locomotive safety regulations in *Kurns v. Railroad Friction Products Corp*.[97] There an indefinite federal statute was found to bar claims related to asbestos injuries. The statute said nothing about such injuries, but it was interpreted as occupying the entire field of torts related to such equipment. Since the federal statute made no provision for recovery, those injured were barred from protection and left to suffer without recourse.

Field preemption disregards all state and private interests. It undercuts state power to protect victims from physical harm.

Field preemption disregards all state and private interests. It undercuts state power to protect victims from physical harm. It casts aside protection in the name of federal regulation that is often without substance. Professor Catherine Sharkey has noted that recognition of field preemption serves to undermine the evolution of products liability protection where applied.[98] Sweeping declarations that block safety protections pose a serious threat to victims. Their application should be tightly limited in light of the need to protect consumers.

Forced Arbitration

In 1925, Congress passed a statute recognizing the value of voluntary arbitration as an alternative to court-based litigation. For more than 50 years, that statute was viewed as requiring the genuine consent of both parties before arbitration would be compelled. In the 1980s, in a sharp departure from prior precedent and history, the Supreme Court majority decided that arbitration could be imposed by one party, clearly the dominant one, on its customers or employees. What this has produced is a vast increase in compulsory arbitration notices announced in shrink-wrap packaging, on boilerplate inserts, in employment agreements, and through online texts. What these have done is to cut access to court and undermine development of contract and consumer law. The espoused justification is that arbitration offers procedural advantages with respect to cost, speed, and informality. These claimed benefits have not materialized. Despite the proliferation of literally millions of arbitration clauses in adhesion contracts dictated by communications companies, commercial platforms, product manufacturers, and others, a minuscule number of arbitrations are actually conducted. Most potential claimants are simply forced to "lump it."[99] Moreover, the arbitration process, when used at all, is closed to the public, is not guided by legal precedent, and it is, in most circumstances, unappealable. This arrangement not only undermines victim access to remedy, it dispenses with law entirely. As Professor Maria Glover has demonstrated, the upshot is the "erosion of substantive law."[100] What is left is a lawless space where secret proceedings resolve claims with no obligation to honor or even recognize established principles.

In the 1980s, in a sharp departure from prior precedent and history, the Supreme Court majority decided that arbitration could be imposed by one party, clearly the dominant one, on its customers or employees.

Such a process not only undercuts the policing of corporate misconduct but is open to corruption. One need not look very far to find evidence of such corruption. As reported in the business magazine, *Barron's*, in 2022, Wells Fargo used dubious methods to win one of the few arbitrations to proceed against it.[101] An investor, Brian Leggett, claimed that the bank's employees were negligent in the handling of his account. He was required by an adhesion contract to arbitrate his claim. That arbitration was, eventually, reviewed by a Georgia judge. She found that in the arbitration, Wells withheld information, procured perjured testimony, and intentionally misrepresented the record.[102] Wells was also found to have a secret deal with the Financial Industry Regulatory Authority (FINRA) to blackball potential arbitrators it did not like. It is hardly surprising that the arbitration resulted in a finding against the claimant, Leggett, and ordered him to pay Wells Fargo $83,000 in costs. When all this secret material was disclosed, FINRA, a supposedly neutral, government-sanctioned private entity, hired an outside law firm to investigate whether and, if so, how, its arbitration process had been so corrupted.

Recently, there has begun something of a legislative backlash against arbitration requirements perceived as particularly unfair.

It might be thought that the Wells Fargo case is simply an anomaly. This notion is belied by the fact that consumers sedulously avoid arbitration, recognizing the process as stacked against them. Recently, there has begun something of a legislative backlash against arbitration requirements perceived as particularly unfair. Congress recently voted to prohibit imposed arbitration in sexual harassment cases.[103] This came after repeated episodes of abuse and biased treatment against female victims.

G. Corporate Personhood and Effective Civil Justice

The problems posed by lethal and injurious corporate misconduct call for substantial invigoration of both public and private remedies. One of the ideas that has stood in the way of such action is that corporations are treated as the equivalent of human beings, deserving all the rights afforded by the Constitution to human citizens and in some cases, even greater protections.

With respect to rights, fairly recent Supreme Court rulings have strained to find that corporations have First Amendment rights equal to those afforded to humans. The Court, in conflict with Congress and well-established precedent, has declared that corporations have a First Amendment right to spend as much money on political activity as they wish, unrestrained by government-imposed limitations. This declaration, by the majority in *Citizens United v. Federal Election Commission*[104] set off a firestorm of protest, but is now the law of the land. It has swelled the flood of political expenditures in American politics. It has, in particular, thrown open the floodgates to corporate spending (especially through dark money routes)[105] on judicial elections at the state supreme court level. Its effect is to increase the dangers of bias and favoritism identified by a differently constituted Supreme Court majority in *Caperton v. A.T. Massey Coal Co.*[106] What has not been effectuated is a recusal process that protects the integrity and reputation of the courts. The judiciary has not only been tarnished by this flood of cash but, perhaps, intimidated in its willingness to control corporate misconduct.

> Recent Supreme Court rulings have strained to find that corporations have First Amendment rights equal to those afforded to humans.

The "personal" protections afforded to corporations accused of harmful misconduct have significantly impeded calling wrongdoers to account. Corporations have been vouched the same evidentiary protections as people with a record of prior misdeeds. Federal Rule of Evidence 404 (b) sharply limits the use of evidence of "other crimes, wrongs, or acts." When applied to corporations, this means that prior corrupt schemes and misbehavior may be barred from use at trial. Since corporations act by fixed routines and established protocols, the prohibition of such evidence often deprives the injured of the most powerful and revealing evidence. This may be warranted to protect human litigants, but it seems ill suited to the routinized and hierarchically controlled actions of corporate employees.

Corporate Privilege

Corporations have also been afforded a range of evidentiary privileges that withhold important evidence from decision makers. The attorney-client privilege has, since *Upjohn Co. v. United States*[107] been held to cover a wide range of corporate conversations. The rationale for that privilege, getting a client to communicate truthfully with her lawyer, has less traction in the corporate setting, where records and oversight are substantially increased and corporate authority over employees is substantial. Other privileges, too, allow for the hiding of critical information and communications. The trade secrets privilege has been stretched to encompass much risky corporate behavior, and to hide what is found in one case from litigants in other proceedings.

> Corporations have . . . been afforded a range of evidentiary privileges that withhold important evidence from decision makers.

It has been observed that large corporations not infrequently get greater protections in criminal prosecutions than their human counterparts. They are regularly afforded deferred prosecution deals that are not offered to other defendants, perhaps because it would cost the government more to prosecute them than it does with individual defendants.[108] The GM deal appears to exemplify this. The company acted in a manner that led to hundreds of deaths, while refusing to recognize the risks it had created. It was allowed to walk away from the deadly mess it had created by paying a $900 million fine—far less than the exposure it would have faced with civil damage awards. Money trumped justice. Buying one's way out of criminal liability is a privilege seldom offered to human actors accused of taking lives. The penalties applied to human murderers appear to have been ruled out for major corporations.

There is good reason to revisit our societal reluctance, expressed after the Arthur Andersen case, to put a corporate wrongdoer out of business. When the Enron scandal led to the collapse of the seventh largest corporation in America, Enron's accounting firm, Arthur Andersen, was implicated. Andersen had already been involved in a string of other corporate scandals involving Waste Management, Inc., WorldCom, Sunbeam Corporation, and the Baptist Foundation of Arizona, among others.[109] Andersen managers appeared to direct employees to shred accounting records evidencing wrongdoing. The accounting firm then had the temerity to demand an accelerated trial regarding a charge of obstruction of justice. Andersen lost before a Texas jury, and disintegrated—something akin to a corporate "death penalty." Although the range of Andersen's misdeeds might have warranted such a result, that was not how its fate was viewed. The Supreme Court reversed the Texas conviction on a technicality.[110] The DOJ, after substantial hand-wringing, said that the death penalty is not really appropriate for corporations[111] (though justifiable, apparently, for human beings). The claimed "loss" of 28,000 jobs and the harm to innocent employees was decried. If Andersen were a person, its behavior would, at a minimum, have justified the termination of its license. Why that should be excused because of corporate personhood is hard to fathom unless corporations are, by their aggregate composition, rendered immune from responsibility. The prevailing conclusion about Andersen seems wrong. Corrupt organizations deserve to be punished. It is appropriate to remove them from situations in which they can continue to do harm. Deferred prosecution agreements, and fines that allow a corporation to buy its way out of liability, will not deter grave misconduct.

V. Conclusion: Can Private Action Actually Curb Grave Corporate Misconduct?

This paper has been structured around a series of stories. Most of them have been cautionary tales about the harm done by corporations and their leaders, including Massey, Purdue, and GM, among others. I would like to end with one more story, but this one concerning not only the harm done by a corporate malefactor but also the social and, in fact, global, benefit derived from private litigants' efforts to confront and correct wrongdoing. The subject is the litigation that challenged, and, eventually, led to change in the Catholic Church's handling of the problem of pedophile priests.[112]

When private litigation regarding priests' assaults on children began in the early 1980s, . . . there was great skepticism that a serious problem of child sexual abuse existed among the clergy.

When private litigation regarding priests' assaults on children began in the early 1980s, most particularly with accusations against Gilbert Gauthe, a Catholic priest in the Lafayette, Louisiana, diocese, there was great skepticism that a serious problem of child sexual abuse existed among the clergy.

The facts of Gauthe's case, and his eventual admission of having abused 37 children, lent credence to the claims that began to surface after a lawsuit against the church was filed by the families of six abused boys. Although that case was settled on secret terms, information about the problem began to spread. Thereafter, a victim's family chose to go public, and in subsequent proceedings, the Church's knowledge of Gauthe's misconduct and its coverup of his behavior became known. The case triggered concern and drew attention to the issue.

That attention was powerfully amplified between 1984 and 1991, as the first wave of suits and journalists' reports appeared. Litigation continued to grow in a number of dioceses, yielding, between 1992 and 2001, a second and larger wave of accusations. One particular case, that of a Massachusetts-based priest, James Porter, drew particular attention. Police and prosecutors refused to act, but private claims were filed, press coverage expanded, and a narrative of widespread sexual assault, unaddressed by informed church officials, grew. A large financial settlement ($5 million or more) underscored the seriousness of the claims and the complicity of responsible churchmen.[113] One plaintiff's lawyer called the growing scandal "Organized Religion's Watergate."[114] The ripples from this second wave of scandal yielded a third and even larger set of filings after 2001. One of the central figures in this third wave was John Geoghan, who abused more than 200 children over the course of a church career marked by repeated complaints and coverups. The *Boston Globe*'s reports on Geoghan became a national sensation and the newspaper won a Pulitzer Prize for its work. The story was then turned into a movie entitled *Spotlight*, which won an Academy Award. In the wake of the public outcry, the Catholic Church began to reform its approach to pedophilia, paid upwards of $2.6 billion in damages,[115] and began what would become a worldwide effort to protect children from predation.

Byproducts of the Church Litigation

The private proceedings drew public attention, generated information through discovery of the Church's repeated concealment of harm and forced profound change—not simply among Catholic clergy and their Church but also among athletic organizations, schools, and other institutions. The early cases followed a predictable pattern, with initial denial, followed by claims of exaggeration, hardball litigation tactics to try to intimidate victims, vilification of plaintiffs' lawyers as money grubbers and, when all else failed, resort to bankruptcy (in the dioceses of Tucson, Portland, Spokane, San Diego and Davenport, Iowa). Yet, the civil actions produced hard proof and provided critical information to the press and public. All of this helped to rewrite the social agenda. Both legislatures and prosecutors eventually joined the effort to address the problem. The proof tore down the Church's claim to probity and exposed the "soul murder" it had, in many cases, allowed. The litigation was also directly responsible for genuine change and provided a powerful spur to action against institutionally-protected pedophilia in Canada, Ireland, and elsewhere.

The success of diligent lawyers in uncovering proof of horrendous harm suggests that, in societies with a truth-seeking judiciary and a free press, the work of civil litigation can yield protection of society's weakest from the worst sort of harm.

The pedophile priest story may be an anomaly, but the success of diligent lawyers in uncovering proof of horrendous harm suggests that, in societies with a truth-seeking judiciary and a free press, the work of civil litigation can yield protection of society's weakest from the worst sort of harm.

Notes

1 Robert A. Clifford Professor of Tort Law and Social Policy, Emeritus, DePaul University College of Law.

2 Unless otherwise noted, the material in this section is based on the excellent book by Kris Maher, Desperate: An Epic Battle for Clean Water and Justice in Appalachia (2021) [hereinafter Maher].

3 See Gerald M. Stern, The Buffalo Creek Disaster: How the Survivors of One of The Worst Disasters In Coal-Mining History Brought Suit Against the Coal Company—and Won (2008).

4 *See* Dylan Lovan, *After Decade, Still Signs of Coal Slurry Spill*, Wash. Post (Oct. 17, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101507010.html.

5 *See* Maher, *supra* note 2, at 75-76 (discussing the career of Jack Spadaro).

6 *Id.* at 45.

7 *Id.* at 56.

8 *Id.* at 261.

9 *Id.* at 100.

10 *See, e.g.,* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders,* 12 Bridgeport L. Rev. 937 (1992).

11 *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations*, 131 U. Pa. L. Rev. 793 (1983) (focusing primarily on civil rights cases brought under statutes that provide for awards of attorney fees).

12 Maher, *supra* note 2, at 215.

13 This section too draws primarily on Maher, *supra* note 2, unless otherwise noted.

14 Ken Silverstein, *Coal Baron Blankenship Gets Maximum Prison Term. Judge Says It's About Respect for Law*, Forbes (April 6, 2016), https://www.forbes.com/sites/kensilverstein/2016/04/06/coal-baron-blankenship-gets-maximum-prison-term-judge-says-its-about-respect-for-law/?sh=1cb100e67c23 [hereinafter Silverstein].

15 This recitation of facts is drawn from Caperton v. A.T. Massey Coal Co., Inc., 690 S.E.2d 322, 328-31 (W. Va. 2009).

16 Quoted in Caperton v. A.T. Massey Coal Company, Inc., 679 S.E.2d 223, 232, n. 15 (2008).

17 Quoted in Caperton v. A.T. Massey Coal Company, Inc., 556 U.S.868, 871 (2009).

18 Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, Wash. Post, Nov.4, 2004, https://www.washingtonpost.com/archive/politics/2004/11/04/wva-supreme-court-justice-defeated-in-rancorous-contest/3e048f3b-b8db-4d07-a5d4-a1f3338e0764/ (providing election details).

19 Pema Levy, *This Election Inspired a John Grisham Novel. Now It Just Got Even Weirder*, Mother Jones, May 9, 2016, https://www.motherjones.com/politics/2016/05/west-virginia-supreme-court-blankenship-benjamin/.

20 Adam Liptak, writing in The New York Times, broke the story. *See* Adam Liptak, *Motion Ties W. Virginia Justice to Coal Executive*, N.Y. Times, Jan. 15, 2008.

21 Caperton v. Massey Coal, 556 U.S. at 872, 882, 884, 886.

22 Dennis J. Seese, *Don Blankenship, the Chamber, and the Murky Nexus of Money and Judicial Influence*, LittleSis, April 14, 2010, https://news.littlesis.org/2010/04/14/don-blankenship-the-chamber-and-the-murky-nexus-of-money-and-judicial-influence/.

23 Unless otherwise noted, the material in this section is drawn from J. Davitt McAteer et al., Governor's Independent Investigative Panel, Upper Big Branch, The April 5, 2010 Explosion: A Failure of Basic Coal Mine Safety Practices (May 2011) [hereinafter GIIP]. It should be noted that the seed for this section was planted when, some years ago, I read David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295 (2013) [hereinafter Uhlmann].

24 *Not King Coal*, Forbes, May 26, 2003, https://www.forbes.com/forbes/2003/0526/080.html?sh=75e5d3c518a5.

25 Maher, *supra* note 2, at 156.

26 *Id*.

27 GIIP, *supra* note 23, at 78.

28 *Id*.

29 GIIP, *supra* note 23, at 93.

30 *Id*.

31 *See* Silverstein, *supra* note 14.

32 GIIP, *supra* note 23, at 4.

33 U.S. Dep't of Lab, Mine Safety & Health Admin., A Report of Investigation, Fatal Underground Mine Explosion, April 5, 2010, Upper Big Branch Mine-South, Performance Coal Company, Montcoal, Raleigh County, West Virginia 9 (Dec. 11, 2011).

34 *Id.*

35 *Id.* at 2.

36 GIIP, *supra* note 23, at 105.

37 *Id*.

38 Silverstein, *supra* note 14.

39 *See* John Raby, *Coal Exec Convicted in Miner Deaths Is Released From Prison, Immediately Lashes Out on Twitter*, Chicago Tribune, May 11, 2017, https://www.chicagotribune.com/business/ct-don-blankenship-mine-executive-20170511-story.html.

40 *See* Mihir Zaveri, *Conviction of Don Blankenship, Ex-Coal Baron, Should Be Overturned, Judge Recommends*, N.Y. Times, August 26, 2019, https://www.nytimes.com/2019/08/26/us/coal-ceo-don-blankenship.html.

41 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 875 (2009).

42 Patrick Radden Keefe, Empire of Pain: The Secret History of the Sackler Dynasty (2021) [hereinafter Keefe].

43 Anton R. Valukas, Report to the Board of Directors of General Motors Company Regarding Ignition Switch Recalls (May 29, 2014), https://

www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf [hereinafter Valukas].

44 Keefe, *supra* note 42, at 193.

45 *Id.* at 196.

46 *Id.* at 195.

47 Francis X. Clines & Barry Meier, *Cancer Painkillers Pose New Abuse Threat*, N.Y. Times, February 9, 2001, at A1, https://www.nytimes.com/2001/02/09/us/cancer-painkillers-pose-new-abuse-threat.html.

48 Elizabeth Chamblee Burch & Abbe Gluck, *MDL Revolution*, 96 NYU L. Rev. 1, 21 (2021) [hereinafter Burch & Gluck].

49 Keefe, *supra* note 42, at 252.

50 *Id.* at 273-276.

51 *Id.* at 303.

52 *Id.* at 346.

53 *Id*.

54 Catherine M. Sharkey, *The Opioid Litigation: The FDA Is MIA*, 124 Dick. L. Rev. 669, 673-674 (2020).

55 Office of the Inspector General, U.S. Department of Justice, Review of the Drug Enforcement Administration's Regulatory and Enforcement Efforts to Control the Diversion of Opioids i, 13, (2019), https://oig.justice.gov/reports/2019/e1905.pdf.

56 In re Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

57 *See* Burch & Gluck, *supra* note 48.

58 *Id.* at 47-51.

59 In re Purdue Pharma, L.P., 635 B.R. 26, 118 (S.D.N.Y. 2021).

60 Jan Hoffman, *Sacklers and Purdue Pharma Reach New Deal with States Over Opioids*, N.Y. Times, March 3, 2022, https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html.

61 *See* Max Blau, *No Accident: Inside GM's Deadly Ignition Switch Scandal*, Atlanta Mag. Jan. 6, 2016, https://www.atlantamagazine.com/great-reads/no-accident-inside-gms-deadly-ignition-switch-scandal/ [hereinafter Blau].

62 *Id.* at 14.

63 Unless otherwise noted, the material in this section is based on Valukas, *supra* note 43.

64 James R. Healey & Fred Meier, *Lawsuit: GM knew of Cobalt Ignition Problem*, USA Today, February 18, 2014, https://www.usatoday.com/story/money/cars/2014/02/18/gm-cobalt-g5-faulty-ignition-switches-recall-deaths-airbags/5582241/.

65 Valukas, *supra* note 43, at 92.

66 *Id.* at 3.

67 *Id.* at 121-123.

68 *Id.* at 4.

69 *Id.* at 10.

70 *Id.* at 147.

71 Blau, *supra* note 61, at 7-8.

72 Valukas, *supra* note 43, at 68.

73 Blau, *supra* note 61, at 14.

74 Maher, *supra* note 2, at 45.

75 Keefe, *supra* note 42, at 346.

76 George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, The Atlantic, Mar. 1982, https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

77 556 U.S. 868 (2009).

78 *See, e.g.,* Alyssa Katz, *The Chamber in the Chambers: The Making of a Big-Business Judicial Money Machine* 67 DePaul L. Rev. 319 (2018).

79 *See* Hale v. State Farm Mut. Auto. Ins. Co., No. 12-0660-DRH, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018) (order re motion for final approval of settlement).

80 *See, e.g.*, Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 Yale L.J. 1 (2019); Alexandra Lahav, In Praise of Litigation (2019); Diego Zambrano, *Discovery as Regulation*, 119 Mich. L. Rev. 71 (2020) [hereinafter Zambrano].

81 Benjamin Kaplan, *A Toast*, 137 U. Pa. L. Rev. 1879, 1881 (1989).

82 Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989). *See also* Alexandra Lahav, *A Proposal to End Discovery Abuse*, 71 Vand. L. Rev. 2037 (2018) (for a critical analysis).

83 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).

84 *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

85 *See* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. Rev. 683 (1998); Stephen B. Burbank & Sean Farhang, Rights And Retrenchment: The Counterrevolution Against Federal Litigation (2017).

86 *See* Alexandra D. Lahav & Elizabeth Chamblee Burch, *Information for the Common Good in Mass Torts*, 70 DePaul L. Rev. 345 (2022).

87 *See* Andrew Welsch, *Wells Fargo Won an Investment Dispute. Judge Says It Gamed the System*, Barron's (Feb. 4, 2022), https://www.barrons.com/advisor/articles/wells-fargo-arbitration-award-vacated-51644009697 [hereinafter Welsch].

88 See Jeff Overley, *Endo, Arnold & Porter Accused of Cover-Up In Opioid MDL*, LAW 360, July 28, 2021, https://www.law360.com/articles/1407656/endo-arnold-porter-accused-of-cover-up-in-opioid-mdl; Brendan Pierson, *Endo Faces Default Over Hiding 'Smoking Gun' Opioid Evidence (Again)*, Reuters, August 3, 2021, https://www.reuters.com/legal/litigation/endo-faces-default-over-hiding-smoking-gun-opioid-evidence-again-2021-08-03/.

89 Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1185, 1190 (2017); *See* Jeffrey Stempel, *Asymmetry and Adequacy in Discovery Incentives: The Discouraging Implications in* Haeger v. Goodyear, 51 Akron L. Rev. 639 (2017) (for a critical analysis).

90 In re National Prescription Opiate Litigation, 927 F.3d 919, 930-31 (6th Cir. 2019).

91 *See, e.g.*, Zambrano, *supra* note 80.

92 Jonathan Harr, A Civil Action (1995).
93 *See* Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981) (coal company barred from pressing defamation claim against environmental activists).
94 Allan Brandt, The Cigarette Century: The Rise, Fall and Deadly Persistence of the Product That Defied America (2007).
95 Gordon v. Marrone, 590 N.Y.S. 2d 649, 656 (Sup. Ct. 1992), *aff'd* 616 N.Y.S. 2d 98 (App. Div. 1994).
96 In re Nat. Prescription Opiate Litig., 440 F. Supp. 3d 773, 805-08 (N.D. OH. 2020).
97 Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625 (2012).
98 Catherine M. Sharkey, *Field Preemption: Opening the "Gates of Escape" From Tort Liability,* 50 J. Legal Studies S27 (2021).
99 *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2408 (2015).
100 *See* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015).
101 *See* Welsch, *supra* note 87.
102 *Id*.
103 Public Law 117-90, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (March 3, 2022).
104 Citizens United v. Fed. Elect. Comm'n, 558 U.S. 310, 375 (2010).
105 *See* Alison Frankl, *Behind $250 Million State Farm Settlement, A Wild Tale of Dark Money in Judicial Elections*, Reuters, Sept. 5, 2018, https://www.reuters.com/article/legal-us-otc-darkmoney/behind-250-million-state-farm-settlement-a-wild-tale-of-dark-money-in-judicial-elections-idUSKCN1LL2ZQ.
106 Caperton v. A. T. Massey Coal Co., Inc., 556 U.S. 868 (2009).
107 Upjohn Co. v. United States, 449 U.S. 383 (1981).
108 *See* Uhlmann, *supra* note 23 at 1327.
109 *See* Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 Chi.-Kent L. Rev. 1203 (2003).
110 Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).
111 *See* Uhlmann, *supra* note 23, at 1311. *Cf.* Neil Weinberg, *NRA Is Spared by Judge from Risk of Dissolution in N.Y. Lawsuit*, Bloomberg, Mar. 2, 2022, https://www.bloomberg.com/news/articles/2022-03-02/nra-death-penalty-rejected-by-judge-in-new-york-ag-s-lawsuit.
112 The following materials rely upon the work of Professor Timothy Lytton, which provided the basis for my analysis: Timothy D. Lytton, Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse (2008).
113 *Id.* at 22.
114 *Id.* at 25.
115 *Id.* at 164.

Oral Remarks of Professor Landsman

I would like to begin by thanking the Civil Justice Institute for inviting me to speak again, to address a topic that I think is very important today.

Corporate energy, productivity, and innovation are among the key elements in American prosperity. I should make it clear that neither I nor the paper intend to suggest that the corporation is a bad thing or needs to be terminated. That said, the distinguished American theologian Reinhold Niebuhr, cited as a key influence by such a diverse group as Martin Luther King, John McCain, and Barack Obama, reminded the nation in 1933, in his groundbreaking book, *Moral Man and Immoral Society*[1] that

Corporate energy, productivity, and innovation are among the key elements in American prosperity.

> [i]n every human group there is less reason to guide and to check impulse, less capacity for self-transcendence, less ability to comprehend the need of others and therefore more unrestrained egoism than the individuals, who compose the groups, reveal in their personal relationships."

Niebuhr wrote that in 1933. It was an observation that proved prophetic. The rise of the Nazis, with their violent antisemitism and their Holocaust, are a demonstration of the insight that Niebuhr had.

Niebuhr's insight has, I think, a broader set of implications as well. The corporate form can let loose dangerous and injurious attitudes that, in the hands of the wrong leader, can sweep away people's solid moral values and their essential decency. The question is when that might happen, and what, as lawyers and judges, we might be able to do about it. It is the thesis of my paper that one of the surest signs of a seriously troubled corporation is its responsibility for multiple deaths as a result of its activities, most particularly if those activities violate established law or legal norms. Unfortunately, in recent times, some of our largest corporations have lost their way in precisely that manner.

We would hope that our regulatory bodies and our law enforcement agencies would address these sorts of behaviors. Recent evidence suggests the failure of both in a significant number of cases.

My paper has three case studies that I think focus powerfully on deadly corporate failures and suggest the need for more effective civil litigation to at least particularly fill the gap left by regulatory and prosecutorial failure.

Massey Coal

The first case study concerns Massey Coal, a poster child for the runaway corporate organization. Much of this story about Massey Coal is well told in a recent book that I cited in the paper: Kris Maher's excellent book, which is titled *Desperate*.[2] It is, in part, a tale about pollution so vile— that it produced water that was actually opaque and toxic, and sickness for thousands, notwithstanding regulatory hand-wringing for more than a decade.

Massey was able to parlay financial clout, political influence and cronyism to mostly skate above the law.

Massey was able to parlay financial clout, political influence, and cronyism to mostly skate above the law. There's a pretty well-known picture of Massey's CEO, Don Blankenship, vacationing in the south of France with a West Virginia Supreme Court Justice. They were there while a 50-million-dollar appeal was pending

in the Justice's court. The Justice initially refused to recuse himself, although he was requested to do so, and was part of a 3 to 2 majority that overturned the 50-million-dollar verdict. Massey was never really called to account either for its pollution or its bare-knuckles business practices as dealt with in the *Caperton* case,[3] the one that was involved in that appeal.

I would suggest that the results were, in the end, deadly. After thousands of unaddressed pollution complaints and thousands of safety violations, on April 5, 2010, the company's Big Branch mine suffered a series of explosions that killed 29 miners in the largest mining disaster in America in 40 years. There's a monument to all 29 standing outside the mouth of the Upper Big Branch Mine. The coal company improperly maintained machinery that produced sparks that caused an explosion and destroyed the mine. The mine was destroyed, and you can imagine what happened to the men who were inside.

Don Blankenship, the CEO who took the Massey company down that dark path, gives the appearance of being little more than a profit-driven sociopath. Regulatory bodies never ever caught up with him. And criminal liability was too little and came too late, yielding a one-year prison sentence five years after the deaths of the 29 miners—deaths in which he was centrally implicated.

Purdue Pharma

The second case, the Purdue Pharma story, is, if anything, worse than Massey Coal. Again, the facts are well laid out in Patrick Radden Keefe's award-winning book, *Empire of Pain*.[4] Purdue manufactured Oxycontin, an opioid that the company falsely claimed was less addictive than other pain medication. Sales of Oxy were promoted by every strategy the company could devise, and it flooded the United States market with essentially deadly narcotics.

Sales of Oxy were promoted by every strategy the company could devise, and it flooded the United States market with essentially deadly narcotics.

The criminal law came into play in 2007, with a conviction of three executives for misdemeanor misbranding. But those convictions were actually no more than a literal throwing of minor employees under the bus. The three dispensable functionaries were lost. The company sailed on.

The real beneficiaries of Purdue's billions in profits, and the drivers of its conduct, were the Sackler Family. Richard Sackler was the one-time CEO of Purdue and a guiding hand throughout much of Purdue's rise to greatness as a pharmaceutical company. His central role, and that of his family, in running Purdue, was hidden by discovery limitations and secrecy for years. Richard and the rest of the family were the main beneficiaries of the huge profits generated by the sales of Oxy.

In 2007, after the criminal prosecution I just mentioned, with the help of McKinsey & Company, America's premier consulting firm, they tripled the sale of Oxycontin in America from 2007 to 2013—tripled it.

Today, the family has apparently won protection from the bankruptcy court by parting with a small part of its fortune, a fortune built on the addiction and deaths of several hundred thousand Americans.

The GM Ignition Switches

The third case, the GM ignition switch story, is not so deadly, but it's sadly similar. That story is told in great and disturbing detail by Former U.S. Attorney Tony Valukas, who did an internal investigation with his Jenner & Block team. What they found was a deadly cover-up by GM engineer Ray DeGiorgio. The cost in human terms was at least 124. I believe that actually hundreds more died because of the ignition system problems that cut steering power to automobiles and depowered airbags.

Mary Barra, CEO of GM, apologized for the losses, and the company paid $900 million in a deferred prosecution agreement. But the company walked away from the mess without real reform or effective oversight.

These cases are but the tip of an iceberg of deadly activity by corporations in America. Hundreds of other lives have been lost through the shoddy construction of commercial aircraft, the delivery of power without preparing for forest fires, and the reckless extraction of oil from the sea beds in ecologically vulnerable settings.

These cases are but the tip of an iceberg of deadly activity by corporations in America.

All of these cases raise enormous questions about regulatory failure: the failure in the Massey case of the EPA and mine safety officials, both local and federal; the failure of the FDA and the DEA in the Purdue case; and with respect to GM, the failure of the National Highway Traffic Safety Administration.

Why all of those failures? Simply put, regulators do not have the resources to stand up against the mega corporation. Further, they seldom have the will to do so, even if they had the resources. Finally, they are stymied by political interference, often generated by dark money contributions to elected officials.

The story is sadly the same with respect to criminal enforcement—too little enforcement, coming way too late. Certainly, that was the case with respect to Massey, as I have said, and also with respect to Purdue. When you think about Purdue and the conviction in 2007, followed by the tripling of the sales of Oxy, you cannot say that was effective enforcement. GM's story is the same, with the addition of the modern corporate escape route—deferred prosecution agreements, decried by a number of scholars particularly, Professor John Coffee from Columbia, whose recent book on this topic I recommend.[5]

What is Left?

What is left? I believe that it is civil litigation, which offers the last potentially effective barrier to large-scale corporate life-taking. But it is hobbled in a variety of ways.

What is left? I believe that it is civil litigation, which offers the last potentially effective barrier to large-scale corporate life-taking.

First, it is hobbled by a lack of the appearance of justice, caused in part by ineffective recusal mechanisms. It took an intervention by the Supreme Court of the United States in *Caperton v. Massey Coal* to overturn the action of the West Virginia Supreme Court that was potentially influenced by very large political contributions.

We need a better set of recusal mechanisms: automatic recusal where that is practical, and a recusal process that is collegial, so the

judiciary speaks with one firm voice rather than putting one judge on the spot. We also need to adopt an "appearance of justice" standard rather than search for some sort of smoking gun in this area.

A second barrier to effective civil litigation is inadequate disclosure. Purdue managed to peddle its narcotics for years without the control of the Sacklers ever being disclosed or pursued. Massey stonewalled on its pollution activities for more than seven years. We need more demanding discovery. We need discovery with less secrecy and sealing, more restrictions on prohibitions like trade secret rules, and I believe we need to narrow the corporate attorney-client privilege.

We need better access to courts. We need more effective use of the class action mechanism that was thwarted by Massey. We need to be intolerant of intimidating tactics like "SLAPP" litigation and other means of trying to drive plaintiffs from litigating. We need efficient, cost-controlled procedures.

Finally, we need to talk about a new problem, and that problem is bankruptcy. Corporations like Purdue and their owners should not get an amoral free ride of the sort they seem to be getting. The irony is that real people in bankruptcy do not get kid-gloves treatment. Corporations (in other words, fake people) should not get value-free excuses.

Courts need to use their common law powers to expand the reach of the law. The use of public nuisance in the opioid litigation is a fine example of the places that we need to go. The impediments to civil redress for corporate killing run even deeper.

I think we have gone too far in giving corporations human—and even superhuman—rights.

I think we have gone too far in giving corporations human—and even superhuman—rights. We might begin with the United States Supreme Court. Its rulings in *Hobby Lobby* [6] and *Citizens United* [7] have vested corporations with rights that are not articulated in the Constitution, and are not appropriate to profit-seeking entities.

Our evidence rules provide a powerful example of where we ought *not* to go. Federal rule of evidence 404(b) prohibits evidence of other crimes, wrongs, or acts with respect to litigants. You cannot show some other bad conduct. That is decent and fine with human litigants. It is not good with corporations. They work by routine acts. They work by past history and experience. To exclude that kind of material with respect to them is to approach it in a way that does not make sense.

Perhaps no recent trend is, to my mind, as disturbing as our fear of the colloquially referred to "death penalty for corporations." This was our misguided reaction to Arthur Andersen and its demise. It was wrong then. It is wrong now. Real corporate wrongdoers ought to expect *not* to continue to do business.

The power of the civil courts has been essential to the preservation of the Rule of Law in the United States. I believe that we need to harness that power to address the challenge of deadly corporate misconduct.

Comments by Panelists

Professor Andrew Bradt, UC Berkeley School of Law

The main point that I hope to make in my remarks is that what Steve Landsman describes is a central and perennial problem in American government. That is, we rely on our courts to do an enormous amount of work when it comes to enforcing the law. But in order for that to happen, there needs to be a procedural system that ensures that litigants will have access to court, and that those courts are able to reach the merits of cases. That is to say, American litigation, civil litigation has never been just a gap filler for top-down government regulation. Instead, it is a central feature of American government. I believe that recognizing that litigation is a central feature of American government is one of the ways to start rethinking and addressing the problems that Steve notes.

> We rely on our courts to do an enormous amount of work when it comes to enforcing the law.

Courts as Government

Why do I say that we rely on courts to do much of the governing in this country? That is an intentional and uniquely American choice. My Berkeley colleague, Bob Kagan, has called this "the American commitment to adversarial legalism."[8] Because, unlike European countries, which by and large rely on top-down regulation by the central government, we rely on private enforcement of the law through civil litigation. Kagan argues that that is because of a particularly American paradox. We care deeply about protecting our rights. But we also have a deep suspicion of centralized government power.

My Berkeley colleague Sean Farhang has expanded on this idea in his book *The Litigation State*,[9] in which he notes that it has been a conscious choice of the Congress and state legislatures since the 1960s to effectively deputize lawyers to enforce new rights, say, against employment discrimination or environmental contamination.

The choice of the legislatures was to enforce those rights not primarily through top-down regulation but to incentivize private litigation to enforce the law. Not only would that be effective by unleashing the profit motive, it would also be effective because it would take away the ability of future executives running administrative agencies to water down the enforcement priorities of the legislatures who passed those laws.

> Litigation in America has never been only about vindicating individual rights but has always been central to American government.

I say this simply to drive home the point that litigation in America has never been only about vindicating individual rights but has always been central to American government. However, in order for this system to work, there must be a procedural system that supports it, one that can provide access to court and efficiently handle litigation.

I teach civil procedure. I always start off my first-year procedure class with two quotes that emphasize that procedure is about the power to enforce the law. One is from the famed law professor Karl Llewellyn, who said that "what substantive law says should be means nothing except in terms of what procedure says that you can make

real."[10] And the former Michigan Congressman John Dingell, speaking in a saltier manner, said, "I will let you write the substantive law, and I will write the procedure, and I will screw you every time."[11]

The drafters of the original federal rules of civil procedure in 1938 understood this well—most especially Charles Clark, who was then the dean of Yale Law School and later a federal judge on the Second Circuit. He understood that the rules should both encourage easy access to court but also encourage the ability of judges to reach the merits in those cases. Hence, innovations that simplify procedure, like notice pleading, open discovery, and rare summary judgment. Clark also believed that those rules should have a lot of flexibility baked in, because, like his fellow realists, he believed that judges should have wide discretion to ensure that justice was done in the individual case.

Multidistrict Litigation

This ethos extended through the 1960s and the expansion of possibilities for aggregate litigation like class actions under revised rule 23 and multidistrict litigation, which came to us in 1968.

Judge William Becker, a district judge from Kansas City, who was the primary architect of the MDL statute, testified in Congress in 1966 in favor of the legislation. He said the following about why it was necessary, and his language, I think, was rather striking: "We feel that there is a litigation explosion occurring in the federal courts along with the population explosion, and the technological revolution, that even with the addition of new judges, the case load is growing and new tools are needed by judges in order to process the litigation, which results from the matters I have mentioned, as well as from the extensions of jurisdiction from the federal courts and acts of Congress. This is a method which we think will work."[12]

A litigation explosion is not to be solved by eliminating the cases, but by ensuring that judges have the tools to process them efficiently and fairly.

Note the notion that a litigation explosion is not to be solved by eliminating the cases, but by ensuring that judges have the tools to process them efficiently and fairly. That's very different from the ethos that we have seen grow in the last decades, that Professor Daniels will talk about this afternoon: the idea that litigation is not to be facilitated, but eliminated. Indeed, Supreme Court decisions on matters like personal jurisdiction, the Federal Rules of Civil Procedure, pleading summary judgment, and class actions have made it more difficult for courts to accomplish the governing function they are meant to do in the federal system.

Happily, the vast majority of these cases interpret the federal rules and they are not binding on the states, which leaves the initial system, or the original ethos of the system, intact throughout most of the country, and empowering judges with the flexibility they need to ensure that cases are able to be decided on the merits.

Indeed, procedure *has* to facilitate litigation in order for litigation to serve the regulatory purpose it is meant to serve in the American system. It largely lies in the hands of innovative judges to ensure that litigation can achieve that function. Efficiency is not a dirty word, nor should it be thought to be a dirty word on either side of the "V." Neither is effective case management, which allows judges the flexibility to innovate and the flexibility to be creative in order to address the kind of massive problems that Professor Landsman describes. In other words, judicial recognition of the role and power of procedure is essential to making litigation effective and making civil litigation effective is essential to the American project of government.

Today's papers, by both Professor Landsman and Professor Daniels, suggest that procedure is as important, if not more important, than the substantive law. Indeed, some of the failures in governance that Professor Landsman describes in his paper can be rooted in failures of procedure even if the substantive law might be thought to be effective to accommodate new situations.

What I would urge in thinking about the kinds of problems that Professor Landsman raises is that these are often issues that can be dealt with through the flexibility baked into our uniquely American procedural system, and that we should avoid the public relations problems that that system has developed over the years, like problems that have been suggested about open discovery, the use of juries, and notice pleading. Luckily, that sort of attention and that sort of reaction to that PR problem, is happily placed in hands of our very effective judges.

The Honorable Martha Walters, Chief Justice, Oregon Supreme Court

Thank you for giving me this opportunity to think about these important questions. It is wonderful to be here. The paper that we have all read starts by stating the assumption that the executive branch of Government is responsible for the enforcement of laws designed to curb serious misconduct. Yes, it is. And we are all responsible for the enforcement of laws designed to curb serious misconduct.

> Unless we all hold ourselves responsible to enforce the Rule of Law, money and power will prevail.

I do not see the issue as whether there is a gap to fill or a role for the civil justice system to play as a result of executive branch failure. Unless we all hold ourselves responsible to enforce the Rule of Law, money and power will prevail. That is the way the world, and we imperfect human beings, are made. We are all selfish and greedy, and, knowing that, we have designed laws to govern our behavior. That system of laws will not work unless we all abide by the laws and help ensure that others do as well.

Yes, of course the civil justice system must be strong and do its part to hold wrongdoers accountable, but not because of governmental failure; instead, because it takes everyone working together to give the heft and not just lip service to the Rule of Law.

We can take the examples that the paper provides—the Massey, Purdue Pharma, and GM cases—as demonstrating ineffective governmental response and horrific results. And certainly, government did not move quickly enough or with enough clout, and that cannot be overstated. But neither did the civil justice system work quickly and effectively. Do not forget that civil justice claims cannot be brought until after harm results. And it took too long to get to verdict with too many abuses along the way even in the pedophile cases that Professor Landsman cited as successes.

Grave Misconduct

Addressing grave misconduct is difficult. "Any problem worthy of attack proves its worth by fighting back." That is a little quote that my dad had in front of him, and that I have sitting in front of me. It is hard work. But I think that we should not avoid some celebration as well. In those cases that are discussed in the paper, fines were levied. People were put in jail. Verdicts were rendered—maybe not enough, but we have to call attention to what we are able to do as well as what we are not able to do.

> Addressing grave misconduct is difficult.

There was a social and global benefit provided by those in all realms of government and independent civil action who did take concerted action in those cases. They did. It took too long to bring down the pedophile priests as well, way too long. But I would like to see a paper (and maybe it has already been written and I just have not read it yet) that focuses on the successes. What are the factors in the cases in which we have been able to change the course of corporate action? I know we have. I know all of you could start to list some of those. What were the factors that made a difference? When were the instances in which we were able to get there before bankruptcy occurred, collection was able to happen, and change resulted?

Civil litigation, no matter how imperfect, is a huge hammer for the good, but only if people believe that it can be used. Part of having them believe that is to point out instances in which it works. If we want to make it even more effective, I think we need to focus on those factors and make them evident out in the world.

All judges hate discovery disputes, but we have to dig into those facts.

A couple of things have been mentioned that I think we, as appellate judges, can help with. One is ensuring adequate timely discovery, and the other is in determined efforts to get cases to trial on a timely basis.

All judges hate discovery disputes, but we have to dig into those facts. We cannot just be saying both sides are unreasonable, that it is all difficult. No. There are instances in which we can say it has to happen and it has to happen now and the same with the attorney fee disputes, which we also do not like. But sometimes attorney fees need to be awarded so that the right thing happens.

In the appellate courts we have to decide our cases more quickly, and we have to make sure that the trial courts are doing the same. Days matter. Every day matters. Delay is the enemy of justice.

Support for the Courts

Part of this, and I think this will resonate with all of you, is that we need adequate support for our courts. They are not sufficiently funded. We have to make our case as courts, as well as the plaintiffs and the other litigants making the case, for the correct procedures, the correct claims to be made. We cannot process those claims, as has been said, if we are not sufficiently funded to have adequate judges and staff to move the cases.

Just a couple of other points from the paper that I hold particularly close just because of my own experience. The first of those is the importance of state law. Most of the claims that are made that can help to curb this great misconduct are state law claims, common law claims, and statutory claims. And as judges, we have an opportunity to recognize those claims and ensure that they can be brought. We should also be cognizant of arguments that these claims are preempted by federal law. I recommend to you the article that is noted in the paper we read, by Catherine Sharkey.[13] She has done a lot of good work on preemption. Unless there is a clear intent by Congress to preempt state law, we can give effect to the laws in our state. The Uniform Law Commission has just adopted, for consideration in the states, anti-SLAPP legislation that you might look at and recommend in your states.

Number two, we need to carefully guard the right-to-jury trial. We know that jury trials were conceived as a check on power, and it is a very effective one. Be skeptical of arguments that arbitration can be a fair substitute.

And three, we need to recognize the importance of whistleblowers and claims by whistleblowers. When I say that we are all responsible for enforcing the Rule of Law, I mean all of us as individuals, not only in our role of judges. We must abide by the law and we must take on, every day, those who do not. It is easy to go along, and most of us do.

In my practice before I joined the bench, I represented whistleblowers in many of my discrimination cases. The most potent claims that we had were claims for retaliation. No one likes boat rockers. But the justice system is dependent on them. Those who report must be listened to. Those who give testimony, we must thank. Those who have been punished wrongly, we must make sure that they are praised.

Looking out at you, I imagine that there are a number of you who have experienced, yourselves, how hard it is to stand up. Imagine standing up against the power of Massey or Purdue Pharma or GM. The people who do that are courageous heroes. We have to show that their message is heard, that it matters, that what they do does make a difference in the fight— and it is a fight for justice.

Lana A. Olson, President-Elect, DRI-Lawyers Representing Business

It is indeed an honor to be here on behalf of DRI to speak to you. I certainly appreciate the opportunity to have different voices on these issues. I think that is exceedingly important that we continue to do that. Thank you and I appreciate being here.

I certainly, as you would expect, have a lot of comments that I could make about the very important and interesting things raised in Professor Landsman's paper.

There are two key issues that I really wanted to focus on over the next couple of minutes, following just a couple of quick introductory comments. From my perspective as a defense lawyer, I did not see anything in the paper that suggested to me, and I am not sure that that is even what Professor Landsman was suggesting, that simply having more litigation is the cure for many of the issues that he raised.

I was laughing with my friend at the end of the table who was an officer for the AAJ that we all agree that, without the plaintiffs' lawyers, we defense lawyers would not have a job. We want to make sure we are not putting each other out of business.

But some of the examples raised in the paper to me, while certainly evidence of bad behavior, I see as extreme examples. They aren't terrible examples, but they are more extreme examples. In my opinion, extreme examples do not always make for good public policy.

And certainly, if somebody wants to seek out examples of bad behavior, all you have to do is turn on the TV these days. There are lots of bad behaviors that we see in many aspects of our life, unfortunately. If I had more time, I could have told you some stories from my personal experience about bad behavior on both sides of the V, and unfortunately even in our judicial ranks on occasion.

We live in a world where, if everybody did what they were supposed to do, most of us in this room would probably not have as much work.

We live in a world where, if everybody did what they were supposed to do, most of us in this room would probably not have as much work, but that is just not the reality that we deal in. My point there is that focusing on those extreme examples, especially when focused primarily on one side of the judicial system involved in litigation, perhaps does not look as clearly at our civil justice system as a whole.

But I'll get to the two issues that I really wanted to focus on today. They are a little bit different from those of the other commentators, but certainly one of them was raised by Professor Landsman. It's a call for help essentially on something that I think is important to you as judges. That is, ensuring that we have fair, unbiased judges deciding the cases before them, with clear rules on how they can and should do that. I particularly appreciated Professor Bradt's comment about giving judges the tools to be able to make that decision.

Judicial Selection

I want to focus on two aspects of this. One is the selection of judges. How are we selecting the judges who are so critical in our civil justice system? How do we ensure that our judges can be ruling and making decisions without fear or favor? And then, secondly, as Professor Landsman pointed out, having clearer standards for recusal. I think that is certainly a major takeaway from the paper.

Let me talk for just a moment about judicial selection. I did not see on the attendee list any judges from Alabama, where I am from. But I come from a state where there are partisan elections, and judges are permitted to ask for campaign donations directly. My state has made headlines over the years (among other things that we tend to make headlines for) for having some of the most expensive judicial races in the country. Our judges run on party tickets, and politics unfortunately tend to take front and center in those races.

There has been a lot of study, and a lot of articles, over the last ten years or so about the unprecedented money that is spent on judicial elections. You may be familiar with an entity called the Brennan Center at the University of Virginia, that looked at the 2019-2020 judicial election cycle and determined that $100 million was spent on judicial races in this country. Think of what we might be able to do with that money for some other reason if we could perhaps figure out a better way.

Partisan judicial elections, especially with the amount of money that is now being spent on them, make your jobs as judges harder.

I cannot help but think that partisan judicial elections, especially with the amount of money that is now being spent on them, make your jobs as judges harder. And in particular, I worry that that can erode public confidence in our judicial system. Judges are to decide cases fairly based on the law, without having to think about financial or political pressure. But if you have seen any of the political ads in my great State of Alabama, it would be hard for the average person not to wonder if judges are anything other than political people in robes. Unfortunately, in Alabama the ads you see for judicial races do not really have much to do with the judges' qualifications. It is much more focused on politics.

Several years ago, DRI decided to examine the state of the judiciary in the U.S., and formed a taskforce to look at the current status of issues facing the state courts at all levels. They conducted in-depth interviews with judges, lawyers, and folks out in the populace, to look at issues that threaten the independence of judges. They wanted to figure out how lawyers (and for DRI, that means defense lawyers, but it applies equally) can and should play a role in ensuring that independence.

One of those key issues was looking at the impact of judicial selection methods. I can't tell you as much as I would like to, but I would love to refer you to this paper. It is on the DRI website. It is called *Without Fear or Favor*.[14] It is a couple of years old now but it is certainly something that I think you would find very interesting. One of the other things we talk about is funding for our courts, to make sure that there is adequate funding to do what you need to do.

I also wanted to throw this out there, because it is from Alabama. There is a former Supreme Court Justice. Some of you may know her: Sue Bell Cobb. She ran in one of the most expensive judicial races in the country. She won. But she wrote a very interesting article called "I Was Alabama's top judge."[15] She wrote, "I am ashamed of what I had to do to get there." She talks about some of the concerns she has, having gone through the process with partisan judicial elections. The article is online, in *Portico*. She was also interviewed about her experience by NPR, and you can listen to Terry Gross talk to her about that.[16]

Recusal

Last, but equally important, is the issue of recusal. Even after winning a judicial seat, there is certainly more that we can do to give clearer standards and rules about recusal. I certainly agree with Professor Landsman about the importance of that issue. I actually wish we had been able to spend a lot more time on what that might look like and how that might have assisted with some of the issues that he raised in the Massey case. I do not believe it is a one-sided issue related purely to corporate donations. That is certainly part of the discussion, but we cannot ignore donations by many other groups and entities as well.

Even after winning a judicial seat, there is certainly more that we can do to give clearer standards and rules about recusal.

I submit that there are certainly better, more detailed, and more transparent ways to address the recusal issue. Having better rules will not only assist our judges in determining when recusal is necessary. I believe it will also help improve the public perception of the judicial system as a whole.

The problems facing the judicial branch in America are real. We certainly cannot take for granted that elected officials will protect our judges, and, indeed, the trend seems to be going the other direction. Nor can we assume that judicial independence and accountability, which are the hallmarks of the Rule of Law in our system of government, will forever be in existence.

We (and I am speaking on behalf of the lawyers who appear before you) should use our knowledge and our resources to focus on these critical issues affecting the judiciary and figure out if there is perhaps a better way to select judges and provide information about recusal.

N. John Bey, Bey & Associates, Atlanta, GA

Four different areas really jumped out at me as I was going through this paper. You got your judges. You have your attorneys. You have your corporations. And then of course you have the people who have been harmed or killed. For our purposes here, we have the attorneys and judges. I am sympathetic, because I am married to a trial court judge. I have friends at the appellate level. I think that I am sympathetic to a lot of the things that you are going through. You have saturated court rooms. The questions of when to recuse and when not to recuse is a very difficult one. It is the "wild, wild west," state to state, on what those rules are. Those things are difficult. But let us talk about some of the things that were discussed in the paper and where I see ways where we can deal with those.

I want to focus for a second here on the corporations, because the corporations really hold a lot of the cards. As we are sitting here talking about things that we all can do that are different, we really have to take a look at the corporation. We talk about some of these late disclosures and other things. I do not think the defense attorney in many cases will even know about them. The corporation gives them the information whenever they give them the

information, and that is when it is disclosed to us. I do not think that everyone is trying to hide something. But if you have these really well-funded bad actors, how do we combat those folks? I think that is what a lot of what we were talking about was about.

Discovery and Transparency

Part of that is this discovery process and transparency, and that is where I think a lot of our trial judges and appellate judges have to dig down and try to figure out how can we get more transparency into what is going on. In a lot of these cases that we are talking about, things do not necessarily click or happen until we get transparency.

In the Massey case that Professor Landsman discussed in his paper, there were some really bad acts for a long time. I think we are talking about the 1970s to 2004 before things really got rolling with the litigation. But let us say they make all of those profits throughout the years, which is funding this litigation, and those 29 people do *not* die. Let us say they have a change of heart, or a change of leadership, and they say, "We made out like bandits." None of the other things, none of the other cards fall. How do we stop that a little bit earlier? I think that is where the transparency in that discovery process is really important.

> The GM case . . . almost would never have happened if it was not for some brave judges who allowed the attorneys to dig a little bit deeper.

I loved it, Chief Justice Walters, when you were talking about how we all have to shine a light on that and try to figure out how we can do that, and all work together.

Another question I think we have to ask ourselves is whether this is a common thing, to impede justice, or whether it's uncommon. I agree that there were some examples in the paper that were definitely on the extremes. I think that is the point—to shine a light on some of those things. But is it uncommon? From what I see in my practice, I just do not think it is that uncommon. I am from Ohio but I live in Georgia. That GM case involved one of our local attorneys. You look at some of the disclosures and things that happened. That was the case that almost would never have happened if it was not for some brave judges who allowed the attorneys to dig a little bit deeper. If you just take that initial discovery at face value, you will never find out about those ignition switches. There were sometimes two or three rounds of fights over that information. They finally got it, and they really are good lawyers. And that is how that happened.

Let us look at it differently. As I was reading the paper, I was thinking, "Wow, it was lucky that this ever got to justice." If you do not have someone who is well-funded, well-versed in the law (and let us be honest—every lawyer is not going to be equal), and that person who has been hurt or killed, which lawyer's door they walk through is really kind of arbitrary to some degree. You have to really think about what the safeguard is for making sure that justice is there. I think the safeguard is in the judiciary and it is with transparency.

Next, you have this question of whether the executive branch and the judiciary can be neutral. Massey ran the kind of campaign that I do not think is unknown to a lot of different corporations.

Bankruptcy

It reminded me of some of the things that we are dealing with now with Johnson & Johnson. I do not know how familiar you are with it. But there is a Johnson & Johnson case where they are taking all of their liability and they are putting it into a corporation and then declaring bankruptcy for the liability, while obviously still running a billion-

dollar organization. These are the types of things that I think are going to be on the cusp, and the future of what we are going to be looking at and have to really deal with in the next few years.

I think that the work is on all four of these legs: the judges, the attorneys, the corporations, and the people who have been injured or killed. I think the work that the judges do is amazing. I think that if there is anything that you all can do to help is in the transparency part, that would be good. To the extent that there should be more recusals, I really think that is going to be a state-by-state matter, and that is something that we will have to work on with each bar, and that is a large project, but I am sure you are up to the task. Everybody is up to the task on that.

But if there is something that immediately everyone can do, it is to enforce transparency to find these needles in the haystacks that are out there. Then, if we have the transparency, but the needles are not there, and there is a summary judgment, then that is what is supposed to happen. But if the needle *is* there, and we are able to get some justice for a client, then *that* is what is supposed to happen. I appreciate your time.

Response of Professor Landsman

Well, what fun! What interesting perspectives we get as we start, as lawyers and judges, to talk about what we hope for our justice system.

I would like to start with a positive story. I did have a lot of negative stories in the paper, for which I apologize. The positive story begins with one of the saddest and most reprehensible kinds of conduct I can imagine, and that is the seduction of children. It was a bunch of trial lawyers, mostly in Louisiana, who began the process of raising questions about pedophilia amongst priests. But it is not really about priests. It is about all organizations with power that deal with children.

> [Resolving discovery disputes] seems always to take a lot of time. But that is okay if in the end we can get it right.

And those lawyers suffered tremendous criticism that their clients were phonies, that they were money grubbers, that everything was out of proportion. They were not. It took them 25 years, and a heartbreaking amount of litigation. But do you know what they did? They changed the world. They changed the world for children. They required the society to dig in and address the difficulties that were being produced by these terrible seductions. It was lawyers who did that. That is the story that tells me that civil justice has the power, and that is very important as far as I am concerned. That is where I begin. I begin with that faith that we can do this, even though sometimes it is going to take a terribly long time.

I must say Justice Walters is right to say we should do it faster. But gosh, it seems always to take a lot of time. But that is okay if in the end we can get it right. We eventually did get it right in tobacco. We are struggling to get it right in asbestos. But really, with respect to those children, we have done a hell of a lot. And that is the model that I think we always want to keep in the back of our mind.

Good Litigation

Andrew Bradt reminds us of something that I think is very important, that I had lost sight of until I was sitting here, and that was that what we talk about with respect to procedure should not be about getting rid of cases, but about how to do them well, now to do them inexpensively, how to do them fast, how to do them right. That is what

we need. We have been caught up in some Supreme Court of the United States rhetoric about less litigation. It is not about less litigation. It is about good litigation. It is about efficient litigation. It is about inexpensive litigation. Those are the things that we can do and we can do it, as Andrew says, with procedure. I think that is very important to say.

Another point that came to me as I was listening to, again, Justice Walters: the states are incredibly important. It is not about nine folks politically wrangled into sitting on a bench in Washington that is the key. It is justice done at the state level, law made at the state level, procedure effectively controlled so that things move quickly, and access to courts, all at the state level. That is where we are going to deliver on the promise of justice for all. That is where we are going to find it.

Is the picture that some of us on the panel have painted an exaggeration? I wish I thought that, but I really do not. We are talking about big-time corporations. As I adverted to briefly, the Boeings of this world, the PG&Es of this world, the British Petroleums of this world, they are all out there. Am I talking about the world's top 50? Sure I am. I am not talking about just a few of them. I am talking about a lot of them. I do not think that the picture being painted is an exaggeration.

> Let us give our judges a decent chance to do a decent job. Give them recusal mechanisms that respect them and respect justice.

At the end, though, we have a real "kumbaya" moment. We all seem to agree that recusal can be handled better. If we make it really good, I suspect that some of that money being spent on those elections is going to dry up, because you won't get the benefit that you poured all the money in to get. Maybe we need to stand together as lawyers and judges on both sides of the bench and of the bar to say, "Let us give our judges a decent chance to do a decent job. Give them recusal mechanisms that respect them and respect justice." When we have those kinds of mechanisms, it is not going to be about game-playing. It is going to be about leveling the playing field. If we came away from this Forum with just that one idea, what a great thing that would be. What a great piece that would be for all the rest of the stuff.

Court funding? My gosh. We have *got* to do a better job. There is just no doubt about it. Judges are excellent, smart lawyers. They are people with experience, and insight, and heart. We ought to give them a chance to do that job well. Are we up to the challenge? I think we are.

Questions and Comments from the Floor

Judge Lucy Inman, North Carolina Court of Appeals: We have new recusal rules in North Carolina that were developed in the last year. The traditional rule had been that the individual judge or justice was responsible for deciding if he or she could essentially be fair.

We had a recusal motion for one of our Supreme Court justices in some litigation arising out of our legislature. The justice's father is the president of the state legislature. We had other recusal requests, including for one of the sitting justices, who is up for reelection this year, and the accusation was that, "You cannot possibly be fair and impartial on an election matter, because you are on the ballot."

Our new rule provides that a judge or justice facing a motion for recusal can choose to do one of two things: one, put it to the vote of the entire court; or two, decide individually and provide an explanation for why that judge is not recusing. And seeing the explanations from these justices about why they were not recusing allows the public

to decide for themselves, "Does that look like a convincing reason, or does that look like I am being handed a lie?" Those recusal orders are there for everyone to read and see. I recommend them to everyone. Thank you.

Justice Peter Kelly, Texas First Court of Appeals: I'm from Texas, which is very much a red state, controlled by tort reformers. I was an AAJ member for 25 years before I was elected to the bench. One of the problems with focusing on recusal is just where the money comes from.

On the defense side, the money comes from the principles. On the anti-tort reform side, the money comes from the plaintiffs' trial lawyers. Because the principles can so diffuse the money and there are so many actors, it's not even a quid pro quo of a thousand-dollar contribution for one particular ruling on one particular case. It's that landlords in general want to limit liability; manufacturers in general want to limit liability. Because they are able to diffuse the money, you cannot trace the money to a particular quid pro quo. With the plaintiffs' lawyers a few years ago, it was easy to trace whoever gave X amount to a candidate because there are actually lawyers appearing in court. It is very difficult when you are fighting the tort reformers to trace where the money is coming from and what the particular reason was for that money. I think the emphasis on recusal is a little bit misplaced. You can put a lot of energy in there and still not solve the problem.

Gerson Smoger, Dallas, Texas: I will take the liberty of giving a personal experience from a case I was involved in in Illinois. There were two very large defendants that had very large verdicts against them. One was State Farm and one was Philip Morris. They elect judges locally in Illinois. It is not a statewide election. In that small area where they had the election at the time, Barack Obama was running for the Senate. The amount of money spent on that one small area for the Supreme Court judge was more than all the other money spent in the entire State of Illinois on all the elections that year. The judge got elected. There was a recusal motion, because his money came from the parties to those two cases. There was a motion was for the judge to recuse himself, but he declined to do so. The vote against recusal was 1 to 0.

Michael Withey, Seattle, Washington: On the issue of whether the kinds of examples that Professor Landsman has described are common, I think it is basically business as usual, and I think it will be until we adopt a system in which we expect prosecutors and state attorneys general to actually criminally prosecute the wrongdoers of the kinds of things that Massey and General Motors did, as they do in Japan and China.

I think it is basically business as usual, and I think it will be until we adopt a system in which we expect prosecutors and state attorneys general to actually criminally prosecute the wrongdoers.

Professor Landsman, do you think that that is on our agenda? Do you think we should start calling for criminal prosecutions, as happened in Purdue? Because as long as the regulatory system is being eviscerated, the regulatory agencies are not going to be able to serve their function.

Professor Landsman: If you think back to around the year 2000, the seventh-largest corporation in America was the Enron Corporation. The CEO and the CFO went to jail. The Supreme Court attempted to bail them out, but it was already too late. And Arthur Andersen, at the same time, went down the tubes.

Twenty years ago, we were prosecuting those folks. We did it with WorldCom and Tyco. We did it in a whole bunch of cases, for instance in the savings and loan industry—a thousand prosecutions, 800 convictions. It is only

for the past 20 years that we have not been doing it. Do I think we should be prosecuting? Heck, yes. Do I think the white-collar bar is very powerful, very sophisticated, very tough to beat, and has intimidated the prosecutors? Yes. I think all that has happened. We need to have a reset in the mind, but it is very tough to do. We are in an era where it does not seem that we are willing to accept that. Should we? Yes. Those people used to go to jail. They should start to go to jail again.

Judge Michael Wilson, Hawai'i Supreme Court: Aloha from Hawai'i: We have an issue in Hawaii that has not been addressed here. But it is important in terms of corporate responsibility and in terms of the issues of the day, access to justice and the kind of credibility that the system has after *West Virginia v. EPA*[17] with young people. It has to do with the climate problem. You might characterize it as a somewhat desperate effort of young people to get the attention of regulators as well as judges. They have been centering around a concept of "ecocide"—prosecuting based on what would be considered criminal intent that translates into knowingly, intentionally damaging the environment at the highest levels of government or the highest levels of corporations.

> Twenty years ago, we were prosecuting those folks. . . . Do I think we should be prosecuting [now]? Heck, yes.

I wanted to get a response, particularly from Professor Landsman, because you have looked historically at this development of corporate responsibility, or the lack of it. How would you respond to this process that *The New York Times* wrote about a couple of days ago[18]—this matter of losing confidence in the judicial system, losing confidence in the regulatory system, growing, powerful cynicism that young people have that this system of justice is not working in the United States anymore with respect to the most important legal issue that humanity has ever faced?

Professor Landsman: I am so glad we have an easy question to end things. I am the father of three sons. I do not know what kind of a world I am going to be leaving them. The question involving the future of our planet and the way we either attempt to preserve it or ignore the problem that we have is as large a problem as there is.

It makes me think though about a book that I read by a wonderful law professor named Timothy Lytton. He wrote a book about food regulation. It is published by the University of Chicago Press—a terrific book.[19] His point was that, with big social issues, it often takes a heck of a lot of time. It is not just in the courts but it is in the press and it is in the way people's minds change. He talked about the regulation of milk quality. He said when the newspapers started to publish stories that children were dying and that their mothers were left with no choices to feed them safe milk, there started to be a concern in the legislatures and there started to be a concern in the courts. There started to be a concern even amongst regulators. That story is very much like the priest story, like the church story—it is a social movement that takes time, in which litigation and lawyers are a critical part, but they are not everything. I find this incredibly discouraging, and my sympathies are with my sons in their discouragement. But maybe we all need to push together, and that may take a lot of time. That is the best answer I have, which is not a very good one.

Notes

1 Reinhold Niebuhr, Moral Man and Immoral Society: A Study in Ethics and Politics, 1932.
2 Kris Maher, Desperate: An Epic Battle for Clean Water and Justice in Appalachia (2021).
3 Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).
4 Patrick Radden Keefe, Empire of Pain: The Secret History of the Sackler Dynasty (Anchor 2022).
5 John C. Coffee, Jr., Corporate Crime and Punishment: The Crisis of Underenforcement (Berrett-Koehler 2020).
6 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
7 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
8 Robert A. Kagan, Adversarial Legalism: The American Way of Law (2nd Ed. 2019).
9 Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (Princeton University Press, 2010).
10 Karl N. Llewellyn, Jr., The Bramble Bush: On Our Law and Its Study (Oxford, Sheppard Ed., 2009).
11 Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983) (statement of Rep. John Dingell).
12 Quoted in Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831 (2017).
13 Catherine M. Sharkey, *Field Preemption: Opening the "Gates of Escape" From Tort Liability,* 50 J. Legal Studies S27 (2021).
14 DRI, Without Fear or Favor: A Report by DRI's Judicial Task Force (2011), https://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-(2007)-(1).pdf?sfvrsn=6.
15 Sue Bell Cobb, *I Was Alabama's Top Judge*, https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503/.
16 Terry Gross, *Judge Says Raising Money To Be Elected Is 'Tawdry'*, https://www.npr.org/2015/03/31/396595322/alabama-judge-says-raising-money-to-be-elected-is-tawdry.
17 West Virginia v. Environmental Protection Agency, 597 U.S. ___, 142 S.Ct. 2587 (2022).
18 Spencer Bokat-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, June 29, 2022, https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html.
19 Timothy D. Lytton, Outbreak: Foodborne Illness and the Struggle for Food Safety (University of Chicago Press 2019).

The Important Role of Civil Justice in America

Erwin Chemerinsky, Dean, U.C. Berkeley School of Law

It is truly a great honor and pleasure to be with you.

Rights are meaningless without remedies. You, as judges and lawyers, know that better than anyone. October term 2021 was momentous in the United States Supreme Court. Deservedly, media attention was focused on the decisions that overruled Roe v. Wade, tremendously expanded gun rights, rejected any notion of a wall separating church and state, and opened the door to challenges to countless administrative actions.

> Rights are meaningless without remedies.

But what did not receive publicity is the way in which the decisions last term continued to close the courthouse doors and restrict access to justice. These decisions are particularly insidious, in part because they do *not* receive media attention. When the Supreme Court says that the government can give unlimited amounts of money to religious schools, and in fact it is *required* to do so, that makes headlines. But when the Supreme Court says no one has standing to challenge government aid to religious schools, the media pays no attention, even though the effect is exactly the same.

I would like to do three things in these brief remarks. First, I want talk about the decisions from this past term that closed the courthouse doors. Second, I want to suggest to you that this is part of a larger trend from the Supreme Court, and one that has too often been overlooked. And then, third, I want to offer some directions for reform—changes that are particularly important for you as state court judges.

October Term, 2021

In discussing October Term 2021, I want to give several examples of cases that might have easily missed your attention, but that have enormous implications of who can go to court and whether rights have remedies. I will not ask for a show of hands, but my guess is that, at least for some of these cases, they are not ones that you have ever heard of.

Let me start with *City of Tahlequah, Oklahoma v. Bond*.[1] It was one of the earliest decisions to come down this term. It arose in Oklahoma. A woman called the police because she felt threatened by her ex-husband, Dominic Rollice. The police came to the house. They found Rollice in a tool shed, a garage-type area. They were questioning him. He picked up a hammer. The officer told him to put down the hammer. When he did not do so, the officer shot and killed him. His estate sued the police officer for excessive force. The officer argued qualified immunity as a defense.

As you know, whenever a government official is sued for money damages—whether it is a federal, state, or local officer—there is always an immunity defense. Some government officials have absolute immunity. You, as judges, have absolute immunity when you are sued under Section 1983[2] for your judicial acts. Prosecutors have absolute immunity for their prosecutorial acts. Legislatures have absolute immunity for their legislative acts. Law enforcement

officers, when they testify as witnesses, have absolute immunity to civil liability. The President cannot be sued for acts taken in carrying out the presidency. But all government officers who are not protected by absolute immunity have *qualified* immunity when they are sued for money damages. The Supreme Court has said that qualified immunity exists unless it is proven that the officer violated clearly established law that every reasonable officer should know.

The United States Court of Appeals for the Tenth Circuit ruled in favor of Dominic Rollice's estate and against the police officer. The Tenth Circuit said that shooting and killing him under these circumstances was excessive force. The officer was far enough away from the man that the hammer posed no danger. And the Tenth Circuit said that, in light of that, the officer didn't have qualified immunity. This was a violation of the Constitution.

The United State Supreme Court unanimously reversed in a per curiam opinion. It is a decision on the merits. The opinion said there is no case on point with sufficiently identical facts; therefore, the officer is protected by qualified immunity. The court said that qualified immunity exists to protect all but the plainly incompetent officer. This is actually one of many cases over the last decade or so where the Supreme Court has reversed lower courts and ruled in favor of police officers, finding qualified immunity.

If the courts insist that there be almost identical facts, there will always be qualified immunity. There are always factual differences from one case to the next.

Think about this for a moment. If the courts insist that there be almost identical facts, there will *always* be qualified immunity. There are *always* factual differences from one case to the next.

I have been encouraged in recent years that there has been great criticism of qualified immunity from both the right and the left. The Cato Institute has strongly objected to qualified immunity. Conservative judges like Don Willett, who was put on the Fifth Circuit by President Trump, has been outspoken in criticizing qualified immunity. And of course, there has been criticism of qualified immunity from the left. But *City of Tahlequah, Oklahoma v. Bond* shows that there is no indication that the Supreme Court is going to change its doctrines of qualified immunity. It very much slams the courthouse doors, preventing recovery for so many whose constitutional rights have been violated.

A second example from this term is *Egbert v. Boule*.[3] Robert Boule owns an inn near Washington State's Canadian border. Perhaps he made a mistake deciding to call it the Smuggler's Inn. It drew attention from a border agent, Erik Egbert, and he followed someone from the airport in Blaine, Washington, to the Smuggler's Inn. He wanted to question the individual about his immigration status and find out if he was lawfully in the country. Boule interjected. He said, "Leave the guests alone." Boule says that Egbert then became violent and threw Boule to the ground. Ultimately, Egbert was satisfied that the guest was properly in the United States and left him alone.

Boule filed a complaint with the Border Patrol saying that Egbert had used excessive force and had acted inappropriately. Egbert then retaliated against Boule. He filed a complaint with the Washington State Licensing Board, saying that Boule was engaged in financial fraud. Egbert went to the IRS and asked that Boule be investigated. Both Washington State and the IRS did investigate Boule. It cost him a great deal of money, but ultimately no wrongdoing by Boule was found.

Boule sued Egbert in federal court for violating his Constitutional rights. He brought two claims. He said that, first, Egbert had retaliated against him for his speech and making a complaint to the Border Patrol. Second, he said that Egbert had used excessive force in throwing him to the ground and the violence that was used against him.

As you know, if a state or local government official violates the Constitution, he or she can be sued under 42 United States Code Section 1983. But there is no federal statute that authorizes federal officers to be sued when they violate the Constitution.

In 1971 in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[4] the Supreme Court said that federal officers who violate the Constitution can be sued directly under the Constitutional provision for money damages. That case involved Webster Bivens. Agents from the Federal Bureau of Narcotics broke into his apartment in the middle of the night and conducted a very degrading and abusive search. He sued the officers for money damages. And the Supreme Court, in an opinion by Justice William Brennan, said that it is the role of the courts to provide remedies for the violation of rights, and the court would infer a damage remedy directly under the Fourth Amendment. Justice John Marshall Harlan, in a famous concurring opinion, said that for people in *Bivens* suits, "it is damages or nothing."[5]

There is no federal statute that authorizes federal officers to be sued when they violate the Constitution.

In the years that followed *Bivens*, the Supreme Court expanded the availability of suits against federal officers who violated the Constitution. In *Davis v. Passman* in 1979,[6] the court said that that if federal officers engage in discrimination that violates the Fifth Amendment's Due Process Clause, they can be sued for money damages. In 1980, in *Carlson v. Green*,[7] the Supreme Court said that federal officials could be sued for money damages directly under the Eighth Amendment if they engage in cruel and unusual punishment.

Since 1980, in every case, without exception, the Supreme Court has rejected the availability of Bivens suits.

But since 1980, in every case, without exception, the Supreme Court has rejected the availability of *Bivens* suits. Time and again, the court has said that *Bivens* is disfavored. But one would think that Robert Boule still could recover because he was claiming a violation of the Fourth Amendment, excessive police force. *Bivens* itself was about the Fourth Amendment. But the Supreme Court, in 6-3 decision, ruled against Boule and said no *Bivens* suit is available.

Think of those whose constitutional rights are violated by federal law enforcement officers or for that matter any federal official. They likely cannot come to court at all.

Justice Clarence Thomas wrote the opinion for the court. He began with the words I just uttered, that "*Bivens* suits are disfavored." He said there can be no *Bivens* suits against border agents under any circumstances. He said also that there cannot be claims under the First Amendment for retaliation. He said there can only be a *Bivens* suit if it could be shown that the court is better suited than Congress for creating a remedy. He said, "If there is any single reason why we should leave this to Congress, no *Bivens* suit is available." The reality, then, is that the Court has all but eliminated *Bivens* suits. *Bivens* has not been expressly overruled, but it has certainly been implicitly overruled.

Think of those whose constitutional rights are violated by federal law enforcement officers or for that matter any federal official. They likely cannot come to court at all.

There was a case in the DC Circuit several years ago. It involved two women, Ariana Klay and Janet Gallo, who had been raped while in military service. They sued the top officials of the military for being responsible for the environment that led to these sexual assaults. The DC Circuit said no *Bivens* suits are available under the circumstances for injuries while in military service, so they were left without any remedy.

My third example from this past term is a case that got more media attention, but its implications, especially for the courts, have not been widely discussed. The case is *Whole Woman's Health v. Jackson*.[8] It involves the Texas law SB8, which prohibits abortion after the sixth week of pregnancy. When it was adopted, it was blatantly unconstitutional. Now, in light of *Dobbs v. Jackson Women's Health*,[9] it is constitutional.

What made the case unusual is that SB8 is not enforced by government officials. The attorney general and district attorneys play no role in implementing the law. Rather, the law is enforced by civil suits. A doctor or anyone who aided or abetted an abortion could be sued for $10,000.

An effort was brought to enjoin the suit. The federal district court issued a preliminary injunction. The United States Court of Appeals for the Fifth Circuit lifted the injunction. And then Whole Woman's Health, a women's reproductive health care facility in Texas, went to the Supreme Court on September 1 for an emergency stay to keep the law from going into effect. That night, in a 5-4 decision, the court denied the preliminary injunction. The five in majority were Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Chief Justice Roberts joined the liberal Justices Breyer, Sotomayor, and Kagan. The court then set the case for oral argument in November and handed out a decision in December.

Any law that creates civil liability where government officials play no role in enforcement cannot be enjoined in federal court.

The court ruled 5-4 that state officials cannot be sued for injunctive relief unless they play a role in enforcing the law. Justice Gorsuch wrote the opinion for the court. It was the same split among the justices with regard to the preliminary injunction on September 1. Justice Gorsuch noted that under *Ex Parte Young*,[10] state officials can be sued for an injunction even when state governments cannot be sued. But the Court said that they can be sued only if they play a role in enforcing the law. Any law that creates civil liability where government officials play no role in enforcement cannot be enjoined in federal court.

Now, of course, anyone who is sued under such a law can argue as a defense that it is unconstitutional, but that takes somebody courageous enough to violate the law first. To use an example that Justice Brett Kavanaugh gave at oral argument, what if a state creates a law that anyone who performs a same-sex marriage can be sued for money damages and the money that would be awarded will be $100,000 or a million dollars? There is a right to same-sex marriage. There is obviously a right to perform it. Could a state create such a law? The Solicitor General of Texas Judd Stone replied to Justice Kavanaugh that such a law would be constitutional. And under the court's decision such a law is constitutional.

California Governor Gavin Newsom proposed and the California legislature adopted legislation that would create civil liability for gun owners under some circumstances, even though there is a constitutional right to have the gun. There is no stopping point to this. Notice how the court is closing the courthouse doors. A state can adopt an unconstitutional law. No one can be sued for an injunction so long as the law is about creating civil liability in instances forced by government officials.

Let me pick one more example from last term. Again, it is a case that might have escaped your attention. It is a case called *Brown v. Davenport*[11]. The specific issue in the case was quite narrow: what is the standard for proving harmful error on a habeas corpus petition?

The reason I discuss it with you is Justice Gorsuch's majority opinion. Again, it was 6-3. Again, it was the six conservatives as the majority. Justice Kagan wrote for the three dissenters. Justice Gorsuch, writing for the Court, said that habeas corpus should be available in federal court only to challenge whether the state court had jurisdiction. He argued that historically habeas corpus was allowed for only to argue that the convicting or sentencing court lacked jurisdiction.

In 1953, in *Brown v. Allen*,[12] the Supreme Court said that habeas petitioners could raise constitutional claims even if they had been fully litigated in the state court. The Supreme Court said habeas corpus exists to make sure that no one is held, let alone put to death, in violation of the Constitution. Justice Gorsuch said *Brown v. Allen* was wrongly decided. The year before in *Edwards v. Vannoy*,[13] Justice Gorsuch wrote a concurring opinion just for himself taking this position. But here, five other justices joined. As Justice Kagan pointed out in dissent, this was just dicta. But six justices of the Supreme Court have now endorsed an opinion saying that habeas corpus should be allowed in the federal court only to challenge the jurisdiction of the convicting and sentencing court. That is the end of habeas corpus if the Supreme Court follows this opinion and makes it the law. Think about how this closes the courthouse doors.

Six justices of the Supreme Court have now endorsed an opinion saying that habeas corpus should be allowed in the federal court only to challenge the jurisdiction of the convicting and sentencing court. That is the end of habeas corpus if the Supreme Court follows this opinion and makes it the law.

The Larger Trend

I want to suggest to you second that this is part of a much larger trend. This is something that the Supreme Court has been doing for a number of years and, again, it does not get much media attention. I think one of the worst Supreme Court decisions in recent years was *Rucho vs. Common Cause*[14] in 2019. It involves the issue of partisan gerrymandering. Partisan gerrymandering is nothing new. It actually takes its name from early American history. A governor of Massachusetts, Elbridge Gerry, engaged in the practice. But what is different now is that, because of sophisticated computer programs, it is possible to engage in partisan gerrymandering with more precision than ever before.

Take the facts of *Rucho vs. Common Cause*. It comes out of the State of North Carolina. At the time, there were 13 Congressional districts in North Carolina. Republicans controlled both houses in the North Carolina legislature. They had a computer run 3000 different maps to produce the one that would maximize the chances of Republicans controlling 10 of 13 districts. In fact, leaders said they would want control of even more than ten districts if they could come up with a map to do that. They were successful.

In 2016, Democrats and Republicans got an almost identical number of votes from North Carolina for seats in the House of Representatives, but Republicans won 10 of 13 races. That occurred in 2018 as well. A three-judge

federal district court found that this violated the constitution—that it denied equal protection. Another three-judge federal court found partisan gerrymandering in Maryland unconstitutional. It said it violated the First Amendment by diluting political influence. But the Supreme Court ruled 5-4 that challenges to partisan gerrymandering are political questions and cannot be heard in a federal court. It does not matter how extreme or egregious the partisan gerrymandering. No federal court can hear the challenge.

> When it comes to challenges to partisan gerrymandering now, the courthouse doors have been closed.

Justice Kagan, in an impassioned dissent, said that, in a democracy, it is supposed to be voters who choose the elected officials. Partisan gerrymandering means it is the elected officials who choose the voters. As Justice Kagan observed: "Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, 'in the Government over the people.'" When it comes to challenges to partisan gerrymandering now, the courthouse doors have been closed.

Another example, which has often been discussed at these programs, is the Supreme Court's aggressive enforcement of arbitration agreements. A case like *AT&T Mobility v. Concepcion*,[15] or, more recently, *Epic Systems v. Lewis*,[16] have aggressively enforced arbitration agreements and closed the courthouse doors to people.

What Can We Do?

This then brings me to the third and final part of my remarks: what can we do about it? The reason I want to talk about it with state court judges is that state courts now play an especially important role in having a forum available for civil justice. The rules on standing that apply in federal court need not be followed in state court. You get to decide your own procedures and rules for standing. You can open your courthouses, even when the federal courthouse doors are closed.

> State courts now play an especially important role in having a forum available for civil justice.

A moment ago, I mentioned the example of gerrymandering, and the "political question" doctrine. In the majority opinion of *Rucho*, Chief Justice Roberts said that there can still be challenges to partisan gerrymandering in state courts under state constitutions, and there have been state court decisions on that in North Carolina, Pennsylvania, and Ohio, where state courts have found there to be a violation. Though I should put an asterisk here, there is a case before the Supreme Court, *Moore v. Harper*,[17] that involves whether state courts can enforce state constitutions or whether only the legislature gets to decide matters with regard to elections.

> Even though a federal officer cannot be sued in federal court because there is no Bivens cause of action, that same federal officer can be sued in state court under state causes of action, making your forums ever more important.

When it comes to the availability of relief against federal officers, it might surprise you that, even though a federal officer cannot be sued in federal court because there is no *Bivens* cause of action, that same federal officer can be sued in state court under state causes of action, making your forums ever more important.

More generally, I think the effect of the Supreme Court decisions in these and other areas make state constitutional law much more important than it has ever been. In 1977, then Justice William Brennan wrote an article in the *Harvard Law Review*, urging the development of state constitutional law and urging state courts to do this. He did so because he saw the conservative turn of the Supreme Court, though obviously he could not imagine the point where we are now. But when it comes to rights that have been taken away by the United States Supreme Court, state constitutions and state courts provide an essential vehicle.

There are other vehicles to remedy what I have talked about as well. There is the opportunity for action at the state legislative level, and in Congress. States can decide their own state civil rights laws, including what defenses to make available. About a year ago, the Colorado Supreme Court changed Colorado law to essentially deny qualified immunity to state officers who were sued for civil rights violations. A bill has twice passed the United States House of Representatives that would change the standard of qualified immunity, especially when it comes to police officers who are sued. Both times it stalled in the Senate. But my point is that there are legislative fixes that are available. And those of us who are lawyers and law professors *must* work for this political fix. We must work for the legislative change to reopen the courthouse doors.

> Rights have meaning only if there are courts there to enforce them. Rights really are meaningless unless there are remedies.

Many years ago, when I was teaching constitutional law and also teaching federal courts, I had my students in each class begin the first day by reading a copy of the Soviet Stalin-era constitution and a copy of the United States Constitution. I also had them read a brief excerpt from Alexandr Solzhenitsyn about life in the gulags.

My students were so surprised that the Stalin-era Soviet constitution had a much more elaborate statement of rights than the United States Constitution does. My point in doing that was that the rights have meaning *only* if there are courts there to enforce them. Rights really are meaningless unless there are remedies.

Questions and Comments from the Floor

Judge Chris McFadden, Georgia Court of Appeals: Judge Newsom on the 11th Circuit recently wrote a separate opinion about standing, suggesting that it ought to be rethought, focusing I guess on the idea of separation of powers. I bet you are familiar with it. Do you have any thoughts?

Dean Chemerinsky: The Supreme Court has often said that the core of standing is separation of powers. You can find that in earlier cases like *Allen v. Wright*.[18] You can find an opinion from just a year ago in *TransUnion v. Ramirez*[19] where Justice Kavanaugh's majority opinion said that.

The problem I have with that formulation is that it is usually taken to mean that, because of separation of powers considerations, we have to limit the role of the judiciary. That is how, if you read the opinions, it is often invoked: "Because of separation of powers, the judiciary has a restricted role; therefore, we have to limit standing."

But I think that approach begs the question. The key question is, what is the appropriate role of the judiciary in the scheme of separation of powers? My answer is that the appropriate role of the

> What is the appropriate role of the judiciary in the scheme of separation of powers? My answer is that the appropriate role of the judiciary, most of all, is to enforce the Constitution of the United States.

judiciary, most of all, is to enforce the Constitution of the United States—at least when we are talking about the federal judiciary. If you accept that as the preeminent role, then sometimes expanding standing is necessary to serve the goal of separation of powers. Restricting standing is not always what we need to do for separation of powers.

My concern with Judge Newsom's opinion, and my concern when the Supreme Court talks about standing for separation of powers, is that it always seems to point in the direction of limiting standing, not recognizing that opening the courthouse doors is often crucial to enforcing the Constitution and achieving the judicial role.

Judge Lucy Inman, North Carolina Court of Appeals: In the wake of two landmark decisions from the U.S. Supreme Court this term, *Dobbs* and *New York Rifle and Pistol Association v. Bruen*,[20] people frequently ask me whether different results might be obtained through the interpretation of state constitutions, which are independent of the federal constitution. I tell people that the impact of these two decisions is very different and would appreciate it if you would explain why that is to this group.

Dean Chemerinsky: I have also found in talking to non-lawyers a good deal of confusion about this. The simple answer of course, which all of you know, is that when the Supreme Court says that there is no constitutional right under the United States Constitution, then the matter is left to the political process, or to the state constitutions and state courts. But when the Supreme Court says there is a constitutional right, then what the political process and the state courts and state constitutions do is very limited.

> When the Supreme Court says that there is no constitutional right under the United States Constitution then the matter is left to the political process, or to the state constitutions and state courts.

To take the two examples you mentioned, *Dobbs v. Jackson Women's Health* says that there is no right to abortion under the U.S. Constitution. State courts can interpret state constitutions to find a right to abortion. California is where I am from. The state's Supreme Court, before *Roe v. Wade*, interpreted the state constitution as creating a right to abortion. There are states, I will give Alaska as an example, that have specific, explicit, right-to-privacy clauses in their constitution that might be the basis for this. But ultimately, it is left either to Congress, the state legislatures, or state courts and state constitutions.

> If the Supreme Court says there is no right, U.S. state courts can find rights under your state constitution. But if the Supreme Court says there is a right that limits what the government can do, you have to enforce that right.

But if the Supreme Court finds that there *is* a constitutional right, then that limits what state courts can do. The other case, *New York State Rifle and Pistol Association v. Bruen*, interprets the Second Amendment to say that the only kind of gun regulation that is allowed is that which is historically permitted—and "historically" seems to mean in 1791 or maybe 1868. That means if there is a challenge to a state gun regulation, you have to apply the Second Amendment and apply the test that is set out by the Supreme Court. If the Supreme Court next term says, as I suspect it will, that the Constitution forbids affirmative action by colleges and universities, then the ability of state courts to permit it is restricted.

The difference, as I said, and as you are all familiar with, is that, if the Supreme Court says there is no right, U.S. state courts can find rights under your state constitution. But if the Supreme Court says there *is* a right that limits what the government can do, you have to enforce that right.

Justice Edward Mansfield, Iowa Supreme Court: That qualified immunity case, as I recall, was part of the so-called "shadow docket." I would be interested in your views on the shadow docket and whether you maybe have any words of wisdom for state appellate judges on deciding cases without full-blown oral argument and full-blown treatment.

Dean Chemerinsky: The "shadow docket" usually refers to matters that come to the Supreme Court for an emergency order. I mentioned *Whole Woman's Health v. Jackson*. The reproductive health care facility in Texas went to the Supreme Court for a preliminary injunction. That is what we usually think of as the shadow docket. It has existed throughout American history. Prior to recent years, it was most common in death penalty cases, where those facing execution would apply to the court for a last-minute stay.

Two law professors, William Baude at Chicago and Stephen Vladeck in Texas, coined the phrase "shadow docket."[21] They have documented a tremendous expansion in the Court's issuing orders in these kinds of matters—orders that can have enormous implications.

Now another aspect of this is where the Supreme Court takes a case without briefing or oral argument and issues a decision. And what makes this different is that those are decisions on the merits. They have precedential effect. An emergency order is not regarded as a decision on the merit, but these are decisions on the merits. *City of Tahlequah, Oklahoma v. Bond* was an example of that. There was another qualified immunity case decided the same day. It came out the same way. *Rivas-Villegas v. Cortesluna*.[22]

I am very concerned about the Supreme Court issuing rulings on the merits that have precedential effect without the benefit of briefing and oral argument.

This really goes directly to your question. I am very concerned about the Supreme Court issuing rulings on the merits that have precedential effect without the benefit of briefing and oral argument. As somebody who has filed many petitions for certiorari in the Supreme Court, many oppositions to petitions for certiorari, they are very different from briefs on the merits. A petition for certiorari wants to convince the court to take the case. It usually shows there are splits among the circuits, the lower courts. An opposition to a certiorari petition is usually not the right vehicle. But it is good practice to focus on that and not to argue the merits of the case. I certainly have had instances where I have had clients very angry at me that my cert petition, my opposition to cert, did not argue the merits. And I said but that is not what this stage is.

The difficulty, then, is that the Supreme Court is deciding without briefing and oral argument. It loses all of the benefits of that. And you, as judges, know that sometimes the briefing and oral argument really can make a difference in your thinking.

I am especially critical of this aspect of the shadow docket, and it has increased in recent years. Unfortunately, it is particularly prevalent in Section 1983, police excessive force cases, and habeas corpus cases.

Judge Michael Wilson, Hawai'i Supreme Court: Aloha from Hawai'i. I could not resist the opportunity to ask you to comment on *West Virginia v. EPA* and the extent to which it has overruled *Massachusetts v. EPA*[23] and the possibility that there might be a constitutional right to a stable climate capable of supporting human life, which would be another approach.

Dean Chemerinsky: Let me try to break that down step by step. *Massachusetts v. EPA*, in 2007, held that Massachusetts had standing to sue the EPA for its failure to deal with greenhouse gas emissions. And the court found that the EPA had not only the authority but the requirement to do this, under the Clean Air Act. It was 5-4 decision. Justice Stevens wrote for the majority. Chief Justice Roberts wrote the dissent.

West Virginia v. EPA does not overrule *Massachusetts v. EPA*. What was involved here is that the Obama Administration adopted the Clean Power Plan to reduce greenhouse gas emissions from power plants. Power plants are a major source of climate-changing greenhouse gas emissions. And the goal was to reduce the amount of energy that came from power plants. The Trump Administration rescinded the Clean Power Plan and adopted the Affordable Clean Energy plan that dramatically changed in terms how much greenhouse gas emissions could come from power plants. It is much more permissive.

The DC Circuit found that the Trump EPA violated the Administrative Procedure Act in rescinding the Clean Power Plan. West Virginia and a couple of coal companies sought review in the Supreme Court.

The Biden Administration argued, and I think they were right, that there was no case or controversy here. The Obama plan was not in effect. The Trump plan went into effect. The Biden Administration said that it was going to come up with its own plan, and it was going to announce it later in 2022. But the Supreme Court nonetheless took the case. And the Supreme Court, 6-3, said that the EPA lacked the authority to restrict greenhouse gas emissions from power plants. Chief Justice John Roberts wrote, joined by the conservatives. He said whether there should be restrictions of greenhouse gas emissions from power plants is a "major question" of social and economic significance. He says that when it is a major question, Congress has to give clear direction to the agency as to what to do. He says Congress has not been sufficiently clear here; therefore, the EPA does not have the power to restrict greenhouse gas emissions from power plants.

Justice Kagan wrote the dissent. She said, "I gave a speech at Harvard a number of years ago where I said we are all textualists now. I guess not. Because the text of the Clean Air Act is clear but still the Supreme Court denies the authority to do it."[24] Why does this matter?

How specific must the law be in order for Congress to have given sufficient authority for the agency to act?

The Supreme Court never defines, in this or any other case, what is the major question: How specific must the law be in order for Congress to have given sufficient authority for the agency to act? The fact that the court does not define what is a major question, and does not say what is specific, now opens the door, especially to businesses, to challenge other environmental regulations and health and safety regulations. All sorts of regulations say the agency is acting on a major question. Congress was not sufficiently specific. This is going to lead to thousands of challenges to agency rules of all sorts.

Might the court overrule *Massachusetts v. EPA*? Perhaps, but this case makes it so much less necessary to do so because the Court has limited the power of the EPA under the Clean Air Act. Might there be some other theory that the Supreme Court will adopt that would require the government to deal with greenhouse gas emissions? I wish, but I am skeptical.

Notes

1 City of Tahlequah, Oklahoma v. Bond, 595 U. S. ___, 142 S.Ct. 9 (2021).
2 42 U.S. Code § 1983.
3 Egbert v. Boule, 596 U.S. ___, 142 S.Ct. 1793 (2022).
4 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).
5 403 U.S. at 410.
6 Davis v. Passman, 442 U.S. 228 (1979).
7 Carlson v. Green, 446 U.S. 14, 25 (1980).
8 Whole Woman's Health v. Jackson, 595 U.S. ___, 142 S.Ct. 522 (2021).
9 Dobbs v. Jackson Women's Health, 597 U.S. ___, 142 S.Ct. 2228 (2022).
10 Ex Parte Young, 209 U.S. 123 (1908).
11 Brown v. Davenport, 596 U.S. ___, 142 S.Ct. 1510 (2022).
12 Brown v. Allen, Brown v. Allen, 344 U.S. 443 (1953).
13 Edwards v. Vannoy, 593 U.S. ___, 141 S.Ct. 1547 (2021).
14 Rucho v. Common Cause, 588 U.S. ___, 139 S.Ct. 2484 (2019).
15 AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).
16 Epic Systems Corp. v. Lewis, 584 U.S. ___, 138 S.Ct. 1612 (2018).
17 Moore v. Harper, No. 21-1271.
18 Allen v. Wright, 468 U.S. 737 (1984).
19 TransUnion LLC v. Ramirez, 594 U.S. ___, 141 S.Ct. 2190 (2021),
20 New York State Rifle and Pistol Association v. Bruen, 597 U.S. ___, 142 S.Ct. 2111 (2022).
21 *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015); Steven I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).
22 Rivas-Villegas v. Cortesluna, ___ U.S. ___, 142 S.Ct. 4 (2021).
23 Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007).
24 "Some years ago, I remarked that '[w]e're all textualists now.' Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed." 142 S.Ct. at 2642.

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

Stephen Daniels,* American Bar Foundation

Executive Summary

The Rule of Law is fragile. For the civil justice system to serve its goals, there must first be trust and confidence in the system itself, such that people will use it. In other words, a sense of legitimacy. Second, since the system is reactive, it needs litigants bringing cases. This requires access, which lawyers, as the system's gatekeepers, provide.

> For the civil justice system to serve its goals, there must first be trust and confidence in the system itself, such that people will use it.

This paper is about legitimacy and access. My collaborator and I have been doing research on tort reform, plaintiffs' lawyers, and access for more than 30 years. This paper offers an opportunity to look back over that research and think about it in a different way than we did originally—with legitimacy in mind. Prompting this rethinking is a political environment in which the legitimacy of so many basic institutions and norms in our democratic polity are being challenged. Our particular interest here is in the long-running, well-funded, and well-organized rhetoric of the tort reform movement. At its heart is an effort to portray the civil justice system as a dystopia, and thereby delegitimate the system and unravel it for political gain. Plaintiffs' lawyers play a starring role in a rhetorical story of chaos and decline, and are a key target of the reformers. They are the villains in the story of a civil justice system that's lost its legitimacy, with dire consequences for society and economy.

The paper draws heavily from our previous work and publications, and 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 where the dystopian image of the civil justice system comes from. The image of illegitimacy didn't just emerge out of thin air or organically, 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 presents an overview of that dystopian image and its characterization, which lies beneath our concern about legitimacy. It focuses attention on the strategic representation of the civil justice system and of plaintiffs' lawyers—especially its metaphors and created images—that is mustered in the service of interventions that benefit the interests of reformers. Building on those three parts, the last section moves to the subject of access, and how the reform rhetoric with its dystopian image can affect access and even undermine confidence in the Rule of Law itself. It looks at electoral politics and legislation, litigating, and plaintiffs' lawyers as gatekeepers. This paper, in short, has something to say about just how fragile the Rule of Law may be.

"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."[1]

—A Texas plaintiffs' lawyer

Introduction

My long-time research collaborator Joanne Martin and I received this statement in a letter from a Texas plaintiffs' lawyer in lieu of a completed survey.[2] The survey was a part of our multi-year research project on tort reform, plaintiffs' lawyers, and access to justice.[3]

Why start a paper for a judges' forum concerned with the civil justice system's responsibility to the public with such a statement? Why care that this lawyer went out of business? A plaintiffs' lawyer gone and good riddance, right? No!

> "Tort reform was a major factor in my decision to close my practice . . . ."
>
> — A Texas plaintiffs' lawyer

Like many, this lawyer was an everyday, local plaintiffs' lawyer. In an interview, he told us, "I thought that being a personal injury attorney, you'd be helping people." He was active in local and state bar associations and in his community (especially the Kiwanis Club). His was a small but successful practice in the Dallas-Fort Worth metroplex. Like many plaintiffs' lawyers of his generation, he built his practice 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 a lawyer of real ability. 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.[4] Even today, only one percent of lawyers licensed in Texas have this certification.[5]

> Why care about this ordinary lawyer's professional demise? From the perspective of our research, we see an important and obvious reason—access to justice.

So again, why care about this ordinary lawyer's professional demise? From the perspective of our research, we see an important and obvious reason—access to justice.[6] Without access, the civil justice system cannot achieve any of its goals, such as accountability and deterrence. The system is reactive, and it needs litigants to bring in cases. As Professor Lester Brickman, the arch critic of plaintiffs' lawyers and the contingency fee, unabashedly notes, "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."[7]

Though short, the letter writer's statement captures some things we have learned from lawyers during our research regarding interventions undermining a contingency fee practice, and, eventually, the civil justice system's ability to serve its goals—among them, that the "reform" movement has always been multi-faceted, and that the term "reform" is a misnomer.

An experienced Texas political observer regularly told us not to make references to tort reform, but to use "tort 'reform'" instead. The quotation marks, he argues, should always be used because of the general understanding

of what reform means. It carries a clear connotation, one that presumes that the current state of affairs—whatever it may be—is in dire need of improvement. Most crudely, it can be cast as the good guys versus the bad guys. Following this logic, proposed changes are not promoted as those favoring one narrow set of interests at the expense of others. Instead, the changes are presented as a needed—not merely a desired—step forward toward some more ideal or superior state of affairs that will benefit the common good. Reality, he says, is nothing like this. While we will not use "reform" in our discussion (it is too cumbersome), our informant's point is well taken as the discussion here will show.

In addition, often—and too often exclusively—legislative actions or appellate court decisions are the place where people look for such interventions. Our letter writer, like many of the plaintiffs' lawyers we studied, would not tell us that such formal actions are unimportant, only that they are not all-important—and maybe not always the most important factors.[8] The letter writer is talking about the long-standing, insidious, and aggressive public relations activities mounted by the reform movement over the years. Over 90 percent of the lawyers in our Texas research indicated that these campaigns have had a negative effect on their practices. For almost three-quarters of those we surveyed, the effect was strongly negative.[9]

In the estimation of two prominent psychologists of law, that sense of legitimacy is crucial for the system to achieve its goals.

Finally, his statement tells us something more important. Aside from lawyers' practices, the activities to which he alludes are ultimately aimed at undermining trust in the civil justice system itself and not just lawyers like him. Beyond the important formal rules allowing and supporting access, the accountability the system is supposed to provide requires something more subtle and fundamental: trust and confidence in the system itself, such that people will actually use it and trust its decisions. In other words, a sense of legitimacy.

In the estimation of two prominent psychologists of law, that sense of legitimacy is crucial for the system to achieve its goals. Drawing from a book-length review of what psychology can tell us about tort law, professors Jennifer Robbennolt and Valerie Hans said:

> Compliance with the law, then, is linked to its moral credibility. When those in authority enact laws that are out of step with the public's sense of justice and fairness, the authorities and the legal system may lose credibility and legitimacy. Declining legitimacy, in turn, reduces a legal system's ability to control conduct. Indeed, 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.[10]

Pro se access is a fool's access in any area of law. Lawyers are the system's gatekeepers. They provide meaningful access, and meaningful access is not free.

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.

Not just legitimacy, there is another more obvious and direct factor if the civil justice system is to serve its goals—lawyers. Pro se access is a fool's access in any area of law. Lawyers are the system's gatekeepers. They provide meaningful access, and meaningful access is not free.[11] For tort matters, unlike others, there is the contingency fee and lawyers, like our letter writer. Law 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.[12] 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."[13]

The point is made more matter-of-factly by a different Texas lawyer we interviewed. He said:

> [N]inety percent of the people out there make their living, they pay for their kids to go to school, they pay to take care of their kids, they pay for their mortgage, they pay for their one or two cars, and at the end of the month, they may have $100 left over if they're the lucky ones. . . . And so, for someone to have the ability to go hire a lawyer on anything other than a contingency, you know, I think it's a fiction.[14]

Still, the contingency fee is an imperfect source of access, providing access only if the likely return to a lawyer, like our letter writer, is sufficient to stay in business.[15]

My collaborator and I have been doing research in this area for almost 30 years. The letter writer's plight, important itself, provides an entry point for looking back over our research and thinking about it in a different way—with Robbennolt and Hans's concern with legitimacy in mind. Their concern with legitimacy is especially important in today's political environment in which the legitimacy of so many basic institutions and norms in our democratic polity are becoming problematic—even the Rule of Law itself. Like democracy, the Rule of Law is fragile.

The contingency fee is an imperfect source of access, providing access only if the likely return to a lawyer . . . is sufficient to stay in business.

The letter writer's complaint about "the propaganda disseminated by insurance companies and big business" prods us to think about the broader importance of the reform rhetoric for legitimacy. The rhetoric has long presented a characterization of the civil justice system that lacks legitimacy and strives to convince us of this. Plaintiffs' lawyers themselves play a starring role in this story of decline—the villain. As the gatekeepers of a delegitimized civil justice system, plaintiffs' lawyers are a key target of reformers. Even if one wants to point to the many and terrible "problems" with juries or with "irresponsible" litigants, it is the plaintiffs' lawyer who decides to take on the client's case and potentially bring it to trial.

Exploring the factors underlying our letter writer's predicament allows us to see how the reformers' efforts to shape and manipulate our views and evaluations of the civil justice system can negatively affect access and the system's ability to serve its goals. This paper is about his demise. Not literally his, but what it represents—as this Forum's organizers put it, "interventions that undermine accountability and deterrence of negligent or malicious conduct." It draws heavily from our previous academic work and publications, sometimes verbatim. Again, this paper is an opportunity for us to think about that work in a different way and to do so for a new audience. It is divided into four main parts.

The first looks at trust, confidence, and the idea of legitimacy in the civil justice context. The second discusses where the dystopian image to which Robbennolt and Hans refer comes from. The image of illegitimacy did not just emerge out of thin air or organically. As such, 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 that led Robbennolt and Hans to be concerned about legitimacy. It pays attention to the strategic representation of the civil justice system and of plaintiffs' lawyers—particularly the

exaggerated metaphors and images—collected in the service of interventions that benefit the interests of reformers. It pays attention to the strategic representation of the civil justice system and of plaintiffs' lawyers—especially the metaphors and created images that have been mustered in the service of interventions that benefit the interests of reformers. Strategic representation is an idea that we have used before and that will be used throughout this paper. According to political scientist Deborah Stone, it is the "struggle to control which images of the world govern policy."[16]

Building on the first three sections, part four examines access and how the reform rhetoric, with its dystopian image, can affect such a crucial aspect of the civil justice system—and may even undermine confidence in the Rule of Law itself. Part four does so by looking at electoral politics and legislation, litigation, and plaintiffs' lawyers as gatekeepers.

I. Trust, Legitimacy, and Shaping the Public Mind[17]

As we noted, much of the discussion of tort reform, understandably, focuses on the specific legislative changes offered by reformers and their success in getting them enacted. The American Tort Reform Association (ATRA) is a national organization "exclusively dedicated to reforming the civil justice system."[18] It devotes substantial space on its website to touting the tort reform movement's legislative successes over the years.[19] But ATRA doesn't stop there. The reformers want to do something more fundamental—to affect the way in which the media, intellectuals, key elites, and ultimately the public at large, especially those serving on a jury, think about the entire civil justice system. It wants to affect our sense of legitimacy.

The reformers want to do something more fundamental—to affect the way in which the media, intellectuals, key elites, and ultimately the public at large, especially those serving on a jury, think about the entire civil justice system. It wants to affect our sense of legitimacy.

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.[20]

In short, it is about shaping and lobbying the public mind with a strategic representation of the civil justice system mustered in the service of interventions that benefit the interests of reformers. It is about molding the cultural environment surrounding the civil justice system by manipulating our commonsense notions of what the civil justice 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.

In raising their concern about legitimacy, Robbennolt and Hans draw from the idea of procedural justice, especially the work of psychologist Tom Tyler.[21] Tyler is one the pioneers of the idea of procedural justice and its link to legitimacy. Most of Tyler's own research (and similar research by others), as Robbennolt and Hans note, has dealt

with people's interactions with law enforcement and courts. Robbennolt and Hans argue that the empirical findings, nonetheless, offer important insights into people's sense of legitimacy when it comes to the legal system generally.[22]

Writing from a psychological perceptive Tyler argues, "The goal of law, legal institutions, and legal authorities is to regulate effectively the behavior of those within society."[23] Legitimacy, he says, is necessary for that goal. By legitimacy he means "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just . . . (that) can explain or make sense of a social system in ways that provide a rationale for appropriateness or reasonableness of differences in authority, power, status, or wealth."[24] Simply, it's about getting and maintaining "buy-in"—the ongoing acceptance of the system and its actions.[25]

Legitimacy depends on people's views on how the legal system works. People's views on whether, and to what degree, fairness characterizes the system's operation are the key.

Legitimacy, in turn, depends on people's views on how the legal system works. People's views on whether, and to what degree, 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 police and the courts exercise their authority . . . In particular, people's reactions to legal authorities are based to a striking degree on their assessments of the fairness of the processes by which legal authorities make decisions and treat members of the public."[26]

Whether people can trust authorities' motives and understand why decisions are made, is fundamental to the idea of fairness. It is about the quality of decision-making in people's minds.[27] According to Tyler,

> Quality of decision-making involves making decision in neutral and unbiased ways using objective information, and not personal biases and prejudices. In neutral decision-making, authorities make decisions based on rules consistently applied across people and situations. Because neutrality involves the use of objective information about the situation, people are more likely to view procedures as neutral when they are given an opportunity to present evidence and explain their situation.[28]

There can be a cumulative effect, with authorities gaining trust as their actions are seen as fair, or vice versa. As we will see later, the reform rhetoric's strategic representation of the civil justice system is almost the opposite of what Tyler had in mind about decision-making that is supportive of legitimacy.

There is another insight from psychology and law that is relevant—the idea of the "availability heuristic." Hans addressed this concept in a book-length study of jurors and jury decision-making in cases involving businesses.[29] Her research for that book included interviews with jurors in actual cases, jurors in mock cases, and a state-level survey, all of which 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."[30]

More generally, she said that the attitudes of people in all three parts of her study—actual jurors, mock jurors, and survey respondents—"reflect widespread belief in a litigation explosion and acute concern about the legitimacy of civil lawsuits. The omnipresence of these attitudes is remarkable. The assumption of litigation crisis pervades all sectors of society and consistently influences judgments in civil cases."[31]

This raised a question for Hans, given that the empirical literature shows that "the civil justice system does not, on the whole, support the picture of an out-of-control and highly litigious population that is conjured up by the litigation horror stories . . . the most significant point in contrasting litigation statistics and litigation horror stories is that the stories present a misleading picture of what goes on in the civil courts."[32] Rather than reflecting reality, Hans argues, people's view of the civil justice system as one in crisis results from a combination of exaggerated and misleading media coverage and public relations campaigns.[33]

Rather than reflecting reality, people's view of the civil justice system as one in crisis results from a combination of exaggerated and misleading media coverage and public relations campaigns.

The reason people accept a fabricated view of the civil justice system can be found in what psychologists call 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. They use the quickness with which they come up with examples as a heuristic, a tool for estimating frequency. If one remembers an example readily, then one is more likely to judge the event as one that commonly occurs. 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.[34]

One wonders if reform groups like ATRA or similar groups on the state level, who invest in public relations campaigns that include a steady stream of press releases, briefings, reports, podcasts, and the like, are aware of the availability heuristic.

II. Dystopia—It Didn't Just Emerge Out of Thin Air

A. Dystopia and Politics

What is this dystopian, as Robbennolt and Hans characterize it, view of the civil justice system? Where does it come from, what's driving it? We will address the first question in the next part of the paper. Here we will deal with the second, as answering this question aids in the understanding of the first. This is because, as Hans's research findings suggest, the veracity of the reformers' claims concerning the civil justice system is not the issue. Political success is the measuring standard, and the claims were created with this purpose in mind. So, we need to know who is fostering the dystopian characterization—meaning who gains from it?

Ultimately civil justice reform is not about improving the law, seeking to cure certain social and economic ills, or even seeking a greater sense of justice.

Despite the reformers' messaging, ultimately civil justice reform is not about improving the law, seeking to cure certain social and economic ills, or even seeking a greater sense of justice. 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."[35]

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.[36] Almost 40 years ago Kenneth Jost, then-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."[37] Jost's conclusion in the middle of the 1980s still resonates today.

More recently, political scientists William Haltom and Michael McCann observed that "the tort reform movement . . . developed to challenge, roll back, and otherwise reconstruct this expanded liability regime of tort law."[38] Leading the effort, they said, were "corporate defendants and those who feared they would soon be civil defendants."[39]

Though not exclusively, the discussion moving forward will place an emphasis on the 1980s into the early 2000s, using illustrative examples from that 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 finely tuned. Not coincidentally, it was also a time of the most concerted efforts to convince state legislators to enact desired changes.

Coordinated legislative efforts by reformers have gone in waves.

Coordinated legislative efforts by reformers have gone in waves. In his 2002 book, political scientist Thomas Burke wrote of three waves of reform beginning in the 1970s, the impetus of the first wave being medical malpractice. He found that "between 1975 and 1978, fourteen states passed laws encouraging arbitration, twenty-nine created screening panels for lawsuits, twenty limited attorney contingency fees, fourteen put monetary caps on damages, and nineteen restricted the collateral source rule."[40]

A second wave of tort reform began in the mid-1980s. Burke notes that this round covered more than just medical malpractice cases. "Between 1985 and 1988 sixteen states capped 'pain and suffering' damages, twenty-eight limited punitive damages, twenty restricted the collateral source rule, and thirty modified their joint and several liability rules. In 1986 alone, forty-one of the forty-six legislatures who met passed some type of tort reform."[41]

The third wave came in the mid-1990s, again involving a broad range of reforms. "In 1995 eighteen states passed tort reforms, including extensive reform packages in Oklahoma, Illinois, Indiana, and Texas. Between 1995 and 1997 fourteen states limited punitive damages, thirteen modified their joint and several liability rules, and eight made significant changes in product liability law."[42]

Another wave of reform efforts came in the early to mid-2000s with the emphasis on medical malpractice. Among the states with major medical malpractice reforms were Texas, Illinois, and Florida. A key provision of these reforms was a cap on damages.[43]

Successfully shaping the public mind and mobilizing it for a coordinated, long-term effort like tort reform, as Haltom and McCann argue, requires leadership, funding, and the right ideas. This in turn requires organization.[44] Much has been invested in the effort to shape the public mind, including the formation of several organizations in the 1980s and 1990s, that placed this effort at the forefront of their mission.[45] 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

Three 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—themes that form the foundation of the reform rhetoric. The maxim "we all pay the price" is especially important. As we will see later, it is the glue that holds the reform rhetoric together and furthers the idea of the civil justice system as a dystopia.

The maxim "we all pay the price" is especially important. . . . It is the glue that holds the reform rhetoric together and furthers the idea of the civil justice system as a dystopia.

One of the earliest examples is a 1953 campaign conducted by the American-Associated Insurance Companies. It involved a series of four advertisements that alternated between *Life Magazine* and *The Saturday Evening Post*.[46] Each was explicitly aimed at potential jurors in tort cases and the consequences of the awards they may give. Interestingly, to emphasize the importance of their "excessive" or "generous" jury awards, each advertisement had a message written in the lower right corner. The messages concerned the role juries played 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.[47]

The first advertisement ran in *Life* on January 26, 1953. It introduces the theme of "we all pay the price." It shows a stern-faced bailiff sitting in front of room labeled "Jury Room." The advertisement's headline reads, "YOUR insurance premium is being determined now."

More evocative is the advertisement that appeared in the February 14, 1953, issue of the *Saturday Evening Post*. It shows a woman standing at a grocery store checkout about to take money out of her purse 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."

The "we all pay the price" theme is based on a series of claims made in each advertisement: there are too many excessive and unjustified jury awards, caused by overly sympathetic jurors; which, in turn, cause insurance companies to lose money. Consequently, everyone winds up paying more not only for insurance, but for other goods and services as well. This theme has been a constant in the reform rhetoric over time. For example, it can be found today on the Bay Area Citizens Against Lawsuit Abuse ("BACALA") website: "How Lawsuit Abuse Affects You: Even if you've never been sued, you have been the victim of lawsuit abuse. You pay the price . . . in the form of higher consumer prices and decreased availability of services your family depends on every day."[48]

Such efforts continued into the 1960s and 1970s. Psychologist Elizabeth Loftus notes two additional companies—St. Paul and Aetna. Writing in 1979 about insurance industry advocacy advertisements, she observed:

> In response [to jury verdicts] several insurance companies have begun a curious advertising campaign . . . . These firms [such as St. Paul Insurance and Aetna] have 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." Another reads, "When anything goes wrong with me . . . somebody is going to pay! They owe me!" Who is this somebody? "It's you!" the ads answer.[49]

Like Hans, Loftus found that such advertisements can affect juror award decisions. She noted, "The results of the experiments were not surprising. Common sense tells us that companies that spend $10 million on advertising expect the advertising will work."[50]

> Advertisements [used in tort reform campaigns] can affect juror award decisions.

Aetna Insurance is perhaps the most revealing illustration. It embarked on a full-fledged marketing campaign in the middle 1980s, built around a Harris poll on the civil justice system and tort reform done for Aetna. 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. The latter 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.[51] We will have more to say about this campaign later.

Aetna ran a similar campaign in the later 1980s. Like a campaign to market a product or service, the campaigns are carefully designed, planned, and test-marketed by specialists. For instance, a 1988 article in the *St. Louis Business Journal* described the test marketing of an Aetna Insurance public relations campaign entitled "Lawsuit Abuse: Enough is Enough."[52] The campaign was developed for Aetna by Minz and Hoke, Inc. a Hartford, CT advertising agency, and just like any product Aetna was planning to mass market, the campaign was first test-marketed in four 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."[53]

C. The Organized Effort

By the mid-1980s, big campaigns by individual companies gave way to the ongoing organized efforts of trade groups, newly created tort reform advocacy organizations, and think tanks. These efforts are more important for shaping the public mind because they are coordinated and have financial and political support of broad coalitions seeking tort reform. They also allow individual corporations and other financial supporters (and their interests) to remain less visible.[54]

> Big [public relations] campaigns by individual companies gave way to the ongoing organized efforts of trade groups, newly created tort reform advocacy organizations, and think tanks.

A 1986 national public relations campaign by the trade group Insurance Information Institute provides an excellent example of trade group activity. Titled "We All Pay the Price: An Industry Effort to Reform Civil Justice," the campaign had a $6.5 million budget ($15.1 million in 2022 dollars) and intentionally presented 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."[55] The campaign was expected to reach 90 percent

of adults through "a broad-based advertising campaign using network television, major newspapers, and national news magazines."[56] 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."[57] 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."[58] As with the Aetna campaign, we will return to this campaign later.

Perhaps the best example of think tank activity is the Manhattan Institute ("Manhattan" or "the 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 that it explicitly wanted to shape the public mind. The Manhattan Institute's mission statement is, however, more revealing of the nature of the strategy, stating, "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."[59] Specifically, the strategy was stated as:

> The rhetoric of legal reform must incorporate transcending concepts, like consumer choice, fairness, and equity, while simultaneously pointing out the opposition's indifference or opposition to these values. Across a wide cultural horizon today powerful new ideas like choice, empowerment, and voluntarism are capturing the public imagination; they can and should be brought into the debate about legal reform . . . 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."[60]

At the time, the Manhattan Institute pushed for substantial change in the civil justice system, arguing that the "litigation system reduces innovation and investment, lowers safety and well-being, and erodes the risk-taking and personal responsibility essential to our free society."[61]

Unlike the 1986 Insurance Information Institute campaign aimed at the general public, the Manhattan Institute targets elites and opinion leaders, including those in the Academy and the media. The institute holds conferences that bring together its senior fellows (such as 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.

Manhattan has also helped to generate, and then aggressively disseminate, key pro-tort reform work by its senior fellows and others. "The Center for Legal Policy's fellows have written multiple books, and they have published numerous articles in newspapers, magazines, and academic journals . . . make frequent radio, television, and public appearances and have testified before both houses of Congress. The Center for Legal Policy publishes reports and conference transcripts, and the Center and its fellows manage . . . websites valuable to legal reform."[62]

In recent years, Manhattan has remained active in the area of law and policy, but perhaps not at the same level of intensity when it comes to civil justice reform. It continues its animosity towards plaintiffs' lawyers and its website still features Professor Lester Brickman's 2011 book *Lawyer Barons: What Their Contingency Fees Really Cost America.* The website states, "In modern America, the Rule of Law is increasingly being eroded by trial lawyers, prosecutors, and socially oriented shareholder activists that manipulate legal rules to achieve policy objectives outside the normal bounds of legislative action and administrative rulemaking."[63]

The most influential 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."[64] Haltom and McCann describe ATRA as a primary agent of tort reform, and provide an excellent overview:

> [ATRA] has coordinated more than three hundred corporate and trade groups and about forty state reform organizations. ATRA's conventional, "inside" politicking includes lobbying (e.g., assisting legislators with arguments, briefs, formulated legislation, credible witnesses, and speeches and speakers); strategizing (e.g., advising legislative and electoral leaders concerning tactics, phrasings, polls, and agenda items); coordinating (e.g., planning conferences, building coalitions, mobilizing corporate, trade, and interest groups); and facilitating (e.g., providing a clearinghouse for reform ideas and information for and among groups associated with tort reform or civil justice) . . . .
>
> Crucial as such conventional politicking is, ATRA's most central role may be to formulate and reformulate "common sense" regarding torts in particular and civil justice in general . . . Its mastery of the arts of perception and persuasion has augmented ATRA's success at conventional politicking by publicizing and popularizing tort reform messages.[65]

This can be seen in an excerpt from ATRA's mission statement:

> 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*.[66]

Under the heading "A Track Record of Success" ATRA continues with its statement, noted earlier, about changing the way people think about the civil justice system.

To change the way people think, ATRA has conducted an ongoing series of public relations campaigns on its own, as well as in conjunction with other tort reform groups.[67] Such campaigns 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.

Campaigns can involve everything from roadside billboards, to television and radio spots, to lobbying the media with press releases and other materials to direct mail.

Local and state-level coalitions and groups that ATRA has helped to create, fund, and often largely direct, are especially important to ATRA.[68] They provide a local presence for ATRA's message and enable its (and its members') agenda to 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 in 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 over the airwaves, in newspapers, on billboards and in shopping malls and living rooms. As a result, CALA groups have helped make the supposed need for tort law changes a major political issue across the country.[69]

More pointedly, Deal and Doroshow state that the CALAs' efforts included trying "to undermine public support for a strong civil justice system by promoting myths about the legal system, demonizing the opposition (in particular, trial lawyers who represent consumers in the court room), and generating constituent pressure on lawmakers."[70] Although less pointedly, Hans's findings noted above make a similar point.

CALAs' efforts included trying "to undermine public support for a strong civil justice system by promoting myths about the legal system."

Among the CALA groups is Texans Against Lawsuit Abuse, which describes itself "as a non-profit, statewide grassroots coalition dedicated to educating the public about the cost and consequences of lawsuit abuse, challenging those who abuse our legal system, and returning common sense and fairness to our courts."[71] Another is CALA-California, "a nonpartisan grassroots movement of concerned citizens and businesses who are fighting against lawsuit abuse in California."[72] The ATRA website currently lists affiliates in 17 states, with more than one group in some states.[73] Other state-level groups may not be associated with ATRA, such as the Michigan Lawsuit Abuse Watch and Texans for Legal Reform, however their messaging and goals are the same.[74]

ATRA, however, may not represent the first and only effort at organizing state and local grassroots organizations. A 1986 article in the *Journal of American Insurance* discussed state-level organizations that were already in existence and had ties to the American Alliance of Insurers. Titled "When You Need a Coalition: How-to-Do-It Examples from Tort Reform," the article listed examples from 19 states and offered practical advice for forming and running a successful organization.[75] The many items of practical advice included "a means for broad-based dissemination of information . . . and effective communication methods for educating the public."[76] Moreover, one example of an organization to emulate was the Texas Civil Justice League, "which uses direct mail, meetings, seminars, phone banks, and public relations efforts directed mainly at newspapers to get its message out. Its objective is to mobilize as many people as possible around the state."[77] Many of the groups chose names with symbolic import that would draw attention and support while masking the groups' actual interests. These included Illinois Project Justice, Indiana Project Justice, Kansas Project Justice, and The Truth and Fairness Litigation Committee in Pennsylvania.[78] Symbolically charged terms like justice, fairness, and common sense appear throughout the reform rhetoric—terms likely to elicit support because no one is against them.

The efforts to shape the public mind have not gone unchallenged; however, the challenges have not matched the reformers' efforts. Plaintiffs' lawyers have pushed back. Even the earliest efforts did not go unnoticed.

The efforts to shape the public mind have not gone unchallenged; however, the challenges have not matched the reformers' efforts. Plaintiffs' lawyers have pushed back. Even the earliest efforts did not go unnoticed. One of the early presidents of the Texas Trial Lawyers Association (TTLA),[79] Franklin Jones, Sr., recounted an incident that illustrates this point. In 1954, Jones gave a presentation to the Tyler, TX Lions Club, that he stated was 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."[80] Two years earlier, TTLA leadership had complained about other public relations efforts by their opponents. In particular, they were concerned with material in national publications tied to "certain interest groups" and "a well-organized drive to influence prospective jurors against plaintiffs' attorneys and so-called 'big verdicts."[81]

State plaintiffs' lawyers' organization had their own efforts to challenge the reformers' activities, typically when their state legislatures were in session and considering tort reform measures. Consumer groups also challenged the reformers' characterization of civil justice.[82] There were journalistic challenges in specialty publications as well as local newspapers.[83] But there was nothing to match the sustained, well-organized, and well-funded campaigns by the reformers.

Consumer groups challenged the reformers' characterization of civil justice.

While the 1980s through to the early 2000s were the heyday of the efforts to shape the public mind, those efforts did not end after the early 2000s. 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, and Instagram with regular content. They can have blogs and produce podcasts. The social media presence can allow for organizing by publicizing themed events. It provides a way to communicate with voters and urge political activity. Social media is a much more efficient means to saturate the public sphere with your messaging and continually amplify it.

For example, the Bay Area (Texas) Citizens Against Lawsuit Abuse website includes an Instagram post for the BACALA Clay Shoot (the first and second place teams would "Win Guns!") and BACALA's 2021 17th Annual Luncheon featuring Karl Rove[84] as well as its 2022 18th Annual Luncheon featuring Rachel Campos-Duffy, "the host of America's #1 rated cable news morning show, FOX & Friends Weekend."[85] Last year CALA-California had a podcast titled, "Stephen Moore, Founder Of Club For Growth And An Economic Consultant With FreedomWorks Joins CALA To Talk About The Legal System Shakedown," which discussed "The huge lawsuit tax California places on its businesses and how it weighs down the economy."[86] One of Texans for Lawsuit Reform's 2021 blog posts highlighted lawsuits against commercial vehicles.[87] Texas enacted legislation on the subject in 2021, which became the subject of an Institute for Legal Reform blog post and a podcast earlier this year.[88]

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."

Far from coming out of thin air, the dystopian image is a matter of strategic representation—created, funded, fostered, and disseminated by interests wanting, as legal journalist Jost's critique of tort reform reminds us, "to rewrite rules more in their [the reformers'] favor."[89] The next section addressees the question we left open at the beginning of this section. What is this dystopian view of the civil justice system? What is the substance? Again, it will emphasize the 1980s into the early 2000s, and will pay particular attention to the visual images used. These images are essential to creating the sense of the civil justice system's illegitimacy using the we all pay the price theme. They also show how the reform rhetoric shifts the discussion from the system's goals to an approach to evaluation that actually negates those goals by making key players in the system the bad guys and those whose actions may call for accountability the good guys.

III. Civil Justice as Dystopia

A. Dystopia and Legitimacy

The dictionary tells us that a dystopia is an "imagined world or society in which people lead wretched, dehumanized, fearful lives."[90] Dystopias are not legitimate—the very idea of a dystopia is to highlight illegitimacy in dramatic and stark terms. Tort reformers, as our discussion shows, have been deeply engaged in trying to shape the image of the civil justice system in dystopian terms and doing so to get changes that would serve their interests.

The challenge for any movement wanting significant policy change is convincing the public and policymakers there is a "problem"—an extremely serious problem or even a crisis—that must be "solved" and can only be "solved" by the desired changes.[91] At the core of this challenge, argues political scientist Stone, is the identification of "problems." Problems, she observes, "are not given, out there in the world waiting for smart analysts to come along and define them correctly. They are created in the minds of citizens by other citizens, leaders, organizations, and governmental agencies, as an essential part of political maneuvering."[92] As we noted earlier, she calls this strategic representation. The process of gaining a place on the agenda and eventually moving a favored change to enactment is essentially "a struggle to control which images of the world govern policy."[93] David Ricci, in his study of the rise of "think tanks," characterizes such a struggle as the "politics of ideas"—the aggressive marketing of ideas and images for political purposes.[94]

The discussion above reflects the scope of the reformers' investment in strategically creating an image of the civil justice system. A substantial amount of sophisticated research—e.g., surveys, focus groups, and testing of themes—lies beneath the messaging. The research is fashioned around the reformers' interests—not so much about support for a particular policy change, but more about uncovering underlying views of the civil justice system and then leveraging that knowledge to craft the messaging.

Find out what's immediately important to people in their everyday lives, then tie the dystopian image to those matters such that the civil justice system poses a dire threat.

The messaging would then emphasize and amplify those parts of the underlying views that are useful and downplay or ignore those parts that are not so useful. This is done by making it real to people—by playing to anxiety and fear. Find out what's immediately important to people in their everyday lives, then tie the dystopian image to those matters such that the civil justice system poses a dire threat. Provide a scapegoat to help focus and mobilize people, one that shifts blame to avoid unwanted regulation and critical examination.[95]

Our reference in the discussion above about the test marketing of an Aetna campaign is an excellent example. So is pollster Frank Luntz's guidance to Republican candidates and activists in the 1990s, which says:

> By interviewing thousands of Americans, we have found the words and phrases that create a photo album of ideas and visions . . . In focus groups and instant response session with Americans of all ages, races, regions and political affiliations, and through dozens of national surveys, we have found the words and phrases that will move the American people.[96]

Legal reform was one of the policy issues involved and his polling data showed "(t)he public is anxious for fundamental legal reform."[97]

One challenge, he says, is that "(t)he public doesn't know the details (or technical terminology) of the legal system, but people know what they don't like. Therefore . . . we need to identify what's wrong in layman's terms and we need to give real life examples . . . storytelling is particularly useful."[98] As Tyler observed with regard to legitimacy, people's subjective judgments are the key to "buy-in"—the ongoing acceptance of the system and its actions. And thinking back to Hans's statement on the effects of the availability heuristic, the idea is to make the reformers' message the most available view of the civil justice system.

Again, one need only think of the symbolic value of a cup of coffee from McDonalds and other stories. Lawyers we interviewed in Texas certainly did. One told us,

> All the advertisements against lawsuit abuse . . . when jurors actually get into the jury room. The trial lawyer is pretty much at a disadvantage because they've heard that everybody's getting sued and about that McDonald's case and . . . that the plaintiff is after a fast buck and you know, the jackpot lottery, the lawsuit lottery."[99]

Another said, "you see the Allstate ads where the guy talks about . . . all these frauds . . . They're not selling insurance with those ads; they're working the jury pool."

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 it doesn't serve the public interest by tending to accountability and responsibility. Indeed, its failings—even corruption—are too profound. It is a system whose operation violates our basic ideas of legitimate authority. It is a story of decline from a better world in the past.

The image of the civil justice system promulgated by the reformers is the antithesis of the values [that] are crucial to legitimacy.

Where the first theme lays out the failings, the second theme tells us that there are substantial consequences for those failures. It is not an abstract issue. It is a big problem (perhaps even a crisis) that demands a significant response because "we all pay the price" in immediate and essential ways. It is a story that 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.

Dystopian stories, to work, need to suggest or show a way forward—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. They encourage and bring lawsuits because they profit by them—it's greed or worse.

B. A Failing Civil Justice System—Chaos and Decline

What is that first theme—what does it look like? It is a troubling vision of a chaotic system run amok (one that is eerily familiar in today's political climate). It is a vision full of evocative metaphors and threatening images that

are the antithesis of fairness and rationality. Stone sees metaphors as an important part of strategic representation, saying "(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." Indirectly, the reform rhetoric plays off what she calls "motherhood issues" that dominate American policy discourse: ideas like equity, efficiency, security, and liberty.[100] She calls them motherhood issues because everyone is for them when they are stated abstractly, like the symbolic terms used in the names of tort reform groups as noted above. These are the kinds of issues that are threatened by the civil justice system.

Reformer-sponsored advertisements depict a system that has gone terribly and dangerously wrong. The basic or unifying theme is the idea of a system run amok for which "we all pay the price," and it is one full of evocative metaphors and threatening images.

Reformer-sponsored advertisements depict a system that has gone terribly and dangerously wrong. The basic or unifying theme is the idea of a system run amok for which "we all pay the price," and it is one full of evocative metaphors and threatening images. It describes a system in which, among other things, 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").

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.[101] This is wonderfully illustrated by Manhattan's mission statement excerpted above about setting the terms of debate. It is about matters people tend to accept uncritically, almost as a matter of common sense. The rarely questioned values that structure people's view of the world in which they live.

In the 1980s, anecdotes and horror stories about lawsuits that strain credulity—often amplified by press coverage—were an integral part of the storytelling about a failed civil justice system.

Symbolic politics is, in essence, an appeal to emotion rather than reason, an attempt to "eliminate the mind and critical faculties from the evaluation process. This can be described as the 'tactical use of passion' which provokes 'feelings rather than thought.'"[102] Systematically collected empirical data are not likely to defeat claims that successfully tie themselves to such values and people's commonsense view of the world.

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.[103] Earlier we quoted Luntz on stories, "we need to identify what's wrong in layman's terms and we need to give real life examples . . . storytelling is particularly useful."[104] In the 1980s, anecdotes and horror stories about lawsuits that strain credulity—often amplified by press coverage—were an integral part of the storytelling about a failed civil justice system.

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."[105] The same story could appear five or six times in different places over the course of a year. Both Peter Huber, in *Liability*,[106] and Walter Olson, in *Litigation Explosion*,[107] 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.[108]

[The narrative portrays] Americans as pathologically litigious and juries as willing to inappropriately award millions of dollars at the drop of a hat, especially in medical malpractice and products liability cases.

While their specifics varied, their narrative structure is uniform. They portray Americans as pathologically litigious and juries as willing to inappropriately award millions of dollars at the drop of a hat, especially in medical malpractice and products liability cases. The tales are used to show five things: many money damage cases are frivolous; most plaintiffs are undeserving, having been the cause of their injuries (if the injuries are real); juries are overly sympathetic to individual plaintiffs suing deep-pockets defendants; the defendant is not at fault; and as a result, cases like the ones in the stories prove the civil justice system has run amok. Each story is a metaphorical mini-morality play.[109] Their use continues today, although in somewhat more sophisticated ways. For instance, the ATRA Foundation's Judicial Hellholes program (started in 2002) rates jurisdictions annually based on the outcomes of cases, "focusing primarily on jurisdictions where courts have been radically out of balance."[110] It invites and relies upon ATRA members and other interested parties to report on problematic cases.

Other organizations also invite information on local cases, even inviting members and others to send information on their cases and experiences with the civil justice system. 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."[111] Such stories may then appear on the website and become another story of a system run amok. The site has a short video montage of small business owners complaining about ADA suits with the introduction, "If you haven't heard, ridiculous lawsuits are plaguing local businesses. Stores are closing their doors for good."[112] Stories may also appear on Facebook and Twitter feeds, largely unfiltered.

2. Metaphors

Specific words also play an important role in the storytelling. Evocative metaphors can efficiently and successfully 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. It suggests the opposite of rationality and any idea of a comprehensible system.

By the middle 1980s, the litigation explosion was an accepted and lamented fact in the public realm, even though the best empirical evidence . . . shows no such thing and finds Americans not particularly litigious.

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

amount of litigation in the United States and the alleged change in the litigiousness among the populace.[113] 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, shows no such thing and finds Americans not particularly litigious.[114]

The media latched onto the term in the mid-1980s. For instance, on June 6, 1986, *USA Today's* editorial focused on the interrelationships among litigation, insurance, lawyers, and juries: "The insurance crunch has become a crisis with liability coverage. The explosion of litigation has choked court dockets. And too few lawyers tell potential clients that some cases are a waste of time."[115] At about the same time, the *Wall Street Journal* ran a four-part series on civil justice reform entitled "Litigation Explosion."[116] In 1989, the Mackinac Center for Public Policy in Michigan bemoaned the amount of employee-employer litigation saying, "Litigation is exploding in our society . . . It should come as no surprise that this 'litigation explosion' has been accompanied by a dramatic surge in the number of practicing lawyers."[117]

The explosion idea as a characterization of patterns and changes in the amount of civil litigation was quickly challenged and debunked by scholars, commentors, and others who actually looked at the data.

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."[118] 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.[119] 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.[120] It too persists despite empirical evidence to the contrary.

The explosion idea as a characterization of patterns and changes in the amount of civil litigation was quickly challenged and debunked by scholars, commentors, and others who actually looked at the data. However, looking at the data rarely, if ever, makes a difference to the everyday lives of people. In her 2000 book, Hans reports that people in all three parts of her study—the actual jurors, the mock jurors, and the poll respondents—"reflect widespread belief in a litigation explosion and acute concern about the legitimacy of civil lawsuits."[121] And the idea still appears in describing changes in the amount of litigation in particular kinds of litigation. For instance, a recent post used the term to describe patent litigation.[122]

There may be an upswing in litigation, but what if the suits are warranted? If they are warranted, the explosion idea loses much of its punch since the system is doing what it is supposed to be doing.

Related to the litigation explosion idea is the characterization of suits as frivolous. After all, there may be an upswing in litigation, but what if the suits are warranted? If they are warranted, the explosion idea loses much of its punch since the system is doing what it is supposed to be doing. Of course, there is the related question of just what makes a suit frivolous, beyond the person, business, or whomever being sued saying it is. Generally, the answer is found in how we see the people who bring the lawsuits and their motives and the motives of their lawyers. The short answer is greed and a lack of responsibility, which, we are told, reflect a loss of previously valued norms. It is a loss of legitimacy.

Luntz' guidance book says his polling shows that by far most people think "too many people are abusing the legal system in order to get large damage awards."[123] 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."[124]

Frivolous suits undermine the system's efficiency by clogging the courts leading to delay and cost. The eight-part 1987 Aetna campaign discussed above—"Speaking Out for Civil Justice Reform"—addressed efficiency in one of its advertisements (55 Cents on the Dollar) saying, "It is time to clean up an act which is bloated with unnecessary costs and delay, played without clear rules, capable of producing verdicts that truly offend the conscience. Don't let anybody tell you that such waste is inevitable. We have far more efficient models."[125] Those other models mean no litigation.

Years before Hans explored public views for her book project, polls related to the reformers' efforts appeared in the 1980s, probing people's views on the civil justice system. They can be read to say that there are too many frivolous lawsuits, and that there has been a litigation explosion. Asked in a 1986 Cambridge Reports survey (done for the Insurance Information Institute) whether plaintiffs bringing civil liability lawsuits have a justified cause for doing so, only 21 percent responded that plaintiffs have cause more than half the time; 40 percent responded about half the time; and 31 percent responded less than half the time.[126] In a 1986 Harris and Associates survey (done for Aetna Insurance Company as a part of its public relations efforts), 68 percent of the respondents agreed with the statement that more people bring lawsuits than should.[127]

ATRA has long emphasized the idea of frivolous lawsuits, saying, "According to a 2003 ATRA survey, 85 percent of Americans believe too many frivolous lawsuits clog our courts. ATRA successfully translates that frustration into action and reform."[128] These suits reflect a problem with responsibility. That is, the lack of personal responsibility on the part of the people bringing those lawsuits and their lawyers (although not apparently the responsibility of those who wind up getting sued).

Returning to ATRA's current mission statement, "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."[129]

For ATRA, the negative effects of frivolous, or even corrupt, lawsuits brought by "aggressive personal injury lawyers" go beyond just the specific targets. These suits themselves "undermine the notion of personal responsibility."[130] The concern with responsibility, a norm that would qualify as a "motherhood" issue is not ATRA's alone and has long been a part of the reform rhetoric. As noted above, in arguing for substantial change in the early 1990s, the Manhattan Institute's Judicial Studies Program also looked to responsibility.

In retrospect, the 1987 Aetna campaign appears as the most sophisticated use of metaphors in conveying the message of an illegitimate civil justice system and it warrants attention. It touches on almost everything thematic in the reform rhetoric. Responsibility was one of its main themes and it was coupled with fairness (irresponsibility leads to unfairness) and restoration.[131] Five of the 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."

"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 in the way in which it works—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 term fairness and various synonyms, like balance or equitable, are ubiquitous in the reform rhetoric—ideas essential to legitimacy.

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 forward—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 can wrong . . . We can restore balance to this system." The fall from grace can be reversed by returning to an earlier, more perfect legal world—one in which developments in the rules were rolled back.

For many people, especially those who see themselves as social conservatives, the 1960s portray an image of moral decline and social experimentation of a kind that was threatening to traditional values.

Interestingly, even the 1960s became a metaphor for decline and restoration to a better age. For many people, especially those who see themselves as social conservatives, the 1960s portray an image of moral decline and social experimentation of a kind that was threatening to traditional values (think Woodstock and the 1968 Democratic convention). In legal historian Joseph Ranney's view,

> The 1960s, a time of great social unrest, ushered in the modern age of American culture and tort law. The modern age has been dominated by a debate between those who support the right to express one's individuality no matter how unconventional . . . and those who believe that allegiance to traditional social mores and an emphasis on self-reliance and individual responsibility are paramount. That debate has also dominated modern tort law.[132]

If that debate has dominated modern tort law, it is because the reformers purposively used the 1960s as a rhetorical device that dovetails nicely with concerns over responsibility and decline. It also dovetails with themes appearing in partisan politics in the 1990s. Luntz' guidebook mentioned earlier told Republican activists and candidates in the mid-1990s that people are afraid and fear for the future and "their emotions are a depressing amalgam of anger, ambivalence, and hopelessness."[133] They also dovetail with themes in politics today.

Moving the notion of the threatening 1960s to the reform rhetoric enhances the idea of a civil justice that has lost its legitimacy. As with the perceived decline in society writ large, the system's decline and change for the worse starts then—the two are conflated. In his 1990 book *Liability: The Legal Revolution and Its Consequences*, Peter Huber characterizes those he calls the "founders" of the current tort system as utopians, well-intentioned, but naive experimenters or revolutionaries who thoroughly undermined the old traditional ways.[134] Their ideas precipitated the dystopia.

Walter Olson also used the 1960s as a metaphor in his 1991 book *The Litigation Explosion.* He structures his argument around an explicit comparison to older and better ways. On the very first page Olson says, "The trend proceeded gradually over decades and then quite suddenly moved into higher gear in the late 1960s and 1970s . . . Taken together, the changes amount to a unique experiment in freeing the legal profession and the litigious impulse from age-old constraints."[135] It is worth noting that any thematic similarity between the books may reflect that both Huber and Olson were associated with the Manhattan Institute at the time and the books were heavily marketed by Manhattan.

Having laid out the contours of the dystopia in *Liability,* Huber reminds us that while the situation is dire there is still hope. The civil justice system must be reformed, and it can be. There are solutions available, the problem can be remedied. In his words, "The path we have been traveling is not inevitable, and there is yet time for a serious change in course."[136] The reform rhetoric speaks not of bold new experiments, but of taking us back to the way things were. 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."[137]

While there has been success in enacted reforms, the idea of restoration is still important, but now vigilance must be maintained so that the restoration does not slip back into dystopia. The battle is ongoing. Michigan Lawsuit Abuse Watch, for example, disbanded in 2013, thinking that "significant progress had been made in restoring fairness and personal responsibility to the justice system." But things began to worsen again, so the group came back in 2019. "We can't let Michigan slide back anymore."[138]

In Texas, where the reformers have been quite successful, the defense of reforms enacted is crucial—if for no other reason than plaintiffs' lawyers. The Texans Against Lawsuit Abuse website says:

> Texas has made great strides in improving the state's legal climate, but we must be vigilant in protecting the progress we've made. Personal injury lawyers are unrelenting and push hundreds of proposals that would create new ways to sue and undo civil justice reforms in Texas . . .
>
> . . . TALA is always at the ready, challenging efforts to take our state back to the days when Texas was the country's lawsuit abuse poster child . . .
>
> . . . In Texas, we've come so far in creating a legal system that is based on common sense and fairness. It's been a long, hard battle to improve our state's civil justice system and every legislative session proves that now is no time to rest.[139]

Such groups have learned that the message needs to be relentlessly stoked because the villain, plaintiffs' lawyers, have yet to be finally vanquished.

C. Making Dystopia Real—Dire Consequences

An important aspect of strategic representation is causality. The glue that holds 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. Stories make things real for people by showing how we all pay the price and doing so in ways that play to fear and anxiety.

The glue that holds 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.

The reform rhetoric has long been full of claims about how we all pay the price. Many will recognize claims about health care professionals being driven out of a state because of medical malpractice cases. Malpractice was the driving force in some of the first tort reform efforts in the 1970s. The idea is that one's basic, necessary health care is constantly being threatened and changes in the law related to malpractice remain high on the list of issues for tort reform organizations. Medical malpractice remains a prominent reform target.[140]

The reformers raised other specters that can easily create fear and anxiety, implying that jobs and America's economic well-being were being threatened, small businesses were being forced to close, and essential products were no longer being produced, including medical equipment. Trucking companies that move essential products of all kinds across the country are being harmed by lawsuits. Day care centers are closing. There is always an innocent victim and an obvious villain. Plaintiffs' lawyers are the villain and their unscrupulousness in these stories is palpable—the scapegoats. The defendants and all of us are hapless victims. Legal journalist Jost, however, reminds us that these stories include a fair amount of blame shifting as a way of avoiding unwanted regulation, critical examination, and accountability.[141]

The reformers raised other specters that can easily create fear and anxiety, implying that jobs and America's economic well-being were being threatened, small businesses were being forced to close, and essential products were no longer being produced.

Visual imagery, in addition to stories told with just words, are an especially efficient and powerful means of telling a story about the consequences of a failing, illegitimate civil justice system. The 1986 Insurance Information Institute discussed earlier—the "Civil Justice Campaign" —provides an example. The campaign conveyed a sense of urgency. Built around the concept of the Lawsuit Crisis We All Pay the Price, the campaign employed a series of eye-catching dramatic print advertisements intended to drive home the idea that we all pay 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."[142]

The first advertisement claims that the civil justice system is driving obstetricians out of business 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 forcing local schools to close 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."[143] Each undermines any idea of legitimacy.

Words can be powerful, but not as powerful as well-crafted images.

What's important is the stark and threatening imagery of each advertisement. Words can be powerful, but not as powerful as well-crafted images. Each image appealed directly to one of the motherhood issues, and each was clearly intended to convey a message that there are serious problems with the civil justice system that threaten the everyday lives of ordinary Americans. Each includes a photograph 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 fears 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*.[144]

In 1990, ATRA embarked on a public relations campaign called LAWSUIT ABUSE! Guess Who Picks Up the Tab? It too draws on the kind of motherhood issues that are related to legitimacy. According to a letter from the ATRA president to ATRA members, one key goal "is to help all Americans understand the consequences of a legal system that encourages lawsuits and high awards."[145] The centerpiece was five posters/advertisements along with bumper stickers with the LAWSUIT ABUSE! logo.

The first ad talks about products liability cases that shows the hidden "tort tax" built into the price of products. The image shows three products—a football helmet, a ladder, and childhood vaccines. Each has a tag showing the cost of manufacture and the added "tort tax" yielding the price to consumers. The second shows a young mother and child, the mother pregnant with a worried look on her face, standing in front of the door to a doctor's office. The sign on the door says, "SORRY. We no longer accept Ob. Patients."

The third advertisement has two sad looking children and a pool maintenance man, with the maintenance man apparently telling the children their pool's diving board is being removed. The fourth is different and distills the connection between irresponsibility and illegitimacy better than anything else. It shows a car with a bumper sticker saying, "GO AHEAD. HIT ME. (I need the money.)" The text complains of too many drivers wanting to cash in, seeing "an auto accident as a means to gain a financial windfall. No matter who's at fault." The fifth advertisement is about volunteerism and it "shows how tort reform helps volunteers who face the threat of lawsuits."

The idea was to place these materials in as many local settings as possible: "Our goal is to have these posters show up in office and public reception areas all across the country . . . and we want to encourage publications of all kinds" to use the ads.[146] In 1992, more than 20,000 LAWSUIT ABUSE! Guess Who Picks Up the Tab? posters began appearing on New York Transit Authority subway trains, buses, and stations.[147] Posters also appeared on Chicago Transit Authority buses and trains.

. . . print media . . . has 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.

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." The article continued, "It's the same story across the state. Tort reform. Tort reform groups like CALA and Texans for Lawsuit Reform have been spreading their message about lawsuit abuse in print, on the airwaves, and on the highways."[148]

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. Why Dystopia is Important for Access

The civil justice system is reactive. It needs litigants bringing cases, which means meaningful access. Without access, the civil justice system cannot achieve any of its goals, like accountability and deterrence. We quoted Professor Brickman at the beginning of the paper on the importance of access, and it is worth doing so again: "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."[149] 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 the letter writer.

The civil justice system is reactive. It needs litigants bringing cases, which means meaningful access. Without access, the civil justice system cannot achieve any of its goals, like accountability and deterrence.

A. Electoral Politics and Legislation

Needless to say, the tort reform movement has always had a strong focus on elections. It seeks support for candidates (legislative and judicial) who share the reformers' view of the civil justice system and the formal changes the reformers 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. For voters, these are the candidates who will, they are told, protect them from the civil justice system's failures—protect them from the dire consequences and restore legitimacy to the system.

The tort reform movement has always had a strong focus on elections. It seeks support for candidates (legislative and judicial) who share the reformers' view of the civil justice system and the formal changes the reformers want.

Many of the formal changes, of course, will undermine access. Some make procedural changes, making litigation

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 and thereby keep professionals in the states, help keep small businesses afloat, or make needed products available at reasonable prices. In practice caps can freeze certain potential litigants out of the civil justice system altogether—what Professor Lucinda Finley calls tort reform's "hidden victims."[150] 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.

Plaintiffs' lawyers must always balance cost, risk, and potential return in deciding what cases to handle.

As one Texas lawyer told us about why he was no longer taking such clients in medical malpractice cases, "the juice simply isn't worth the squeeze." What he was talking about is the contingency fee business model, or as law professors David Hyman and Charles Silver bluntly put it, "It's the incentives, stupid."[151] Plaintiffs' lawyers must always balance cost, risk, and potential return in deciding what cases to handle.[152] 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 another 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."[153]

Regardless of the stated purposes of caps, their proponents appeared to have understood all too well their effect on access.

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."[154] Removing incentives for plaintiffs' lawyers runs throughout tort reform, whether it's legislation or the "propaganda" the letter writer blames.

The Texas cap legislation came only after a referendum amending the Texas Constitution to allow for caps. Controversial and bitterly fought, the amendment was needed to overrule prior Texas Supreme rulings holding that such damage caps violated the state constitution.[155] Interestingly, one of the most important opponents of the amendment and the legislation was Deborah Hankinson, a Republican and former Texas Supreme Justice originally appointed by to the court by then-Governor George W. Bush. She was joined by another former Texas Supreme Court justice and Bush appointee—Republican James A. Baker.[156] Hankinson told a journalist, "this amendment . . . wasn'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 . . . I view this as something that deprives people of their constitutional rights."[157] Former Justice Baker agreed, arguing that the reformers had gone too far in allowing the legislature to limit damages. It would undermine the rights the framers of the Texas Constitution provided to citizens to have their disputes fully heard by the courts.[158]

The success of the 2003 Texas amendment and the subsequent cap legislation show why tort reform organizations encourage voting. For example, Texans Against Lawsuit Abuse posted an election reminder on its website this past February 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."[159] As we noted above, Texans Against Lawsuit Abuse also urges people to vote as way to protect the changes already enacted from the plaintiffs' lawyers: "We must be vigilant in protecting the progress we've made. Personal injury lawyers are unrelenting and push hundreds of proposals that would create new ways to sue and undo civil justice reforms in Texas."[160]

The success of the 2003 Texas amendment and the subsequent cap legislation show why tort reform organizations encourage voting.

Similarly, Louisiana Lawsuit Abuse Watch tells its followers to "engage as voters to urge candidates and elected officials to support reform."[161] It also encourages its followers to contact their legislators and offers instructions on how to do so. It has a link that allows one to find who their legislator is and give tips on writing and calling a legislator. CALA-California's website says, "CALA-California is going to help you call or write, because it's important that your legislators know your concerns."[162] It also encourages followers to "engage as voters to urge your elected officials and candidates to support reform."[163] This is "outside" lobbying.

The tie to electoral politics is longstanding 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."[164]

The tie to electoral politics is long-standing and tends more and more to reflect partisan differences seen today.

Even though the Reagan administration dabbled in tort reform with its Tort Policy Working Group,[165] Texas in the late 1980s through the early 2000s provides perhaps *the* example of the development of that tie. It started with elections to the Texas Supreme Court, a court seen in the 1970s and 1980s as staunchly pro-plaintiff (as well as the site of a certain amount of scandal).[166] By the early 1990s, the Court dramatically shifted back to a pro-defense orientation, where it has securely remained. By the end of the 1990s, all nine members of the Court were pro-reform Republicans.

That shift and tort reform played a crucial role in building the Republican ascendancy in a previously Democratic state. In the view of most observers, the key actor was Republican strategist Karl Rove. He was, the *Texas Monthly's* S. C. Gywnne said, "the driving force behind one of the great tectonic political shifts in American history: the Republicanization of Texas."[167] It was Rove who saw the political advantages of using tort reform as a political issue in building the Republican Party. He combined tort reform, the Texas Supreme Court's then pro-plaintiff orientation, and the demonization of plaintiffs' lawyers to organize and mobilize a set of political interests and contributors not only to elect favored judicial candidates but also to build the foundation for the shift to Republican political control in Texas. Texans for Lawsuit Reform, founded in 1994 and not an ATRA affiliate, was an early and important part of the effort. It has become a major political force in Texas—not just for tort reform but also for pro-business and conservative issues more generally.

Rove's running of Thomas Phillips's successful campaign for Texas chief justice in 1988, Gwynne said, was "a watershed."[168] It was the test of the political valence of tort reform and the demonization of plaintiffs' lawyers. Phillips won, and Rove successfully ran the campaigns of six other Republican Supreme Court candidates using a similar strategy through the 1990s. Building on the success in judicial races, tort reform was also one of the key issues in the Rove-designed campaign for George W. Bush's successful gubernatorial run in 1994. The issue came with Rove and Bush to Washington, D.C, after Bush won the presidency in 2000.

Tort reform, however, reached the national level earlier, being one of the 10 national policy areas in the Republicans' 1994 Contract with America.

Tort reform, however, reached the national level earlier, being one of the 10 national policy areas in the Republicans' 1994 *Contract with America*—The Common Sense Legal Reform Act. As we saw above, civil justice reform was also an issue in Lutz' *Language of the 21st Century* guidebook for Republican activists. Its discussion of reform includes a section called "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."[169]

Activists should emphasize the everyday consequences "of our out-of-control civil justice system."[170] In 1997, *Roll Call* ran a front-page story titled "Trial Layers New GOP 'Villain' for 1998 Elections," citing Luntz' guidebook and saying, "(Speaker) Gingrich . . . believes the trial lawyers are a dangerous threat to the Republicans' Congressional majority and their policy plans."[171] This theme persists in the current efforts to encourage voters and not to let them forget who the villain is.

B. Litigating

The delegitimization of the civil justice system can also affect 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."[172] Not surprisingly, one will find the same admonition on the Citizens Against Lawsuit Abuse-California website and other ATRA-affiliated groups.[173]

The delegitimization of the civil justice system can also affect access by encouraging people not to use the system.

The message is found in the ways litigants are characterized. Personal responsibility has been one of the constants in the reform rhetoric in characterizing people who try to use the system. We can see this in some of the campaigns already discussed. ATRA's mission statement has long said, "We work to change the way people think about personal responsibility and civil litigation." The 1987 Aetna campaign discussed above is all about responsibility. It said, "We need to return to the basic American principle of personal responsibility for one's actions." Doing our part—yours and mine—in the fight against lawsuit abuse is thinking about our own personal responsibility. The subtle message is that all of us need to think of our own personal responsibility—not the possible responsibility of the interests pushing tort reform.

As we saw, other advertisements in the Aetna campaign also emphasize personal responsibility. "Sue City, USA," about tort cases against local governments tells us, "All Americans must be willing to accept more risk and responsibility. Remember we *all* pay." "Sue-icidal Impulse" tells us "today, the object is to collect—from someone [a deep pocket]." It talks of an "entitlement mentality" and a system "which rewards irresponsibility."

Personal responsibility has been one of the constants in the reform rhetoric in characterizing people who try to use the system. . . . People are not only told to take more personal responsibility for their own actions but also to take responsibility for fixing the system.

Other themes can discourage litigation, most importantly the idea of we all pay the price. Litigating is against your self-interest. The idea being that litigating may make one complicit in all those dire consequences and worsen the problem of an illegitimate civil justice system. The restoration to that earlier, better time cannot even begin if one continues to participate in that system.

People are not only told to take more personal responsibility for their own actions but also to take responsibility for fixing the system. The CALA website tells people, "The path to ending lawsuit abuse starts with you! By joining CALA's nationwide network of grassroots activists, we can work together to shine a light on the devastating impact of lawsuit abuse by engaging with community leaders, making our voices heard to state and local lawmakers, and fighting for legislative reforms."[174] People are presented with opportunities to volunteer and, of course, to be a pro-reform voter. You should be a member of a team of like-minded people—you must choose a side.

Sometimes subtlety is cast aside and the message can be direct. 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 has been much in Texas), the dangers of abuse were still out there and vigilance is needed. She said, "Lawsuit abuse hurts us all. . . . October 6-10 is Lawsuit Awareness Week, an observance that Texans Against Lawsuit Abuse takes very seriously as part of our year-round work to educate and raise awareness about the costs of lawsuit abuse, the benefits of reform and the importance of basic civic duties like jury service."[175]

She tells readers that "(s)topping the abuse of courts really starts with each us . . . [and] the choices we make determine whether we are part of the solution or contribute to the problem of lawsuit abuse."[176] She offers advice if one needs to consult a lawyer—"choose wisely and only after doing research to make sure you hire someone who is qualified, has high ethical standards and is acting in your interests rather than in their own financial interest."[177] She then 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.[178]

At the time of the article, Scott was president of Bay Area Citizens Against Lawsuit Abuse.

The website of Citizens Against Lawsuit Abuse Central Texas devotes space to explaining the virtues of arbitration over litigation, noting that consumers are free to choose arbitration despite the efforts of plaintiffs' lawyers to fight against it:

> Congress has long encouraged arbitration and the U.S. Supreme Court has repeatedly upheld it as a fundamental contractual right. That right has come under attack by personal injury lawyers who are fiercely trying to preserve their monopoly on the civil justice system. While it provides a welcome option from the need for money-eating, emotionally draining litigation, there are changes that can make this alternative more consumer-friendly.[179]

The organization also talks of personal responsibility, echoing the 1987 Aetna campaign, it said: "Every action we take in life carries with it some risk. The question is, when do we take personal responsibility for our actions—and their consequences—and when is it OK to blame others?" CALA advocates an end to the "blame game," the alleged practice by many in society to use lawsuits to solve a problem rather than taking personal responsibility for the consequences of their actions.[180]

CALA advocates an end to the "blame game," the alleged practice by many in society to use lawsuits to solve a problem rather than taking personal responsibility for the consequences of their actions.

Michigan Lawsuit Abuse Watch suggests that injured people not file a lawsuit, asking "Is a lawsuit right for you?" The answer: "If you have been injured or wronged, you have a number of options for getting the wrongdoer to pay in order to make things right. A lawsuit is one option. Mediation is another." Hiring a plaintiffs' lawyer is the last option discussed with a long list of consumer tips about working with such a lawyer.[181] In the context of a website devoted to the shortcomings of the system and plaintiffs' lawyers, consumer tips is something of a misnomer—more a set of implied criticisms of plaintiffs' lawyers that may discourage the very idea of turning to a lawyer.

C. Juries and Plaintiffs' Lawyers

Hans's findings point to one obvious reason that efforts to shape the public mind are important for access—influencing the general 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."[182] 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. In turn, decreasing verdicts and what follows them can eventually make it more difficult for lawyers like him to maintain their practices.

> 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. 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.[183] As Governor Perry might say, it's about removing the incentive to file frivolous lawsuits. Or as Hankinson might say, it's about removing the incentive to file lawsuits for people with legitimate claims by restricting access to the courthouse. Professor Brickman would agree, but for him it's a good thing.

The fulcrum for the letter writer's story is jurors and verdicts. As we would expect we found plaintiffs' lawyers in Texas to be careful students of verdicts. They told us of the changes they perceived in verdicts, saying 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 told us:

> They (jurors) have heard about tort reform because there's been a lot of heavy advertising by business groups—I mean advertising statewide . . . radio advertising. 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.

He called the campaigns his "silent helper," and said: "[when I] was trying cases for the City of Fort Worth . . . They (jurors) are sitting there going . . . this is our tax money . . . I never said that, but it's right there." Similarly, a Dallas business principal interviewed as a part of a 1998 Texas Department of Insurance study on the impact of tort reform said: "Well, I think a big part of it is the education of the jurors. You know, I spoke about the movement, Citizens Against Lawsuit Abuse. I think that has . . . my feeling, anyway, is that that has helped educate jurors to where they can associate big awards to the price of their car insurance."[184]

It is important to note that this problem was not seen simply as a Texas problem. It has been seen as national in scope by plaintiffs' lawyers for some time. For instance, writing in 1997 in *Trial* for a national audience on what they called "juror bias," plaintiffs' lawyers James Gilbert, Stuart Ollanik, and David Wenner (all non-Texans) talk about "an environment charged with 'tort reform' rhetoric, where potential jurors come to court already influenced by deliberate propaganda aimed at discrediting plaintiffs and their lawyers."[185] It was considered so serious that the Association of Trial Lawyers of America (now the American Association for Justice/AAJ) began conducting seminars across the country for its members on overcoming juror bias. More recently, AAJ offered a webinar titled, "Connecting with Conservative Jurors in a Divided World." Participants would "learn how to identify a potential juror's belief system and how you can relate your case to that belief system in a compelling way."[186]

Changes in jury verdicts—real or perceived—reverberate throughout the civil litigation process and may affect lawyers' practices in a variety of ways.

Changes in jury verdicts—real or perceived—reverberate throughout the civil litigation process and may affect lawyers' practices in a variety of ways. All of the participants in this process follow verdicts carefully in the jurisdictions in which they work. Most plaintiffs' lawyers adjust their practices to what they believe juries are saying with verdicts—saying 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 we 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."

Plaintiffs' lawyers believe the reformers have been so successful with the public relations campaigns that jury verdicts have changed for the worse, making lower awards in cases with comparable injuries. An experienced San Antonio lawyer summarizes things as follows: "We start with the jury box and we start with the suspicion, and it's hard to get a good verdict for a deserving victim. So very, very hard . . . [in the past] we felt a warmth in the jury box, whereas now we feel like it's a refrigerator." This is the "common sense" that guides many Texas plaintiffs' lawyers. It has something to tell us about how these lawyers—the gatekeepers to the civil justice system—see the immediate future of civil litigation. What they do on the basis of that common sense may tell us something about the longer term.

The law's practical effect depends on the extent to which injured 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. One downsizing lawyer said about his staff: "[its] been going down . . . I mean as a matter of economics, I mean the personal injury field is not as lucrative as it used to be . . . we're trying to work smarter instead of harder with a lot less people."

Greater attention is paid to case and client screening because juries and insurance adjusters are tougher. This results in fewer cases being taken.

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." Lawyers are less willing to take cases with relatively low damages and primarily soft tissue injury. 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 the 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."[187]

Diversifying a practice's mix of business is [a] response to the altered environment . . . [which] may further diminish the supply of legal services for injured people . . . .

Diversifying a practice's mix of business is another response to the altered environment, and it too is one that may further diminish the supply of legal services for injured people, while expanding the supply for others. Diversification is not something usually done because a lawyer simply sees a new opportunity. More likely, it is typically done out of necessity and involves moving to what are perceived as safer markets. One lawyer told us: "I know how to practice criminal law. I know how to do divorces. I don't want to do them, but to be a lawyer you might still have to. And I think a lot of personal injury lawyers are coming to that conclusion." Another said: "The fact is that a lot of the plaintiffs' bar . . . are really trying to diversify in other areas because the handwriting is on the wall." He too is now doing family law and criminal work.

As plaintiffs' lawyers see it, the tort reformers' political efforts at lobbying the public mind have been very successful in altering the cultural environment surrounding civil litigation. This altered environment, in turn, is having a serious impact on their practices. Two of the lawyers we interviewed—one who is older and whose practice did not survive, and one who is younger and whose practice is thriving—each offered similar characterizations of what the future may be like for plaintiffs' lawyers.

The older lawyer talked of the increasing pressure among lawyers trying to make a living in a market in which the number of what are now "good cases" is smaller than in the past and the settlements and verdicts are less for those good cases. He characterized the situation as "a brutal process of some lawyers being weeded out" in the competition in this altered environment.

The younger, thriving lawyer was more vivid in his characterization: "It's Darwinism—survival of the fittest." Tort reform may reduce the number of plaintiffs' lawyers able to survive, but those who do survive are likely to be very good at succeeding in the altered environment. This suggests a smaller plaintiffs' bar and less access. Ironically, it could also suggest a more proficient plaintiffs' bar.

Conclusion

We started our research wanting to understand our letter writer's demise. He's interesting because he was not a big-name lawyer handling high-value cases. He was a good lawyer who handled the kinds of everyday cases that everyday people would have. We wanted to know if his demise, 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 at the outset, is fool's access. Few people can pay a lawyer out of pocket, so it's the plaintiffs' lawyers contingency fee business model that makes access possible. Plaintiffs' lawyers are the system's gatekeepers and provide that access. The demise of lawyers like him or changes in 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.

More significantly, it is his explanation for his demise that draws our attention. It does so because of what it can teach us about the politics of tort reform, but especially because of what it can tell us about how the tort reform movement went about pursuing its goals. Here we're talking about what the letter-writer called propaganda—the sophisticated strategic representation of the civil system honed over many

years and used to garner support from the public and policy-makers for changes in civil justice system that benefited the reformers' interests.

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."[188] The advice echoes Tom Tyler in focusing on the importance of fairness in the operation of the civil justice system.[189] 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."[190] This is the real reason for understanding the letter-writer's demise.

Notes

* Research Professor Emeritus, American Bar Foundation. The American Bar Endowment provides an annual unrestricted grant to support American Bar Foundation research. The views expressed are the author's alone.

1 Stephen Daniels & Joanne Martin, Tort Reform, Plaintiffs' Lawyers, and Access to Justice xi (2015) [hereinafter Daniels & Martin, Tort Reform]; Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest—It's Even More True Now*, 51 New York Law Sch. L. Rev. 285 (2006-07) [hereinafter Daniels & Martin, *Survival of the Fittest*]. *See* Joseph Calve, *Poured Out*, Texas Law. 1 (Dec. 16, 1996), for a journalistic discussion of lawyers like the letter writer.

2 Joanne Martin is Research Professor Emerita, American Bar Foundation and Executive Director, American Bar Endowment.

3 All co-authored by Daniels and Martin. *See* Daniels & Martin, Tort Reform, *supra* note 1; *Damage Caps and Access to Justice: Lessons from Texas*," 96 Or. L. Rev. 635 (2018) [hereinafter Daniels & Martin, *Lessons from Texas*]; *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 Emory L. J. 1445 (2016) [hereinafter *Strange Success Revisited*]; *Plaintiffs' Lawyers and the Tension between Professional Norms and the Need to Generate Business*, *in* Lawyers in Practice: Ethical Decision-Making in Context (Leslie Levin & Lynn Mather eds., 2012); *It is No Longer Viable from a Practical and Business Standpoint: Damage Caps, 'Hidden Victims,' and the Declining Interest in Medical Malpractice Cases,* 16 *Int. J. Leg. Prof. 187 (2010)*; *Survival of the Fittest*, *supra* note 1; *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 Vand. L. Rev. 1051 (2006); *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access,* 55 DePaul L. Rev. 635 (2006); *The Strange Success of Tort Reform*, 53 Emory L. J. 1225 (2004); *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex. L. Rev. 1781 (2002); *"The Impact That It Has Had is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DePaul L. Rev. 453 (2000) [hereinafter *People's Ears*]; *"It's Darwinism—Survival of the Fittest": How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 Law & Pol'y 377 (1999); *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 Wis. L. Rev. 71 (1998); *Access Denied: The Subtle Effects of Tort Reform*, Trial, July 1997, at 26-33 [hereinafter Daniels & Martin, *Access Denied*]; Civil Juries and the Politics of Reform (1995) [hereinafter Daniels & Martin, Civil Juries].

4 *Personal Injury Trial Law*, Tex. Board of Legal Specialization, https://www.tbls.org/specialtyarea/PI (last visited June 3, 2022).

5 State Bar of Texas Membership: Attorney Statistical Profile (2020-21) (State Bar of Tx. eds., 2021) https://www.texasbar.com/AM/Template.cfm?-Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=53596.

6 Our research on tort reform and on plaintiffs' lawyers has always had an underlying concern with access, so others coming from a different angle may see the letter writer's demise differently. *See* Walter Olson, The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law (2003); Lester Brickman, Lawyer Barons: What Their Contingency Fees Really Cost America (2011).

7 Brickman, *supra* note 6, at 121.

8 *See* Martin & Daniels, *Strange Success Revisited supra* note 3, at 1472-75.

9 *Id*. at 1476.

10 Jennifer Robbennolt & Valerie Hans, The Psychology of Tort Law 209 (2016). Political scientists studying courts would agree—"courts depend on legitimacy and public trust to functions successfully." James Wenzel, et al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 Amer. Pol. Res. 191, 204 (2003). *See also* Hon. T.W. Small (Ret.), *The Rule of Law is Powerful and Fragile: It's Your Job to Protect It*, Nat'l Judicial College, https://www.judges.org/news-and-info/the-rule-of-law-is-powerful-and-fragile-its-your-job-to-protect-it/ (May 18, 2020).

11 *See* Herbert Jacob, Law and Politics in the United States 123 (1986); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 Judicature 22 (July-Aug. 1997); Martin & Daniels, *Access Denied, supra* note 3.

12 Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States 254 (2004).

13 *Id*.

14 Daniels & Martin, *Lessons from Texas*, *supra* note 3, at 648.

15 On the business model of contingency fee practice *see* Kritzer, *supra* note 12, at 1-9. Not to be overlooked is the broader challenge of access to justice that is endemic in our system that affects many other areas of legal need.

16 Deborah Stone, Policy Paradox: The Art of Political Decision Making 309 (1997).

17 "Public mind" here means what we—as Americans—think about something. *See*, e.g., Kathlyn Taylor Gaubatz, Crime in the Public Mind (1995), described as exploring "the politics of crime and criminal justice, examining in depth what Americans think about penalties for criminal offenders." https://www.press.umich.edu/14851/:~:text=At%20a%20time%20when%20crime%20has%20been%20called,justice%20done%20with%20our%20innate%20compassion%20and%20understanding.

18 American Tort Reform Association (ATRA), https://www.atra.org (last visited June 3, 2022) ("Fighting Lawsuit Abuse Since 1986").

19 *See id.* "Reform in the States," which provides a list of all 50 states and the instruction; "[c]lick on each state to learn about the civil justice reform laws ATRA has worked to pass in state legislatures, when they were passed, and whether they have been challenged in the courts." *Id.*

20 *Mission—A Track Record of Success*, ATRA, https://www.atra.org/about/mission/ (last visited June 3, 2022) [hereinafter ATRA, *Mission*] (emphasis added).

21 *See* Tom Tyler, Why People Obey Law (1990); Allen Lind & Tom Tyler, The Social Psychology of Procedural Justice (1988).

22 Robbennolt & Hans, *supra* note 10.

23 *See* Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 349 (2003).

24 Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Ann. Rev. of Psych. 375, 376 (2006).

25 Tyler, *supra* note 23, at 286.

26 *Id*. at 284.

27 *Id.* at 300-301.

28 *Id.* at 350.

29 Valerie Hans, Business on Trial: The Civil Jury and Corporate Responsibility (2000).

30 *Id.* at 76.

31 *Id.*

32 *Id.* at 58. Hans summarized the research available at the time of her book. *Id*. at 52-58.

33 *Id.* at 70-74.

34 *Id* at 74. See also, William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis 183 (2004), which shows in detail how the McDonald's case was portrayed in the media and mass culture in a book chapter with a title that says it all: "Java Jive: Genealogy of a Juridical Icon." It shows how "media coverage and analysis made any rational discussion of the dispute and the policy issues it raises virtually impossible, while providing a powerful boost to the dubious general claims of a partisan political reform movement." *Id.* at 196.

35 John Kingdon, Agendas, Alternatives and Public Policies 91 (1st ed. 1984).

36 *See* Harold Laswell, Politics: Who Gets What, When, How (1936); *see also* Thomas Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society 27 (2002).

37 Kenneth Jost, *Polemics Won't Solve Insurance Crisis*, L.A. Daily J., Dec. 9, 1985, at 2.

38 Haltom & McCann, *supra* note 34, at 38.

39 *Id*. In the background are developments in, and debates about, tort law over the last century. Legal historian Lawrence Friedman summarized those changes in the following way: "the old tort system [that generally favored defendants] was completely dismantled; the courts and the legislatures limited or removed the obstacles that stood in the way of plaintiffs." *American Law in the 20th Century* 349 (2002). Joseph Ranney, another legal historian, sees the reformers as "traditionalists" wanting "to roll back accident-cost socialization"—the long-term trend of moving away from traditional ideas of tort law (such as fault, negligence, and liability) as society has changed. Joseph Ranney, The Burden of All: A Social History of American Tort Law xvi (2022).

40 Burke, *supra* note 36, at 31-32.

41 *Id*. at 32.

42 *Id*.

43 *See* Daniels & Martin, Tort Reform, *supra* note 1, at 17-20.

44 Haltom & McCann, *supra* note 34, at 38.

45 *Id.*

46 *See Bill Set Me Straight on Jury Awards*, Saturday Evening Post, Mar. 28, 1953, at 155; *A True Verdict Render According to the LAW and the EVIDENCE?*, Saturday Evening Post, Feb. 14, 1953, at 118; *Me? I'm Paying for Excessive Jury Awards?* Life, Mar. 9, 1953, at 157; *YOUR Insurance Premium Is Being Determined Now*, Life, Jan. 26, 1953, at 91.

47 Many years later the idea of "going rates" appeared in the academic literature. *See* H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment (2d ed. 1980); Marc Galanter, *The Radiating Effects of Courts*, *in*, Empirical Theories About Courts (Keith Boyum & Lynn Mather eds.,1983).

48 *About*, Bay Area Citizens Against Lawsuit Abuse ("BACALA"), https://www.bacala.net/about (last visited June 3, 2022).

49 Elizabeth Loftus, *Insurance Advertising and Jury Awards*, ABA J., Jan. 1979, at 69. For a discussion of how advertisements disseminate ideological messages see William O'Barr, Culture and the Ad: Exploring Otherness in the World of Advertising (1994).

50 Loftus, *supra* note 49, at 70.

51 A broader discussion, including the entire set of advertisements, can be found in Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda Building*, 52 Law & Contemp. Prob. 269, 281-292 (1989) [hereinafter *The Question of Jury Competence*]; *see also*, Daniels & Martin, *People's Ears*, *supra* note 3, at 468-70.

52 Rick Desloge, *Aetna Tests 'Lawsuit Abuse' Campaign Here*, St. Louis Bus. J., Oct. 31-Nov. 6, 1988, at 1; *see also* Daniels & Martin, *People's Ears*, *supra* note 3 at 466.

53 Desloge, *supra* note 52. The story also provided some of the advertising copy for one of the St. Louis ads:

> Lawsuit abuse is out of control. While criminals are suing their victims, a tenth of our obstetricians no longer deliver babies. And many surgeons are refusing risky surgery. They're not afraid of the outcome. They're afraid of the lawsuits . . . .
>
> What's happening to us? When did we start looking at every accident, every mistake as just another easy shot at a quick buck? *Id.*

Similar advertising copy appeared in the Rochester, N.Y., *Democrat & Chronicle*, Oct. 14, 1988, at 12A:

> WHEN DO WE SAY ENOUGH IS ENOUGH?
>
> Nearly every day you hear about playgrounds, parks and pools, even skating rinks, being threatened by crippling lawsuits.
>
> One out of ten obstetricians no longer delivers babies. And some surgeons are cutting back risky surgery. They're not afraid of the outcome. They're afraid of the lawsuits.
>
> What's happening to us? When did we start looking at every accident, every mistake as just another chance at a quick buck?

For a broader discussion see Daniels and Martin, *People's Ears*, *supra* note 3.

54 *See* David Hilder & Leon Wynter, *Those Who Pay the Most to Change Way Suits are Tried, Damages Awarded*, Wall St. J., Jan. 21, 1986, at 1 § 2; Haltom & McCann, *supra* note 34, at 40.

55 *We All Pay the Price: An Industry Effort to Reform Civil Justice*, Ins. Rev., Apr. 1986, at 58; *see also* Daniels & Martin, Civil Juries, *supra* note 3, at 34-35, 96-97.

56 *Id.*

57 *Id*. at 59.

58 *Id*. at 58-59.

59 *Mission Statement and Overview*, Manhattan Inst., Jud. Stud. Program, Nov. 12, 1992, at 1 (on file with the author). See Haltom & McCann, *supra*

note 34, at 40-43 for additional detail on Manhattan's activities at the time.

60 *Id*.

61 *Id*.

62 *Legal Reform*, Manhattan Inst., https://www.manhattan-institute.org/legal-reform (last visited June 3, 2022). *See also*, Haltom & McCann, *supra* note 34, at 40-43.

63 *Id.*

64 *ATRA at a Glance*, ATRA, https://www.atra.org/about/ (last visited June 3, 2022).

65 Haltom & McCann, *supra* note 34, at 43-44.

66 *Mission*, ATRA, https://www.atra.org/about/mission/ (last visited June 3, 2022) (emphasis added).

67 ATRA and most of the major tort reform groups rely heavily on "outside lobbying," as the quotes above illustrate. According to ATRA, "One of ATRA's greatest assets is its network of tort reform advocates and state coalitions that advance ATRA's agenda in state capitals. Their work is bolstered by an 'army' of more than 142,000 citizen supporters who have joined together in state and local grassroots groups. Together, the state coalitions and grassroots activists are an effective one-two punch in the fight for state tort reform." *Id.*

68 *See* Carl Deal & Joanne Doroshow, The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Tale Away Your Rights (2000).

69 *Id.* at 6.

70 *Id*. at 9.

71 *About TALA*, Texans Against Lawsuit Abuse, http://www.tala.com/about (last visited June 3, 2022).

72 *About CALA*, CALA-Cal., https://californiacala.org (last visited June 3, 2022).

73 *Coalitions and Allies*, ATRA, https://www.atra.org/about/partners-programs/ (last visited June 3, 2022).

74 The U.S. Chamber of Commerce Institute for Legal Reform does not have local affiliates *per se*, but its message can be spread through the numerous local Chamber of Commerce groups.

75 *When You Need a Coalition: How-to-Do It Examples from Tort Reform*, 62 J. Amer. Ins. 1, 1-5 (1986). For information on the Alliance, which long ago merged with other insurance industry trade groups, see Julia Kagak, *Alliance of America Insurers*, Investopedia, (last updated Mar. 4, 2021) https://www.investopedia.com/terms/a/aai.asp.

76 *Id.* at 3.

77 *Id.* at 2.

78 *Id.* at 4.

79 TTLA was founded in 1949.

80 John Laird, *A Short History of the Texas Trial Lawyers: Sixth Installment*, Trial Laws. Forum, Mar./Apr. 1968, at 14.

81 John Laird, *A Short History of the Texas Trial Lawyers: Fourth Installment*, Trial Laws. Forum, Nov./Dec. 1967, at 24.

82 *See* Deal & Doroshow, *supra* note 68; J. Hunter, *The Manufactured Crisis: Liability-Insurance Companies Have Created a Crisis and Dumped it on You*, Consumer Reps., Aug. 1986, at 544 [hereinafter *Manufactured Crisis*].

83 *See* Jost, *supra* note 37; *Manufactured Crisis*, *supra* note 82; "Litigation Myths," Charleston (W.Va.) Gazette-Mail June 1, 1986, at 1.

84 BACALA, https://www.instagram.com/bayareacala/ (last visited June 3, 2022).

85 BACALA, https://www.bacala.net/annual-luncheon (last visited June 3, 2022). Other luncheon speakers have been Republican officeholders and officials as well as conservative activists and media figures.

86 *California Citizens Against Lawsuit Abuse Podcast*, CALA-Cal., https://californiacala.org/podcasts (last visited June 3, 2022).

87 *Exporting Lawsuit Abuse*, Texans for Lawsuit Reform ("TLR"), https://www.tortreform.com/for-the-record/exporting-lawsuit-abuse/ (last visited June 3, 2022). Later in the year, Texas Governor Greg Abbott signed HB 19 into law which put certain limits on commercial vehicle suits. *See, e.g., HB 19 Summary and Requirements*, Tex. Trucking Ass'n, https://www.texastrucking.com/hb19/ (June 3, 2022).

88 *Lawsuits Against Trucking Industry Exacerbate Supply Chain Crisis*, U.S. Chamber of Commerce Inst. for Legal Reform (May 12, 2022), https://instituteforlegalreform.com/lawsuits-against-trucking-industry-exacerbate-supply-chain-crisis/.

89 Jost, *supra* note 37, at 2.

90 *Dystopia*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/dystopia (last visited June 3, 2022).

91 For a more detailed version of our argument about agenda-setting and civil justice reform, see Daniels & Martin, Civil Juries, *supra* note 3, at 29-59.

92 Stone, *supra* note 16, at 122.

93 *Id*. at 309.

94 David Ricci, The Transformation of American Politics: The New Washington and the Rise of Think Tanks 182-207 (1993).

95 "A person or a category of persons against whom emotions can be aroused." F.G. Bailey, The Tactical Uses of Passion: An Essay on Power, Reason, and Reality 139 (1983).

96 Frank Luntz, Language of the 21st Century 2 (1997). The work, Luntz notes, started "with the research we did for Contract with America in 1994." *Id.* at 3. "Common Sense" legal reform was one of the 10 topics in the Republicans' contract. Newt Gingrich, Dick Armey, et al., Contract with America 143 (Ed Gillespie & Bob Schellhas eds., 1994), *available at, e.g.*, https://legalectric.org/f/2016/11/Gingrich-CONTRACT.pdf.

97 Luntz, *supra* note 96, at 128.

98 *Id*.

99 For a broader discussion, see Daniels and Martin, *Survival of the Fittest*, *supra* note 1.

100 Stone, *supra* note 16, at 37.

101 *See* Murray Edelman, The Symbolic Uses of Politics (2nd ed., 1985); Murray Edelman, Political Language, Words That Succeed and Policies That Fail (1977).

102 F.G. Bailey, *supra* note 95, at 26.

103 Diane Gale Cox, *Tort Tales Lash Back*, Nat. L. J., Aug. 3, 1992, 1, 37.

104 Luntz, *supra* note 96, at 128.

105 See Daniels & Martin, Civil Juries, *supra* note 3, at 43-46 and accompanying footnotes for specifics and examples for a discussion of the horror story anecdotes.

106 Peter Huber, Liability: The Legal Revolution and Its Consequences (1990).

107 Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991).

108 *Manufactured Crisis*, *supra* note 82. The report noted that one widely-told story was "purely apocryphal" at 546; Haltom & McCann, *supra* note 34, at 61-68.

109 Daniels & Martin, Civil Juries, *supra* note 3, at 45.

110 *About Judicial Hellholes*, ATRA Foundation, https://www.judicialhellholes.org/about/ (last visited June 3, 2022).

111 *Share Your Story*, CALA, https://cala.com/share-your-story/ (last visited June 3, 2022).

112 *Id.*

113 *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know and Think We Know about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

114 *Id.*

115 USA Today, June 6, 1986, at 12A, col. 1.

116 *See* Stephen Wermiel, *Courting Disaster: The Cost of Lawsuits Growing Ever Larger Disrupts the Economy*, Wall St. J., May 16, 1986, at A1, col.6.

117 Jurgen Skoppek, *The Growth of Litigation*, Mackinac Ctr. (July 1, 1989), https://www.mackinac.org/6263.

118 A prominent and influential example is the Reagan administration's Tort Policy Working Group, which argued that "the explosive growth in the damages awarded in tort lawsuits" was one of the primary causes of the "insurance crisis" of the middle-1980s. *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, US DoJ, (Feb. 1986), at 35-42, https://files.eric.ed.gov/fulltext/ED274437.pdf [hereinafter US DoJ, Report of the tort Policy Working Group].

119 Related to the idea of frivolous lawsuits and a system out of control, verdicts were also described as "outrageous." *Id.*

120 John Alan Appleman, *Jury Verdicts and Insurance Rates*, Ins. L. J. (Nov. 1962), at 714.

121 Hans, *supra* note 29, at 76.

122 Jonathan Stroud, *Patent Filings Roundup: Litigation Explosion Fueled by IP Edge*, IPWatchdog (May 5, 2021), https://www.ipwatchdog.com/2021/05/05/patent-filings-roundup-litigation-explosion-fueled-ip-edge-patent-plaintiff-seeking-defendants/id=133214/.

123 Luntz, *supra* note 96, at 127.

124 Contract with America, *supra* note 96.

125 Daniels, *The Question of Jury Competence*, *supra* note 51, at 288.

126 *See* Daniels & Martin, *People's Ears*, *supra* note 3, at 463.

127 *Id.* at 462, n.36.

128 ATRA, *Mission*, *supra* note 20.

129 *Id.*

130 *Id.*

131 See Daniels, *The Question of Jury Competence*, *supra* note 51, at 288-91 for all advertisements.

132 Ranney, *supra* note 39, at xvi.

133 Luntz, *supra* note 96, at 5.

134 Huber, *supra* note 106.

135 Olson, *supra* note 107, at 1.

136 Huber, *supra* note 106, at 224.

137 Olson, *supra* note 107, at 384.

138 *About*, Mich. Lawsuit Abuse Watch, https://www.lawsuitfairness.org/about (last visited June 3, 2022).

139 *Improving Our Laws, Defending Reform*, Texans Against Lawsuit Abuse, https://www.tala.com/about/ (last visited June 3, 2022).

140 *See Issues: Medical Liability Reform*, ATRA, http://www.atra.org/issues/ (last visited June 3, 2022); *Issues: Medical Liability*, Inst. for Legal Reform, https://instituteforlegalreform.com/issues/ (June 3, 2022).

141 Jost, *supra* note 37; *see also*, Bailey, *supra* note 95.

142 Ins. Rev., *supra* note 55, at 58-60.

143 For all three advertisements, see *id.* at 58-59.

144 The Civil Justice Campaign also included press and speaker 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." *Id.* at 59. Copies of all the materials were enclosed with ATRA president's letter (on file with the author).

145 *Id.*

146 *Id.*

147 Letter from Bert Bauman, President of the New York State Trial Lawyers Association, to the N. Y. L. J. regarding posters (Mar. 2, 1992) (on file with the author); *see also*, *supra* note 70.

148 *See* Calve, *supra* note 1, at 5.

149 Brickman, *supra* note 6, at 121.

150 Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L. J. 1263 (2004).

151 David Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives Stupid*, 59 Vand. L. Rev. 1085 (2006).

152 *See* Kritzer, *supra* note 12, at 1-8.

153 Daniels & Martin, *Lessons from Texas*, *supra* note 3, at 664.

154 *Id*. at 635.

155 *See* Daniels & Martin, Tort Reform, *supra* note 1, at 46-48.

156 *Id*.

157 Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!,* Tex. Monthly (Nov. 2005), www.texasmonthly.com/content/hurt-injured-need-lawyer-too-bad.

158 *See* Mary Alice Robbins, *Big Names, Big Change,* Law.com (July 7, 2003, 12:00AM) http://www.law.com/jsp/tx/PubArticleTX.jsp?id=900005389832&Big_Names_Big_Change.

159 *Ask Your Candidates: Do You Support Common-Sense Lawsuit Reform?*, Texans Against Lawsuit Abuse, https://www.tala.com/the-polls-are-open/#w-pcf7-f15-o1 (last visited June 3, 2022).

160 *Id.*

161 *About Us*, La. Lawsuit Abuse Watch, https://www.llaw.org/about-us (last visited June 3, 2022).

162 *Help Us Put an End to Lawsuit Abuse in California!*, CALA-Cali, https://californiacala.org/advocacy (last visited June 3, 2022).

163 *Id.*

164 Burke, *supra* note 36, at 27.

165 US DoJ, Report of the tort Policy Working Group, *supra* note 118.

166 See Daniels & Martin, Tort Reform, *supra* note 1, at 55-60 for a brief overview.

167 S. C. Gywnne, *Genius*, Tex. Monthly (Mar. 2003), www.texasmonthly.com/story/genius.

168 *Id.*

169 Luntz, *supra* note 96, at 128.

170 *Id.*

171 Juliet Elperin & Jim Vande Hei, *Trial Lawyers New GOP 'Villain' for 1998 Elections*, Roll Call, Dec. 11, 1997, at 1-2.

172 *What We Do*, CALA—Fla., https://cala.com/florida/ (last visited June 3, 2022).

173 *What We Do,* CALA—Cali., https://californiacala.org (last visited June 3, 2022).

174 *How Do We Fix This?*, CALA—Cali., https://cala.com (last visited June 3, 2022).

175 Connie Scott, *We Can All Work to Defend Against Lawsuit Abuse*, Chron.com (Friendswood, TX), Oct. 2, 2014, https://www.chron.com/neighborhood/friendswood/opinion/article/SCOTT-We-can-all-work-to-defend-against-lawsuit-9762241.php (Friendswood lies between Houston and Galveston).

176 *Id.*

177 *Id.*

178 *Id.*

179 *Issues and Facts: Arbitration*, CALA-Central Tex., https://www.calactx.com/issues/#responsibility (last visited June 3, 2022).

180 *Id.* at *Personal Responsibility*. Ironically, the empirical literature has long shown that people are reluctant to litigate. *See* Richard Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversarial Culture*, 15 Law & Soc. Rev. 525 (1980-81); Deborah Hensler, et al., Compensation for Accidental Injuries in the United States (1991). This study found that most injured people in the study did not turn to the liability system for compensation. The rate is about 1 in 10. *Id.* at 110.

181 *Some Things to Consider BEFORE Hiring a Lawyer*, Mich. Lawsuit Abuse Watch, https://www.lawsuitfairness.org/before-you-hire-a-lawyer (last visited June 3, 2022).

182 Ron Nissimov, *Plaintiff's Motives Attacked as Trial in Barkley Suit Begins,* Houston Cronicle (Aug. 4, 1999). (The lawyer was representing basketball star Charles Barkley as the defendant in a personal injury suit.)

183 "ATRA's position: ATRA supports legislation that limits the use of contingent fees in cases where a legitimate risk of non-recovery exists, and requires an hourly fee in cases where no legitimate risk of non-recovery exists, such as cases involving automobile accidents and other incidents where the parties are likely to settle, and cases where strict liability is imposed, such that no liability question exists to be resolved at trial." *Issues: Contingent Fee Reform*, ATRA, https://www.atra.org/issue/contingent-fee-reform/ (last visited June 3, 2022).

184 Daniels & Martin, *People's Ears*, *supra* note 3, at 473.

185 James Gilbert, Stuart Ollanik, & David Wenner, *Overcoming Juror Bias in Voir Dire*, Trial, July 1997, at 42.

186 *Connecting with Conservative Jurors in a Divided World*, AAJ, https://www.pathlms.com/aaj/courses/25618 (last visited June 3, 2022).

187 Daniels & Martin, *People's Ears*, *supra* note 3, at 485, n.103.

188 Small, *supra* note 10.

189 Judge Small says, "People are more likely to obey your ruling if: they believe they have been given the opportunity to present all of their arguments; you have heard and understand their position; and your decision, although contrary to their position, is well reasoned and follows the law in the manner that you understand the applicable law." *Id*.

190 Robbennolt & Hans, *supra* note 10, at 209.

Oral Remarks of Professor Daniels

My paper talks about work I have done with my colleague Joanne Martin over 30 years or so on mostly plaintiffs' lawyers, and tort reform, but especially access to justice. I took the opportunity to do the paper for this Forum to go back over the material we had done over all those years and think about it in a different way, one we had not thought about before, I think largely because we had our own blinders on for the issues we wanted to address. It is the idea of legitimacy. It seemed like an important point in time to think about our work with that idea, even though we had not before. So many of our institutions today are under attack. Their legitimacy is being undermined, or at least brought into question. The Rule of Law is one of them. If the Rule of Law is going to work, if we look at it in terms of the civil justice system, it does need two things. First, it needs access. It is reactive. People have to be able to get to the court to ask it to do something. The court has to wait for that, and that has been the focus of much of our work.

So many of our institutions today are under attack. Their legitimacy is being undermined, or at least brought into question. The Rule of Law is one of them.

Undermining Legitimacy

The civil justice system depends on legitimacy. If people do not have faith in the courts, in the civil justice system, they are not going to support it. More importantly, they are not going to use it, and they are not going to respect what the courts do. My paper goes back over at least part of our research and thinks about it with this idea of legitimacy in mind.

In 1953, there was an ad placed in *Life* magazine by an insurance company that shows a woman at a grocery store checkout, paying for her purchases. She says, "Me? I'm paying for excessive Jury Awards?" It was part of a set of four ads by the insurance company, and, quite honestly, they were lobbying the jury pool. "Me, I am paying for excessive jury awards?" Well, yes. The idea is, the ad says, the more money juries award, the more insurance rates will go up. If insurance rates go up, everything you buy, every service you use, will cost more as well. The idea is that you pay, everybody pays. And here is the woman getting her groceries. She is going to "pay for it" at the grocery store. It is saying, in effect, if you are on a jury, be careful. Be thoughtful. Keep this in mind. You are going to pay for it down the line.

A companion ad appeared a couple of weeks beforehand in *Life* that has a bailiff standing in a jury room. His arms are folded. He looks very stern. It says, "Your insurance premiums are being determined now." Same message in the text about how "we all will pay" for this.

By the 1980s, we stop the subtlety of "just be careful when you are on a jury—remember, you are going to pay for it at the grocery store." The older ads were not really attacking anybody, just offering a reminder. By the '80s, the tone changed. Public relations materials got blunt and stayed blunt—or worse—since then. No subtlety. Consider the "We all pay the price" public relations campaign. This was about an insurance trade group program, the middle-1980s, that was well-funded and geared to reach the general public with a particular message about the civil justice

system—that it was in bad shape. It was doing bad things. In fact, you are paying for them. But rather than "insurance rates will go up," and "you will pay a bit more at the grocery store or for a service," now it was "really bad things are happening."

One of the two ads went to the heart of the matter for many people. It stated, "OB/GYNs are going out of business!" And who is against babies? It is the whole medical malpractice idea. Who is going to pay for the civil justice system's activity in the malpractice arena? It is the most helpless among us—the babies!

If you are not really concerned about babies, let us go to what is sacred: high school sports. An ad showed a forlorn young player in uniform. The ad stated, "Lawsuits are undermining school districts' ability to have high school sports." You can find examples of a couple of school districts where they have cut back on the sports, though usually for financial reasons. But the idea was to tie it to lawsuits. "We all pay the price here for something we love, high school sports."

And if that does not get you, there are the clergymen. Really, is nothing literally sacred? Clergy people are being sued! An ad showed a worried clergyman. I have looked at a lot of jury verdicts over a lot of years in a lot of places. This one always baffled me: clergy malpractice. Now, I know Steve Landsman talked this morning about the problem of abuse in the Catholic church. As a product of a Catholic education, I know exactly what he is talking about. But this is different.

A Dystopian Vision of Civil Justice

Again, the idea is to create a vision, a dystopian vision, of the civil justice system that is doing bad things. It is not helping you. It is not serving the common interest. It is affecting things that are important to you, that you need, that you value. If we keep doing this, it is going to get worse. There were more ads in the same time period, ads about losing jobs and the like. But it is all based upon fear to a large extent, and anxiety that the civil justice system was in chaos. It was not doing what it should do. In fact, it was causing really harmful things.

The idea is to create a vision, a dystopian vision, of the civil justice system that is doing bad things. It is not helping you. It is not serving the common interest.

The American Tort Reform Association [ATRA] was founded in 1986. It is an umbrella organization that is well funded and works in many parts of the country as well as on the national level. A lot of it is about reform. It has its legislative reform packages—its wish list. It is famous, or infamous, for its idea of "judicial hell holes." One of our panelists (a judge) is probably on their hitlist in South Texas. ATRA likes to highlight the alleged downside, the terrible things that the civil justice system is doing.

ATRA's goal is not just to pass laws, something in which it is quite involved. More importantly it says, "We work to change the ways people think about personal responsibility and civil litigation." I do not think it is so much that they want to change as *shape* the way people think of the civil justice system and the idea of responsibility: "the civil justice system is in chaos, it has run amok in its responsibility." "We might think of the civil justice system as holding people responsible for the potentially wrong things they have done, but it doesn't."

"There is no point. I am out of business." Why? "I found jury verdicts decreased due to propaganda disseminated by insurance companies and big business."

Here the idea of responsibility is reversed. The irresponsible people are the ones using the system to sue somebody or sue a business or sue a doctor. You will find the idea of responsibility used almost ubiquitously in this rhetoric of tort reform, and the responsibility is not the wrongdoer. It is the irresponsible person who brings a lawsuit or even thinks about it. To top off irresponsibility, if you dig farther into ATRA's website, you will see arguments that the ultimate irresponsible parties are plaintiff lawyers. They do no good. It is about greed. It is about money and power for them. They are unethical. It is not just that they are dirty, rotten scoundrels—they are evil. They are the ultimate irresponsible party, because they bring the suits. They are the gatekeepers that allow people to gain access.

I will not bore you a whole lot with text. I open my paper with a quote at the top of the first page. Joanne Martin and I have used it before in some of our work. It is from a plaintiffs' lawyer in the Dallas/Fort Worth area in Texas who we had interviewed, surveyed, and wanted to interview again. He sent us a letter saying, "There is no point. I am out of business." Why? "I found jury verdicts decreased due to propaganda disseminated by insurance companies and big business."

You can find legislation, like damage caps and the like, that are aimed at the same thing, but the public relations campaign is perhaps more insidious.

We heard plaintiffs' lawyers in Texas, where we did most of our research, complain about this over and over again. It is not that they were looking at polls and surveys. They would tell you, if you sat in their office and asked them as they pointed over to the courthouse: "We see it over there when we go to choose a jury." And of course, juries are important because not only will they give you or not give you a verdict or sufficient damages in your case, but their verdicts will help set the going rate for most things that settle rather than go to trial. That was the message in those early 1950 ads, telling those potential jurors, "You are setting the going rate. It is not just your case." Juries are not just giving verdicts but shaping the settlements that resolve most cases.

There is little reason to think that people will support a system or use it if they do not have trust and faith in it.

With insurance adjustors offering less money, our Texas lawyer said he began to decline representation, because he could not make it work. It cost more. He got less money. He got fewer cases. The incentive system underlying his business model was not working. Indeed, part of the purpose behind the tort reform public relations campaign the lawyer complains about is undermining the legitimacy of the civil justice system itself and not just help put plaintiffs' lawyers like this one out of business.

You can find legislation, like damage caps and the like, that are aimed at the same thing, but the public relations campaign is perhaps more insidious. In their minds we found Texas plaintiffs' lawyers believing the public relations campaign to be more important than legislation. The campaigns hit at their day-to-day business model. They need to get cases. They need to get money coming in. "The model breaks down because people will not come to us. If they do, the juries are not doing anything, and then the insurance adjustors

are really squeezing us on settlements." And eventually, our lawyer goes out of business, even though he was a successful plaintiffs' lawyer for many years.

And the logic of his story is what made me think again about this broader idea of undermining the legitimacy of the system. There is little reason to think that people will support a system or use it if they do not have trust and faith in it. I have been influenced particularly by the work of social psychologists who look at tort law and have looked at this idea, and they are concerned about declining legitimacy undermining the legal system's ability to control conduct. The cause being the dystopian image that has been created by this public relations campaign. It goes back generations in the effort to get people to think that the system is illegitimate and dangerous. The message is that "The system does not—cannot—do what it is supposed to do. In fact, it is worse. It is hurting you."

[The civil justice system] cannot work without access, but it also cannot work without legitimacy.

That is, in my mind these days, probably the most important part of this idea of undermining the civil justice system. It cannot work without access, but it also cannot work without legitimacy. This has been a concerted effort, over generations, to undermine people's faith and trust in support of the system. The system will not work in the long term if people do not accept what it does and how it works.

The reformers say, "We have won all of these victories, but we have to stay vigilant because of the trial lawyers. We know they are out there. They want to gain all of this back."

When you look at the rhetoric of tort reform you are drawn to the imagery and the message it conveys. It is bad for high school sports, bad for babies, and even bad for the clergy and religion. It is the way the system is described and the metaphors that are used: "explosive," "irresponsible." Then there are the horror stories, perhaps the most infamous and well-known being the McDonald's coffee case. Such stories are mini-morality plays, telling people, "This is what's wrong with the civil justice system. Some lady can spill coffee and get a million bucks!" And you think, "That's irresponsible. That's terrible." And of course, that feeds into this idea that the system is not working in your interest, and, in fact, is doing you great harm. It is a constant, almost ubiquitous, message of doom and gloom.

It was largely in print media up until the internet. Now, most of it is on social media rather than print media like mass circulation magazines. And even in states like Texas, where the tort reformers have had some degree of success with legislation, they want to keep pumping this idea of illegitimacy to those who are paying attention. The reformers say, "We have won all of these victories, but we have to stay vigilant because of the trial lawyers. We know they are out there. They want to gain all of this back." If nothing else, we have to slay this villain once and for all. Stay vigilant." And by the way, if you have an injury, do not think about suing. Be responsible. Maybe you should look to your own responsibility and take risks a little more seriously. And if you are interested in pursuing a complaint, do not go to a lawyer. They are unethical. You do not want to do this. If you do, you are adding to the problem. Think about arbitration, or think about just lumping it. The messaging continues to go on and continually erodes legitimacy in the civil justice system.

Dean Mary J. Davis, University of Kentucky Rosenberg College of Law

I am a dean. I am a product liability lawyer. I have written in products liability. That is why I am here. I have a life's work that is in some ways parallel to the reports that Stephen articulates in his paper. As I was reading it, I was thinking about my own career in the law both as a practicing lawyer years ago and as a student of products liability. The images that he describes, the campaigns that he articulates, and the impact of those things on our civil justice system are more salient today than ever. It is hard to argue with the impact of those images and those campaigns on the way that the general population feels about the civil litigation system and yet I am, in my heart, an educator.

I had an opportunity to meet with some first-year law students a few weeks ago, and they are so passionate in their activism. They are so interested in the way in which the legal system is changing, has changed, and that they will change, that I am left being optimistic—hopefully not naively so—but optimistic about the state of our civil justice system in spite of the very legitimate concerns that Stephen articulates.

I would be remiss if I did not say that Professor Stephan Landsman is a superstar in the law of tort scholarship. His Clifford Symposium at DePaul has produced more meaningful, impactful tort and product liability and litigation scholarship than anything else I can think of. I am honored to be speaking alongside him and Stephen Daniels today.

> I am a great believer in the common law of the states. I am a great believer in the importance of state law and . . . remedies for rights.

I will say that of course that I must thank the Institute for inviting me. I presented at one of these Forums about ten years ago on my scholarship in the area of preemption, which is something that I have been passionate about. That is because I am a great believer in the common law of the states. I am a great believer in the importance of state law and, as Dean Chemerinsky would say, remedies for rights. It is extremely important to me, and I am very humbled to be in this room with all of you, because listening to the questions you discussed in the earlier panels, and having an opportunity to talk to you about the issues in your own jurisdictions today at lunch and elsewhere also gives me great hope for the state of our civil justice system, in spite of the fact that there are efforts afoot to impact the way our citizenry feel about the legitimacy of our civil justice system.

I want to tell you a story about my own background in product liability. I graduated from law school in 1985. I remember much of what Stephen discusses in his paper, because my first job was at a prominent law firm in my home state of Virginia. The summer when I started, A.H. Robins filed bankruptcy because of the Dalkon Shield product liability litigation. We took on new litigation representing an asbestos defendant. I was immersed early on in the way in which those clients were responding in many ways to the great successes of the '60s and '70s, the great success of strict product liability in 1965, to create a system of distributive justice so that you did not have to prove that there was some fault—we just allocated risk in a way that was consistent with theories of no-fault responsibility. The same thing is true for no-fault automobile insurance.

Lawsuit "Abuse"

Of course, insurance companies want you to know that your risk of liability may go up because there is no fault now, and there will be changes in premiums. Comparative fault developed in the '60s and '70s, doing away largely with contributory negligence as a total bar to recovery. Those changes impacted the way in which people accessed

justice at that time. Those kinds of backgrounds, I think, fueled the ATRA mantra that they had been "fighting lawsuit abuse since 1986," when I was starting to practice law. The "abuse" was largely driven by those successes in changes in doctrine, changes in opportunity for people to recover in ways that they had not before.

One of the things about getting into academia after having a six-year product liability litigation defense practice is that you have an opportunity to moderate your views. You have an opportunity to talk to your students, and to explore the kinds of balance to changes that are brought about by "the threatening '60s."

Many of you probably read Ralph Nader's book, *Unsafe at Any Speed*.[1] As a result of that book, and other initiatives, we have now greater product safety in automobiles. Yes, there are problems with defective products. But it is a very different system now. And yes, that regulatory scheme can provide one level of deterrence, but the civil justice litigation system adds a layer on to that.

[The] regulatory scheme can provide one level of deterrence, but the civil justice litigation system adds a layer on to that.

The point of my walk down memory lane is to say that there are opportunities to change the narrative. I wonder why, in the '80s and '90s, the anti-civil justice narrative was not responded to in a more aggressive way. Maybe it was and I am not familiar with it, but my memory of the '90s was that there were efforts to retract the gains in product liability from the '70s. There were efforts to change the way in which we thought about aggregating claims and not fighting the one-off claims in the ways that had been done—a move that I think is extremely important to remember for access to justice.

I think of course the asbestos litigation in which I was involved became part of one of the first MDLs, and that changed the game in access to justice for those litigants. I am also aware of the fact that Texas was the jurisdiction where asbestos litigation was largely born. It makes some sense that the tort reform efforts would be really robust in Texas, where that litigation started.

Challenges to Legitimacy

In the late '90s, of course, preemption became a very significant movement, and that in and of itself limits access to the courts. But it did not challenge the legitimacy of the court system to say there is a regulatory scheme that you can use as a defense.

In the late '90s preemption became a very significant movement, and that in and of itself limits access to the courts.

In the 2000s, the growth of class actions, or the *attempted* growth in class actions and additional aggregate litigation, I think may have enhanced the efforts toward "lawsuit abuse" notions, or at least the "reform" efforts, because of the large numbers of people who had access to the kind of litigation remedy that we might hope that they would have as a result of the corporate misconduct. I see the pendulum swinging. I think the availability of aggregate litigation, and opportunities to combine claims, has enhanced our access to justice.

I want to finish with a couple of ways to respond to the dystopian dilemma that Stephen has articulated. It is frightening to think of it, isn't it? It is frightening to think about how the students that I have admitted, who, in that meeting I was telling you about earlier, said to me, "How about that litigation explosion." It is 2022. *What* litigation explosion? Haven't you been around? That argument has been debunked over and over with data. Frivolous lawsuits

really are not a thing. It is my responsibility to talk to them about the landscape, to make sure they understand, so that they can go and talk to people, so that *they* can understand.

> It is frightening to think about how [law students have] said to me, "How about that litigation explosion." It is 2022. What litigation explosion? . . . It is on us to change the narrative.

I would simply offer, as an opportunity to respond to the dystopian dilemma, that it is on us to change the narrative. We have to be prepared to make sure people understand that their lawyer is going to be a good lawyer. We have to have dialogue with one another—lawyers, members of the citizenry, people in the political arena, with whom we disagree. We have to be able to disagree agreeably and respectfully, so that people can believe that we will do that when we represent them in their litigation—that we will be fair, we will be people of integrity, people who are determined to make sure that the system works for them, even though not everyone has the same opportunities. I understand that. But it is so important for us to respond to the struggles that Stephen articulates, going forward. My students will demand it of you. The members of your legal communities will demand it of you, and they should. I think we ought to find ways of responding to that narrative that uphold the system that we are in, that provides opportunities for people to have access to justice, some of which I have talked about. I think the aggregation mechanisms that Professor Bradt discussed earlier and that many of you, I am sure, have been involved in, are going to be a response to the dystopian dilemma that he articulates.

> The conflicting messages in the media *are* our biggest enemy, because people will only listen to what they are typically used to listening to.

I will say finally that the conflicting messages in the media *are* our biggest enemy, because people will only listen to what it is they are typically used to listening to. I do not know how to respond to that, but I think we should talk about ways to respond to that modern component of the dystopian dilemma that we face.

Hon. Dori Contreras, Chief Justice, Texas Thirteenth Court of Appeals

I do agree with the premise of Professor Daniels's paper, and I agree that there must be trust and confidence in the system—and not only that it is lacking, but unfortunately is getting worse with time. And I agree that access has become more of a challenge because of the successful efforts of tort reform that continue today.

I want to share my personal experience and observations over the years, and then give at least one example of something that I feel that we can do as judges that actually fits right in with what Dean Davis was talking about. (And I do want to point out that Dean Davis is the first woman dean of her law school, so kudos to her.)

Judicial "Hell Holes"

I was licensed in 1990. Initially, I was practicing in Houston. I worked as a trial lawyer in Texas from 1990 to 2002 when I was elected to the 13th Court of Appeals. Early in the '90s, I made my way back to my home county, which was Hildalgo County, which happened to be one of the counties that were called "judicial hell holes" that were mentioned in the paper. At that time, it was probably considered the worst place, according to the group. It is a border

community, part of the Rio Grande Valley. In fact, the court that I am on now, the 13th Court of Appeals, was rumored to be the most reversed court in the State of Texas because it was affirming all these "crazy" verdicts that were allegedly coming out of Hidalgo County, although many people considered that to be more of a badge of honor than anything.

The court that I am on now . . . was rumored to be the most reversed court in the State of Texas because it was affirming all these "crazy" verdicts.

At the time, I recall very well the concern that the doctors were being "run out" of the community, and that doctors would not move to the community because of the rampant lawsuit abuse. Although during that time, I noted that one of the most profitable doctor-owned hospitals was established there in Hidalgo County and continues to operate today, quite lucratively I must say.

And also there was talk that insurance companies were refusing to issue policies in that part of the state, even though I knew personally many insurance agents did quite well during those years and were quite comfortable financially. But that story certainly wasn't part of the landscape at that time.

I experienced firsthand the effects of what we call "CALA," or "Citizens Against Lawsuit Abuse." In Spanish, "cala" means something that bugs you, like if your pants are too tight and you say, "*Aye, me cala*" (enunciated with a short a). I guess that is why we pronounced CALA that way, rather than with a long a. There are lots of Mexican-Americans there in my part of the world. And we also have TLR, the Texans for Lawsuit Reform. Even now, as a judge (and I will talk about this in a little bit), we are dealing with TLR issues. But no doubt, their efforts have made access more difficult. As I said, the efforts continue today.

Demise of Worker Compensation Remedies

In 1990, I experienced firsthand the demise of the workers' compensation remedies. Right out of law school, I joined a law firm in Houston that was a plaintiffs' personal injury practice. It also handled workers' comp cases. That is when a new law was passed in Texas. I had a chance to work under the old law, because the older cases were still making their way through the system. And then I could immediately see the difference and the impact. The remedies were diminished. Workers could not get adequate representation, because lawyers just could not make a living under the new law. They just stopped taking the cases. That was a definite problem.

Then, during the 1990 to 2000 era, I saw that the reformers were very successful in the state legislature. The best example, of course, is the statutory cap on damages, and again fewer lawyers could take these cases because they simply could not justify the cost of prosecuting them, with the cost of experts who were required, and that sort of thing.

As I was joining the appellate court in 2003, our conservative Texas Supreme Court began imposing stricter and stricter standards in various areas of the law. The best example is in the medical malpractice area, which in our state has a reporting requirement. A report has to be filed within 120 days of filing the lawsuit. It allowed for an interlocutory appeal in every single case. Well, of course, that results in more expense and more delay. And more and more cases were being dismissed at that very preliminary stage of litigation.

Class actions is another area. One of my first cases as an appellate judge was a class action, and I do not think I have seen one since. We all know what happened with those. Yes, the efforts against the civil justice system have succeeded.

But, interestingly, there was a gentleman by the name of Bill Summers. He is now deceased. May he rest in peace. He was at the forefront of the Citizens Against Lawsuit Abuse efforts there in the Rio Grande Valley. I had a chance to get to know him. He really was a nice guy, a funny guy. We had a conversation. He said, "We may have gone a bit too far." You think?

> One of my first cases as an appellate judge was a class action, and I do not think I have seen one since. We all know what happened with those.

Restoring Confidence

What role do judges have in restoring confidence in the civil justice system? First, I have to note that I think the problem is compounded by the attacks on the judiciary and on our democracy that we see around the country. There's a lot of negative campaigning. Of course, this is not a good thing. Ms. Olson referred to that this morning, about the negative campaigning in states where there are partisan elections of judges, which we do have in Texas. But I have met many judges from across the country who are in the states where there is an appointment/retention system. They have negative campaigning by special interest groups in those places, too. The negative campaigning is a serious problem because it does cause people to distrust the system.

> What role do judges have in restoring confidence in the civil justice system? I think the problem is compounded by the attacks on the judiciary and on our democracy that we see around the country.

And then there are the groups like Texans for Lawsuit Reform that are still out there—efforts at controlling and influencing who gets on the courts. For instance, in Texas, this last session, we dealt with an effort to redistrict our Court of Appeals. We have 14 courts, and there was proposed legislation to reduce it down to seven—to create super courts, as we would call them, which could enable them to control who got elected to those positions. We were able to defeat that. But in this next session, we are preparing for "specialty courts" that this group is pushing. Of course, they would handle only cases involving the government or business litigation. And again, they are advocating for state-wide appellate courts, so that they can again control who the decision makers will be in those cases. That is something that our Council of Chiefs in Texas will be visiting with our legislators about. (Lucky me—I'm the chair this year!)

What can we do? It is tough when the highest court in the land is deciding matters that are hitting everyone so close to home. Many see the U.S. Supreme Court as making political decisions. People are discouraged, and rightfully so. We need to do what we can within our sphere to change the narrative, as Dean Davis said—to restore faith and legitimacy. We have to be vocal about it.

> We need to do what we can within our sphere to change the narrative, . . . to restore faith and legitimacy. We have to be vocal about it.

I am also a part of the National Association of Women Judges. We are in the process of releasing a video.[2] They have been working on it for a couple of years now. It is extremely well done. It is a beautiful video. And it is intended to help educate people on the civil justice system and the role of judges, to help put the system in a more positive light, to reassure people that we are trustworthy, to stress the importance of the system and how their lives are impacted by it. We, as judges, need to

utilize this tool. It will be available to everybody to use when you have jury selection (for those who are trial judges), or when we have speaking engagements, or on social media. We need to utilize all of the tools that are available to us to put positive messages out there about the system. Those are small measures. But collectively, I think they can add up so that we can make a difference as judges.

My husband uses an expression, "Keep pounding the rock." When you have a big rock and you want to break it into pieces, it is not just the last hit that gets credit for breaking it open. It is all the multiple hits that you have been giving it along the way that have helped to break it up. That is what we have to do. We have to keep pounding the rock.

Randy Aliment, Lewis Brisbois, LLP, Seattle, WA

I will limit my comments to attacks on the civil justice system and some views on the Rule of Law. I intend my remarks to be in the defense of both.

Attacks on the Civil Justice System

When I graduated from law school, I joined a leading Seattle law firm just months before Washington passed its 1981 tort reform act. At that time, my firm was on the front end of the new asbestos litigation, and I was tossed into the fray to represent Eagle-Pitcher, a target defendant. By the time I was 34, I had deposed more than my fair share of dying plaintiffs, tried the first case that went to verdict here, tried 3 of the first 8, and had a front row view of some damning corporate documents.

I became uncomfortable with my role defending these wrongful death cases and sought advice from a senior partner, Paul Gibbs. Paul asked me if I thought I was the plaintiff lawyer—and I said, "No." He then asked if I thought I was the judge, or perhaps a member of the jury—and I said, "Of course not." "That's right," he said. He told me the civil justice system works only if I provide a defense to the best of my ability, consistent with rules of professional conduct, the facts, and the law. Paul added that, "When plaintiff's counsel, the judge, and the jury do the same, there exists a delicate balance of responsibilities among these four pillars of our civil justice system that make it the best in the world."

Around the time the tort reform initiative took hold in Washington, insurance companies also began to attack the insurance defense bar.

As Mr. Daniels's essay points out, various tort reform initiatives sought to, and have, adversely influenced aspects of this delicate balance. But I would like to address an attack on the civil justice system missing from his essay.

Around the time the tort reform initiative took hold in Washington, insurance companies also began to attack the insurance defense bar. Among other things, they leaned on us with:

- Slow pay on our invoices;
- Rate pressure if we wanted to continue to do the work;
- Billing codes, audits coupled with onerous appeal procedures, and administrative hurdles, all to justify aggressive fee reductions;

- Restrictions on what we could and couldn't do to represent our clients, who of course are the insured, including:
  - —Advance written permission to do legal research in excess of 1 to 3 hours, depending on the carrier; and
  - —Advance written approval for depositions we believed necessary to the defense.

This led to reputation and compensation hits to insurance defense lawyers. Some, like me, chose to move on to other practice areas—in my case, to commercial litigation and higher education law.

The attack on the civil justice system has not been limited to the plaintiff bar or unfair attempts to influence the jury—it has been an attack on all aspects of our civil justice system.

So the attack on the civil justice system has not been limited to the plaintiff bar or unfair attempts to influence the jury—it has been an attack on all aspects of our civil justice system. We have all "paid the price."

The Rule of Law

I next want to share some thoughts on the Rule of Law and access to the civil justice system, including some of the points made in both essays. There are several definitions of the Rule of Law, and during my time with the ABA's Rule of Law Initiative we considered many.

Plato once summarized the importance of the Rule of Law, writing that, "Where the law is subject to some other authority and has none of its own, the collapse of the state is not far off."

Most definitions come from a group of lawyers, sitting in a conference room, who are tasked with deciding what the Rule of Law means. This approach can lead to politicized definitions.

Another approach is to study historical views on the subject, some that have been with us for quite some time. The Code of Hammurabi, and both the Arab and Greek worlds, all had their own thoughts on the meaning of the Rule of Law. For example, Plato once summarized the importance of the Rule of Law, writing that, "Where the law is subject to some other authority and has none of its own, the collapse of the state is not far off." Plato also wrote that, "As night follows day, arbitrary power inevitably causes unfairness, injustice, and abuse."

The historical record highlights four essential elements to the Rule of Law.

- **First, everyone is equal under the law.** This literally means the law applies to everyone in the same way no matter who you are.
- **Second, the law should be properly published and easily assessable.** If people don't know what the law is, it cannot be enforced with equality. Said otherwise, if you don't know what the law is, you can't demand its protection.
- **Third, there must be reasonable access to a reasonable remedy.** This is simple logic. If one doesn't have a remedy for their claim, the law can simply be ignored. And if there are no consequences to ignoring the law,

you don't have law at all. This especially means access to a remedy against the government and against others in positions of power. To me, anyway, this element of the Rule of Law is an important feature of Mr. Daniels's essay.

- **Finally, the Rule of Law must be administered by an impartial judiciary.** A judge must have no conflicts of interest in which side wins. And a judge must have nothing personally to gain by the outcome and must not be compelled, because of external pressure from any third party, to come to her decision.

Attacks on access to the civil justice system aren't the only attacks on access in America today. Among other things, we are seeing political and institutional attacks on access to the ballot box, attacks on access to essential health care services, and attacks on access to education. Some state and local governments are even banning books from libraries and classrooms.

We are seeing political and institutional attacks on access to the ballot box, on access to essential health care services, and on access to education.

Finally, I want to point out the significant difference between the Rule of Law and "Rule *by* Law." Although Rule by Law is a system of laws, it may be a system where one or more of the four criteria I just mentioned are missing. For instance, Rule by Law can and has historically led to some very bad scenarios. An often-cited example is the changes made to German laws by the Nazis that led directly to mass murder. An older example includes the Roman Code of Justinian. Although the Emperor codified a system of laws, he himself was above the law and could ignore or unilaterally override that law.

Many Americans see the 2020 Presidential election through a similar lens, where some of those in power acted as though they are above the law. Many are also concerned with the 2022 Supreme court rulings on climate change, the Second Amendment, separation of church and state, school prayer (in a case from my state), and abortion rights. So here we are, a nation where some believe the law is moving toward Rule *by* Law and away from the Rule *of* Law, a system where the law is what those in power say it is. And that, friends, signals a very difficult road ahead.

Here we are, a nation where some believe the law is moving toward Rule by Law and away from the Rule of Law, a system where the law is what those in power say it is.

I am so very proud to be a lawyer. There hasn't been a single day since I graduated from law school when I regretted my career decision. And I have long believed that, in the end, no matter what, the law would always save us. But I'm not so sure anymore.

What can we do to reverse institutional and political attacks on the Rule of Law generally, and against the civil justice system specifically?

I leave you with this question, because I believe success in defeating these attacks, including attacks on the absolute independence of our judiciary, is essential to the preservation of our nation.

Michael Withey, Law Offices of Michael Withey, Seattle, WA

I want to comment on Steve Daniels's paper, because I think the overwhelming strength of the paper is the focus on the concept of legitimacy described the civil justice system.

The attack on the right to jury trial and access to justice has been a long-term strategy of the insurance industry and corporate America, as Steve points out in his paper. His starting point is to look at the trust, the confidence, and the idea of legitimacy in the civil justice system, including in your courts and the Supreme Court. He examines where the dystopian image of the civil justice system comes from. As he states, the dystopian image of illegitimacy did not just emerge out of thin air or organically.

> Our efforts, and our practice, must be to breathe new life into [trial by jury], and we face incredible odds.

In 2002, a great federal judge here in this district, William Dwyer, wrote a fantastic book that kind of parallels, Steve, what you have to say. It is called *In the Hands of the People*.[3] Bill Dwyer describes the fact that a jury trial is more than a pillar of democracy. He said, "No tyrant could afford to leave a subject's freedom in the hands of 12 of his countrymen. Trial by jury is more than an instrument of justice, more than one wheel in the Constitution. It is the lamp that shows that freedom lives." Folks, that lamp is barely flickering today. Our efforts, and our practice, must be to breathe new life into that lamp of freedom, and we face incredible odds. And in the state courts, you all play an extraordinarily important role in keeping that flame alive.

The Rule of Law and Democracy

There is a parallel assault on democracy and the Rule of Law that is unfolding in our country and is being waged by an institution that is supposed to serve as the bastion and protector of that democracy. The legitimation crisis that Steve Daniels speaks of starts at the very top of the ladder and permeates through the entire civil justice system. I am speaking of the U.S. Supreme Court, which I believe is in the throes of a profound legitimation crisis.

Let me define what I mean by legitimation or legitimacy. The German sociologist Jurgen Habermas wrote a seminal work in 1973 called *Legitimation Crisis*,[4] in which he laid out the fundamental definition. It refers to periods when "the organizational principle of society or institution does not permit the resolutions of problems that are critical to its continued existence. That is, of course, usually accompanied by widespread disaffection and disapproval of the institutions and the unwillingness to comply with their mandates and rulings." Habermas was prophetic as well as descriptive.

> Every time a state court judge puts on a robe and enters a courtroom, the party litigants and the public expect you to be neutral, objective arbiters, who merely interpret the laws.

Dean Chemerinsky wrote an incredible book in 2014, *The Case Against the US Supreme Court*. It describes how the court, in its history and present practices, has been beholden to and has served the interests of the powerful—the white and male elite, corporate America, and the institutions of repression in our society.

Every time a state court judge puts on a robe and enters a courtroom, the party litigants and the public expect you to be neutral, objective arbiters, who merely interpret the laws. Chief Justice Roberts claimed the Court's role was calling balls and strikes.[5] Even before *Dobbs*, that notion was in shambles.

You embody the idea that justices are interpreting the laws to the best of your abilities, rather than simply finding a justification for your political predilections. This notion is fundamental for the public's faith in the judiciary. Unfortunately, because of actions by the Supreme Court, that does not hold today.

Starting with *Bush v. Gore*[6] in 2000, culminating in what I think we could call the worst week in U.S. Supreme Court jurisprudence between June 23rd and 30th of 2022, the Court has created its own crisis of legitimacy. And as Steve Daniels said, it did not appear out of thin air. Because this crisis is going to take resistance, and it is going to take state court judges to rectify it. Because without legitimacy you, as state court judges, and the entire federal judiciary, have no power. After all, you have no army. In fact, you are not even adequately funded.

I am reminded that Chief Justice John Marshall ruled in *Worcester v. Georgia*,[7] back in 1837, that the Cherokee nation's lands could not be controlled by state governments. What did then-President Andrew Jackson, a notorious purveyor of genocide in the native lands, say? He said, "John Marshall has made his decision; now let him enforce it"[8] It is similar to Stalin who, when confronted by the Catholic Pope's antagonism to communism, said, "Well, how many Army divisions does the Pope have?"[9] Even your court's power depends on its legitimacy.

Originalism

What has led to this state of affairs? First is the doctrine used to justify their exercise of raw power: originalism. That doctrine looks exclusively to the ancient text written by largely white, slave-owning males, property elites, as well as the milieu of its time. James Monroe was 18, Hamilton was 21 or 19, Madison was 25, and Jefferson a ripe old 33, when they wrote the Declaration of Independence. Why is such reverence given to these men and these words?

[Originalism] looks exclusively to the ancient text written by largely white, slave-owning males, property elites, as well as the milieu of its time.

Searching ancient text to answer today's complex, myriad problems is merely a justification for the perpetuation of a system that is outmoded. It has brought us minority rule. It reminds me of religious zealots who search and find quotes from the Bible to justify homophobia and intolerance.

Originalism, textualism. You heard today the notion of a shadow docket. "Shadow docket" means shadow justice. And a new doctrine: the "major question" doctrine. That just means, "We have the raw votes 6-3 and we are going to tell you what life is going to be like."

For the first time in its history, the Supreme Court is taking away fundamental rights, especially the right of women to control their own bodies and reproductive freedoms. It has torn the wall of separation between church and state to include and allow prayer in school and public funding of religious education. Professor Landsman's paper this morning discussed the lack of resources our regulatory agencies have. But the Supreme Court piled on in *West Virginia v. EPA* to say that the regulatory agencies do not have the proper authority to perform the mission. The EPA cannot take on global warming. The CDC can't tell people that they have to wear masks. And there is a cynicism to it, because the Supreme Court is well aware that Congress is not going to overrule them, because Congress is dysfunctional.

For the first time in its history, the Supreme Court is taking away fundamental rights.

And look at the manipulation of the confirmation process. Do I have to cite chapter and verse on that? Three justices were appointed by a president who received a minority of the popular vote. Those three justices, in their confirmation hearings, swore under oath that *Roe v. Wade* was settled law. Merrick Garland. Do I need to say more?

The Supreme Court has two justices against which serious allegations of sexual abuse were leveled. The Supreme Court has an associate justice who refuses to recuse himself from cases involving former President Trump's "Big Lie," despite the fact his wife is an ardent opponent of that lie.

Response of the State Courts

Given this state of affairs, what will be the response of the state courts? We need to do more than hold the line. But I will tell you who held the line on the election results. They were the 60 court judges who, when confronted by the Big Lie, and were told by Rudy Giuliani and Sidney Powell that they should throw out the elections in their states. What did they say in unison? "Prove it." And it was never proven.

Given this state of affairs, what will be the response of the state courts? We need to do more than hold the line.

I want to ask you something, because I do not get many opportunities as a plaintiff trial lawyer to talk to judges. You are going to be asked if, as a matter of state constitutional law, the right to abortion and reproductive privacy is guaranteed. The right to privacy is guaranteed under the Washington State Constitution.[10] You will be asked to reject the notion that personhood begins at conception. You will be asked to hold that the criminalization of women's reproductive choices cannot be allowed. You will be asked to rebuild the wall of separation between church and state. In this fight, the Supreme Court is not your ally. It is not your friend. We ask you to restore the legitimacy of trial by jury and access to justice. Keep bending that arc of the moral universe toward justice. As the struggle to maintain jury trial and access to justice proves and as Steven Daniels's paper described so well, we need you now more than ever.

Response of Professor Daniels

I don't want to be too facetious, but part of this reminded me of when I was in graduate school—I have not been hit with Habermas in a long time, nor have I been hit with Plato. It is a great final exam question in a seminar on Plato. Compare the Plato of the *Laws* with the Plato of the *Republic*. For the *Laws*, it is an argument about arbitrary power. I have not thought about those two dialogues in a while but maybe they do fit into this discussion—an argument about arbitrary power and the allegory of the cave. But it's a discussion for another time.

Still, Mr. Aliment's comments accomplished something I hoped to accomplish with this paper and my remarks—to get people thinking about the problem of legitimacy more broadly. My particular area is tort reform, civil justice, and the like. But it is a broader problem, as I alluded to in my remarks.

Challenges to Legitimacy

Mr. Aliment talks about access to other important things: the ballot box and education, particularly public education, which are under attack as well. The idea of legitimacy is a battleground and the challenges are great today. Whether one wants to say it is greater than in the past, I do not know, but it is quite serious. The attack on civil justice is merely a part of that. I don't want to appear as a conspiratorial type, some of the same political actors are behind the broader attacks on legitimacy.

If you look at, for instance, at the Manhattan Institute's attack on the idea of critical race theory, it's the same strategy used when they were going after the civil justice system in the 1990s. Needless to say, Karl Rove and Frank

Luntz seem to be almost everywhere where you can make something a cultural battle and undermine the legitimacy of some institution.

I was taken with what Dean Davis said about some of her students and the idea of a litigation explosion, which is kind of an indicator of how deep some of this has seeped into the public mind. A year and a half ago, I was asked to teach one class session in a first-year torts course at Northwestern Law School for that very reason. "Can you come in and talk about this stuff?" the instructor asked me. I am not sure the instructor knew where their students were on the vision of the tort system, but some appeared to be like the students Dean Davis described. It was an interesting discussion I had with that class, a first-year section of 60 or 70 students. There was a real split among them about whether any of the tort reform image is real in terms of what they brought with them to law school, which is an interesting and somewhat scary indicator of how deep this goes.

Challenges to Law Practice

Randy's idea about defense lawyers is, indeed, not in the paper. Joanne Martin and I actually had long discussions, while we were during our research, about whether we ought to extend our research from plaintiffs' lawyers into defense lawyers. It was just too big a task. But we did talk to and interview a number of defense lawyers and judges in Texas to at least get a sense of it. We heard precisely the types of things that Randy talked about in terms of the squeeze on defense lawyers: that not only were they going to squeeze out the plaintiffs' lawyers, but they wanted to cut back the cost of defense as well. For many of the people we interviewed, it was highly problematic. It kind of ties into one of the things Justice Contreras mentioned from early in her career in Texas in 1991, when they completely revamped the workers' comp system. That hit defense lawyers as hard as it did the plaintiffs' lawyers, but it hit plaintiffs' lawyers harder because workers' comp cases in Texas were the bread and butter of your everyday plaintiffs' firm. The comp cases paid the bills. They covered the overhead. You take those out, and that hits hard for your everyday plaintiffs' lawyers.

The workers' comp changes in Texas put a number of the plaintiffs' lawyers out of business, because that is the whole business model. You get those comp cases. They were trial de novo, as I recall. The attorney got a set percentage of the award. It was a good way to build a practice.

The workers' comp changes in Texas put a number of the plaintiffs' lawyers out of business, because that is the whole business model. You get those comp cases. They were trial de novo, as I recall. The attorney got a set percentage of the award. It was a good way to build a practice. The other way in Texas was consumer fraud cases. That changed as well, because the consumer fraud statute again allowed for fees to the attorney if they won.

But the defense bar took it hard as well. We heard not just from the comp lawyers in the '90s, but also from the med-mal defense lawyers in the later '90s and early 2000s when the Texas legislature, as you suggested, "may have gone a bit too far." Changes in the law were hitting those defense lawyers as well. I want to honor Randy's point and simply say yes, we understand, but that is a whole other project.

The one person who has looked a bit at this other side is Professor Bert Kritzer at the University of Minnesota Law School. Kritzer looked at plaintiffs' attorneys, as did we, but he also started doing work on defense attorneys.

He is really the only major research scholar I know who has been looking at the defense bar and the challenges it has faced.

As I listened to Randy parse out his four characteristics, and thought about the sense of legitimacy, I had in mind the literature of social psychologists who study law, particularly a tort system. It seems to be basically the same thing. The Rule of Law is kind of a nebulous idea. There is the lawyer's definition, the scholar's definition, and historical definitions. And then there is the everyday common-sense definition, which is kind of the level where Joanne Martin and I have always worked. It is about fairness. It is about equality. It is about openness. It is about knowledge, knowing about what the law is telling you. It is about impartiality—an impartial decision-maker applying rules that are known in advance, in an equal, fair fashion.

The Rule of Law is kind of a nebulous idea. There is the lawyer's definition, the scholar's definition, and historical definitions. And then there is the everyday common-sense definition . . . . It is about fairness. It is about equality. It is about openness. It is about knowledge . . . . It is about impartiality.

If you were to ask what the difference is between this idea, the Rule of Law, and common ideas of legitimacy, I am not sure I can draw the line. They seem to me to be deeply enmeshed in our collective psyche. Again, legitimacy and the Rule of Law are kind of messy topics, but I think for most people, the civil justice system—as they understand it—has been under attack. I do not know if it changes minds so much as reinforces certain ideas that have always floated around in American society. Is it getting worse? I thought it started really getting worse in the '80s, and it has just kind of plateaued at a very high, nasty level.

I have not talked to the panelists in advance. But one of the things I had hoped to do (and I think I accomplished it in looking back at my own work) was to get some of the panelists to think about this idea of legitimacy, of undermining basic institutions in our society, writ large. I think I have accomplished that from Randy's list, from Mike talking about the obvious elephant in the room, the Supreme Court. But again, his litany of problems—the same thing in Dean Chemerinsky's remarks earlier at lunch—pretty much reflect kind the basic ideas of what legitimacy requires. The U.S. Supreme Court, beyond their lip service to textualism, it appears arbitrary to many people in trying to understand what happened in *West Virginia v. EPA*. And it is a major doctrine. The same types of problems are coming up, and the court has become more obviously politicized, and some of the justices appear to relish that idea in the way they talk about issues themselves and their decisions.

There is a lot in your hands in terms of how you play the role that you do play in keeping this idea of legitimacy and its challenges in mind. You will set the stage, or help set the stage, for what happens in the courts below you in your states.

For me, I am kind of a happy camper in getting folks to think about not just legitimacy for the civil justice system, but how it fits into a larger problem that I think we face today, and my fear, in looking at my own work and its implications more broadly, is that it is getting worse.

I do not have any great words of advice beyond what you have already heard from folks about what appellate judges can do. I know of one ex-appellate judge who got deeply involved in the politics in Texas in the early

2000s—Deborah Hankinson, who was a former member of the Texas Supreme Court. She was among the leaders of an interesting coalition of people who fought the idea of imposing a $250,000 cap on med-mal cases. It required a constitutional amendment to overrule a series of Texas Supreme Court cases. She is a Republican appointed by George W. Bush to the State Supreme Court. Yet she and another justice, Justice Baker, fought tooth and nail. They lost, but I want to see judges do that. But you cannot do it as long as you are on the bench. You cannot play those kinds of politics.

I cannot add anything new other than what Mike and the others have suggested on what you can do. But the idea is ultimately that there is a lot in your hands in terms of how you play the role that you do play in keeping this idea of legitimacy and its challenges in mind. You will set the stage, or help set the stage, for what happens in the courts below you in your states, and, of course, that is where most of the action is.

Notes

1 Ralph Nader, Unsafe at Any Speed: The Designed-In Dangers of the American Automobile (1965).

2 This video may be viewed at https://drive.google.com/file/d/1zYlF_sMvuw4Zxu2e0lf-NqhrBD_-xhoq/view

3 William Dwyer, In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy (Thomas Dunne 2004).

4 Jürgen Habermas, Legitimation Crisis (Suhrkamp 1973).

5 "Roberts: 'My job is to call balls and strikes and not to pitch or bat'" (opening statement of John Roberts during his confirmation hearing), https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

6 Bush v. Gore, 531 U.S. 98 (2000).

7 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

8 Quoted in Remarks of Justice Stephen Breyer ay University of Pennsylvania Law School, May 19, 2003, https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-19-03.

9 *History of the Phrase: 'How many divisions has the Pope?'*, Word Histories, https://wordhistories.net/2019/08/23/how-many-divisions-pope/.

10 Washington State Constitution Art I, §7. Invasion of Private Affairs or Home Prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Professor Daniels: In thinking about the day and sitting in on the different panels and just listening to what folks have to say, this has really been interesting. I am an outsider. I am not a judge. (God help us if I was!) I am not a lawyer. But I do study lawyers. I study the civil justice system. I especially study access to the courts.

Get-togethers like this for me are a reality check. I can sit in my office and write all I want. I can dig through the data all I want. I can say what I think is going on. But I am far enough removed that I do need to have these opportunities to talk to the folks who actually do this stuff, who are out there in the system, whether it is a lawyer's group that I speak to, or, in this case, a group of judges. It gives one an enormous amount of perspective on what I do and what I try to communicate, to the academic audience, but also to the rest of the world: the professional audience, the judiciary, and once in a while even the public in general. This has been great for me in terms of the feedback I get and what I hear from the comments, the way folks will actually interpret something, which may be a little different from what I had thought. For me, it is quite good.

The Long Game

The one thing that came up often, which I do not have answers to, is what do we do next if there is a problem of legitimacy? This is the downside of being an academic. We can tell you about all the problems that are out there. We can explain them to you. But we do not work in the real world. It is the real world that has to come up with the solutions. With the material I look at, and what I have talked about, I think the most prescient comment came from one of the panel members for my paper and a couple of the group meetings we were in. Basically, it is the long game. There is not a fix tomorrow or the next day. It is a long game about how we might maintain, or even strengthen, the idea of legitimacy, of people's faith in the system itself, because, again, if people do not have faith in the system, they are not going to use it. They are not going to accept what it does.

What do we do next if there is a problem of legitimacy? This is the downside of being an academic. We can tell you about all the problems that are out there. . . . But we do not work in the real world.

Most importantly, one of the people in my discipline who studies the legitimacy of the Supreme Court says, "Legitimacy is for losers." You would initially think that means it is not important. No. That is the point. Legitimacy is important so that the people who do *not* win in a given situation will accept that decision and will follow it. That is the tough thing in thinking about "legitimacy for losers," legitimacy for the people who do not get immediately what they want, and how can, in this case, judges help maintain that idea, help foster that idea? It is about thinking of fairness, of how we do things.

A couple of the judges in one of the morning sessions said, "We have an oath. We need to look at the facts. We need to look at the rules." Often that does not happen, unfortunately, at least not in the minds of many people. What goes on with the U.S. Supreme Court will only exacerbate the problem of whether losers will accept what the Court does, because they do not see it as a legitimate type of decision in terms of what is it based on. And a lot of it does go to how judges do their job, day in and day out, and then how they can help to bolster confidence in the system in which someone wins and someone loses. The bolstering is a constant battle. In a sense, the lesson of the tort reform

groups who have been pushing this idea of illegitimacy, of dystopia, is that they keep doing it. Even in Texas where I researched, where they have had great success in the legislature, the reformers are not giving up. They are going to keep pushing. It just keeps going.

There is a Texas country and western song that I like to quote that seems to fit here. It is the idea that "the road goes on forever, and the party never ends." It's a Robert Earl Keen song.[1] It is the idea that you just keep pushing. That is the lesson, I think, of the tort reform people: they just keep going, and they are not going to quit. There has to be a long-game strategy for the other side. It is tough for judges. You are limited in what you can do and how you can do it. But it does not mean you are helpless in terms of the way decisions are written or how arguments are dealt with—that you try to deal with things in a way that communicates some sense that, "Even if I do not like the outcome, I can accept that."

And the other thing that came up that I wanted to mention on the idea of access to justice (and only because this is Washington State), which again has been one of the things that my collaborator Joanne Martin and I have long been concerned with. It gets us a bit beyond looking at specific tort cases. It is the idea of access in general. The system will have a real challenge for legitimacy if people cannot use the system. I am not talking about big cases—I am talking about everyday stuff: family law cases, small debt cases, landlord-tenant cases, the stuff that affects everyday people all the time. That is where I think the greatest access issue is. If you do not have the contingency fee, some people are not going to get access because they cannot afford to bring that case. They do not know how to do it. But that is not the only area in which access is a challenge.

And the legal profession, God bless them, has always tried, through pro bono and through other mechanisms, to deal with the problem of access. It will never fulfill the need. Any study you look at will tell you the need is so deep and so long that pro bono, as much as it can help, is never going to solve the problem. It means thinking outside of the box.

The legal profession, God bless them, has always tried, through pro bono and through other mechanisms, to deal with the problem of access.

Washington State did something unthinkable. In 2012, it instituted the limited license legal technician program, which was to have well-trained non-lawyers in very narrow areas represent folks who could not otherwise get access because they did not have the means. It has now been sunsetted here. What that will mean down the line is up for debate, I think. But other states have picked up on that idea of trying to find other ways of getting access to people— because if people cannot access, the system is going to work *on* them, not *for* them. It is going to work *against* them. There is nothing worse than having a legal problem that affects you every day and you cannot do anything about it because you cannot afford a lawyer.

Legal aid can be backed up for months. There may not be much where you live. But the idea of thinking of other ways of providing access to people is supremely important if you are thinking in the most general sense of the legitimacy of the system, because it goes to the idea of who the system is for. And if it is not for everyday people, then it is going to continue to be a problem.

Sorry to preach. I just had to get that in because it came up in a discussion group today. My interest is in access for all kinds of problems, not just for tort cases. This has been really an education for me. It is my reality check. I need that. Thank you for listening and commenting and talking, even on the side. It has helped me a lot in thinking about my own work.

Gerson Smoger: I have represented a lot of people in rural areas and I have asked them, "Did you talk to a lawyer or a doctor?" And they said, "We are not lawyer or doctor kind of people." They do not see doctors and they do not know any lawyers and they do not even know how to *begin* to get access to the system. It is a bigger challenge in those marginalized populations.

I have represented a lot of people in rural areas and I have asked them, "Did you talk to a lawyer or a doctor?" And they said, "We are not lawyer or doctor kind of people."

Professor Landsman: The last word. Has there ever been a law professor who didn't want it? Certainly, not this one. As I was sitting up here trying to think about what I wanted to say, there was one phrase that just kept running through my head and it has been cumulative throughout the whole day. We all know it: "The truth shall make you free." We have been through a time when truth has taken a beating. What today has been about for me is a group of heroes who really want the truth, because I think, deep down, they really understand that it does in a way create the possibility of being free.

Heroes and Villains

It starts, I think, with plaintiffs. It starts with people who are willing to put themselves on the line and tell their story, and their stubborn willingness to believe that they can get a fair shake in a court of law. It is easy to disbelieve that these days. They are heroes to me. Juries, too, are real heroes to me.

It starts with people who are willing to put themselves on the line and tell their story, and their stubborn willingness to believe that they can get a fair shake in a court of law.

The thing that stayed with me in reading about the McDonald's coffee case was that journalists interviewed the jurors after the trial. The foreman of the jury said something like, "We came in here. We thought it was just a coffee spill—a silly thing. Why the heck are we spending our time? Later on, we heard the proof. We listened to what happened to the lady. We understood that the big guy was not doing the right thing, and we had to say the truth about it and we did."[2] They are my heroes too.

Another of my heroes is my partner. She is a federal judge. She sits in New York. She taught me a lot about what good judges do. It is not about the big cases. She is a real star. She is a real class action whiz. But I watch her day in and day out preparing for every one of her sentencing hearings. She puts in the time. She reads the submissions. She thinks about the sentences. And she compares them to the other sentences. America lucked out when they got her as a judge. But I think America lucked out when they got all of you, too, because you care about it. You want it to be right. *You* are my heroes. *You* are the folks who are going to make a difference and continue to make a difference. I just respect that.

"Who are the villains?" It is not any individual. It is not any group . . . . It is those who do not want to speak the truth. It is those who lie and know that they are lying, those who want to tell you an untruth.

In the afternoon discussion groups, one of the questions was, "Who are the villains?" It is not any individual. It is not any group, although I have a couple that I might argue about. It is those who do not want to speak the truth. It

is those who lie and know that they are lying, those who want to tell you an untruth. They are the people who I think we stand against in the justice system and as lawyers. That is our job.

I went online to listen to a program from the Traveler's Insurance Company—my own insurance company! It was about "mega verdicts" and how they were getting out of hand. I wrote in dutifully a couple of questions: "Where is the data? Have you factored in inflation? Have you thought about the problems?" None of my questions were answered. It was not about the truth. It was about what Steve was saying: to perpetuate a certain state of mind, a certain kind of set of beliefs. That is not what you are doing. Those who do not want the truth are the ones who trouble me.

Another success story is railroad crossing cases. It is a little thing. Seventy-five years ago, 50 years ago, we were killing Americans left and right at those railroad crossings. It changed. How did it change? It changed because the victims and their lawyers worked like heck to make a change, to make it safer. And then the railroads got the message as well, because it was bad press. You just could not keep doing that. And then even the legislatures got on board. I knew that things had changed and this sort of rang a bell in my mind. My navigation app warns me about them. It says "Railroad crossing coming! You have to look out! Got to be safe!"

Just keep on doing what you are doing, because it is the way that we get out of this house of mirrors, this hall of delusions, the claims of fake news and all the rest of it.

How did it happen? How did we get so much better? We got better because of the work of all of you: the plaintiffs, the families, the bereaved, and all of that. In a way, that is what the truth can do. That is what it really is about.

All I can say is, just keep on doing what you are doing, because it is the way that we get out of this house of mirrors, this hall of delusions, the claims of fake news and all the rest of it. For me, and for Steve Daniels, too, it's the same thing. It makes you feel that your work is not in vain, and that somebody is out there listening, and there is somebody about whom who you can say, "Here is somebody I respect. Here is somebody I can point to."

Notes

1 Robert Earl Keen, *The Road Goes on Forever*, https://www.youtube.com/watch?v=iJRWtKePKuY.

2 For additional context, see the documentary *Hot Coffee*, https://www.youtube.com/watch?v=psebm9RJDvU.

In the discussion groups, judges considered the issues raised by the paper presenters and the panels. Judges made individual comments, and the moderators were asked to note areas in which the judges' thinking appeared to converge.

Remarks made by judges during the discussions are excerpted below and arranged according to the discussion subjects. These remarks have been edited for clarity only. Conversational exchanges among judges are indicated with dashes (—).

These excerpts are individual remarks, not statements of consensus. For general points of convergence that arose out of the discussion groups, please see page 159 of this report. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

Prof. Landsman's examples of deadly corporate misconduct (Massey Coal, Purdue Pharma, and General Motors) as "outliers"

- I don't know if it's intentional misconduct, but the misconduct, at least from what I've seen, has been driven by the need to make money, especially with big pharma with a 20-year patent expiration. By the time they get the drug out and approved, half the patent time is used up. So, they're constantly exploring new markets. Sometimes that's where you run into some problems.
- I do not think that it is an outlier. But I do not necessarily believe that it is a trend, either. I think that the trend probably is more downward. But it is not an outlier. I think that a lot of litigation has taken place as the result of this conduct and similar conducts. I believe that litigation helps stem the tide of this type of conduct.
- I come from a plaintiff's perspective from when I practice law. Defense attorneys did this all the time. Defense firms get paid by the hour, so they tend to drag things out and make it difficult to litigate—in part as a strategy, because there is a tiring effect on parties that are not able to afford the cost of litigation. I do not think it is an outlier at all. I do not think it gets addressed enough.
- They are certainly outliers from the perspective of my docket. Most of my cases involve issues like, "Can I get out of the guarantee of the real estate deal that failed?" or a variety of other things. Cases of this scale are a handful of times a year for me, let alone the very striking factors of these cases. They might look different from the perspective of someone with a sophisticated plaintiff's practice or defense practice.
- Based on what I see in the news media, I think they are outliers.
- If we look at our states individually, they look like outliers. But I don't think these are companies that are outliers with regard to misconduct.
- I don't think they are outliers. These are just the ones that pop into mind. That seems to be cyclical, and it may run from a defective product to dealing with bad water and environmental issues. It seems to be happening, at least from my perspective after 41 years of practice. It just may be a different part of the country or a different product,

but there are still these mega-cases, and then you can always come up with smaller cases in each state. Frankly, what I think happens is when these companies are not held to account, both criminally and civilly, it enables smaller companies to say, "Well, maybe they can get away with it. We can't get away with it to that extent, but we can push the envelope and cross the line."

- Both the corporate conduct and the actions of the judges in the Massey case raise questions of intent. I was a sole practitioner for ten years, and practiced nearly exclusively plaintiffs' litigation. But what is so striking about these three cases, and other cases I handled, is that they seem to be conscious actions to subvert the Rule of Law or ignore it or evade it.
- I do have to say that I find this relatively rare. It may be that people work really hard to soften negligence, but it is nearly always negligence you see, including by judges, perhaps, on recusal issues, as opposed to an actual intent (which seemed pretty clear with Massey and Purdue Pharma—I don't know anything about the GM case) to actually subvert the Rule of Law or evade it.
- I disagree that they are outliers. I think they are, unfortunately, part of the norm of corporate practice.

Does the type of conduct in Prof. Landsman's examples constitute a trend?

- I think it's kind of a pattern of practice with big corporations. They think they are invincible.
- I don't see a trend, but I do think the more people there are calculating the costs, the more regularized that calculation becomes. And sometimes it's easy to start calculating things that perhaps you should stop and ask yourself, should I be calculating this, or should I not do it at all?
- Whether we call it an outlier or a trend, we as judges are front and center in this kind of drift towards lack of access to justice.

Effectiveness of responses by the regulatory and/or criminal justice systems to major misconduct by corporations and other institutions

- For the most part, regulatory agencies handle the low hanging fruit, and they do it well. It's the outliers that I think regulatory agencies don't have the drive, nor the resources, nor the will, to take on these big, huge cases. So, are they effective? Yes. And to a degree, with low hanging fruit. It's those isolated big offenders that probably skirt by.
- You remember tobacco, right? Until the first tobacco case, or the first asbestos case, the bottom line was big money.
- If there's opportunity, that's what happens. Guns. Water. Tobacco litigation. Norplant.
- The trucks that go through our area are 80,000 pounds. If you have a fleet of 100 trucks and you say to all your truckers, you can go 15 miles over the speed limit, it's the scale that's killing us. And that's a small, intentional act.

I don't feel like it's as malicious as the ones we saw with Don Blankenship in these things. But that's a small act that has at scale incredible repercussions. It's the scale I think that is becoming a little disconcerting to me right now, for lack of a better term, where it may not seem an intentional act. But with large-scale acts, if that negligence percolates out, it kills an extraordinary amount.

- I thought that this question was an easy "no." But the reality is, it is true that most of the regulatory things are taken care of. We're not talking about one murder, which you might be able to handle here with the local DA. We're talking about 50. We're not talking about one sexual assault of a nine-year-old. We're talking about 50. And that's where that scale has become so complex. I think it's dwarfing our regulatory ability in places of limited resources.
- I think asbestos is something that we've done a good job regulating. And those cases are few and far between now.
- I don't have much faith in regulatory action, because the people who do regulatory work are appointed. They are appointed by the governor or legislative committees, and those people are subject to a lot of influence by the business lobby.
- State criminal prosecutors have not done much. The federal ones have. The federal prosecutors have been more aggressive and vigorous.
- I think that your run-of-the-mill DA guy in Podunk, Mississippi is intimidated by the prospect of prosecuting General Motors or whoever it may be.
- I think this question matters, because a pure view that says, "increase government, regulate more, prosecute more, have a top-down response," puts one structurally hierarchical and racist system in place of another structurally hierarchical and racist system. It's just a little more elite.
- In our state and nationwide, one of the big trends I see that highlights this is the regulation of the workplace and the most vulnerable workers—warehouse workers, meat packing plant workers, farm workers. I don't know that increased regulation handles that situation more sometimes than the other system.

• You can only have effective regulatory and criminal justice enforcement if there are the resources provided to the regulators and the justice system.

Different treatment in civil litigation for corporate conduct that kills or maims, versus conduct that causes only economic loss

- I do not know that we can actually prioritize what is more important. Is life more important? Economic loss more important? But I think the issue really goes to access to the courts.
- The answer should be no. There should not be any different treatment. But it goes up against the notion of proportionality and how we are supposed to evaluate things from that perspective.
- I think this is not really a judicial type of question. I think it is more of a policy question than a legal question.
- Our system is supposed to be accessible to all, and if you created a different method of treatment, I think it would undermine the public's confidence in the judiciary. The message would be, "His case is more important than yours. I'm going to take his case first."

- Wouldn't that tend to be more a legislative function?
  —That is not our call.
  —We go where the law takes us, whatever the legislature says is within the ambit of our authority.
- I have to decide the cases that come to me, and the extent to which a case that's assigned to me relates to one of these big issues is not a predictable sort of thing. It happens when it happens. That's kind of the nature of the role of a judge. Theoretically we are not policymakers. We should not be policymakers; we are implementing policy decisions made by the executive and the legislative primarily.
- Does it mean the total destruction of a person's home such that they become homeless? In my county we are in Ground Zero of the homelessness crisis in this country, so "only" economic loss can have profound consequences. And then you start talking about civil rights losses. Women can be excluded from the workforce without any killing or maiming, and yet, I think we recognize that as a loss.
- One-by-one justice is really unequal when you have mass torts. In cases that involve death I think it's a real limitation of our one-by-one litigation system, that eventually the money is going to dry up. A lot of damaged people don't have the resources to individually litigate the case and maybe they are just too late.
- The system, at least in my view, ought to recognize real harm for what it is. Something doesn't go away just because we decide as a matter of law not to recognize it.

Possible different responses to harmful corporate conduct

- Of course you can treat different cases differently. In our Western state we had a terrible problem with sex assaults from certain people within our Catholic churches, and we have a huge private school that caters to indigenous children whose psychiatrist was sexually assaulting the children. What our legislature did was waive the statute of limitations to provide more time to prepare legal action. So, they did get treated differently.
- I think civil litigation already does that. At least in our Southern state, with exemplary damages, punitive damages, the threshold inquiry on that is whether there is a risk of substantial harm. That's not economic harm. Are you doing serious injury to someone? So, I think we already recognize in the law that if it causes maiming or killing, it's going to be subject to exemplary and punitive damages. You would not necessarily do the same in an economic loss situation.
- We already do that with speedy trials. So, if you're a trial judge, you may have to bump a civil trial so that you don't lose your time on a criminal case. To do that in civil cases, and to parse it like that, might be difficult.
- I think punitive damages have a role to play.
- We have a system that should put that into place. If you've got a punitive damages system, you've got a compensatory damages system where juries should be able to judge the standard. The damages should obviously be higher, but we've got a system that I think in theory should do that.
- The fact is that there are already things in place for more egregious conduct—punitive damages, etc. I do not know that you really need anything new or different. Just needs to be dealt with and enforced.

Civil litigation filling the gap left by failures of the regulatory and criminal justice systems

- There are not sufficient resources in the judicial system to fill the gap.
- Absolutely it can help to fill the gap. In a prior life, I represented victims of sexual abuse, and, sadly, some in the context of medical services of doctors. The medical board was not going to do anything to anybody. But the standard to discipline a doctor was a lot higher than the standard for civil liability. And for a lot of regulatory agencies, the standards are higher than the standards for civil liability. We all know that prosecutors are overworked. They do not want to take cases that they are going to lose. They like to bet on the winning cases.
- In our Northeastern state we have special legislation that allows litigation for survivors of sexual molestation to file claims during a very specific time period, even if the statutory period had run. In my mind, that has, to some degree, allowed for some gaps created by the problems with the regulatory and criminal justice systems to be filled, and even though perhaps the time period is past for criminal justice, at least there is going to be some civil justice. I think that is an example.
- When I was in practice (primarily a defense background) I heard the lines about how civil litigation is not a fair way of dispensing justice around society. But I have come around to the view that it's better and less arbitrary than the regulatory system, and especially the criminal justice system, because criminal prosecutions of, especially, corporate crimes just seem extraordinarily arbitrary when deals are made. So I think that our civil justice system is certainly imperfect, but compared to what?
- I would say yes, it can help to fill the gap, because when a regulatory agency violates the public trust, then obviously civil litigation will be the next step. At that point, the courts can at that point step in. Yes, it can fill the gap.

What judges can do to help civil litigation fill the gap

- One thing the public does not understand is that judges cannot go out there proactively and solve a problem. We can only take the cases that are brought to us. Sometimes there are these really creative theories and these great lawyers. And then sometimes you have the case of the century, but the lawyer is dropping the ball. There's a need for organizations who can offer help to a lawyer who does not have the financial resources, or does not have the experience. The worst thing in the world is when you have the case of the century, and the lawyer does not know what to do with it, and then you have a precedent set.
- What can judges do? At least at the trial court level, we do have some discretion in certain matters. I think discovery is one of those, when there's a matter of first impression, or just something maybe that has never come across your bench before, or an interesting cause of action or case, and they are seeking discovery on it. Objections to discovery are an everyday problem. I really think it is used as a delay tactic. I think there should be more access to the courts regarding these discovery disputes. They use every opportunity they can to stop this cause of action from going forward, or this interesting issue to go forward. More access, easier access, and discretion so that there is not delay.

- An appellate judge can order supplemental briefing. When you have the case of the century and the people who really should win, in the name of justice, have lousy briefings, you know it is going to go down the tube. If the case happens to be assigned to me, I can order supplemental briefings, hoping that somebody is going to notice that and call the plaintiff's lawyer up and say, "I would like to help you. Would you brief on this?" I do this all the time.
- I do not know what I, as a judge, can do to ensure that civil litigation will be adequate, other than what I always do as a judge, which is to make sure that there is a fair and impartial adjudication of the facts. I do not see that I can do anything more than that.

Adequacy of current recusal regimes

- There's a nationwide trend to tighten and strengthen the recusal requirements across the country, with more transparency, to give judges less flexibility.
- As a trial judge in our southern state, I had a choice, when faced with a motion to recuse. I could either recuse or refer it. Referring it means it goes to another judge to hear it and decide, and they tell me whether I have to recuse or not. I think it's a good system. And we do the same thing on the appellate level. If someone's asked to recuse, then the other justices sit. The justice who is being singled out for recusal does not get a vote or a voice in the matter.
- In our state we now have a "tertiary" rule. If you have some deranged pro se litigant who's now on their third motion to recuse, you don't have to stay the case while waiting for the ruling. You can proceed on.
- I started looking for our state's appellate court rule on disqualification. We don't have one. We have a rule for all the lower courts, and it's "either recuse or refer." And it's beautiful, but we've got nothing for the appellate courts. And I think it's embarrassing. I don't think anybody's done anything wrong. But when something wrong happens, our answer is going to be "what the feds are doing, which is, "trust us." That's not going very well, is it?
- I think there is an associated question, which is how vigorous your conduct commission is. Because if the judge should recuse and they don't, in our state, we have a very vigorous judicial conduct commission who would be more than interested to look at any circumstance of judge misconduct and not recusing when they should. And they don't care who the judge or justice is. And there was a somewhat high-profile case where a Supreme Court justice took some free tickets to an NBA game from somebody with an arguably pending case before the court. And that did get referred to the commission.
- In our Northeastern state, the legislature thought judges were ducking things, so now judges have to say why they are recusing. Do we think that is really helpful? I think you're better off, if a judge feels they cannot be impartial or unbiased that they simply say I recuse. I think it encourages recusal. I think having to state why they're recusing does not –
- The recusal statute that was enacted in our Southern state was part of a packet of bills that have been submitted all over the country to new legislators as "things you might want to be introducing."
- Already I'm seeing abuse of the recusal process where a judge in my court, who is the fairest person on the planet, discloses something and then, to delay trials in this big case that's been pending, they move for recusal. They

go through the whole process, and we have to have another judge appointed to hear it, and it has just become a fairness issue in my mind. The abuse of the recusal procedure has become a fairness and access to justice issue. It really has.

- I think recusal is a threat to elected judges. We don't have elections, but I would be so fearful for judges that have to run for office in that situation, because it is completely fertile ground for your next campaign.

- I think recusal is poorly understood by the public. When you are on a court of highest resort there's a duty to sit as well as a duty not to sit, and if I'm off a case, it potentially affects the outcome of that case. There was one case this term that I was recused on. I *should* have been recused on it. When I read the outcome I disagreed, and I hoped that I would have been able to persuade my colleagues to do something different, even though it was 5-0 the other way. We don't have a system to bring in judges from other courts, and even if we did, I don't think their views would carry the same weight as the views of those of us who have been on the court for years and years and have seen the issues the same way.

  The public's view of our court, as I see from comments on social media and elsewhere, is overbroad as to when a judge should be recusing. I am not sure that even writing out the explanation would convince them.

- I think the appearance of impropriety is something that we as judges have to figure out ourselves. Of course you have an opinion about a case you're assigned to. We all have an opinion. Some people are republicans, some are democrats, some come from a prosecutorial background, some come from the defense. You do have opinions, but you also know what the law is and you make the decision the way you make the decision. So I think it's too bad it's different everywhere, but I think we have done it pretty well.

- I wish we were more transparent, and I think that does help. Whether or not the public understands it, I think even just the appearance of transparency is helpful to the public. In our Southern state we have sort of an opposite problem where people will recuse for the very smallest of reasons, and sometimes for political reasons. I think if you had to write down the reason, we would have fewer people doing it, because it was a hot potato case. And because we don't have to explain ourselves, I think that sometimes we end up with kind of a "strange bedfellows" panel on an appellate court, where several people recuse because they are beholden to somebody—not a campaign donor, necessarily, but a political faction or maneuvering.

- In our Northeastern state, there is a form that we have to fill out and we have to state exactly why we are recusing on a particular case, whether it is because we had a former court attorney who is now working as a plaintiff's attorney or defense attorney, whether we have a relationship with the law firm or other reasons. I think there were nine or ten reasons that we could check off or there are catch-all personal reasons. That has to be filed with the clerk of our court prior to our hearing the case. Therefore, if someone is privy to that form, they will see why a particular judge is recusing on a particular case. We also have ethical obligations as well, in terms of when you are required to recuse on a particular case, whether you have to disclose as well.

- We have two different avenues of recusal. One is our ethical duty to disclose. Our chief judge accuses me of "over-disclosing," but I am okay with that. Once you disclose, it does not necessarily mean that you have to recuse yourself from the case. But as a result of your disclosure, if one side or the other feels as though they want you off the case, they can file a motion for recusal. They do not have to file a motion to disqualify or recuse. I automatically do it. We do not need a reason. We just sign an order that says "I am recusing myself." I state the rule and have the case randomly reassigned.

- You want to know exactly why the judge is recusing.
- I think while the appearance of the three cases discussed by Prof. Landsman may be bad, but I think the actual influence of money, like in the Massey Coal case, may exist, but it exists only in a very small way. The vast majority of the judges are honorable. They're honest. They're ethical. And we have strict recusal procedures in place that would not have allowed *Massey* to occur in our state.
- I was shocked by Prof. Landsman's three examples. I knew some of the facts, but it was alarming. I don't see cases like this happening in our state. I think this is lawyers behaving badly, and judges behaving badly. I think we might have two checks on that in our Northeastern state: we're appointed—our system predates the federal system—and we get nominated and appointed for life. And I've never seen judges behave that way. And we have a small bar, with few "players" to begin with. We all know each other. And pretty quickly you get a reputation if you're not honest and forthcoming, and you're sort of excluded by the judges or the bar. So, I think it has been sort of self-regulating.
- To show you just the lunacy of some of the procedures, my late husband was a lawyer for a lot of years, a prosecutor. I had a standing recusal for 30 years that I wasn't going to sit on my husband's cases. Obviously, I wasn't going to. Under the new recusal law in our state, I would have to disclose that now, whereas before, I would have a standing recusal and it would be handled at intake review: "Oh, this is the judge's husband; obviously she is not going to sit on this case." It would be automatically, randomly allotted to someone else. With the disclosure requirement, it's another step of paperwork and it delays things. Once I recuse, I have to issue the order, issue the reasons, they have to be served on the parties, and presumably, although no one has tried it yet, they could object to my recusing. I guess somebody might, and take a writ on that to the supreme court. In my opinion it's an unwarranted interference. And I believe at some point it becomes a violation of the separation of powers for the legislature to tell us how to do certain things. That's one of them.
- In our court we don't see many recusals. Many of us come from smaller jurisdictions where we might know the lawyers in a small town, but we don't feel that that is sufficient grounds generally to recuse. But we don't have the litigant problems, you know, the Blankenship and Massey types of situations, so there really are not that many recusals.
- I take a very over-broad approach to recusals. If somebody might hold a grudge, let's recuse.
- If we're using the civil justice system as the people's voice, not the regulatory or the criminal but as the people's voice, then people need to believe that the judges on the benches are the fair adjudicators of their claims. There doesn't need to be that question of whether they are going to be bought and paid for, like your legislature, or the state in a criminal justice action. Do we have judges who are going to fairly adjudicate?

Fragility of the Rule of Law

- Is it fragile? Yes.
  —Of course.
- It goes back to Reagan's first campaign where he goes, "What are the nine scariest words in the English language? I am from the government and I am here to help." It is an attack on the legitimacy of the administrative state, the

legislatures, and of the court system. For better or for worse, we are part of the government. If the government as a whole is treated with mistrust, then we get treated with mistrust too. It is not specific to the juridical function but just a broader part of government function. It is mistrust of government in general that is bleeding off into the judiciary as opposed to only targeted at the judiciary.

- The manner by which they have tried to control the membership of the courts itself is harmful to the courts because the public will look at the process of how we choose judges. They are political so we choose them for political reasons. And then the people behave as judges in ways that track that expectation where you have less respect for the results. It is a thoroughgoing consistent body of effort that has such pervasive harmful effects on the institutions. The idea of an independent judiciary making the government comply with law or give effect to rights that are there to be recognized when no one really sees the system in a position that can produce that. It is harder for people then to care and believe that these people matter and should be respected in the work they do.

- There is one aspect of the Rule of Law that gives me more hope. We talk about the definition of the Rule of Law. I encourage everybody to look at the World Justice Project, which was started by the ABA and has international people all over the place—they have come up with definitions of the Rule of Law. They do a Rule of Law index, evaluating countries every year. I think the United States is number 26 out of 140 countries.[1]

  But they have four principles: (1) accountability, (2) just laws, (3) open government, and (4) accessible and impartial justice. In the accessible and impartial justice category, justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

  In terms of that last aspect, I think we are doing much better than we were 50 years ago. We have a lot more women now. We have a lot more diversity. I think that is really important. And I think that, even though there might be distrust, when we go out there and talk to the kids and bring them in, I think it helps give legitimacy to the judiciary. I think we have to keep doing that.

  I think every opportunity I am asked to speak to the public, I will say yes, and I will go wherever it is. I go to high schools a lot to talk to kids. I think it is important that we all do that.

- The legislature has the purse, and the executive has the sword or the gun these days, and we have the quill, the pen. And so, the power that we have is really based on how careful we are with the words, how carefully we steward the law, and how much people trust us. you see that time and again.

- In my state, there are very few lawyers in the legislature. There's nobody to really speak up for the law. It becomes "technicalities." And things come out of people's mouths that you just could not believe—for instance, "We should have good pro-business judges." Even the trial lawyer organizations do not say, "We need to have good pro-plaintiff judges." But on the business side, they go as far as to say they want pro-business. That's like saying at the Red Sox-Yankees game that, "We want a pro-Yankees umpire."

- If the legislature passes good laws or bad laws, that doesn't erode the Rule of Law. You may not agree with them, and it may be bad law, but that doesn't erode the Rule of Law. If you don't agree with a legislator, elect somebody else. That doesn't make the Rule of Law vulnerable, in my opinion.

1 https://worldjusticeproject.org/; 140 COUNTRIES, US now #26.

- We may not like the law, but what's wrong with it? How does that erode the Rule of Law if they have a stupid law?

  —Well, it erodes public confidence, for one thing.

  —Well, if the public voted them in, vote them out.

  —Easier said than done if they're gerrymandered.

  —And especially if there's demagoguery involved. We have some crazy people.

  —Well, demagoguery is politics.

- The Rule of Law is indeed fragile. Democracy is only as good as what people think it is. Same with the judiciary.

- It's more fragile today than it was 50 years ago, 100 years ago, maybe even 150 years ago. With the special interest propaganda, the messages on social media, we are all under attack, and the public's confidence in our system does, in fact, make the Rule of Law fragile. Is it worse today? Absolutely. Social media, in my personal opinion, has done more damage to this country than anything we've seen in a long time. Everybody has an opinion. Everybody has a voice. Everybody's a reporter.

- Our society has become much more transparent. At what other time would the initials "AOC" ever resonate with somebody outside of New York? It's because of social media and the marketing of an identity, pro and con. The judiciary, I think, is not immune to that influence of transparency. I remember it was a few years ago that a news reporter had the gall to go in and report that a parking spot in the judges' parking garage was empty. So, they went and found that the judge was not there. That judge was being happy somewhere else during a happy hour.

- We have the power of the quill. That's true, but only if people read what we write. And what is the attention span of the basic American citizen now? Maybe they'll read my introductory paragraph—*maybe*. I think what Americans are saying to us generally is, "I just care about the bottom line. How you judges get to where you get, that's all a sideshow." It's a thumbs up, thumbs down world to be in. And if they'd read it, I think that it would be different. But sometimes when they read decisions, they say, "Oh, now I see what you're doing."

- I would have said, no, the Rule of Law is not fragile until we heard from Professor Chemerinsky at lunch, but now I think it probably is pretty fragile.

- My answer is that it depends on who you're asking, who you are looking at. If I just look at my court, and the work that my colleagues and I do, I think we very much believe in the Rule of Law. We very much believe in access to justice. And I think we practice it on a day-in-day-out basis with all our cases. But if you ask the public, I think right now the public is having a big crisis of confidence in judicial institutions, and it's only by educating them about what we do and how we do it that maybe we would regain that trust. Otherwise, they paint us I guess with the same brush as the U.S. Supreme Court. We are a very different court than the Supreme Court, but I think we need to make them see that or understand that, because if they don't know what we're doing it's easier for them to lose confidence.

- Yes. There is a real lack of faith in the judicial system where I'm from. I mentioned earlier that I ran against someone who was indicted and went to federal prison, but in the four-county area that I live in, every county has

had a sheriff that has gone to federal prison. There have been other district judges who have gone to federal prison, all based on their roles as a judge in the civil justice system, and that kills the faith amongst the public in our area.

- I come from a nonpartisan court. We can't be involved in politics, but we're sitting there and hearing a politician talking about "so-called judges." It doesn't help matters, and when there's an explosion of social media spreading that even more, I'm quite concerned.
- I think the Rule of Law is bigger than the rule of the courts, and I do think that the Rule of Law is in peril and I think that Exhibit A of that is January 6th. And I think that court legitimacy will, for some time, be questioned because the courts have been even more politicized. You see machinations made for when you fill vacancies and how you fill vacancies and you have one rationale today and that same rationale by the same people is thrown out the window because of just pure political views.
- I do think people are asking, "How could you rely on anything if it can be changed so quickly?" It's going to take a lot to turn it back, it seems to me.
- The traditional Rule of Law was always that nobody is above the law. The law applies equally across the board. They talk about some features of the Rule of Law today, for example, making a law that is understandable, that people recognize, and to comport your conduct with things of that nature.
- But I think—and some of the speakers commented on this— you can't just gripe and complain. We have our state laws to interpret, and as long as our individual states feel that our decisions are legitimate, I think the people who live in our states will accept what we do.
- I would give a lecture every year for about ten years to Chinese students who would come to Salem. My talk was about independence, judiciary, and Rule of Law. I tried to capture the idea that, to me, made a start for them from China. I said, I think of my role as a government actor whose job it is to say no to the government and to do it in an honest way. And they, of course, could not imagine that because that is not what they believed their world could do. But I had a colleague say, "It is not your job to always say no to the government." Yes, you are right. It is to apply the law to the government and thereby say no to the government.

  But that is really what at some base level should be the thought of an independent judiciary applied in law. And if broadly the public no longer believes that is what courts do then it is really hard to get them to have a different idea of what to expect and how to demand and work toward.

  I always tell the Chinese students I meet that the answers are not always clear, and that is why there are judges. I tell them that I completely disagree with Chief Justice Roberts when he said judges are umpires. I say unless you concede that the strike zone is subjective, judges are not umpires. That means it is so important that if you have a point of view such as wanting to protect the environment or wanting to protect civil rights or things like that, you need to find judges who care about these things, because we all have our own personal perspectives, and judges are human. You need to get the kind of humans that you want to become judges.
- What do you say to the young people now?

  —I tell them it matters.

Stare decisis

- Follow the doctrine of stare decisis, and follow the law even when you don't like it. I'm a justice on an intermediate court of appeals and I am often faced with precedent from the court that I disagree with, but I will follow the law even when I don't like it. I think that's what we do to restore legitimacy, that we just don't get to make it up.

  I have got to be able to hang my hat on stringing words together and being able, in an original question, to make a distinguishing finding on a narrow issue, find a reason why it doesn't fly here. But that's what I think we have to do.

- When I just take a step back and think about the role of the judicial branch in our democratic system, we're a safety valve. And there is certainly that Magna Carta notion that people have to have a forum for neutral adjudication of private disputes. But we are clearly a legitimating force in society. We are the law enforcement fulcrum. We are the stabilization of incremental change. I mean, the whole notion of stare decisis is very much about avoiding big swings and incremental change.

Realistic alternatives to contingency fee representation to secure access to the civil justice system

- No. If you're an average citizen and you can't get a contingency fee, forget it. You can't do it now. No. There is no such thing as a pro se injury case of any amount. You can't do it.
- I do not know how anyone can afford to pay a lawyer in a personal injury case. It is just too much work. The whole idea is that you are taking the risk. But even in a case where I had $60,000 invested in it and did not recover the verdict, I did not go to the client and say, "Okay, now, pay me the 60K in expenses." You eat it.
- You could call it "involuntary pro bono."
- The problem is not the contingency fee. It is the entire idea of an adversarial justice system. In other countries, a lot of times it is inquisitorial rather than adversarial. Also, medical bills are paid for. There are a whole lot of different economic incentives and factors that are in play in the United States that are not in play in other jurisdictions. But if there is an adversarial litigation system, you need to have contingency fee representations.
- For the last 25 years in the UK you can buy what is called "after the event insurance." Basically, when you walk in the lawyer's office, they will bind a policy that will pay the lawyer's fees on a contingent basis. And if you lose, the insurance company pays the fees. They have it in Florida, I am pretty sure. It is a massive business. It is actually funded by the insurance companies.
- How do you pay a lawyer for time when you do not have money to pay a lawyer for time? That is really the question. People need access to justice. They need to be able to have an attorney represent them so they can recover if there is an injury. What is the alternative?
- I do not know of an alternative to the contingent fee. So much of the energy in my court is toward pro se litigants, self-represented litigants. We help them. You fill out a form, which is so complicated I am not sure I could fill it

out. And then we end up forfeiting their appeal or dismissing their appeal. But so much energy is being devoted to the pro se litigants, because of this problem. They cannot afford to get into court any other way. Access to justice.

- It is ironic, isn't it, that in our system, we have lots of pro bono lawyers. We have public defenders that handle indigent criminals. We have the legal aid societies that handle the people in poverty who cannot have other access. But then there is that gap of people who have been injured.
- Bar associations, state and local, and law firms will have clinics. Affinity bars do this probably better than the big bars. Clinics for wills. And there was a clinic after Uvalde. There are veterans' clinics. So, the lawyers are going out with a helping hand. That, I think, improves access to justice.
- We had one from Missouri where the punitive damages award, when you get a punitive damages award, a share of it goes to the Victims Compensation Fund. And a share of it now goes to legal aid.
- Even in our small town, they've got the legal aid pumped up and they're representing people on landlord tenant things. So that's a legislative thing but it's something that could be done.
- Every study tells us that the amount of legal need, everyday stuff for everyday people, is tremendous and there's a limited number of lawyers. One alternative could be to create another level of legal professional who can handle some of those everyday things, hopefully at a lower price and more easily, so you take out the economic barriers. It's the nurse practitioner model, but not exactly: limited licensed legal technician. It started as a slow but identifiable movement in other states, mostly in the West, but not exclusively, to see if the state could put together something like this.
- Can we create this other level of professional in such a way that they can help this access issue? It's kind of endemic, and it's very, very controversial because as you pointed out, the idea is it's going to take money away from lawyers.
- There are a lot of people who, often if it's family law or landlord tenant, you've got to deal with the system or it's going to come get you. And if you feel you're on the receiving end of what in your mind is a raw deal, you're not going to be very happy about the way the system is working.
- But contingency fee is an imperfect vehicle. If there's not enough there for the lawyer to make a profit, they're not going to take the case. So, it won't solve everybody's problem, but it does do a lot, nonetheless. It's the small cases that are always problematic in terms of, it's going to cost me X number of dollars and so much time to even prepare a case. I can't afford to do that.
- In some practice areas, some lawyers are experimenting with unbundled legal services, where they just go in for part of the case. But I think that makes it hard for both the client and the lawyer.
- In our Northeastern state they are really pushing mediation as an alternative to litigation. Not that I'm a big proponent of it, but I suppose you could say it's an alternative.

  —But in mediation, wouldn't the attorney collect a fee? So, it's not like you'd get around the fee.

  —In our Northwestern state it's a requirement for civil cases to have gone to mediation before they go to trial. It has to be formal. They have to go to mediation with a third party. We have mediations where the judges offer themselves as a free mediation service. They can sign up with that.

—We had a pilot mediation program in my court. Our takeaway was that the people who intended to mediate were going to find a way to mediate it out, but for the ones who weren't really committed on either side, it wasn't going to work. But we also found that it significantly impacted the rest of the docket, because the easy cases---easy in the sense that there were clear resolutions available---got mediated out. All we were left with were the beasts, and it took us, I would say, probably a good eight to ten years to recover from the impact of that on the docket. I mean, the difficulty of the cases, the sheer paper volume cases, none of those went to mediation.

—Most of the judges where I'm from also require mediation before they will let them go to trial. And they make you pick a mediator within their community.

- We have a massive problem with rural justice in our Southwestern state. Each of our counties has its own county court, county court system, and district courts. In many of those counties there isn't even one single private attorney to handle the litigation in those counties. So, we have a huge problem with access to even the basic, "Hey, I have this letter that was put on my door from my landlord; I don't understand it. They're saying I'm going to get evicted and I don't know." We don't have that problem in our big cities.

  I think we are doing something which is really shocking to me, but we're doing "low bono" programs, for young lawyers that come out of law school who are looking to work in communities that make too much money to access legal aid programs, but not enough to actually pay a lawyer. And I think that is one step, but so much more could be done.

- I think the biggest tool we have in our state is large-scale regulatory reform over how legal services and legal information can be delivered. We were the first state to adopt a full limited licensed legal technician program, and then sadly, I'm disappointed to say, my court in a divided vote sunsetted the program basically because of the push-back of lawyers who said people deserve a "real lawyer." But in the family law area in which these people were licensed, hardly anybody has a real lawyer of any sort.

  But I just don't think we're going to "pro bono," "low bono," "appoint a counsel" our way out of a civil litigation crisis that is caused by a crazy, expensive system and, honest to goodness, in my view, is an 18th Century artisan culture to practice law and deliver access to legal information and legal help.

- If you look at the numbers, our civil legal needs study three years ago showed an exponential growth in unrepresented legal problems that people in poverty have. It is really expensive and complicated to be poor. It's really impossible for most people to even think about where they would turn to get legal information, and yet we consistently shut down every online self-help program. We are really suspicious of ABO and Legal Zoom and all of that.

- There is always push-back from the lawyers, because "you're invading our turf." We have a rule in the pipeline for evictions, landlord-tenant types of stuff, and foreclosures. You can have individuals who are really skilled and knowledgeable about that, but they're not lawyers, and they are sort of overseen, but not really by real practicing lawyers. And they kind of come in as almost a legal aid society type of representation and are handling some of these cases.

- We have a pretty successful plaintiff bar in this country, as evidenced by this conference. Arguably, if you have a good tort case, you don't suffer from lack of access to the judicial system.

  —You always have a cash flow problem, though, don't you?

- If we're talking about access to justice for potentially lucrative tort cases, there is not a problem. The contingency fee has solved that problem. But opening up to outside investment by private non-lawyer interests is not going to do anything for the non-lucrative cases. The fundamental problem with family law and landlord-tenant law is that there is not a financing means inherent in the case to support the representation.
- When I was in private practice at a defense firm, we had one person who did foreclosures for different mortgage companies. He didn't do the work; it was all legal assistants. So why can't someone be on the other side and going into court on the foreclosure case?
- I worked for a bankruptcy lawyer in law school, and that's what he did. It was a one-man shop with 10 paralegals, and all he did was creditor-side bankruptcy.
- Our Northeastern state has a "navigator" program. They are like courthouse facilitators to help people find their way through the system.
- All of the district courts in our Western state Hawaii have self-help centers at the courthouses. They are staffed by *pro bono* attorneys, so people are contributing time. There is usually one person there. And it's their self-interest in the judiciary in doing that, because we all know how difficult it is with self-represented clients to get through the calendar, so there's a little bit of self-interest in adopting that plan. But there has been buy-in by the lawyers, and we devoted serious money to having these places installed—the forms, all that kind of stuff, and somebody staffing it, and it has worked pretty well, I think.
- Could we afford lawyers? I could not afford a lawyer.

"Villains" in the civil justice system

- The Chamber of Commerce. I come from one of those "judicial hell holes." We have a newspaper that is run by the Chamber that reports on everybody—every verdict, everything. It is all slanted toward that message, "you are paying for this." "It is too much." "The verdicts are too high." "You are too litigious." And every time a lawyer gets arrested for anything, it shows up there. The same thing we have read about in Prof. Daniels's paper. But it's a newspaper. It is free. You pick it up at the local hardware store. They do a wonderful job of messaging. It has reduced our verdicts substantially and yet we are still a "judicial hell hole." We just cannot lose the nickname. It never stops, because it is the Chamber.
- We need this system. The tort system is a part of the regulatory system that helps keep us all safe. The problem is funding it.
- I think the answer is no. There are not any villains in the civil justice system. But it is the non-systemic actors who have an economic interest in it, whether it is the Koch Brothers or the insurance companies. It is the non-systemic actors who game the civil justice system and not the actual participants. There are conservative judges. There are liberal judges. There are defense lawyers who are very good at what they do. I assume the vast majority that I encounter are acting in good faith. But it is the non-systemic actors that is the problem.

- It is people that do not understand their appropriate role in the system, and they are not honorable and ethical.

  —They do not value the system. They do not value the integrity and legitimacy of the system because it will produce results they do not like. If you can diminish it to a degree, it is no longer going to produce bad results from your perspective. You do not care because you do not want the system to work anyway.

  —I think it is so important for us to uplift the system and keep explaining that it is not perfect, but this is a great system compared to other countries.

- The tort reform advocates.

- Well, I think the villains in the civil justice system right now are the district courts that require that you go to a commissioner before you see the inside of a courtroom. Years ago I was on a study committee dealing with reapportionment and caseload equalization and all sorts of things. One of the most sorrowful pieces of testimony that really almost made me sad to be a lawyer and ashamed to be a judge, was a man who was a doctor who said, I am a father seeking custody of my two children. I have spent $38,000 in mandated court fees in such-and-such parish, and I have yet to see a judge or the inside of a courtroom. And it happened that the chief judge of that district court was on the committee. I said I'm not going to respond to that one. I'll let my colleague on the panel here respond.

  Honestly, I hadn't been on the bench long so I wasn't aware -- when I was practicing law you went to court in front of a judge, period. You put on your stuff and you got a decision from a judge. But it has evolved into a cottage industry of required steps to go through before you have a judge hear your case, and that just seems so unfair to me. It seems that, more than anything else that I have seen in 31 years, it undermines public confidence in the process and it undermines a belief that judges are actually working to do good. I think it really has a significant impact.

- I don't know if I would call them villains, but I think there is negative pressure from all sides. I forget who was talking about having to ask permission to depose witnesses, having to ask permission from the insurance company. I don't know how many of you all have been district court judges or trial judges, but I can remember on a number of occasions defense lawyers referring to their client as the insurance company, which they are not. And so I see that pressure coming from the insurance companies, which negatively affects the clients.

  You also see a lot of pressure from plaintiff's lawyers trying to influence the judge or judges in a variety of ways, especially where they are elected, and they are allowed to contribute to their campaigns. That in itself I think in ours and some of your other jurisdictions would create an appearance of impropriety when they're appearing before the court, so there's pressure from all angles that is negatively affecting the civil justice system.

- Formulated legislation is one of the things that I think is a big threat to the independence of the judiciary and the fairness of the judiciary. We talked earlier about the recusal law and some other things. I saw it myself in action when a young legislator introduced a bill and could not even explain the bill in committee. It made me realize there's a lot more going on here than first meets the eye with formulated legislation, and these packets that you get when you're a new legislator, saying here are the talking points, here's the bill, here is how you go about getting it done. It's a very organized thing, apparently.

- Those so-called "villains" might be categorized as those that are providing false information strategically over social media so that people misunderstand the civil justice system. You know, a calculated campaign of misinformation.
- I think increasingly the political gets personal. We heard about "cancel culture." I think villainizing is just part of our DNA as Americans. What's an activist judge? The one who does what you don't want.
- There is no right without a remedy. If we don't provide them as courts, as a judicial system, they will provide them for themselves, and I think we are seeing that happen. The blame is not on them for finding the remedy; I think it is very much on us if we are not providing it for them or making them feel like they have a path to a remedy.
- I know that the Institute is for access to trial, but I think that we need to look larger than that. If people don't have the right to even get to a court for a sexual assault allegation or for an eviction or for whatever, they are going to start just making their own remedies, and that is what we're seeing happen.
- I certainly think that there are villains. I think there are those who want to distort reality and intentionally go about doing so. I will say here the United States Chamber of Commerce, on a regular basis, distorts the picture about civil justice. I think the Manhattan Institute does exactly the same thing. And I think a number of others. The funding that's provided is provided by those who have an interest in pursuing a certain agenda, and that agenda is profoundly committed to undermining the credibility of the judiciary and the judicial process.
- I think there are some villains. When there's abuse in discovery, that is villainous conduct.

  —That is not systemic necessarily, it's more individual companies, and I think that is where the plaintiff bar does a really good service in trying to ferret it out. Fraud on the court, really, is what it boils down to.
- Obviously, there are many villains.

Judges' responsibility for keeping the public safe

- We try to. Of course, we try to keep them safe.
- No, because my job is to review a record for errors. If there is no error then I move on to the next case. From an appellate perspective, my answer is no. It is not my job.
- There are certain things that are guaranteed under the Constitution. It is our duty to protect those things that are guaranteed under the Constitution.
- We have to protect our democracy as much as we can, especially now, and that is what makes decision-making so important. That is what makes each decision so important.
- It's a combination. It's a whole system. But you do feel like a critical cog in that process. I did.
- Who's responsible for keeping the public safe from the Masseys of the world?

  —The trial lawyers are responsible for that, obviously.

  —We do that in civil court. We give judgments, restraining orders.

—I think this is kind of a flip side of regulation and -

—If the courts do their job correctly in the civil arena, we provide economic stability to our jurisdictions. So, do we keep the country safe? Yes, we do in that sense.

- I think we are responsible for following the law. An assumption that I make about the law is that it was written in part to keep people safe, and if we're doing it on that foundation, then yes.
- What we do day-to-day in following the law and upholding the law, with one of its goals being to keep the public safe, is something that we do as part of our job responsibilities.
- I think we are responsible for protecting the integrity of the process. I think that is the best question, rather than whether we are responsible for keeping the public safe. If we uphold the integrity of the process and do everything within our power to ensure that people are treated fairly, hopefully that process ensures that we maintain a civilized society.
- I believe the way you ensure fairness and, therefore, the safety of society, is by making sure to the extent possible that you stay above the fray of politics and try to look at what you have before you and decide on what you have before you. It's not always easy to do that, particularly when you're in an elected state. It can be difficult, but that's what people do.
- It does seem, though, that there is a specific substantive duty on the part of the judge to protect certain elements of the public. This is what's often important in family court cases that we have. There are doctrines like we are supposed to make sure that the welfare of the child is the number one priority in certain circumstances, and certainly if there's an issue of life there has to be some sort of immediate action taken.

  The duty that comes before the court for the right to life is at issue now with these climate cases. Do we have a duty under the Constitution—you could call it substantive due process of law—to make sure that where you have a life-threatening situation arising and you have a group of future generations seeking remedies in the court, that they should have some opportunity to participate because the level of severity, as it's alleged, is threatening them at a lethal level?

  I think it's straightforward that sometimes the courts do have a direct responsibility to protect human life. We don't want to get into too much detail about abortion, but there is a point of view that is saying that judges have a requirement to protect the life of a mother under certain circumstances. They have a constitutional right to be able to have an abortion because it will protect their life and you can't take that away from them.
- Judges are not necessarily personally responsible, but the legal system itself should be responsible for keeping the public safe, and judges are an integral part of that. But unless the legal system itself is working, judges don't have any super power. I think the question is not what do the judges do, I think the question should be, does the justice system have the ability to do that, in both the civil and the criminal?
- If judges can't step in on climate change, then I don't know what issue we should really be stepping in on. So, I do think there is a role for the judiciary to play in the safety of people and humankind. And this is litigation that is really going to be preempted on the fed side. There's no way you use a due process clause to run the climate change litigation up the federal food chain.

Many of you probably have seen these cases coming up to you. Those are the types of big-time issues that especially the younger generation is looking at. So, if there's a role for the judiciary to play, I think those are cases we need to take hard looks at.

- I feel that the role we play in keeping the public safe is partly to maintain a systemic, informed judicial role in how we go about that, not to cleave to the past but to be that stabilizing legitimating force.

  I say all the time I get to be a parent at home; I don't put on a robe to decide who gets what. I put on a robe to try to get the law on the riverbed and work through these things, but I do think we can do it in a way that recognizes that lives are at stake if we keep perpetuating systems that don't address real needs.

- What about our obligations when we're asked, as trial court judges, to make initial rulings on confidentiality agreements either at the discovery stage or with settlements, or when we're asked to review them in terms of enforcing a confidentiality agreement? Those are very difficult situations for judges because they know that this may be the first case of a new product issue, and it has been settled but no one can talk about it.

  So, what do you do? Do you as a judge say, no, we have to let the public know because this is a real safety issue. People are being killed or maimed by this unsafe product. I am only concerned with the case that's in front of me.

  The plaintiff's attorney should be concerned about the client initially, but then the concern is about getting that information out so that other people aren't going to be harmed. But I don't think we talk enough about those issues regarding the effect of keeping silent.

  And the sexual harassment things that are coming out, too. What's our obligation as judges? To just say I know you want your money, plaintiff and plaintiff's attorney, but I am not going to allow this to be confidential?

- We are a lot more than umpires. We do have a duty to protect life under our statutes and under the Constitution I think, under certain circumstances.

- We have the greatest job in the world. We get to solve people's problems for them. Isn't that a great thing to do? To have the ability and the authority to do that, there's nothing better.

- The law basically protects the public, and is enacted to govern behavior, and if we all follow and interpret the law and apply it correctly, in that regard you are protecting the public safety.

- Do your job, apply the law.

How judges can most effectively support and protect the legitimacy of our civil justice system

- I think the answer to the question of how you support and promote the legitimacy is to be transparent. Transparency is the most important thing you can do as a judge, in my opinion.

- It's as though the appellate judges feel that it's part of their responsibility to reduce big punitive damages awards. The proportionality analysis that is generated has to do with our value system. We think it is disproportional even though a jury has awarded the punitive damages. I think this demonstrated trend to either do away with punitive

damages at the appellate level or reduce them at the appellate level is something that affects the legitimacy of our civil justice system at a time when some say corporate accountability is becoming really important. So, I would suggest that the tendency to reduce or eliminate punitive damages is affecting the legitimacy of the civil justice system.

- As lawyers and as judges, I think we have an obligation to make sure that everybody can have their day in court. If they don't have their day in court, to me, that undermines the system more than anything.

  To me, if people had their day in court more than they do currently, I think that would encourage mediation. And I love mediation. It is certainly much better than arbitration, and I have settled cases at mediation many times. As the DA always says, nobody is going to be happy, but if you go to trial, it's a risk.

- I am a big believer in open courtrooms and I think it adds to the legitimacy of the court. When people are not allowed into the courtroom, when things don't happen in public, the court is not seen as a legitimate operation.

- In our Southern state, when we were dealing with COVID, our office of court administration statewide set up a system so that everything was broadcast via YouTube!

- Openness and disinfection, that helps. When people see it, it cleans up the system. And it will combat some of these misconceptions that are on social media, too.

- Transparency is how you do it.

- The T-word, transparency. And integrity, and timeliness. Being self-aware of the appearance you project in court. It doesn't make people happy if they're arguing and you're looking at your cell phone.

Public outreach

- I feel like courts actually have to be a little more aggressive in telling our own story about what courts do and not be in this ivory tower as courts have been in the past.

- I used to joke that the approach of a supreme court to issuing opinions in Washington was "run, duck, and cover," but now with a lot of our decisions we take the time to get some messaging, pull out the key points and use it as an opportunity to educate the public about what the court does. I think we could do a lot as courts.

- Use your retired colleagues to go out and talk about the courts and the legitimacy of the courts and how they do things and why they do things, and push back on the attacks. You as a single judge may not be ready, but your retired colleagues may be ready, willing and able.

- In dealing with school students, it all depends on what is popular at the time. For a while, I was getting, "I want to be a forensic pathologist," because they were watching *CSI* all the time."

- One thing that I have done to try to counteract the way the media report now is that if I am writing an opinion that I know is going to be controversial, regardless of which side I come down on, I try to put on the first page what's called the "newspaper" paragraph. If I write it correctly, the reporter will cut and paste it and put it in the article. That's about all you can do. There is some explanation. If we can't get people interested in what we do, and why we do it, that chips away at the legitimacy of what we do.

- I serve on my state's Judiciary Commission. So, we're the disciplinary arm, and all of our canons require us to what? Be silent! We can't talk about our cases. We can't take positions. It's like going into a fight with a blindfold on, and a muzzle, and we have our hands tied behind our backs. We're the softest target in the world.

- Social media can be a big problem. I have a colleague, a trial court judge. He hired a new court attorney from somewhere in Eastern Europe. Instagram! He brought his parents to visit the office. They took a photo. He posted it on Instagram, and had some loving words to say about the judge and what an opportunity the lawyer has been given. I cannot tell you how many "likes" that got. And what does that do? That takes the mystique away from a judge. Pre-pandemic, groups would come in to visit the courts, and we'd invite them in. We do have rules about social media, even if we don't use it. But if you invite a law student or a college student, they will post.

  We are just public servants. I cannot afford to run infomercials. The principals, the malefactors of great wealth, have the interest and the ability. They own newspapers! They own Sinclair news. They can keep on pushing that stuff out there.

- People just didn't understand how judges make their decisions, the information they have in front of them, the legal structure that it all fits in. So we have people who will go out and speak to that, explaining that what judges do is really hard, they hear 20 cases a week, and this or that is a horrible outcome, but that doesn't mean the judge screwed up. You're going to have some bad outcomes. But those are all things we judges can't say. But people who are knowledgeable about the system can talk about that.

- We do traveling dockets, which I think is kind of a cool idea. All the courts of appeal do it. We go to colleges, we go to courthouses if somebody asks, and we just do dockets out there and answer questions and are basically available. The supreme court has encouraged us to have roundtables with legislators and invite them to those traveling dockets, and explain what we do. We can't exactly talk about the decisions, but we can explain what was going on to a certain extent, how it worked, and what happened. It's very helpful, I think, to keep us kind of in the loop with the legislators about what's going on and what we do.

- In our Southern state we do a thing called Court on the Road, where we go to colleges. Due to our history of segregation, we have a lot of historically black colleges, full time, four-year institutions, and a lot that are still predominantly white.

  But when I was a lawyer, I got to do a couple oral arguments at these events, and we would actually sit and have lunch with the judges before the argument. Of course, that's usually never done. It would be forbidden for me to interact or see someone in the hallways before an oral argument.

- I understand that at least one state, very early on in the pandemic, went to YouTube with dockets. And as a result, there was a study done where the public's confidence in the system rose exponentially because it was open. They saw the work the judges would do and how hard it is to try a case, and they had more confidence in the result.

- Adam Liptak, has covered the Supreme Court for *The New York Times* for years. I remember him speaking at a conference, and he talked about how the pool of, I would say, confident, eligible journalists who cover the courts is very shallow now. And Adam is one of a handful of people who do it competently. He says there just isn't anybody to cover it locally in smaller jurisdictions. You don't have anyone. You have somebody who did sports, and they're telling him, "Hey, why don't you write an article on the *Dobbs* decision? And he's like, what? So, they go to Siri and Google and ask them to tell them about *Dobbs*, and they write down what they hear and publish it almost verbatim.

- We all are bound to do pro bono work, right? My former law partner was a Superior Court judge. Every week he spent two hours at a high school, holding mock jury trials. What if every judge had a requirement to spend an hour or two a week at a local high school putting on these programs? We've got to do something. There are no civics classes anymore in high school. There's nothing about how a jury system works. But that's what he did, and it was extraordinary. Everybody wanted to be in that class. If a judge goes to a high school and teaches a class on the jury system, it's going to be a positive thing.
- The one thing I do talk about when I talk in public is—because we elect our judges—is the importance of electing *good* judges and knowing who you're electing.
- I will tell you the most disheartening thing to me is that people don't know or understand what state court judges are doing. The supreme court is that big court, and they kind of get that. But I don't know how to make them interested. We try to go out and talk and educate, but it's a difficult undertaking.

ADDITIONAL TOPICS DISCUSSED

The *Dobbs* decision's impact on the legitimacy of the courts[2]

- The problem of lack of trust starts at the top. The public sees U.S. Supreme Court justices on TV who took a disingenuous position when they testified under oath at their confirmation hearings, and then created a contrary decision. How are you supposed to trust anyone, frankly?
- Maybe all of you or some of you have seen the vignette where they had the justices during their confirmation hearings, saying "It is all settled law." It was like bump, bump, bump and then bingo. What do they do as soon as they have the majority? It seems like the legitimacy issue has been raised more with these recent trio of decisions in the past 30 days.
- And then you get the disclosure of the *Dobbs* decision from the Supreme Court. The leak has reduced, I think, the public's confidence in the judiciary.
- I remember being surprised the day that the *Dobbs* case came down. I was leaving my building and I don't remember exactly what I said to my doorman, but he said to me, "Judge, they really lied during their confirmation hearing. That's what bothers me. They sit there with settled precedent and they didn't follow it." I was very surprised to hear my doorman make that evaluation. I'm sure he listened to some of the news media and read some of the local papers and he was very upset about that.

  Never do I recall people having discussions about the Supreme Court as a body saying, you know, the supreme court has lost all my respect. People, especially those who aren't lawyers, didn't necessarily talk about the Supreme Court as if that would be an interesting thing to talk about, because most people just don't care about it or don't think about it. But now I hear people saying—and I read articles and I'm sure you do, too—that it's de-legitimized. "Anything they say, I can't even respect them." "I have no respect for the court." And that I think is a terrible thing.

2 Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022).

- I think one problem with some of the recent decisions coming from the federal side was that there is no buy-in. If one of the justices was saying, "This was wrongly decided," and all of a sudden, we have *five* judges who suddenly, after years and years, think that it's egregiously wrong, where does that come from? As I think Justice Kagan said, "You're just sort of making it up." And there is where the problem is. The Rule of Law is eroded when there is this sort of lack of collective acceptance of what that Rule of Law is and whether it's valid or not.

  And whether you disagree or not with the underpinnings of *Roe vs. Wade* 50 years ago, that was the law. And when you're going against precedent in this type of fashion, or you're suddenly transforming the original meaning of the Second Amendment into other things that really impact certain states that have different viewpoints there under their rules of law, you are not going to have the buy-in.

- The United States Supreme Court has made a lot of mistakes. Think of *Plessy v. Ferguson*.[3]

  —I say vote. I tell the young people to vote.

  —Register, vote. You need to care about who become your judges.

- The bottom line is elections have consequences. We know what happened. The bottom line is that you have to let people know they have a lot of power and what that power is. That power is to vote. You vote for people or you vote them out. The thing is it starts locally—the school board, etc., and how these things affect your everyday life. I think it is about messaging and talking about power because you can complain all you want, but did you go to the polls?

- The thing that is scary, though, is after you have made the courts recognized publicly and broadly as political institutions, it is really hard to undo that. It is hard for me to conceive of how you undo that, because it is hard enough to have an idea of what judges are doing and how they are supposed to do it as a baseline. It is hard for people to even understand all that. And when you broadly convince people that Supreme Court justices are political people doing things that are not what we think of as judicial work, the institution no longer seems to serve its purpose. How do you then get people to make choices about whom to elect and expect a different group of people to be there doing the work in a different way. How do you work that back to where the right understanding, as I would think of it, is no longer understood to be true?

- What worries me, although I am not as optimistic, is how to explain to a young person what the Supreme Court just did, when the Supreme Court is supposed to be above political influence. And now there are Republicans too. They are not just Democrats. The Republicans are cheering. They are happy. You have to explain to the young people that this American institution has decided it is politically infused because that is what it is whether you are a Republican or a Democrat. It doesn't really matter.

- I've always told my colleagues, "You earn your reputation."

3 163 U.S. 537 (1896).

The Rule of Law in other countries

Ukraine

- Over the years, I have done Rule of Law training in Ukraine, and obviously I am following very closely what's going on now. But in two ways, in 2012 they threw out everybody and got new judges, and in 2014 they had the Maidan, what they called the "Revolution of Dignity," everybody went out again—new judges. And the problem with the Rule of Law from their perspective, of course, is that there is no social commitment to the independence of judges or the integrity of courts. Even the new judges are worrying, "How am I supposed to make a decision if I can't pick up the red phone and find out what decision I'm going to make?"

  Or like in 2019, the constitutional court was stormed by citizens because they were outraged that the court refused to remove from office the judges who were loyal to Putin.

  So, when I look at what's going on here, I am very concerned, because every time we chip away at politicizing the judiciary, which seems to come from the left and the right and the top and the bottom, I think we are risking the very foundation of the Rule of Law. So even in many of the academy, the judicial, and the legal systems' responses to the *Dobbs* case, I worry about the tenor of that response because I think it is equally -- it's going to reverberate across the topic areas.

  That's a lot to lay out there, but I'll just say I think the Rule of Law is incredibly fragile. It probably always has been, but we are in a society in which we are increasingly suspicious of everybody and everything for every reason. I feel a special responsibility as a judge to do what we can to strengthen it by focusing on some of the strengths and pulling those out as opposed to criticizing the U.S. Supreme Court, or criticizing a particular decision or that sort of thing. I find as a judge that it feels like it's adding fuel to the fire.

Middle East

- I did my master's degree in Arab studies, and so I did a lot of work on the Rule of Law in Middle Eastern countries. I very much relate to all the comments made about Ukraine. Our system is very unique in that historically the judiciary has been not necessarily independent but always *viewed* as independent and impartial. And certainly it is, I think, overall. For individual judges that might be different.

  But what I have always found interesting about the American system is that we have no enforcement mechanism as judges. We rely on the trust that the people have for the judiciary to follow our opinions, to follow the precedent that we set, because without that we have no way of enforcing what we write.

  So, I think this question is exactly right. I think the Rule of Law is fragile, and I think posing it as a question is almost disingenuous, because yes, of course, it is fragile. We have to look at bigger things than just plaintiff versus defendant work in civil use cases that are now dealing with kind of the heart of what our rights are as human beings in the United States. I would like to see a lot of that discussed, also.

Serbia

- I've done USAID work in Serbia nine and ten years ago and have done stuff since then too. And you look at a country—like when I went there in Serbia, there was 25 percent unemployment. The guy who was an air traffic controller also had to do massage therapy just to make ends meet. And the reporter took me aside at one point and said that he had to pay the principal €3,000 just for a public school, just for his wife to get a job as a teacher, and that he had no other alternative but to do it. But at least he could expose it by reporting on it.

  They had something called an "anti-corruption agency," which it just seems ludicrous to any of us that we'd ever hear of an agency named that. But this is a country that was formerly communist (inaudible) and was struggling just as I watched Egypt struggle after the Arab Spring to form a democracy. And every place you go when you're doing anti-corruption work, the greatest antidote to corruption is a strong judiciary.

  And so, I have never heard any of our speakers at Pound, as the last professor did, be so direct about the concern about the state of our democracy and of our Rule of Law. Do we have corruption here? Of course, we do, but it's institutionalized. And the one thing that has always made us different from some of these struggling democracies is that we do prosecute where there is accountability. And it's really the judiciary that creates that public trust in government, or at least begins to restore that public trust in government.

  I'm sure *Plessy v. Ferguson* was a really bad time in the history of the judiciary, and we're not at such a good time right now. But I think I've never heard this seminar to just lay it out so clearly as what I heard today. And I think that tells us something.

Discovery

- I fought every single protective order that has ever been in a case of mine and I have lost every time. Judges don't want to go through the work of reading all the documents. It's a lot easier to have us affirmatively choose the documents we think should be public, but when we want a protective order, we will almost always lose.
- I think one thing when you're talking about discovery, what you really see many times is not the big discovery issues but the lawyers arguing over every sentence and every line of every interrogatory. And that is what I think, when judges say they hate discovery disputes, trial judges hate the lawyers fighting over everything.
- I don't really think it's conflict avoidance, but I was in trial courts for a long time. talk about courts not being funded! I can't spend 25 hours looking over everybody's discovery dispute, because I'll never get a trial done or a motion decided or anything else, even if I never sleep for three years, which it felt like for a couple years. There are only 24 hours in a day.
- I heard a comment today about judges hating discovery disputes. I am too new as a judge to know what I'm going to hate and not hate. As a lawyer, when I heard that, my thought was, if you don't like discovery disputes, there's a lot of other jobs out there besides being a judge. If you're conflict-avoidant this might not be for you.
- As judges, I think we have a tendency to say, "Let the parties work it out." But I actually think we sometimes do a disservice by doing that. Let's say we're dealing with large-scale litigation. Oftentimes, what you've got is one

plaintiff, or one group of plaintiffs, and they agree to a confidentiality agreement about what they can produce. But then how does that affect the rest of the litigants, and the public, and regulatory agencies, for getting that information? How does that affect the use of the criminal justice system in getting that information? Because they signed these behind-closed-doors NDAs and the judge just let them "work out" that issue. I think we as judges have to pay more attention to what is transpiring with regards to that.

- We see it. We have litigation right now and we get 17,000 pages of writ applications fighting over discovery, fighting every step of the way over things that should be a no-brainer and you should be having reciprocal discovery.

  It's a task that maybe is beyond the reach of what government agencies can do, any kind of regulatory work, to have the kind of attention to detail that it takes. For this one case, in our court we moved out all of the furniture in one office just to store the writ documents from discovery, and it hasn't been to trial yet. It has been ongoing and is probably going to be ongoing by the time my grandchildren are lawyers. We have staff attorneys who do nothing but work on those writs in that one case because there is no other way to process the docket and keep current on all the other stuff. So I agree that it may be a task that's beyond the scope of regulatory action.

- We have had many cases when I was a trial judge on which, really, the life, the viability of the case did depend on discovery. I think with the advent of electronic discovery, in some ways, it is more efficient. But in some ways, it is even easier to do a document dump. You do not even have to hold the documents.

- I've been a judge in our Western state for 20 years. We have a case that involves, for example, an abuse of discovery by a major corporation during the course of litigation, in which $1 million in sanctions was awarded by a judge because of discovery abuse by the corporation. That became a *cause célèbre* for the corporation to litigate all the way to the supreme court. They argued, with an extraordinarily talented lawyer, that that sanction was excessive when, in fact, the million dollars was minor compared to the amount of damages awarded. And it is very likely that it was worth paying the million dollars.

  So we receive requests now to adjust the discovery rules. One of the main concerns we hear regularly from different quarters of the bar is that there is too much litigation, too much discovery, and it all takes too much time. So then we have to decide whether we will amend the rules to limit discovery, so that, if you want extensive discovery, you would have to show special circumstances.

  Is that the direction we need to go in terms of the culture of our court? Are we supposed to respond to the idea of limiting the opportunity for plaintiffs to have discovery because there's too much discovery abuse? Is that the problem? Or do we have an access to justice problem where you can't get the discovery you need?

  I think there's this refrain that we heard today: "Judges can't stand discovery;" "They don't want discovery disputes;" "This is something that the judges don't want to see;" "The parties should work it out on their own." Really?

  I *like* discovery disputes, because that's where the justice is. And judges are supposed to participate in that. We have to allow the parties to get the evidence, particularly when it comes to the high-wealth groups that can hire the best attorneys to resist discovery.

Forced arbitration

- I have not been a trial judge, but I worry about forced arbitration in the same way that it removes knowledge from the body of the common law, as well as it removes knowledge of the immediate safety risks from the public that needs to know. It also removes the development of a body of law that helps provide equal justice because it's all confidential and private. But I don't know what the rubric is for how you handle that as a trial judge when somebody wants to have a matter dismissed or have you approve a settlement. That's tough.
- I cannot think of a case in our Southeast state that is as egregious as Purdue or Massey Coal or GM. But then again, if it went to arbitration, how would I know?
- In my state, we see a lot of mandatory arbitration contracts. I see that as a way to keep those sorts of misdeeds or malfeasance kind of private and more secretive, because we are not privy to a lot of the information about what takes place in arbitration. Maybe it is a way to keep things less transparent. In our state, they are bound by those. It is very difficult to get out of an arbitration clause in a contract. I see a lot of the judges' hands tied in that respect.

Procedural matters

- Statistically speaking, I would say most civil cases are being lost at the procedural stage.
- I have been practicing for 40 years. When I started out, discovery was more open than it is now, and there weren't as many objections. (And I have been on both sides, too. I represented hospitals and nursing homes for 24 years.) The "proprietary information" objection is one of the other impediments to getting to the truth.
- The whole idea of our justice system is to have fairness. And I see, a lot of times, all of these impediments to fairness, including these proprietary information objections, and then judges have to put the pressure on them.

Legislative tort law revision

- One thing that is concerning is a trend I have seen in our Southeastern state, where if someone gets redress from a trial or appellate court, our legislature will directly pass a statute to take away that remedy, and will even pass a statute to take away a remedy retroactively. That is the trend I see in my state.
- To me, the thing that has changed the most in my 31 years on the bench is how legislatures are passing these summary judgment laws. There are "prefab" bills that are being introduced that come from a packet from a certain group, and one of the things is summary judgment. We might see a case 10 times on discovery stuff and summary judgment motions before any of the lawyers see the inside of a trial court. Cases are being won or lost in motion practice.

Threats against the judiciary

- In the *Dobbs* abortion case, a request was made for injunctive relief. About 10 judges did not want to hear that case, because they were afraid for their families. We've got to have some Rule of Law in spite of the fact that we don't agree with each other. And some of the ways you do that is going to the polls. That's how you deal with it.
- Judges are affected by what happens. They have children, and grandchildren, and sometimes they just would not hear a certain case, so they had to bring in a special judge.

In the discussion groups, the moderators were asked to note areas in which judges' thinking on issues raised in the Forum appeared to converge.

Prof. Landsman's examples of deadly corporate misconduct (Massey Coal, Purdue Pharma, and General Motors) as "outliers"

- Such cases, and the conduct they exemplify, are not uncommon, not merely outliers—and they might even have been bigger than they were.
- The practices Prof. Landsman discussed exist down to a small level.
- The really bad cases get settled.

Does the type of conduct in Prof. Landsman's examples constitute a trend?

- The examples do not actually represent a trend in corporate conduct.
- The recent prevalence of arbitration may have reduced the incidence of this conduct.
- This is not actually a trend—there are always people who use a risk-benefit analysis when engaging in risky conduct.

Effectiveness of responses by the regulatory and/or criminal justice systems to major misconduct by corporations and other institutions.

- Regulation is effective for routine problems, but some cases get very complex.
- There should be mechanisms for criminal penalties for some of the worst conduct.
- Regulatory agencies are always hampered by lack of funding, and they have to decide which actions offer biggest "bang for the buck."
- The courts are not always effective, either.
- The regulatory process is often delayed by appeals to courts, which adds to the workload of the courts.
- The system works as designed.

Different treatment in civil litigation for corporate conduct that kills or maims, versus conduct that causes only economic loss

- Placing one type of injury over another would create imbalance in the system.
- Priority should not be given to certain types of conduct. All conduct that causes losses deserves access to justice for the victims and review by a court.
- Conduct that kills or maims does not warrant different treatment.

Possible different responses to harmful corporate conduct

- Provide for punitive damages for more egregious behavior.
- No different treatment, but proportionality of the response might be considered.
- Other possibilities: special courts, expedited process, fast track, exemption from arbitration.
- Perhaps waive statutes of limitation, as is done for adult victims of child sex abuse.
- This is not the judiciary's call. These are policy questions for legislatures.
- We need a criminal deterrent.

Civil litigation filling the gap left by failures of the regulatory and criminal justice systems

- Civil litigation can work well if the courts are adequately funded.
- Civil litigation *can* fill gaps effectively if it is handled well.
- If litigants continue to pursue particular types of cases, the regulators will notice and respond.

What judges can do to help civil litigation fill the gap

- Ensure transparency in all aspects of litigation.
- Afford litigants fair hearings.
- Use rulemaking authority.
- Trial courts can use their discretion in the discovery process.
- **J**udges can't do it on their own.

Adequacy of current recusal regimes

- There is no uniformity in what circumstances require recusal.
- Views on this subject tended to vary by state. Some judges believe that their states' recusal rules work well enough, while judges from other states think their rules do not.
- In some states there are no rules at all.
- There is support for an ethical duty to disclose reasons for recusal. (There is a national trend to require judges to explain the factual basis for recusal, but this can have a chilling effect, particularly in states where judges are elected.)
- There should be mandatory disclosure of the judge's reasons for recusing.
- It is up to the judges to explain recusal better to the public.

Fragility of the Rule of Law

- The Rule of Law is fragile.
- The Rule of Law is strong when people believe in it, but the belief is waning.
- The judiciary is in danger of becoming politicized.
- Many litigants look for favorable outcomes without regard to legitimacy.
- There is general mistrust of government.
- Attacks on judges are common, and responding to them is difficult.
- Even long-term Republican judges receive death threats.
- There is too little media coverage of positive judicial action, and not enough clear messaging by the courts.
- Fragility is exacerbated when judges do not apply the law equally, or when they fail or refuse to follow it.
- A positive view: The courts' successes in handling recent election challenges demonstrate the strength of the Rule of Law, but those successes were often lost in the political uproar.
- Part of the fragility comes from judges' inability to justify their decisions publicly.
- Fragility is exacerbated by attacks from legislatures and special interest groups, and on social media; very few people in the news media are competent to explain legal matters.
- Communication and engagement efforts help, e.g. taking courts "on the road."

Stare decisis

- Judges' failure to adhere to stare decisis undermines the Rule of Law and the need for stability.
- Stare decisis is becoming a meaningless phrase used by politicians.

Realistic alternatives to contingency fee representation to secure access to the civil justice system

- There is no clear alternative.
- There are massive access-to-justice problems in rural areas.
- There are a few suggestions for alternatives, including mechanisms for non-lawyer practice, or legal aid, which has largely been gutted in this country.
- Fee shifting statutes could help, but they are not a major alternative.
- Many people self-represent because they have no way to get to court otherwise. They usually do not attempt to handle personal injury cases pro se unless they have been turned down by lawyers.
- Some appellate courts have pro bono programs.
- Clinics (especially affinity-based) and legal aid can help.
- Private attorney general processes can help.
- Mediation requires cases to be ready for trial, which requires a lawyer.

"Villains" in the civil justice system

- Yes there are, but there is no agreement on a single villain.
- There are unscrupulous lawyers on both sides. Judges need to investigate and discipline lawyers who abuse the system and mistreat clients.
- Misinformation provided by any party can, in effect, be a "villain."
- Transparency is the most important response to villainy.

Judges' responsibility for keeping the public safe

- There is shared responsibility. Judges have a role in it, but the entire legal system has that responsibility.
- Judges should watch for constitutional errors.
- Appellate judges should look at the case before them and follow the law, without considering low their rulings could impact others.
- Judges should apply the law reasonably and consistently.
- Laws are enacted to protect the public and govern behavior. Judges are stewards of the proceedings. If they follow the law, interpret and apply it correctly, in that regard they are protecting the public.
- Judges are part of a system.

How judges can most effectively support and protect the legitimacy of our civil justice system

- Follow the law and stare decisis, even when judges don't personally like the outcome.
- Produce results that are transparent, are clearly stated and understandable, and are reached in a timely manner.
- Ensure that all sides feel they have had their day in court and have been heard.
- Use common sense.

Public outreach

- Judges should speak out more about the importance of the Rule of Law and the overall legal system.
- They should encourage voting.
- They should encourage support for judges, whether they are appointed or elected.
- They should try to educate the public via social media.
- Use community engagement and education, explaining how the system works; use of ad hoc committees to go out into communities and explain what judges do.
- "Travel the circuit"—hold oral arguments in different places so that the public can see the judge and the court in action.

FACULTY BIOGRAPHIES

Paper Writers and Speakers

Dean Erwin Chemerinsky (Luncheon Keynote speaker) is Dean and Jesse H. Choper Distinguished Professor of Law at UC Berkeley School of Law. Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine, School of Law. He previously taught at Duke University, the University of Southern California Law School, and DePaul University College of Law.

Chemerinsky is the author of fourteen books, including leading casebooks and treatises on constitutional law, criminal procedure, and federal jurisdiction. His most recent books are *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (Norton 2021), and *The Religion Clauses: The Case for Separating Church and State* (with Howard Gillman) (Oxford University Press 2020). He also is the author of more than 200 law review articles. Chemerinsky is a contributing writer for the Opinion section of the *Los Angeles Times*, and writes regular columns for the *Sacramento Bee*, the *ABA Journal*, and the *Daily Journal*, and frequently contributes op-eds to newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, *National Jurist* magazine named Dean Chemerinsky as the most influential person in legal education in the United States, and he currently serves as President of the Association of American Law Schools. He received his B.S. from Northwestern University (1975) and his J.D. from Harvard Law School (1978).

Professor Stephen Daniels is a Senior Research Professor Emeritus at the American Bar Foundation. He holds a Ph.D. in political science from the University of Wisconsin-Madison. His research focuses on law and public policy, legal education, and the various aspects of the American civil justice system. He has written on law-school curriculum and financing, trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform—including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with Joanne Martin) of *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (2015) and co-author (with Joanne Martin) of *Civil Juries and the Politics of Reform* (1995). He has testified before congressional and state legislative committees on the subject of civil justice reform, and has served as an expert witness in cases dealing with large jury awards and/or constitutional challenges to civil justice reform. Daniels also maintains a long-standing interest in teaching courses related to law and policy, and especially courses on the Supreme Court and constitutional law.

Honorable Steven C. González (Welcome Speaker) was sworn in as the Washington State Supreme Court's 58th Chief Justice on January 11, 2021, for a four-year term, following a vote of his peers. He was appointed to the court effective January 1, 2012, and subsequently won two contested races for six-year terms starting in 2013 and 2019. Before joining the Supreme Court, Chief Justice González served for ten years as a trial judge on the King County Superior Court hearing criminal, civil, juvenile, and family law cases.

Chief Justice González is passionate about providing open access to the justice system for all. He was appointed by the Supreme Court to the Washington State Access to Justice Board that was established in response to a growing need to coordinate access to justice efforts across the state. He served on the Board for seven years, including the last

two years as its chair. Chief Justice González has served as Chair of the Supreme Court's Interpreter Commission for eight years, supporting efforts to enhance language access across the state, including amendments to general rules that address remote interpreting as courts respond to the COVID-19 pandemic and establish protocols for team interpreting. Chief Justice González's work has earned him numerous awards and honors, including the Justice C.Z. Smith Trailblazer Award and the Exceptional Member Award from the Latina/o Bar Association of Washington, the "2012 Difference Makers Award" from the American Bar Association's Solo, Small Firm and General Practice Division, and "Judge of the Year" awards from the Washington State Bar Association, the Washington Chapter of the American Board of Trial Advocates, and the Asian Bar Association of Washington in 2011.

Chief Justice González earned a J.D. from U.C. Berkeley School of Law and Honorary Doctor of Laws Degrees from Gonzaga University School of Law in 2011 and the University of Puget Sound in 2015.

Professor Stephan Landsman is Emeritus Professor of Law at DePaul University College of Law and the Organizer and Director of the annual Clifford Symposium on Tort Law and Social Policy. He is a nationally renowned expert on the civil jury system and, through his ongoing study of the American jury, has become a leader in applying social science methods to legal problems. Among his recent publications are empirical and historical pieces regarding the jury, as well as an examination of legal responses to human rights abuses. At DePaul, he served as the Robert A. Clifford Chair in Tort Law and Social Policy. Professor Landsman is the author of several books including *Closing Death's Door: Legal Innovations to End the Epidemic of Healthcare Harm* (Oxford University Press 2021) (with Michael Saks) and *Crimes of the Holocaust: The Law Confronts Hard Cases* (University of Pennsylvania Press 2005). He has successfully argued cases before the U.S. Supreme Court, and is a member of the leadership of the American Bar Association's Litigation Section.

Dr. Gerson Smoger **(Forum Moderator)** heads Smoger and Associates, P.C. In addition to serving as the President of the National Civil Justice Institute, he also serves currently on the boards of Public Citizen, Public Justice (of which he is a past president), the Civil Justice Research Initiative, the Human Rights Center at U.C. Berkeley, as Chair of the Board of Physicians for Human Rights, and as a Commissioner for the IAS-Lancet Commission on Health and Human Rights. In the past, he has served for many years on the American Association for Justice (AAJ) Board of Governors, as Chair of its Legal Affairs Committee, and as Chair of its Amicus Curiae Committee. As a plaintiff attorney, Dr. Smoger has tried cases and argued appeals throughout the United States. He has been named the Public Justice Trial Lawyer of the Year for his role as lead trial counsel in gaining a precedent-setting decision for sixteen children suffering from lead exposure. He represented Admiral Elmo Zumwalt and the Agent Orange Coordinating Council in getting benefits for Vietnam veterans for Agent Orange-related injuries, and argued in the U. S. Supreme Court on behalf of veterans who brought suit against its manufacturers. He has also served as Vice-Chair of the ABA's Toxic Torts Hazardous Substances and Environmental Law Committee, and was named Missouri Environmentalist of the Year. Dr. Smoger is co-sponsor of the Hogan/Smoger Access to Justice essay contest under the auspices of Public Citizen. He earned his B.A. from Lycoming College *summa cum laude*, his Ph.D. from the University of Pennsylvania with distinction, and his J.D. from Berkeley Law. He is a member of the bars of Texas and California.

Navan Ward, Jr. **(Luncheon Welcome)**, is a principal at the Beasley Allen Law firm's Atlanta office. He is a member of the bars of Alabama, Tennessee, New York, and Mississippi. Ward has been active in litigation involving hip implants, pharmaceuticals, and hormone replacement therapy, and has had leadership roles in MDL cases. He has

also been involved in nursing home neglect and abuse and wrongful death trucking cases. Ward is a member of the American Association for Justice (AAJ), and currently serves as its 76th president. Among many other offices, he has served as a member of AAJ's Board of Governors, and as past chairman of its Minority Caucus.

Panelists

Randy Aliment is a partner in the Seattle office of Lewis Brisbois, with a broad-based practice focused on commercial litigation, higher education and the sports industry. He conducts internal investigations for universities in anticipation of potential government investigations or other legal exposure. He has represented universities in arbitrations related to admissions, governance, and their relationships with teaching locations and partner institutions outside of the U.S. He also serves as General Counsel for the Northwest Commission on Colleges and Universities—one of seven regional organizations recognized by the U.S. Department of Education to accredit postsecondary institutions. He has extensive experience representing foreign clients in U.S. litigation and overseeing foreign litigation and commercial transactions for U.S. clients. In 2012, Aliment served as chair of the 25,000-member Tort Trial and Insurance Practice Section of the American Bar Association. In 2013, he was elected to the Executive Committee of the Union Internationale des Avocats, headquartered in Paris, France. In 2014, he served as editor and co-author of *Invest Washington*, an ebook that has been translated into Chinese.

N. John Bey is the founder and managing partner of the firm of Bey & Associates, with offices in Atlanta, GA, and Cincinnati, OH. The firm represents clients in cases involving medical malpractice and defective drugs and other products. He is a graduate of the University of Cincinnati and the University of Alabama School of Law. Bey is an active member of the American Association for Justice (AAJ), currently serving as its Parliamentarian, and is a faculty member of its National College of Advocacy. He is a member of the Georgia bar, and is a trustee of the National Civil Justice Institute.

Professor Andrew Bradt teaches at Berkeley Law, where he also serves as Associate Dean. His primary scholarly interests are Civil Procedure, Conflict of Laws, and Remedies. Bradt's work has been published in numerous law journals, and has been cited by courts and in prominent legal treatises. He is a co-author, with Geoffrey C. Hazard, William A. Fletcher, and Stephen McG. Bundy, of *Pleading and Procedure—Cases and Materials* (12th ed. 2020), and a co-author, with Edward Sherman, Richard Marcus, and Howard Erichson, of *Complex Litigation—Cases and Materials on Advanced Civil Procedure* (7th ed. 2021). In 2019, he was elected to the membership of the American Law Institute. Prior to joining the Berkeley Law faculty, Bradt was a Climenko Fellow and Lecturer on Law at Harvard Law School. Before entering academia, he worked as a litigator at Jones Day in New York City, and at Ropes & Gray in Boston. He had clerkships with the Honorable Robert A. Katzmann of the United States Court of Appeals for the Second Circuit and the Honorable Patti B. Saris of the United States District Court for the District of Massachusetts. Bradt graduated *magna cum laude* from Harvard Law School, where he received the Joseph H. Beale Prize for Conflict of Laws, and *summa cum laude* from Harvard College, where he concentrated in Social Studies. He is a member of the Massachusetts Bar.

Honorable Dori Contreras was first elected as a Justice to the 13th Court of Appeals in Texas in 2002 and was re-elected in 2008 and 2014. She will serve as Chief Justice through 2024. She received a Bachelor of Business Administration in Accounting degree from the University of Texas at Austin. She received her law degree from the University of Houston Law Center and received the school's Distinguished Service Award.

After law school, Chief Justice Contreras had a civil litigation and mediation practice for more than 10 years. She has served on boards of numerous legal and community organizations, including the Texas Trial Lawyers Association and the Board of Governors for the Association of Trial Lawyers of America. She currently serves on the Executive Committee and the Strategic Planning Committee for the Council of Chief Judges of the State Courts of Appeal; as Chair of the Council of Chief Justices of Texas; as Treasurer of Texas Latinx Judges; and as a Council Member for the Hispanic Issues Section of the State Bar of Texas. Throughout her legal career, Chief Justice Contreras has lectured at continuing legal education programs around the state and country. She enjoys speaking to students at local schools and serving as a role model to the young women in her community and has won numerous awards for community service.

Mary J. Davis is Dean of the University of Kentucky's J. David Rosenberg College of Law. She joined the UK Law faculty in 1991 after six years of law firm practice, during which she managed nationwide products liability defense litigation. Prior to her deanship, she was a UK University Research Professor. Davis is co-author of the widely adopted law school textbook *Products Liability and Safety: Cases and Materials* (7th ed. 2015) and of the leading multi-volume products liability treatise, Owen and Davis, *Products Liability Law* (4th ed. 2014). She has been a visiting professor of law at the University of Texas School of Law, Boston College Law School, William and Mary College of Law, and Wake Forest University School of Law. Her articles have appeared in leading law journals, and her recent work on federal preemption of state products liability laws has been cited by the United States Supreme Court. Davis is a 1979 *cum laude* graduate of the University of Virginia and a 1985 *magna cum laude* graduate of the Wake Forest University School of Law. She is an elected member of the American Law Institute, where she has served on the Members Consultative Groups for its *Restatement (Third) of Torts* and its *Aggregate Litigation Project.*

Lana A. Olson, the president-elect of DRI—Lawyers Representing Business, practices with Lightfoot, Franklin & White in Birmingham, AL. She received a B.S. degree from Florida State University, and her J.D. degree, *cum laude*, from Samford University's Cumberland School of Law. Her practice areas include catastrophic injury, commercial litigation, commercial transportation, class actions, employment law, environmental law and toxic torts, and products liability. Olson is admitted to practice in Alabama and Mississippi. She has extensive litigation experience, including trials, class certification hearings, Frye/Daubert hearings, complex arbitrations, and service as in-house counsel. Olson represents large and small business clients in legal matters in numerous states. In addition to DRI, she is a member of the International Association of Defense Counsel (IADC) and other defense-oriented legal organizations.

Honorable Martha Lee Walters is the 44th Chief Justice of Oregon. She was first appointed to the Supreme Court in 2006, and was elected in Chief Justice by her colleagues in 2018. Prior to her judicial service, she was in private trial practice from 1977, emphasizing employment law and civil litigation as well as general civil practice. She holds a B.S. from the University of Michigan with distinction, and a J.D. from the University of Oregon School of Law, where she was a member of the Order of the Coif. In addition to her judicial duties, Chief Justice Walters has been active with the National Conference of Commissioners on Uniform State Laws, becoming its first woman president in 2007, and is a Fellow of the American College of Trial Lawyers and a member of the American Law Institute. She has served in leadership positions and on many bar committees and task forces of the Oregon State Bar, and has taught a variety of courses and seminars at the University of Oregon School of Law.

Michael Withey is an attorney and author based in Seattle, WA. His legal career has spanned 50 years with several firms, concentrating on personal injury and public interest law. He is a past president of Trial Lawyers for Public Justice (now Public Justice), and served on the boards of the Association of Trial Lawyers of America (now AAJ) and

the Association of Trial Lawyers of Washington. He is most recently a best-selling author of *Summary Execution: The Seattle Assassinations of Silme Domingo and Gene Viernes* (WildBlue Press 2018), which recounts the events behind one of his major cases. Withey received his B.A. from Pomona College and his J.D. from the University of San Francisco School of Law.

Discussion Group Moderators

David M. Arbogast practices law in Santa Ana, and throughout California concentrating on appellate, and complex law and motion matters involving a wide array of disciplines, including consumer protection, business torts, and access-to-justice related matters. He sits on the amicus and legal affairs committees of the American Association for Justice (AAJ). He also is a member and active volunteer brief writer for AAJ and the amicus committee of Consumer Attorneys of California (CAOC). He is a Fellow of the National Civil Justice Institute, and an AAJ Champion.

David Berger represents consumers in class action lawsuits with a special emphasis on data breach, privacy, and financial services litigation. With broad technical and IT expertise, David is widely regarded as a leader in data breach and privacy law. His substantive technical knowledge ranges from hacking techniques and cybersecurity controls to industry standard IT practices, information security frameworks, and auditing processes. This unique background positions him to understand and sift through the relevant technical aspects of a case, competently interface with corporate IT executives, and negotiate settlement agreements that incorporate meaningful changes to business practices, all of which are critically important to ensure consumers' data is appropriately protected.

Michael Patrick Doyle practices in Houston, representing plaintiffs in maritime personal injury, international and trans-national personal injury, including work injury claims, and insurance bad faith. He is board-certified in personal injury trial law by the Texas Board of Legal Specialization. He holds a B.A. from the University of Virginia and a J.D. from the University of Texas School of Law, and also studied marine insurance, international law, and maritime law at the University of London, St. Mary's College of Law. He was admitted to the Texas Bar in 1990.

Deborah Elman is a partner at Garwin Gerstein & Fisher LLP in New York City, where she specializes in complex antitrust litigation. Ms. Elman is a Fellow of the National Civil Justice Institute, Vice Chair of the Pricing Conduct Committee of the American Bar Association Antitrust Law Section, the founding member of the Amicus Committee for the Committee to Support the Antitrust Laws, and a member of the Class Action & Private Litigation and the Pharmaceutical and Health Care Committees of the New York State Bar Association Antitrust Section and the Executive Committee of the Public Justice Foundation. She is a frequent speaker on topics involving class actions and expert witnesses. Ms. Elman holds a B.A. *cum laude* and an M.P.H. from Columbia University and a J.D. *cum laude* from the University of Pittsburgh School of Law.

Misty A. Farris is senior counsel and an appellate attorney with Dean Omar Branham & Shirley in Dallas. Ms. Farris received her B.A. from the University of Houston and her J.D. from the University of Texas School of Law. She also holds an M.Div. degree from the Southern Methodist University Perkins School of Theology. She has spent more than 25 years litigating asbestos, pharmaceutical, and medical device cases for plaintiffs. She has also worked as a teacher, as a minister, and at a home for the developmentally and physically disabled. She is a Trustee of the National Civil Justice Institute, and a member of the American Association for Justice, the Texas Trial Lawyers Association, and Public Justice (of which she was a Trial Lawyer of the Year in 2006).

Karen Barth Menzies is a nationally-recognized mass tort attorney with more than twenty years of experience in federal and state litigation. Courts throughout the country have appointed Karen to serve in leadership positions including Lead Counsel, Liaison Counsel and Plaintiff Steering Committee in some of the largest pharmaceutical and device mass tort cases. She has testified twice before FDA advisory boards as well as the California State Legislature on the safety concerns regarding the SSRI antidepressants and the manufacturers' misconduct. She has also advised victim advocacy groups in their efforts to inform governmental agencies and legislative bodies of harms caused by corporations.

Wayne D. Parsons practices in Honolulu, Hawai'i. He received B.S. and M.S. degrees in engineering, physics, and mathematics from the University of Michigan. After college he went to work with NASA on the Apollo space project, which took him to the astronomical observatory on the Island of Maui. After seeing Hawai'i, he went to the University of Michigan Law School and moved to Hawai'i permanently. He specializes in personal injury matters for plaintiffs and engages in consumer advocacy in the construction industry. Mr. Parsons has been president of the Hawai'i State Bar Association, was a founder of the Consumer Lawyers of Hawai'i, has served as a governor of the American Association for Justice (AAJ), and has been the Hawai'i chair of the Public Justice organization. He is a Fellow of the National Civil Justice Institute and a member of several construction, engineering, and architecture organizations.

Gale Pearson is an Officer of the National Civil Justice Institute. She is Senior Counsel with the law firm of Fears Nachawati in Minneapolis. Her practice concentrates on complex litigation, ranging from environmental law to pharmaceutical and medical device litigation to Qui Tam prosecution. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry, and her law degree from Loyola Law School in Los Angeles. She is a nationally recognized clinical laboratory scientist. She has played pivotal roles in MDL litigations, serving on science committees, and, in a class action against a tobacco company, as lead counsel. In 2003, U.S. Supreme Court Justice Stephen Breyer presented her the Outstanding Pro Bono Service Award for her work with the Trial Lawyers Care organization, which provided free legal assistance for applicants to the September 11th Victim Compensation Fund. Gale is a member of the Minnesota and American Associations for Justice and the American Bar Association, and is a board member of the Public Justice organization. She has served as a speaker for Minnesota's "We the Jury" project, and is a frequent lecturer on topics in science and law.

Ellen Presby practices with the law firm of Ferrer, Poirot & Wansbrough in Dallas, TX. She specializes in pharmaceutical injury cases, and has had leadership roles in MDL pharmaceutical cases and in Judicial Council Coordinated Proceeding (JCCP) cases in California. Outside the courtroom, Ellen serves as Adjunct Professor at Southern Methodist University (SMU) School of Law, teaching product liability law. She is the incoming secretary of the Public Justice Foundation and its Executive Committee, a board member of the American Board of Trial Advocates (including its Dallas Chapter Executive Committee), a trustee of the National Civil Justice Institute and has been Co-chair of the Tort Trial & Insurance Practice (TIPS) section of the American Bar Association. She co-authored *Texas Pretrial Practice*, published in 2000.

Ellen Relkin is Partner and Practice Group Chair at Weitz & Luxenberg in New York City. Her practice focuses on medical device and pharmaceutical product liability, as well as toxic tort matters. She serves in leadership capacities appointed by courts as the Co-Lead Counsel of the In Re: DePuy ASR Multi-District Litigation (MDL) and the Lead and Liaison Counsel for the New Jersey In Re: Stryker Rejuvenate & ABG II Modular Hip Implant Litigation, as well as a member of the Plaintiff Steering Committee in the In Re: Xarelto Product Liability Litigation and the Executive Committee of In Re: Invokana (Canagliflozin) Products Liability Litigation. Ms. Relkin, who is Certified by the New Jersey Supreme Court as a Civil Trial Attorney, is an elected member of the American Law Institute as well as the Summit Council. She is an active member of the American Association for Justice, a Governor of the New Jersey Trial Lawyers Association, the New Jersey and New York Bar Associations, and the American Bar

Association, where she was co-chair of the Pharmaceutical and Medical Device Subcommittee of the ABA Section of Litigation Mass Torts Committee. She is past president of the National Civil Justice Institute.

Rosemary Rivas is a partner at Gibbs Law Group in Berkeley, CA. She represents consumers in complex class action litigation involving a wide variety of claims, from false advertising and defective products to privacy violations. She serves in leadership positions in a number of large-scale complex class action cases and multi-district litigation, such as Volkswagen Clean Diesel Litigation, In re: Gerber Heavy Metals Baby Food Litigation.

Peggy Wedgworth is a partner with Milberg Coleman Bryson Phillips Grossman, PLLC, in New York. She is a managing partner and chair of the firm's Antitrust Practice Group. She has handled numerous securities, commodities, antitrust and whistleblower matters, representing defrauded investors and consumers. She currently represents a nationwide class of plaintiff car dealerships who allege antitrust violations in the data management systems. She also represents consumers in the Google Play antitrust litigation, and consumers in contact lens and hard disk drive antitrust litigation. She has tried numerous cases, including a tobacco case in the *Engle* progeny litigation. She is a member of the New York State Bar Association's Antitrust Committee, and the American Association for Justice, and a trustee of the National Institute. She holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama Law School.

Judicial Participants

ARIZONA
Hon. Philip G. Espinosa, Court of Appeals, Div. II

ARKANSAS
Hon. Raymond R. Abramson, Court of Appeals

CALIFORNIA
Hon. Malcolm H. Mackey, Los Angeles Superior Court

COLORADO
Hon. Terry Fox, Court of Appeals
Hon. Robert D. Hawthorne, Court of Appeals

FLORIDA
Hon. Jay Cohen, Fifth District Court of Appeal
Hon. Sandra Perlman, Seventeenth Judicial Circuit

GEORGIA
Hon. Anne Elizabeth Barnes, Court of Appeals
Hon. Christopher J. McFadden, Court of Appeals

HAWAI'I
Hon. Todd Weldon Eddins, Supreme Court
Hon. Sabrina Shizue McKenna, Supreme Court
Hon. Paula A. Nakayama, Supreme Court
Hon. Dean E. Ochiai, First Circuit Court
Hon. Michael D. Wilson, Supreme Court

ILLINOIS
Hon. Judy L. Cates, Appellate Court, Fifth District
Hon. Mathias W. Delort, Appellate Court, First District

IOWA
Hon. Edward Mansfield, Supreme Court

KANSAS
Hon. Thomas Edward Malone, Court of Appeals
Hon. Jessie Ann Thompson, Graham County District Court

LOUISIANA
Hon. Marc Errol Johnson, Sr., Fifth Circuit Court of Appeal
Hon. John Jackson Molaison, Jr., Fifth Circuit Court of Appeal
Hon. Vanessa G. Whipple, First Circuit Court of Appeal

MICHIGAN
Hon. Thomas Charles Cameron, Court of Appeals
Hon. Elizabeth Louise Gleicher, Court of Appeals

MINNESOTA
Hon. John Smith, Court of Appeals

MISSISSIPPI
Hon. James W. Kitchens, Supreme Court
Hon. David McCarty, Court of Appeals
Hon. Deborah A. McDonald, Court of Appeals

MISSOURI
Hon. Thomas N. Chapman, Court of Appeals, Western District
Hon. Anthony Rex Gabbert, Court of Appeals, Western District
Hon. Michael E. Gardner, Court of Appeals, Eastern District
Hon. Jennifer Growcock, Court of Appeals, Southern District

NEW HAMPSHIRE
Hon. James P. Bassett, Supreme Court

NEW YORK
Hon. Linda Christopher, Supreme Court, Appellate Division, Second Department
Hon. Barbara R. Kapnick, Supreme Court, Appellate Division, First Department
Hon. Troy Karen Webber, Supreme Court, Appellate Division First Department

NORTH CAROLINA
Hon. John S. Arrowood, Court of Appeals
Hon. Anthony Waldo Brown, Sr., Seventh Judicial District Court
Hon. Lucy Noble Inman, Court of Appeals

OHIO

Hon. Jennifer Brunner, Supreme Court
Hon. Cynthia Westcott Rice, Eleventh District Court of Appeals
Hon. Mary Jane Trapp, Eleventh District Court of Appeals

OKLAHOMA

Hon. Robert Bell, Court of Civil Appeals
Hon. Gregory C. Blackwell, Court of Civil Appeals
Hon. Dustin Rowe, Supreme Court

OREGON

Hon. Rex Armstrong, Court of Appeals
Hon. Martha Walters, Supreme Court

SOUTH CAROLINA

Hon. Clifton B. Newman, Circuit Court

TEXAS

Hon. Cory L. Carlyle, Fifth Court of Appeals
Hon. Dori Contreras, Thirteenth District Court of Appeals
Hon. Meagan Hassan, Fourteenth Court of Appeals
Hon. Peter M. Kelly, First District Court of Appeals
Hon. Nora Longoria, Thirteenth District Court of Appeals
Hon. Rebeca Martinez, Fourth District Court of Appeals
Hon. Leslie Osborne, Fifth District Court of Appeals
Hon. Margaret Anne Poissant, Fourteenth District Court of Appeals
Hon. Liza Ann Rodriguez, Fourth District Court of Appeals
Hon. Bonnie Sudderth, Second District Court of Appeals
Hon. Jaime Eduardo Tijerina, Thirteenth District Court of Appeals
Hon. Lori Irene Valenzuela, Fourth District Court of Appeals
Hon. Beth Watkins, Texas Fourth District Court of Appeals

UTAH

Hon. David Mortensen, Court of Appeals

WASHINGTON

Hon. Susan Amini, King County Superior Court
Hon. Ian S. Birk, Court of Appeals
Hon. Steven C. González, Supreme Court
Hon. David Keenan, King County Superior Court
Hon. Susan Owens, Supreme Court
Hon. J. Debra Stephens, Supreme Court

2022 Forum Underwriters

The National Civil Justice Institute's innovative judicial education program is possible only with the financial support of lawyers, law firms, and other organizations. The Institute gratefully acknowledges the support of the following 2022 contributors, whose generosity helps to assure that the Institute will enrich the understanding of the law in courtrooms throughout the United States.

Counselor ($5,000 and up)

Gibbs Law Group, LLP
Justinian & Associates PLLC
Gerson H. Smoger, PhD

Barrister ($3,000-$4,999)

Murray & Murray Co., L.P.A.

Defender ($2,000-$2,999)

Arkansas Trial Lawyers Association
Delaware Trial Lawyers Association
DC Trial Lawyers Foundation
Florida Justice Association
Stephen J. Herman
Indiana Trial Lawyers Association
KsAJ Legacy of Justice Foundation
Louisiana Association for Justice through its sister nonprofit Bayou Research Institute
Michigan Association for Justice
Milberg Coleman Bryson Phillips Grossman PLLC
Mississippi Association for Justice
Oregon Trial Lawyers Association
Wayne D. Parsons
Washington State Trial Association for Justice

Sentinel ($1,000-$1,999)

Linda M. Atkinson
Ciresi Conlin LLP
Kathryn H. Clarke
Robert A. Clifford
Mark Davis
Fay Law Group, P.A.
Robert L. Habush
Kline & Specter, P.C.
Koskoff Koskoff & Bieder, P.C.
Minnesota Association for Justice
George Moyer
Ohio Association for Justice
Gale D. Pearson
Ellen Relkin
Herman J. Russomanno
Todd Smith
Walkup, Melodia, Kelly & Schoenberger
Cory Watson, P.C.
Weitz & Luxenberg P.C.
David G. Wirtes, Jr.
Zoll & Kranz, LLC

Advocate ($500-$999)

David M. Arbogast
Brian Franciskato
Hofmann & Schweitzer, P.C.
Patrick Malone & Associates, P.C.
Teresa Fariss McClain
Kristine K. Meredith
Richard P. Myers
Ellen Presby
Wright & Schulte LLC

Other Supporters ($25-$499)

Lawrence Anderson
Arizona Association for Justice
Augustus F. Brown
Sean Domnick

The Forum for State Appellate Court Judges was endowed by the Law Firm of Habush, Habush & Rottier. The National Civil Justice Institute also gratefully acknowledges the generous support of the AAJ-Robert L. Habush Endowment. None of the donors has any control over the content of the Forum, the makeup of faculty or attendees, nor the placement of information in Forum materials.

About the National Civil Justice Institute

NCJI is dedicated to the cause of promoting access to civil justice through its programs and publications, which give a balanced view of issues affecting the U.S. civil justice system. Since 1956, the Institute has promoted open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. To bring positive changes to American jurisprudence, NCJI promotes and organizes:

Annual Forum for State Appellate Court Judges—Since 1992, NCJI's annual Judges Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Lauded by attending judges as "one of the best seminars available to jurists in the country," the Forum is unique in its mission to educate state judiciaries on the role of the U.S. civil justice system in protecting citizens' rights. Our 2023 Forum, "Expert Testimony: Judges, Science, and Trial by Jury," takes place on July 15, 2023 in Philadelphia, PA.

Academic Symposia—The Institute holds periodic Academic Symposia in conjunction with law schools in an effort to produce new empirical research supportive of the civil justice system. The academic papers prepared for the symposia are published in the co-sponsoring law schools' Law Reviews. Recent symposia include The Future of Substantive Due Process: What Are the Stakes? (SMU 2023), The Internet and the Law: Legal Challenges in the New Digital Age (Hastings 2021); Class Actions, Mass Torts and MDLs: The Next 50 Years (Lewis & Clark 2019); The Jury Trial and Remedy Guarantees (Oregon Law Review, Oregon Jury Project 2017); The Demise of the Grand Bargain (Rutgers and Northeastern 2016); and The "War" on the Civil Justice System (Emory Law 2015).

Appellate Advocacy Award—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

Civil Justice Scholarship Award—This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

Twiggs Professionalism Lecture—Founded in 2010 to honor former Institute President Howard Twiggs, this annual lecture series, held during the AAJ Annual Convention, educates attorneys on ethics and professionalism. These lectures are delivered by prominent attorneys, law professors and jurists, and qualify for ethics and professionalism CLE credit.

Papers of the Institute—NCJI has an expansive library of research resulting from its Judges Forums, research grants, Academic Symposia, Warren Conferences, Roundtable discussions, and other sources. This research, NCJI Papers, is available via NCJI's website. NCJI Fellows, judges, courts, and academics receive complimentary copies of NCJI's publications.

Alliance with Academics—The Institute has developed strong relationships within the legal academic community. Currently, 81 **Academic Fellows** keep NCJI abreast of emerging legal trends.

NCJI Fellows—Attorneys who care about preserving the civil justice system are invited to join NCJI's important dialogue with judges and legal academics by becoming an NCJI Fellow. We offer several affordable, tax-deductible membership levels, with monthly options available.

Officers & Trustees of the Institute, 2021-22

Officers

Gerson H. Smoger, President
Christopher T. Nace, Vice President
Gale D. Pearson, Treasurer
David G. Wirtes, Jr., Secretary
Stephen J. Herman, Immediate Past President

Trustees

N. John Bey
Jan Conlin
Misty A. Farris
Caragh Fay
Brandi Gatewood
Raymond R. Jones
Michelle L. Kranz
Adam J. Langino
Andre M. Mura
Amber Pang Parra
Ellen A. Presby
Todd A. Smith
Alinor Sterling
Peggy Wedgworth
David G. Wirtes, Jr.
Zachary L. Wool

Ex-Officio Trustees

Amy Heins
Bhaveen R. Jani
Andrew W. Mason
Teresa Fariss McClain
Tobias Millrood
Tad Thomas
Navan Ward

Past Presidents Advisory Committee

Mary E. Alexander
Jennie Lee Anderson
Kathryn H. Clarke
Roxanne Barton Conlin
Kathleen Flynn Peterson
William A. Gaylord
Robert L. Habush
Russ M. Herman
Patrick Malone
Mark S. Mandell
Patrick A. Malone
Ellen Relkin
Herman J. Russomanno
Larry S. Stewart

Executive Director

Mary P. Collishaw

Consultant

James E. Rooks, Jr

Papers of the National Civil Justice Institute

Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at www.ncji.org.)

2022 • CIVIL JUSTICE IN AMERICA: RESPONSIBILITY TO THE PUBLIC

Stephan Landsman, DePaul College of Law, *Civil Justice and Accountability: The Challenge of Grave Corporate Misconduct*
Stephen Daniels, American Bar Foundation, *The Rule of Law is Fragile: The Importance of Legitimacy and Access*

2021 • JURIES, VOIR DIRE, *BATSON*, AND BEYOND: ACHIEVING FAIRNESS IN CIVIL JURY TRIALS

Valerie P. Hans, Cornell Law School, *Challenges to Achieving Fairness in Civil Jury Selection*
Shari Seidman Diamond, Northwestern Pritzker School of Law, *Judicial Rulemaking for Jury Trial Fairness*

2020 • DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

Dustin B. Benham, Texas Tech University School of Law, *Foundational and Contemporary Court Secrecy Issue*s
Sergio J. Campos, University of Miami School of Law, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?*

2019 • AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

D. Theodore Rave, University of Houston Law Center, *Federal Trends Affecting Aggregate Litigation in the State Courts*
Myriam Gilles, Cardozo Law School, Yeshiva University, *Rethinking Multijurisdictional Coordination of Complex Mass Torts*

2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*
Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*
Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*
Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*
Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*.

2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*
Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After* Concepcion

2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*
Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*
J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*
Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*
Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*
Stephen B. Burbank, University of Pennsylvania Law School, Pleading, *Access to Justice, and the Distribution of Power*

2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*
Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*
Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of* Minnesota v. White
Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY

Joseph Sanders, University of Houston Law Center, Daubert, Frye, *and the States: Thoughts on the Choice of a Standard*
Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate:* Daubert's *Impact on the State Courts*

2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

Law Reviews from Academic Symposia

2023 • THE FUTURE OF SUBSTANTIVE DUE PROCESS: WHAT ARE THE STAKES?

forthcoming, SMU Law Review

2021 • THE INTERNET AND THE LAW: LEGAL CHALLENGES IN THE NEW DIGITAL AGE

Hastings Law Journal, Vol. 73 No. 5

2019 • CLASS ACTIONS, MASS TORTS, AND MDLS: THE NEXT 50 YEARS

Lewis & Clark Law Review, Vol. 24, No. 2

2017 • THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?

Oregon Law Review, Vol. 96, No. 2

2016 • THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY

Rutgers University Law Review, Vol. 69, No. 3

2015 • THE "WAR" ON THE U.S. CIVIL JUSTICE SYSTEM

Emory Law Journal, Vol. 65, No. 6

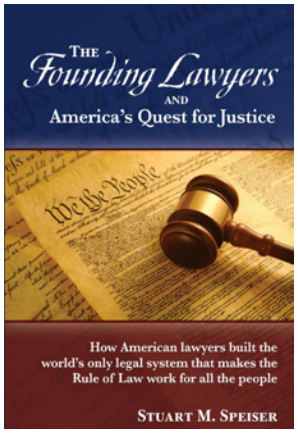
2005 • MEDICAL MALPRACTICE

Vanderbilt Law Review, Vol. 59, No. 4

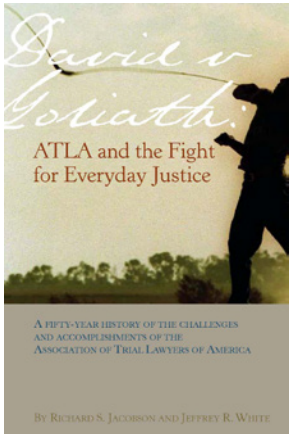
2002 • MANDATORY ARBITRATION

Law and Contemporary Problems, Vol. 67, No. 1 & 2, Duke University School of Law

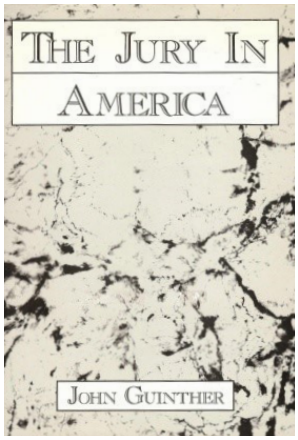
Books distributed by the National Civil Justice Institute



The Founding Lawyers and America's Quest for Justice
by Stuart M. Speiser (2010)



David v. Goliath: ATLA and the Fight for Everyday Justice
by Richard S. Jacobson & Jeffrey R. White (2004)



The Jury In America
by John Guinther (1988)

Reports of the Chief Justice Earl Warren Conferences on Advocacy

1989 • MEDICAL QUALITY AND THE LAW

1986 • THE AMERICAN CIVIL JURY

1985 • DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY

1984 • PRODUCT SAFETY IN AMERICA

1983 • THE COURTS: SEPARATION OF POWERS

1982 • ETHICS AND GOVERNMENT

1981 • CHURCH, STATE, AND POLITICS

1980 • THE PENALTY OF DEATH

1979 • THE COURTS: THE PENDULUM OF FEDERALISM

1978 • ETHICS AND ADVOCACY

1977 • THE AMERICAN JURY SYSTEM

1976 • TRIAL ADVOCACY AS A SPECIALTY

1975 • THE POWERS OF THE PRESIDENCY

1974 • PRIVACY IN A FREE SOCIETY

1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA

1972 • A PROGRAM FOR PRISON REFORM

Reports of Roundtable Discussions

1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

1991 • SAFETY OF THE BLOOD SUPPLY

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C. attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the p.resence of HIV and litigation involving blood products and blood banks.

1990 • INJURY PREVENTION IN AMERICA

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include "Farm Safety in America," "Industrial Safety: Preventing Injuries in the Workplace," and "Industrial Diseases in America."

1988-89 • HEALTH CARE AND THE LAW III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include "Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue," "Health Care Providers and the New Questions of Life and Death," and "Medical Providers and the New Era of Assessment and Accountability."

1988 • HEALTH CARE AND THE LAW

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include "Hospitals and AIDS: The Legal Issues," "Medicine, Liability and the Law: Expanding the Dialogue," and "Developing Flexible Dispute Resolution Mechanisms for the Health Care Field."

1988 • HEALTH CARE AND THE LAW II—FELLOWS FORUM

Report on the 1988 Fellows Forum, "Patients, Doctors, Lawyers and Juries," written by John Guinther, award-winning author of The Jury in America. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

Research Monographs

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Institute, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

The Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D. Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

The American Lawyer's Code of Conduct. Available at https://ncji.org/.

Civil Justice Digest


Civil Justice Digest

A NEWS, RESEARCH & COURT DECISIONS ON THE U.S. CIVIL JUSTICE SYSTEM

Voir Dire: Choosing the Jury

Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection

Juror Bias in Criminal Trials

HIGHLIGHTS

Voir Dire: Choosing the Jury 1

The Design of Dispute System 8

The Ancient Revocability of Dispute Resolution Agreements 10

WINTER/SPRING2003 THE ROSCOE POUND INSTITUTE VOL. 8 NOS. 1-2

A quarterly newsletter on current and emerging legal trends. Distributed 1994-2003 to judges, law school professors, and attorneys. Back issues available at https://ncji.org/.

For information on how to obtain copies of any of these publications, contact:

National Civil Justice Institute
777 Sixth Street, NW, Suite 200
Washington, D.C. 20001
202-944-2841
FAX: 202-298-6390
info@ncji.org

NCJI
NATIONAL CIVIL
JUSTICE INSTITUTE

777 Sixth Street, NW, Suite 200, Washington, D.C. 20001 • 202-944-2841

www.ncji.org • info@ncjo.org